



**Director of Public Prosecution v Mwakunona (Sexual Offence
E053 of 2021) [2023] KEMC 282 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEMC 282 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E053 OF 2021
ZK KAGENYO, RM
DECEMBER 29, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

PETER NGALI MWAKUNONA ACCUSED

JUDGMENT

1. The accused person was on the 12th day of October 2021 arraigned facing an indictment of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence [Act No. 3 of 2006](#) where it was said that on the diverse dates between 1st August 2021 and 22nd September 2021 at [Particulars Withheld] in Kwale county within coast region intentionally and unlawfully caused his penis to penetrate the vagina of P.N a child aged 8 years. He faced another indictment but in the alternative, whereby he was accused of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 where it was said that on the diverse dates between 1st August, 2021 and 22nd September 2021 at [Particulars Withheld] in Kwale county within coast region intentionally and unlawfully caused his penis to touch the vagina of P.N a child aged 8 years.
2. The accused denied the charges and a trial ensued. He conducted his case while in custody even though he had been granted personal bond of Ksh. 800, 000/= with one surety of similar amount which proved unattainable for him.
3. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili language, or its interpretation, the language of choice by the accused.

The Prosecution's case

4. To prove the guilt of the accused, the prosecution marshalled a total of 4 witnesses.



5. It was the Prosecution's case that on diverse dates between the 1st day of the months of August 2021 and the 22nd day of September 2021, the accused person, sexually abused the complainant the second time being by way of defiling her. The complainant's mother realized these unfortunate occurrences 6 days later and thereafter reported to the police wherefrom investigations and arraignment of the accused followed.

Defence case

6. The accused person was placed on his defence under section 210 of the *Criminal Procedure Code*, and section 211 of the *Criminal Procedure Code* and Article 50 (2) (i) having been explained to the accused person, he, in person, elected to defend himself by way of tendering sworn evidence and calling one witness who however was not presented.
7. It was the defence case that the case before court was a fabrication and that the complainant's mother was using the police to torment him. He denied ever committing the abominable acts as alleged.
8. Both parties having closed their respective cases, the Court invited them to put in their closing arguments, the accused filing his on the last day of August 2023, while the prosecution opted not to file but rely on the record in the court file. The parties invited the court to make its judgment based on the material available in the file.
9. Having heard both parties at their full lengths, the court retired to make its decision.
10. In his submissions, the accused addressed two main items namely;
 - a. Infringement of his right to fair trial for failure of being informed of his right to legal representation at the initiation of the case; and
 - b. Failure by the prosecution to prove its case beyond reasonable doubt; and
11. I have read through the submissions and the record in the file and in the end, my findings are as follows.

Analysis and Determination

12. Section 8(1) of the *Sexual Offences Act* provides the key elements of the offence of defilement. The said elements were also stated in the case of *George Opondo Olunga -v- Republic* [2016] eKLR where the court held thus;
the critical ingredients forming the offence of defilement are;
 - a. Age of the complainant;
 - b. Prove of penetration; and
 - c. Positive identification of the assailant.
13. About the standard of proof of these elements, it was said by the Court of Appeal in *John Mutua Munyoki -v- Republic* [2017] eKLR that the prosecution must prove each of them beyond reasonable doubt.

Age of the Complainant

14. The age of the complainant was not in issue and was further proven by way of a Certificate of Birth for the complainant that showed that she was born on 13th May 2013 and as such as at 22nd September



$\frac{1}{4}$

2021, she must have been 8 $\frac{1}{4}$ years old hence a minor as defined in section 2 of both the retired [Children Act](#), 2001 and the current [Children Act](#), 2022.

Penetration

15. The complainant testified that the accused caused his penis to penetrate into her vagina.
16. The medical examination adduced was that there was partial penetration into the vagina of the complainant. Section 2 of the [Sexual Offences Act](#) defines penetration to include either partial or whole penetration and hence the element of penetration was proven according to the tabled evidence. The question that follows is who or what caused the said penetration and in any case, whether there was evidence to show that it was the accused who did so.

Positive identification

17. The complainant said that the accused caused his penis to penetrate her vagina. It was therefore to be assumed that it was the accused who caused the penetration into the vagina of the complainant and further proven by way of evidence.
18. As statistics would prove me right, it has been seen that such acts of defilement and rape occur where there are no other people to witness the same and hence corroborate on the same at trial. It is for that reason that Section 124 of the [Evidence Act](#) enjoins me to take note that survivors of Sexual and Gender Based Violence and more particularly rape and defilement experience the horrendous acts in the absence of other people who cannot corroborate their version and hence a court may convict without corroborating evidence on the account of the complainant save as for medical evidence and other corroborating documentary evidence if available.
19. However, the court is required to record the reasons why it is believing the survivor as telling the truth. In other words, the court is tasked to give its reasoning for believing the prosecution's case.
20. In this matter, the minor said that the accused sexually abused her in the absence of everyone else but only the two of them.
21. When the complainant was testifying, the following issues emerged;
 - i. That the accused had been contracted to work for her mother, at home twice;
 - a. First, to make a Box for the Christian Union's instrument's box; and
 - b. Secondly, To repair the complainant's bed.
 - ii. That these works were done on two different days, the 1st work being done on a Sunday and the 2nd work being done on the Wednesday after that Sunday;
 - iii. That the 1st work was done when the mother was away from home while the 2nd work was done when the mother was at home;
 - iv. That while doing the 1st work, the accused inserted his fingers into the vagina of the complainant over and above touching her bust;
 - v. That while doing the 2nd work, the accused inserted his penis into the vagina of the complainant; and



- vi. On the morning she was taken to Kwale Subcounty Hospital after visiting Waa and Tiwi dispensaries, she did not go to school as her sister did but was taken to hospital on that day.
22. From the evidence of her mother, PW 2, it emerged that;
- i. She had given the accused tasks at her place, to make a Christian Union's podium and as he was making that the need to repair a bed arose that was made the same day;
 - ii. That the podium would not be completed on that day as the accused had to take the timber for smoothening;
 - iii. That the 2 tasks above were done on one single day, the Wednesday, save as for the postponed podium;
 - iv. That on that day, she was home with her daughters;
 - v. That that day is when the defilement occurred;
 - vi. On the day she was taken to Kwale subcounty Hospital, the complainant went to school first to sit for her examination and then was taken to hospital later at 1400 hours;
 - vii. That the accused had come to her place on another time, previously, to draw a sketch of a podium and repair an instrument's box;
 - viii. That at all times, whether to draw a sketch of the instrument box, to repair a bed or make the podium, the complainant's mother was at home;
 - ix. That on the first time the accused sexually abused the complainant, he inserted his fingers into the vagina and anus of the complainant;
 - x. That the event happened on 25th September 2021 as she was leaving school and when she met the accused on the road, that is when she asked him to go and make the Christian Union podium; and
 - xi. That she was continually commending how handsome the accused's boys are.
23. I make a finding that there were contradictions on when the offence was made, however trivial they can be seen to be but I believe they are above what was described as fanciful explanations that Lord Denning was discouraging in *Miller -v- Minister of Pensions* [1947] 2 ALL ER 372 as would deflect the course of justice.
24. If the mother stated that the accused came to repair the bed and the Christian Union item at two different days, how was I to weigh that against the complainant's evidence that this was done at different days?
25. I note that the complainant said that the accused inserted his fingers into her vagina with no mention of anus, where did the mother get the extra information of the anus which the complainant neither told the court nor the hospital?
26. Who between the two, the mother and the girl was telling the court the truth that the minor went to school and later to hospital or just went to hospital and not school on that date as her sister did? Given that this is a material difference in information, what does such misinformation tell of the entire case?
27. The prosecution was to discharge the burden of proving the accused's guilt beyond reasonable doubt which I warn myself that it is however not to be confused with beyond a shadow of doubt. The evidence available was marred with material inconsistencies contradicting among others on an evidentiary



agreeable day of the commission of the offence as discernable from the evidence of PW 1 and PW 2 which raises doubt on the likelihood of the same occurring.

28. The Blackstone's formulation urges the court to protect the innocent even if it is at the expense of discharging the guilty. This is a case in which the court found itself making a finding on a lukewarm basis on whether the accused committed the offence or not and granted the accused the benefit of the doubt.

Disposition

29. From the foregoing, this court hereby dismisses the case against the accused person and forthwith acquits him under section 215 of the Criminal Procedure Code for both the main count of defilement of a child aged 16 years proscribed under section 8 (1) as read with section 8 (2) of the Sexual Offences Act, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11 (1) of the Sexual Offences Act, 2006.
30. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF DECEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 15th day of January, 2024, by Hon. C. K. Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

In the presence of :

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

