



**Mwakio v Republic (Criminal Appeal E019 of 2023)  
[2024] KECA 1471 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1471 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL E019 OF 2023  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**COLLINS MZEE MWAKIO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court at Voi (J. N. Onyiego, J.) delivered on 15th February 2022 in H.C. Criminal Case No. E009 of 2021)*

**JUDGMENT**

1. The appellant, Collins Mzee Mwakio, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence were that on 9<sup>th</sup> September, 2020 at around 1800hrs in Kidaya-Ngerenyi Location within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of FC (PW1), the complainant, aged 10 years. On the alternative charge, the particulars were that on 9<sup>th</sup> September, 2020 at around 1800hrs he intentionally touched the vagina of FC (PW1), the complainant, aged 10 years with his penis.
2. The appellant pleaded not guilty and the matter proceeded to hearing and the prosecution called 4 witnesses.
3. FC (PW1) the complainant, gave unsworn testimony that on the material day, she left home for her grandmother's place to fetch water for her. On returning home, she met with the appellant at a place called Kwa Michael. She testified that the appellant grabbed her hand and took her to a place where "viazi" is sold on the roadside where he bought her some "viazi" but she threw them away. He took her to a shop nearby and bought her club soda and 'kdf'. When she asked the appellant to let her go home, he refused and instead took her through a deserted and bushy place where they used to fetch firewood,



removed her panty and sweater, but left her dress on. He also removed his lower clothes and defiled her with the dudu he uses to urinate. She felt a lot of pain and her screams attracted the attention of her aunt who confronted the appellant by pulling him off her. FC picked her clothes and ran away. Later, while at home, she saw her aunt PW2, her cousin Eva, their village elder and the appellant who pleaded not to be beaten. She was taken to Mwatate Police Station and later to Mwatate Sub-County Hospital where she was examined and treated. It was her evidence that she did not know the appellant before, and that it was the first time he had defiled her; and that the appellant has a twin brother whom she knew very well as they are distant neighbors. She identified the appellant in the dock as the person who sexually assaulted her.

4. PW2 LN stated that she knew the complainant as a child to her neighbor, who calls her aunty; that on 9<sup>th</sup> September, 2020 at 6.00 p.m, she was in her house which also serves as a kiosk when the appellant arrived in the company of PW1. He bought her a club soda and 'kdf' and they left together. It was then that her sister-in-law asked where the appellant was going with the child. She stated that as the appellant and minor were heading towards the bushes where there was a short cut, she decided to follow them, but lost sight of where they went. While returning to her house, she met a village elder who asked her where she was going. She continued looking for the minor, and then heard her voice coming from some bushes saying, 'naumia'. On checking the bushes, he found the appellant on top of PW1. The appellant was naked and had lowered his trousers and boxer shorts. The minor had no panty nor trousers on, but was still wearing her dress; that the appellant had defiled PW1, who was crying. She confronted the appellant who tried to run away, but held him while screaming for help. As they struggled, PW1 who was scared picked her clothes and ran away. Then the village elder came with other people and found her holding the appellant. She asked the village elder to take the appellant while she looked for PW1 whom they later took to Mwatate Police Station from where they were referred to Mwatate Sub-County Hospital for examination and treatment. She stated that the appellant was a villagemate and her cousin whom she positively identified; and that she had no grudge against him.
5. Emiline Chari PW3, a clinical officer at Mwatate Sub –County Hospital stated that PW1 was in good general condition when she was presented to her. On examination of her genitalia, she found that it was reddened and tender to touch. The hymen was broken and there was mucoid discharge at the vaginal opening. That laboratory tests revealed that the VDRL and HIV test was negative and there were no spermatozoa. The urinalysis test was normal and the medication PW1 was given was antibiotics and pep. She thereafter produced the treatment notes and P3 form as evidence.
6. PC Felistas Tuitoek PW4, an investigating officer stationed at Mwatate Police Station, stated that, on 10<sup>th</sup> September, 2020 at 9.00 a.m, she was at the station when a case of defilement which had been reported the previous day was assigned to her for investigation. She reiterated the evidence of PW1 and PW2 and, after interrogating the appellant, she preferred the charges against him.
7. In his defence, the appellant testified that, on 9<sup>th</sup> September, 2020, he went for his usual duties at a place called Survey in the morning and, when he finished, he went to a bar to drink and at around 3.00 p.m he left for his home. On the way, he met some children at a place known for selling "viazi", and after buying "viazi" for himself and the children, PW1 one of the children, requested him to buy her a soda as she was hungry; that he asked her whose child she was as he did not know her. Upon introducing herself, he realized that the mother of PW1 was his former classmate. They went to a "Kibanda" where he bought her 'kdf' and soda and escorted her to the main road as the place was not safe. There, he was confronted by PW2, and a village elder who asked him where he was going with PW1. Despite his explanation that he was escorting her, PW2 called people and claimed that he had defiled PW1; that he suggested that the child be taken to the hospital to establish the truth of the allegations. He



stated that he was being framed by PW2 who accused him of being a drunkard who never wore a mask during corona time.

8. Upon considering the evidence, the trial magistrate convicted the appellant of the offence of defilement and sentenced him to 30 years imprisonment.
9. Aggrieved, the appellant filed an appeal to the High Court on the grounds that: the trial Magistrate convicted him and that he was serving an illegal sentence; that the offence was not proved beyond reasonable doubt as required by the law; that there was material contradiction in the evidence; that the burden of proof was shifted to the appellant; there was no evidence of penetration or partial penetration; in failing to appreciate the sworn evidence of the appellant; in relying on a medical report without evidence from the appellant; in failing to state the language used during plea taking; in sentencing the appellant without providing him a chance to offer any mitigation; and in convicting him on a defective charge sheet.
10. Upon considering the appeal, the High Court found that the prosecution had proved their case to the required standards and upheld both the conviction and sentence.
11. Dissatisfied, the appellant has filed an appeal to this Court on grounds that: the learned Judge shifted the burden of proof to the appellant leading to a miscarriage of justice; in convicting and sentencing the appellant without evidential proof beyond reasonable doubt, in particular that penetration partial or otherwise was not proved; and in failing to grant the benefit of doubt which accrued to the appellant.
12. Both the appellant and the respondent filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Mr. Gichana submitted that the prosecution did not prove its case to the required standards; that the burden of proof that does not shift from the prosecution throughout the proceedings lies on the prosecution in terms of Sections 107 to 111 of the *Evidence Act*; that the age of the minor and penetration were proved; and that, in the absence of the rapture of the vagina flowing blood, stained clothes, difficult in walking and a freshly broken hymen, penetration was not proved.
13. Counsel submitted that the prosecution did not discharge the burden of proof beyond reasonable doubt; that doubt existed as borne in the treatment notes and whether there was a mere attempt at penetration calls or was there proof of partial or complete penetration before PW1 was rescued; and that the absence of the hymen was not indicative of the act having taken place the previous day as it ought to be as a natural consequence of such an act. Counsel argued that the benefit of doubt ought to have been afforded to the appellant as a matter of right.
14. On their part, learned prosecution counsel Ms. Ongeti for the State submitted that the prosecution proved the charge to the required standards; that the incident occurred in broad daylight, and that PW2 caught the appellant red handed defiling the minor and restrained him; that he was a person well known to her.
15. With regard to PW1's age, it was submitted that the minor testified that she was 8 years old and a pupil at Kidaya Primary School, and that her Birth Certificate indicated that she was 10 years old as at the time of the incident. On penetration, it was submitted that penetration was proved by the complainant, that the appellant put his 'dudu' into the area she uses to urinate and she felt pain. PW2 heard her screams in the bushes and when she found them, the complainant was without her panty or trousers; and the appellant was on top of her; and that PW3, a clinical officer, confirmed that the complainant's genitalia was reddened and tender to touch and her hymen was broken. It was her evidence that a reddened vagina was a sign that an act of defilement had occurred.



16. Counsel went on to rely on the case of *Richard Munene v Republic* [2018] eKLR for the proposition that not every trifling contradiction or inconsistency in the evidence of the prosecution witness will be fatal to its case.
17. On sentence, counsel submitted that the sentence imposed by the trial court and upheld by the High Court was not manifestly excessive.
18. This is a second appeal. The mandate of this Court in a second appeal is clear. By dint of Section 361(1) (a) of the *Criminal Procedure Code*, the Court is mandated to consider matters of law only. The above provision has been enunciated in several decisions of this Court. In the case of *David Njoroge Macharia v. Republic* [2011] eKLR the Court’s mandate was summed up in the following terms:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings”.
19. Having carefully gone through the record and the rival submissions by the parties, the issues that arise for determination are:
  - i) whether the prosecution proved its case to the required standards;
  - ii) whether the prosecution shifted the burden of proof to the appellant; and
  - iii) whether the appellant’s defence was considered by the courts below.
20. In determining whether the prosecution proved its case to the required standard, it is necessary that three key ingredients for the offence of defilement be proved. These are the complainant’s age, the appellant’s identity and whether there was penetration.
21. Section 8(1) of the *Sexual Offences Act* provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
22. This Court in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
23. Our assessment of the record does not disclose that either PW1’s age or the appellant’s identity were in any way challenged. The Birth Certificate that was produced showed that she was aged 10 years at the time, and that PW2 who caught the appellant red handed in the act confirmed that the appellant was a person well known to her and, therefore, he was identified by recognition.
24. Turning to the contested question of penetration, the appellant has asserted that penetration was not proved. He has argued that, from the treatment notes, it was doubtful whether the act of penetration took place before PW1 was rescued, or whether there was proof partial or complete penetration.



25. Upon considering the evidence, both the trial court and the High Court were satisfied that penetration was proved. Penetration is defined in Section 2 of the *Sexual Offences Act* as:

“‘Penetration’ means the partial or complete insertion of the genital organ of a person in the genital organ of another person.”

26. In the case of *Alex Chemwotei Sakong v Republic* [2018] eKLR, the Court went to a great length to explain the extent of penetration in a sexual offence as follows:

“Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ.A) in the case of *Mark Oiruri v. Republic Criminal Appeal 295 of 2012* [2013] eKLR in which they opined thus:

‘... and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ ...’”

27. It is trite law that penetration for the purpose of proving an offence of defilement does not have to be complete to amount to penetration, it can be either partial or complete and can be proved by direct evidence of the complainant or by medical examination. PW 1 testified that:

Appellant removed her panty and sweater but left her dress on; he also removed his lower clothes thus exposing the dudu that he uses to urinate. She told the court that appellant then put the said dudu at the place she uses to urinate, she felt a lot pain and started screaming and that an aunty came. That the said aunt confronted the appellant”

28. PW2 stated that:

I heard someone cry “naumia”. I walked quietly and then saw the accused and the child. The accused was naked, he had lowered his trouser and boxer.

“PW1 had no panty/trousers. She was wearing a dress. He had removed her panty and trouser. I found them red-handed. He had penetrated her and she was crying. I immediately called him and asked him is that the reason he had bought the KDF and the club soda. He got startled and wanted to flee. I grabbed him. PW1 was saying she has been screaming and no one was helping her. PW1 was so scared and she took her clothes and ran. She was trembling.”

30. PW3, Emiline Chari, the clinical officer who examined PW 1 testified that her genitals were reddened and tender to touch, and that her hymen was not intact. From the evidence, it is also clear that the appellant was caught in the act just before he completed the sexual act.



- 31. On the basis of the evidence, both the trial court and the High Court found that penetration was proved. For our part, our reevaluation of the evidence leads us to uphold the concurrent findings of the two courts below, that penetration was proved to the required standard.
- 32. The appellant has also alleged that his alibi defence was not taken into account. We have considered the judgment of both the trial court and the High Court and find that the appellant’s alibi defence was considered and found to be a mere afterthought. Likewise, we have no reason to depart from the lower courts’ assessment of the defence that boils down to a mere afterthought.
- 33. In sum, we are satisfied that the prosecution proved the offence of defilement to the required standards. The conviction was safe and we have no reason to interfere with the trial court’s decision as upheld by the High Court that the appellant defiled the complainant.
- 34. In sum, the appeal is without merit and is accordingly dismissed in its entirety.
- 35. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCIArb.**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

signed

**DEPUTY REGISTRAR**

