



**Director of Public Prosecution v Vura (Sexual Offence E016 of 2021)  
[2022] KEMC 29 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEMC 29 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E016 OF 2021  
ZK KAGENYO, RM  
OCTOBER 31, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC**

**AND**

**MALEWE VURA ..... ACCUSED**

**JUDGMENT**

1. The accused person is facing charges of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

The particulars were that on the 13<sup>th</sup> day of March 2021 at [particulars Withheld] village [particulars Withheld] location in Kinango sub-county within Kwale county intentionally and unlawfully caused his penis to penetrate in the anus of MC a child aged 4 years.

2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

The particulars were that on the 13<sup>th</sup> day of March 2021 at [particulars Withheld] village [particulars Withheld] location in Kinango sub-county within Kwale county intentionally and unlawfully touched the buttocks of MC a child aged 4 years with his penis.

3. The accused denied the charges and a full trial ensued.
4. The accused person was unrepresented. He was present in court all through the trial. The matter was conducted in Kiswahili Language or its interpretation, the language of choice by the accused. He conducted his case while in custody even though he had been granted bail and bond.
5. The DPP to prove their case lined up a total of 5 witnesses while upon being placed on his defence, the accused gave his sworn evidence without calling any witness for the defence.



## The Prosecution's Case

6. It was the Prosecution's case that at the night of 13<sup>th</sup> March 2021, at about 0200 hours, the accused person herein went into the house of PW 2 where the latter's child MC, PW3, was sleeping and took her away. The accused was said to have taken the complainant child to a forest nearby and defiled her as per the particulars above.
7. While asleep, PW 2 and PW 4, the parents to the complainant child heard the screams of their daughter and responded with haste to rescue her. The two parents when they walked out, it was said that they saw the accused person holding the baby and when he saw them, he dropped the complainant victim and run away. Efforts to pursue him were futile and as he vanished in the darkness, PW 2 and PW 4 took their child.
8. At that stage, PW 2 and PW 4 examined the body of the complainant and they saw that the accused had penetrated her anus. The two reported to the police station and were referred to hospital where examinations revealed that the minor had a bruise at her anal area.

## The Defence Case

9. DW 1, the accused person maintained his innocence. He told the court that on 13<sup>th</sup> March 2021, he left Tanzania, his maternal grandfather's home and came to their home at Kwale county where he arrived at around 1400 hours. At around 1800 hours, as he was going back to his house from the village elder's home where he had gone to lodge a complaint, he was attacked by PW 4's two brothers who arrested him, assaulted him and robbed him off Ksh. 1, 700/= he had before taking him to the police station 5 hours later, at 2300 hours.
10. At the heart of these charges, the accused person believed that they were motivated by a vendetta arising from land ownership and murder of his own father.

## Analysis and Determination.

11. The accused person has been charged with the offence of defilement of a child aged 4 years which is proscribed by section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. In the alternative count he is charged with the offence of committing an indecent act with a child which is proscribed by section 11 (1) of the Sexual Offences.
12. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the accused person on the DPP. This burden hardly shifts to the accused who on the other hand is to be presumed innocent until the contrary is proven.
13. The standard to which the DPP is to discharge the burden of proof is beyond reasonable doubt as was restated in Joan Chebichii Sawe -v- Republic [2003] eKLR, that the prosecution must prove the guilt of the accused person beyond reasonable doubt. This Court however reminds itself that beyond reasonable doubt does not mean that the DPP must proof every single element or accusation to perfection beyond a shadow of doubt. In his undoubted wisdom, Lord Denning shed light in this in the case of Miller -v- Minister of Pensions [1947] 2 ALL ER 372 where he held that;

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible,



but not in the least probable,” the case is proved beyond reasonable doubt but nothing short of that will suffice.

14. 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 identity of the assailant.

15. These elements were said that the Prosecution must proof each of them beyond reasonable doubt by the Court of Appeal in John Mutua Munyoki -v- Republic [2017] eKLR.

### **Age of the victim**

16. Rule 4 of the Sexual Offences Rules of Court, 2014 states that;

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document. (underline mine).

17. In this case, the DPP produced a Child Health Card which was not contested by the accused person. I take the Child Health Card to fall under the category of similar document. The card was for the complainant herein MCB. It was indicating her date of birth as 10<sup>th</sup> December 2017. The charges herein were that on 3<sup>rd</sup> March 2021, the accused herein defiled the complainant. As at 13<sup>th</sup> March 2021, the complainant herein must have been 3 years and 3 months, old and hence a child as defined in section 2 of the then *Children Act*, 2001.

### **Penetration**

18. The DPP adduced evidence by way of medical evidence to proof the element of penetration. It was the DPP’s case that the medical tests conducted on the 13<sup>th</sup> March 2021 demonstrated that the rectal area of the complainant had a bruise at 0300 o’clock position according to PW 1 and going by the history and this medical evidence collected, it demonstrated that there was penetration.
19. To contextualize the medical observation, the court analyzed as a whole the evidence of the prosecution case.
20. PW 1 the medical practitioner stated that when the complainant was presented to him, she was timid and appeared worried. On rectal examination, he observed that she had a bruise on the right side of the rectum at 0300 o’clock. There was no discharge around the anus or thighs. Due to presence of the red blood cells found in the rectal swab, PW 1 opined that there must have been penetration. On cross examination, he stated that there was no blood on her body. The medical practitioner indicated that the head and neck were okay and nothing of interest was observed.



21. On his part, the father to the complainant said that when they rescued the complainant from the accused person, he observed the child. In his words, he said,

We looked (observed) at our child. She had been damaged. Her anus had been penetrated. I saw vidonda (sores) many sores. The child was wearing her clothes. The child could not even manage to sit down.....
22. On her part, the mother to the complainant said that once she went back to the house,

I examined my child. I noticed that he had penetrated her anus. Her anus was bleeding. She had sores around her anus. She was okay before that date.
23. PW 3 the complainant when she was testifying, the minor told the court that Vura took her into the forest and when at the forest Vura held her throat and laid on her stomach. After that, Vura took her back home. She said that on that night, she did not feel her private parts being touched. Further, she said that Vura was in his clothes while the dress she was wearing was not removed.
24. Taking these pieces of evidence together, the court posed a question to itself, was it safe to say that in the totality of the circumstances that there was evidence of penetration?
25. The medical expert while observing the minor was categorical that he observed a bruise at 0300 o'clock. This was a test done barely 12 hours after the alleged incidence. PW 2 and PW 4 gave a graphic presentation of their observation when they used naked eyes and while they don't have any medical background. It was expected that at the hospital, the medical practitioner would have observed the many sores as described by PW 2 and PW 4. It was expected that the medical practitioner would have observed the blood that was said to be bleeding from the anus of the complainant. This was not observed neither on the exterior parts of the complainant's body nor internally as the rectal swab did not show any blood clots.
26. The complainant testified that the accused did not undress her. She testified that her private parts were never touched by the accused on that night. While she was testifying, the DPP using various techniques examined the minor, PW 3, drawing her attention to possibility of any such contact between the accused's body and her private parts but the minor still yielded a negative answer.
27. As a result, while there was observed a bruise on her anus by PW 1, given the totality of the foregoing, I find that it is in doubt what caused the interference on the anal area of the minor herein.
28. I find the versions of the PW 2 and PW 4 as highly exaggerated versions which are unsafe to rely on. This I say because while they just used their laymen observations and observed the minor in as great details as they narrated, the medical practitioner, with such elaborate medical background and experience of 20 years did not observe such injuries in spite of them appearing to be too obvious not to observe.

#### **Positive identification of the assailant**

29. The court has made an inference of cast doubt as to the penetration of the minor herein. However, the court went on to interrogate on whether it would be safely said that indeed it was true that the accused broke into the house PW 2 and after such breaking in took away the minor herein. If so, the accused would be liable of the offence of breaking therein and committing the felony of kidnapping the minor from lawful guardianship or such other offence.
30. In her evidence, PW 3, the victim said that the person who took her to the forest that night was Vura. It was said that it was pitch dark at night. It was not established the condition of lighting that enabled PW 3 identify the Vura she said took her away nor the mode of identifying her such as speech. I find



- that from the evidence of PW 3, it would be unsafe to infer that the accused took her out of their house on that night.
31. On the part of PW 2, he said that he heard the screams from outside and discerned that those are screams from her daughter. While this could be true, the evidence of the complainant depicted a smooth and peaceful transition from one point to the other. She said that Vura took her from their house, into the forest, he laid on her and he took her back home. She did not struggle nor scream. While this could be argued that it was since the Vura was holding her throat as she said, it is still to be observed that there were no screams.
  32. Be that as it may, PW 2 stated that the accused was a stranger to him and he had not seen him before. On that night, he said that he saw the accused while at a distance of 3 metres and that he saw his face. He said that he saw him as such before the accused started running away. He identified the accused while at the dock.
  33. It is my finding that in order to rely on the evidence of identification by PW 2, it would only be if a proper identification parade was done but none was done at all. Without the identification parade, the dock identification was inconsequential.
  34. On the part of PW 4, she told the court that when PW 2 shone the torchlight, she recognized Malewe Vura and screamed, “Ni malewe! ×3.” Then the two started chasing him but unfortunately after a short distance, PW 2 fell in a ditch and were unable to capture the accused as when the husband fell into the ditch, PW 4 could not chase him alone due to fear but she just went and assisted her husband to rise up again, they took their child and went into the house.
  35. At this juncture, to assess the credibility of PW 4, it became necessary to contextualize the incidence that night from the perspective of the husband.
  36. PW 2 told this court that at that night, when the accused person who was holding the child saw him, he dropped the child and started running away. His wife, PW 4, asked the accused, “Malewe mtoto wangu unatoka naye wapi?” where he just kept mum and run away. It would appear that there was neither hot pursuit nor tripping into the ditch. In my assessment, even though the witness was testifying an year+ after the alleged incidence, given the circumstances of this case, such an incidence remained too relevant in the circumstances that it was not to be omitted if it happened having had regard to the finding in Philip Nzaka Watu v Republic [2016] eKLR that while discrepancies are expected in human recollection, the court should treat the believability or otherwise of such discrepancies based on the circumstances of each case.
  37. Coupled with the defence of the accused which I don’t rule out in toto I find the credibility of both PW 2 and PW 4, as shaken and unsafe to rely upon without any corroboration.

### **Disposition**

38. Having found so, 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 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.
39. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2022.**



**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of:

Mr. Felix- Court Assistant

Ms. Faith Luseno, Prosecution Counsel, for the DPP

Malewe Vura - Accused

