



**Director of Public Prosecution v Nyanje (Sexual Offence E076 of 2021)
[2022] KEMC 32 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEMC 32 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E076 OF 2021
ZK KAGENYO, RM
DECEMBER 15, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

MENZA NYANJE ALIAS FRED ACCUSED

JUDGMENT

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

The particulars were that on diverse dates between the month of September and 24th day of December, 2021 at (Particulars withheld) village (Particulars withheld) sub-county in Kwale county within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of H.W a girl child aged 12 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 diverse dates between the month of September and 24th day of December, 2021 at (Particulars withheld) village (Particulars withheld) sub-county in Kwale county within Coast Region intentionally and unlawfully caused his penis to touch the vagina of H.W a girl child aged 12 years.

3. The accused person was unrepresented. He was present in court all through the trial. The matter was conducted in Kiswahili Language or its interpretation from English, the language of choice by the accused. He conducted his case partly while in remand and partly while out on a cash bail.

4. The DPP to prove their case lined up a total of 6 witnesses while upon being placed on his defence, the accused gave his sworn evidence without calling any witness for the defence.



Dpp's Case

5. PW 1, MWN, the mother to the complainant child told this court that on the 24th day of December 2021, during the day, there was an issue between her and her daughter, HWN, the complainant herein whereby her daughter had misled her on the whereabouts of her phone. PW 1 later realized that the accused and her daughter had been communicating and that is when she directed her daughter to call the accused as they listened over. The phone call between the accused and the complainant herein yielded a date together that night at PW 1's house who had disguised to her daughter that she would be leaving that night for a night keshu. In the company of her sister, they acted as if they had left for the keshu but unbeknown to her daughter, they hid behind the house and laid an ambush with an aim of stopping the accused from further engaging her daughter into the bad behaviors. At around 2000 hours, the accused came by his motorcycle and entered into her house and immediately he got inside, the two came out of their hiding points and raised an alarm whereby the accused person was arrested and taken to Vigurungani Police Station. Her daughter was later taken to hospital where medical tests showed that she was pregnant but unfortunately on the 28th day of December 2021, she got a miscarriage.
6. PW 2, HWN, the complainant herein gave a similar version leading to the arrest of the accused as given by PW 1. She added that her knowledge of the accused person started when the accused was hired by the complainant's mother to take her to a dispensary and in that process, he gave her his contacts, which she rehased off-head. PW 2 told the court that at a date that she could not recall, the accused in the company of his friend came to their house and while the friend held her hands, the accused inserted his penis into her vagina and defiled her.
7. PW 3, AW testified to the effect of how together with her sister, PW 1, they laid an ambush on the night of 24th December 2021 and when they saw a human figure get into the house, they came out of their hiding point and peeped inside the house. In there, she saw the accused and PW 2 holding each other and they screamed whereby neighbors came and helped them tie the accused with ropes.
8. NPS Service No. 113421 PC (W) Elizabeth Mutanu of Vigurungani Police Station testified in her capacity as the investigating officer. She told the court that at around 2200 hours in the night of 24th December 2021, the accused person was brought to their station tied with ropes and the complainant and her mother were at the station as well. After her investigation which materially involved the collation of the statements of the parties, she presented the accused to court for the present charges.
9. PW 5, Clinical Officer, one Moses Kasyoki Mutuku testified in his capacity as a medical practitioner and produced the medical evidence that he had filled at the hospital upon examining the complainant herein.
10. PW 6 was Chaka Nyondo whose evidence was to the effect that after the accused was tied by ropes as detailed by PW 1 and PW 3, he was asked by PW 1 to take the accused to the police station which he did in his capacity as a boda boda rider.

Defence Case

11. 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 without calling any witnesses.



12. DW 1, the accused himself told the court that on the night of his arrest, he was ferrying a passenger and they were stopped along the road. They were both beaten and he was then taken to PW 1's house where he was photographed and later taken to the police station.
13. After the testimony of DW 1, the Accused closed his case.
14. The Court invited the parties to put in their closing arguments but none opted to put in any, relying on the record in the court file.
15. Having heard both parties at their full lengths, the court retired to make its decision.

Analysis And Determination

16. 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 (3) 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.
17. 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.
18. 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 prove 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.
19. 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.
20. These elements were said that the Prosecution must prove each of them beyond reasonable doubt by the Court of Appeal in *John Mutua Munyoki -v- Republic* [2017] eKLR.

a. Age of the victim

21. 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.

22. In this case, the DPP produced a Certificate of Birth showing that the complainant herein HWN was born on the 24th January 2009. As at September 2021, the complainant herein must have been 12 years and 8 months old and hence a child as defined in section 2 of the retired *Children Act*, 2001 and the current *Children Act*, 2022.

b. Penetration

23. By way of oral evidence by PW2, the complainant, there was credible evidence of the sex ordeal she had with the accused person. Her description of the sexual attack by the accused and his friend brought forth the elements of the offence of gang defilement. She was categorical that the accused had sex with him only that one time. It was clear that the accused and the complainant had had previous interactions to the extent that the complainant would cram the accused's phone number, a number that he did not contest. I did not find any reason not to believe the complainant in this case. There was no vendetta between the two that was to be settled and indeed, the accused while he was having an affair with the complainant on the one hand, on the other hand the mother and aunt to the complainant trusted him for business reasons. This business relationship had not gone sour to infer any bad blood between the two and hence I choose to believe the version of the complainant.
24. On his part, PW 5 adduced medical evidence summarized in the Form P3 dated 25th December 2021, the form PRC and the Medical Treatment Notes both of even date and produced as P. Exh 1, 3 and 4 respectively, that showed that the features on the body of the complainant herein proved that there was penetration. There has been debate and findings that breaking of hymen could be caused by many factors but this medical observation coupled with the oral evidence of the minor and given that the minor was found to be pregnant, as evinced by the obstetric ultrasound report produced as P.Exh 2, this court finds that it can only make an inference of penetration by a penis, taking judicial notice on the ordinary course of nature as guided by section 60 (1) (m) of the *Evidence Act* as no scientific procedures were said to have been undertaken on the complainant such as IVF process.
25. It is therefore my finding that there was penile penetration on the vagina of the complainant herein.

b. Positive identification

26. Identification in this case was by recognition. The complainant stated that she knew the accused since that day she was taken to the dispensary. She distinguished the role the accused played as being the one who penetrated her and the role the accused's accomplice played which was holding her as the accused defiled her. She said that later on they interacted and that ultimately, the accused was arrested in their house on that night.
27. On the circumstances of the accused's arrest, I found the evidence by PW 1, PW 3 and PW 2 as credible and unshaken. The accused was arrested in the house of PW 1 by PW 1 and not along the road and taken to that house. I make a finding that his line of defence was an afterthought raised too late in the day that renders it a defence to fail and it does.

Disposition

28. From the foregoing, I make a finding that the DPP has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person at an unknown date between September 2021 and 24th December 2021 defiled the minor victim initialized as H.W and I thus find him guilty



of the same and convict him under section 215 of the Criminal Procedure Code for the main count of defilement of a child aged 12 years which is proscribed by section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*.

29. Turning on to the alternative count, having made a finding in the main count, the alternative count rests determined.
30. The accused who has been on a cash bail of Ksh. 50,000/= deposited in court on the January 27, 2022, and who has now since been adjudged guilty beyond reasonable doubt shall have his cash bail cancelled. The cash bail shall be refunded to the depositor.
31. The court shall fix this case for sentence hearing on the 30th day of January 2023 with the involvement of all the parties.
32. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court at Mombasa within 14 days from today's date if dissatisfied with this court's finding.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 15TH DAY OF DECEMBER 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Archibald Kimbada- Court Assistant.

Mr. Khamis Mahdi, Prosecution Counsel, for the State

Menza Nyanje alias Fred - Accused

