



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Sughor (Sexual Offence 3 of 2017)
[2021] KEMC 11 (KLR) (28 October 2021) (Judgment)**

Neutral citation: [2021] KEMC 11 (KLR)

**REPUBLIC OF KENYA
IN THE HOLA LAW COURTS
SEXUAL OFFENCE 3 OF 2017
PA NDEGE, PM
OCTOBER 28, 2021**

BETWEEN

REPUBLIC PROSECUTION

AND

ALI ABDI SUGHOR ACCUSED

JUDGMENT

1. On 05.06.2017, the accused person herein, ALI ABDI SUGHOR, was charged with the offences of Defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 (hereinafter abbreviated as SOA) in the main count. The charge also has an alternative Count of Committing an Indecent Act with a Child contrary to section 11(1) of the [SOA](#). On the same day, he denied in the main count that on 10th and 11th day of May, 2017, at Garsen township, Tana Delta sub-County, Tana River County, he intentionally caused his penis to penetrate the vagina of R. Z. M., a child aged 15 years. The accused herein again denied in the alternative charge that on the same dates, and at the same place, he intentionally touched the vagina of the same child with his penis.

The Evidence

2. The complainant herein, PW1, R. M., stated that she was at all times herein 15 years old. That on 10.05.2017, the accused person, who wanted to force her into a relationship, tricked her from where she was washing clothes and led her to a lodging in Garsen, while using a motorcycle. That the accused then locked the lodging room and penetrated her genital organs (kaffi) using his. That he did that on two days. She was then able to proceed to Mombasa where she met with her sister. She then came back to Garsen, where she met with her father who then took her to Wenje police station where she made the defilement reports. She was then brought to Hola hospital for medical examination
3. Her father, PW2, M. H. G., confirmed that the complainant was at the time aged 15 years. That on 10.05.2017, she failed to go back home from where she had been sent to wash clothes. He later got



information that she had been spotted at Garsen. He then went and met her at Garsen. She told him that someone had confused her.

4. PW3, Flora Andisi, operated Mkokoa Guest House at Garsen. She stated that on 10.05.2017, she booked in a customer called Ali Abdi who was with a girl behind him. That Ali paid Kshs. 600/= for the room. That he again spent there the next day on 11th. She produced her records as PEXH NO 4. She however confirmed in her evidence in chief, and also in cross-examination that the person who booked the room was not the accused person herein.
5. The accused person is then alleged to have attempted to fraudulently issue an identity card to the complainant herein, so as to deceive that she is over 18 years with the main purpose of eloping with her. PW5, Mohamed Shambaro, an oral health officer with 18 years' experience however, in an age assessment conducted on 05.06.2017, confirmed that her age was 15 years as at the date of the commission of the alleged offence herein. He explained that he used the sequence of teeth eruption and the intentionally accepted method of age assessment, which he however did not elaborate, to do the assessment. He then produced his report as PEXH. NO. 3. PW6, Dr. John Mwangi, of Hola County Referral Hospital, on the other hand, conducted the medical examination on the complainant herein and found her with bruises at the vulva. He produced his report as PEXH. NO. 2.
6. PW7, NO. 7XXX4 CPL GR, of Wenje Police Station, received the complainant herein and her father on 15.05.2017. He booked their report and then referred them to the hospital for examination. He then also took them to the dentist for age assessment. He was then called on phone that the accused person herein had been arrested at Kilifi. He went there, rearrested, brought him and had him charged with the present offences.
7. The accused person in his defence, DW1, stated that he was arrested at Majengo, Kilifi where he had gone to look for employment. That he met with the brother to the complainant who employed him as a shop steward. That he however failed to pay him as per their employment contract. That he worked for him for around 2 years without pay. He therefore attempted to sue him. He instead turned against him and had him implicated with the present case. That when he got out on bond, he realised that the complainant herein was an adult with an Identification Card and had even voted during the general elections of that year. He stated that on 10.05.2017, he was at Majengo and not at Garsen as alleged herein. That all these are grudges.

Issues, Burden and Standard of Proof

8. However, the offence herein is that of defilement or 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 is guilty of an offence termed defilement'. Justice George Dulu, in *Jumaahiribaekomora v 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.
9. Justice Majanja, in *Peter Mokami Nabashon v 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)



10. 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 includes the anus. The same 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, breasts, 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

11. In the alternative charge, the prosecution was just therefore supposed to prove to the same standard of beyond reasonable doubt that the defendant herein intentionally touched the vagina of the same complainant with his penis. As noted herein, the burden of proof herein lies with the prosecution and going by how the case against the defendant 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 defendant except as he could have raised a defence under section 8(5) of the SOA.

Determination

12. To begin with, on 05.12.2019, I found that some part of the evidence for the complainant, including her cross-examination, were missing from the records herein. There was therefore an order that she be recalled. The prosecution however informed the court that she could not be found and that she had since become an adult and was married. Her evidence as summarised herein therefore has no benefit of the cross-examination and I did treat it as an unsworn evidence. That is why I still called upon the accused to make his defence. However, the alibi defence that was raised by the accused person required rebuttal by the prosecution. This is because PW3, did not prove that he was the one who was seen with the complainant herein at the lodging, scene of the alleged sexual assault herein. She in fact confirmed even in cross-examination that the accused person herein was not the Ali Abdi that she booked into the room. Furthermore, there was no confirmation that that Ali Abdi in PEXH NO 4, was or is the accused person. The accused person has thus raised a sufficient defence which has not been rebutted. It has in fact been corroborated by the evidence of PW3. I thus do hereby find the accused person herein not guilty.

Conclusion

13. Pursuant to the provisions of section 215 of the Criminal Procedure Code¹, I do hereby acquit the accused herein of the offences of Defilement contrary to sections 8(1) as read with 8(3) of the SOA, as charged in the main count. He shall therefore be immediately be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT HOLA IN OPEN COURT (BUT IN CAMERA) THIS
28TH DAY OF OCTOBER , 2021**

ALOYCE-PETER-NDEGE

PRINCIPAL MAGISTRATE

¹ Cap., 75, Laws of Kenya



In the presence of;

Court interpreter:

Prosecution counsel:

Accused:

Victim:

Victim's guardian/ parent:

