



**Director of Public Prosecutions v Mbule (Sexual Offence E038 of 2021)  
[2022] KEMC 38 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEMC 38 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E038 OF 2021  
ZK KAGENYO, RM  
DECEMBER 15, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC**

**AND**

**SHANI BAKARI MBULE ..... ACCUSED**

**JUDGMENT**

1. The accused person was arraigned on 13<sup>th</sup> July 2021 for the offence of Defilement contrary to section 8 (1) (4) of the [Sexual Offences Act](#) No. 3 of 2006. (sic).

The particulars were that on diverse dates between 4<sup>th</sup> day of July, 2021 and 10<sup>th</sup> day of July 2021 at [Particulars withheld] village, Waa Location, Matuga Sub-County in Kwale County within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of M.M.J a child aged 17 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 4<sup>th</sup> day of July, 2021 and 10<sup>th</sup> day of July 2021 at [Particulars withheld] village, Waa Location, Matuga Sub-County in Kwale County within Coast Region intentionally and unlawfully caused his penis to touch the vagina of M.M.J a child aged 17 years.

3. 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. 300, 000/= with one surety of similar amount.

4. 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.



## DPP'S Case

5. The DPP, to discharge their duty under section 107 of the *Evidence Act* called a total of 5 witnesses.
6. PW 1 JMM the father to the complainant testified to the effect of how he noticed that the accused had an intimate relationship with her daughter and how he warned him not to come into the life of her daughter. Later, the accused took away with him the custody of the complainant and they started living together. He narrated how his efforts to have the accused cause the return of her daughter to him were frustrated by the accused and ultimately an operation was hatched on how the complainant would be rescued from the accused and how the actions of the accused would be brought to book, the operation which proved a success and the accused was arrested and the complainant daughter rescued.
7. PW 2 the complainant, MMJ, testified to the effect of how she eloped to the accused's house and they lived there as paramours doing all that a married couple would do. She narrated how she would dodge her parents but finally she was tricked that her mother was ailing and as strong as a bond of a mother to a daughter, it proved that that was the weak point that would smoke out the complainant from their hiding spot and in the company of the accused, they were arrested at the gate of the hospital which they believed her mother was admitted, St. Thomas Hospital at Likoni.
8. PW 3 FSM, the mother to the complainant testified to the effect of how her daughter went missing on a date that she had visited her father who lives at a different location from her. That night, the complainant did not go back to the house of PW 3 as agreed and for the next 7 days, she remained holed up in an undisclosed location until PW 3 feigned illness and the accused and the complainant, in belief that they were visiting her at the hospital to pass their compassionate message to the ill and admitted mother, they were arrested.
9. PW 4, NPS Service No. 257532 PC (W) Mercy Andati of Kombani Police Patrol Base testified in her capacity as the investigating officer detailing how the case of a missing child was reported at their police post and later the accused was flagged as a suspect and ultimately how the accused was arrested. In the end, she told this court how she gathered and coalesced the facts from the witnesses and the medical evidence and upon concluding her investigations, she caused the arraignment of the accused person.
10. PW 5 Senior Clinical Officer Cornelius Machage of Kwale Hospital testified in his capacity as a medical practitioner and adduced his findings which he made after examining the complainant herein.

## 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 10<sup>th</sup> day of July 2021, PW 1 and PW 3 called him to their house and told him of their missing daughter but he told them that he did not know their daughter. Shortly thereafter, police officers entered into that house and he was arrested. He denied in toto the allegations against her and even denied knowing the complainant herein.
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. 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.

17. 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.

### a. Age of the Complainant

18. 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.

19. By way of a Certificate of Birth produced as P. Exh 1, indicating the Date of Birth as 23<sup>rd</sup> March 2004 and its holder as M.M.J.M the element of age was proved beyond reasonable doubt. The authenticity of the said document or any entry within it was not attacked by the accused. Through it, it can therefore be said that, as at 10<sup>th</sup> day of July 2021 the complainant was 17 years and 4 months hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the *Children Act*, 2022

### b. Penetration

20. By way of oral evidence by the PW 2, the complainant, she said on 3<sup>rd</sup> July 2021 she left her mother's place at Likoni and went to visit her father where she would attend a wedding that evening. She testified that she was expected to go back to her mother's place at Likoni the following day, a Sunday but instead, she didn't but she went with the accused to his house. It is during the period that they stayed together PW 2 and the accused had sex twice. The Medical Practitioner, PW5, stated that he examined the complainant recorded his observations. He produced the Medical Treatment Notes as P.Exh 3, Laboratory Request and Result Forms as P. Exh 4 (a) and (b), Form P3 as P.Exh 5 and a Post Rape Care Form (PRC) as P.Exh 6, documents whereat he made her observations. After the examination, he concluded that there had been penetration into the vagina of the complainant. This evidence by the doctor and the oral evidence by the complainant left no doubt in the mind of this court that the element of penetration, and in particular, penile penetration into the vagina of MMJ was proved to the required standard.

### c. Positive identification

21. The complainant stated that they had been living with the accused together in the days she went missing from her parents. She identified the accused as her boyfriend. She disclosed to this court that she had been taken to the accused's home and introduced by the accused to his kin and his wife. She told this court that in the period she was living with the accused, the accused had sex with her, twice.



22. The complainant, testified how she was tricked by her sisters that her mother was ailing only to realize that she had taken herself and her paramour to the long arm of the law that never misses its target.
23. It was her evidence that her parents promised to take her and the accused before the Kadhi for officiating their marriage only to find that their ultimate destination was the Kombani Police Post.
24. On his part, the accused denied knowing the complainant. That founded his defence. It is my view that that is an ingenuine approach theory on the part of the accused and qualifies his defence to fit the description of a mere denial. I say this particularly from the evidence of the complainant and in particular the facts elicited during the cross examination, and the circumstantial evidence of the mode of arrest which the accused neither denied nor challenged when PW 1, PW2, PW3 and PW 4 were testifying.
25. At one point, the accused intimated to be introducing the statutory defence under section 8 (5) of the *Sexual Offences Act*, 2006, that he believed the complainant to be a minor when he asked her to confirm that he had enquired from her of her age way before they had sex, but during his defence, he took a U-Turn from such propositions and strongly denied the knowledge of the complainant herein. It is on the strength of this set of facts that I find that the feigned ignorance of the knowledge of the complainant by the accused is dislodged.
26. The evidence led by the prosecution regarding the arrest of the accused person and the chain of events leading to his arrest and presentation at Kombani Patrol Base was believable. The accused did not manage or attempt to explain the circumstances of such arrest or in any case, what he was doing with the complainant as they were headed to console the sick PW 3 where she had been admitted and under treatment at St. Thomas Hospital, Likoni.
27. In the end, I make a finding that the evidence led by the DPP proved beyond reasonable doubt that, the accused was positively identified by the complainant as the person who caused penetration into her vagina.

### **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 defiled the minor victim initialized as MMJ 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 17 years which is proscribed by section 8 (1) as read with section 8 (4) 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. This court shall fix this matter for Sentence Hearing on 24<sup>th</sup> day of January 2023.
31. 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 15<sup>TH</sup> 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

Shani Bakari Mbule- The Accused Person

