



**Republic v Mohamed (Sexual Offence 13 of 2020)
[2021] KEMC 14 (KLR) (15 April 2021) (Judgment)**

Neutral citation: [2021] KEMC 14 (KLR)

**REPUBLIC OF KENYA
IN THE HOLA LAW COURTS
SEXUAL OFFENCE 13 OF 2020
PA NDEGE, PM
APRIL 15, 2021**

BETWEEN

REPUBLIC PROSECUTION

AND

OMAR MOHAMED ACCUSED

JUDGMENT

1. The accused person herein, Omar Mohamed, was on 16/07/2020 charged with the offence of Defilement contrary to section 8(1) as read with 8(2), and Committing and Indecent Act with a Child contrary to section 11(1); all of the *Sexual Offences Act* No. 3 of 2006 (hereinafter, abbreviated as SOA).
2. The charges were read to the accused person, who denied in both counts that on 15.07.2020 at about 4.00pm in [particulars withheld] village in Tana River Sub-County within Tana River County, he intentionally caused his penis to penetrate and touch the anus of MKG, a child aged 4 years.
3. The prosecution called 9 witnesses, including the victim herein, who because of extreme tenderness, could not be heard. Evidence adduced by PW9, Mohamed Galgalo Shambaro, a Dental Officer at Hola County Referral Hospital, confirmed that the child herein was approximately 4 years old as at the material time.
4. PW2, HS, however confirmed in his evidence that on the material evening, at around 4.00pm, he was at home, when he responded to the cries of the victim herein which was coming from a neighboring home. He peeped into the house and from about 3m, he could see the accused person herein while on top of the child victim herein and while on a mat. The child's undergarment had been removed and the accused was having sexual intercourse with him. He stated that the accused had inserted his penis into the child's anus. He quietly left to alert some neighbors so as to corroborate his testimony.
5. PW4, DH, and PW5, ZI, are some of the neighbors who responded and found when the accused person and the child victim were still at the scene. They then went and called the victim's mother.



6. PW3, GF, is the mother. She immediately proceeded home (to the scene) where she found the members of the public while with the accused person. The child victim was also still crying while inside the house. A toy was also found at the scene. The father to the victim was then also called. The police also. The child was then escorted to Hola County Referral Hospital for medical examination.
7. PW7, Mohamed Ali Mwenje, a Clinical Officer, examined the victim and noted some bruises and tears at the anal region which were actively bleeding at the time. The external and internal anal sphincter muscles were loose. In his opinion, the child had recently been defiled. He produced the Medical Examination (P3) Report, the Treatment notes and the Post Rape Care Form as PExh. Nos 2, 3 and 5, respectively.
8. The accused had been re-arrested from the village by Police Officers including PW6, No. 25XXXXX2 PC Suleiman Mohamed. While at the police station, the matter was extensively investigated by PW8, No. 11XXXXX9 PC Matunga Victor. The recovered toy was produced as PEXH. No.1.

Issues, Burden and Standard of Proof

9. It is trite law that the burden of proof is always on the prosecution to prove its case beyond reasonable doubt. The main issue for determination herein is thus a simple one, namely whether the prosecution has discharged this burden?
10. The offences herein are Defilement and Indecent Act. Defilement has been defined in section 8 of the SOA thus: ‘A person who commits an act which causes penetration with a child I guilty of an offence termed defilement’. Justice George Dulu, in *Jumaahiribaekomora Vrs Republic* (High Court of Kenya at Garissa Criminal Appeal No. 53 of 2017, UR), at page 7, paragraph 9, held that in a defilement case, 3 elements are to be proved by the prosecution beyond reasonable doubt. They are firstly, the age of the complainant, secondly penetration, and thirdly the identity of the culprit.
11. Justice Majanja, in *Peter Mokami Nabashon vrs Republic* [2014] eKLR, stated as follows on the offence of Defilement: -
 13. A person is said to have committed an act of defilement under section 8(1) of the *Sexual Offences Act* when the person commits an act which causes penetration with a child. ‘Penetration’ under section 2 of the *Act*, means ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person (Emphasis supplied)
12. Indeed under section 2(1), SOA, penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person. Genital organs have been defined as the whole or part of male or female genital organs and, as is the case herein, include the anus.
13. Section 2(1) of the same Act defines indecent act to mean: -
 - ...unlawful intentional act which causes –
 - (a) any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include any act that causes penetration;
 - (b) exposure or display of any pornographic material to any person against his or her will.
14. In the second charge, the prosecution was just therefore supposed to prove to the same standards of beyond reasonable doubt that the defendant herein intentionally touched the anus of the same complainant with his penis.



15. As noted herein, the burden of proof herein lies with the prosecution and going by how the case against the accused person herein proceeded in trial herein, and mainly the nature of the evidence adduced herein, I do not find any such burden that shifts to the defence except as the accused would have – which he did not – raised a defence under section 8(5) of the SOA.
16. The prosecution must therefore prove to the required standard of beyond reasonable doubt that the accused person herein committed the acts alleged in the charges and as elaborately defined and explained hereinabove.

Determination

17. The accused person was seen by the witnesses herein while sexually defiling the complainant herein, a boy child. They were on a mat and the complainant was naked downwards thus exposing his genital for penetration. PW2 saw them 3m away and he confirmed that he saw the accused person herein while inserting his penis into the child victim's anus. He went and called PW3 and PW4 who responded almost immediately and found when both the accused and the victim were at the scene. Whereas it is not clear whether PW3 and PW4 found them while still in the act, I find the direct evidence of PW2 when considered and corroborated by the medical evidence of PW7, that the child victim had anal bruises and tears which were then fresh, to prove to the required standard that the victim herein was forcefully penetrated, by the accused person herein, and in a manner as witnessed by PW2.
18. Before penetrating him, the accused's penis had to and indeed touched the complainant's anus. The age of the complainant was assessed scientifically and found to be 4 years. I thus find that all the essential ingredients or elements of the charges and the offences herein have been proved to the required standard of beyond reasonable doubt. I do not find any other evidence, material or fact that might make me doubt the evidence herein. I thus do hereby find the accused person herein guilty as charged and consequently pursuant to the provisions of section 215 of the Criminal Procedure Code, do hereby convict the accused person herein of the offences of Defilement contrary to section 8(1) as read with section 8(2) and Committing an Indecent Act with a Child contrary to section 11(1) of the SOA.

DATED, SIGNED AND DELIVERED AT HOLA IN OPEN COURT THIS 15TH DAY OF APRIL, 2021.

A. P. NDEGE

PM

In the presence of;

Osman court interpreter

Atika present for prosecution

Accused person present

Victim/ guardian absent.

A. P. NDEGE

PM

15/04/2021

Atika: 1st time offender

Accused in Mitigation in Kiswahili: NIL



A. P. NDEGE

PM

15/04/2021

CT: Accused person herein committed a serious offence on a child of tender years. He did it on a boy child and hence against the ordinary course of nature. He appears unremorseful. I am aware of the principles of sentencing as enunciated in the *Muruatetu case* by the Supreme Court of Kenya as regards mandatory sentences. I however still do find that the accused person herein does not deserve any mercy at all. I thus do hereby sentence the accused person to serve life imprisonment in count 1.

The second count appears to be a duplication of the 1st count. There could not have been penetration in the 1st count without the accused person touching the complainant's genital/ anus. So as to avoid double jeopardy, I shall exercise my discretion and discharge the accused person under section 35(1) of the *Penal Code* in count 2.

Right of Appeal 14 days.

A. P. NDEGE

PM

15/04/2021.

