



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munyao v Republic (Criminal Appeal 78 of 2020)  
[2023] KECA 49 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 49 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 78 OF 2020  
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**JOHN MUNYAO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya (Thuranira, J.) dated 22nd June, 2018 in Kakamega H.C.CR.A. No. 19 OF 2018)*

**JUDGMENT**

1. John Munyao, the appellant, has preferred this second and perhaps last appeal challenging his conviction and sentence for the offence of defilement. The jurisdiction of this Court in such an appeal was succinctly set out in *Karani vs Republic* [2010] 1 KLR 73 thus:-

“This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

2. The facts giving rise to the instant appeal are that the complainant, MW (PW1) a class two pupil, aged 4 years old from Thika, and who stayed with her grandmother, testified that the appellant who was their neighbour sent her friend whom they were playing with to the shops to get sweets and called her into his house. Whilst in the house, she found a young child belonging to one, Rebecca and was equally sent to the shop to buy sweets. Upon leaving, the appellant locked the door, led her to the bed and sexually violated her. She felt pain but was warned that if she screamed, she would be killed. When



- those who had gone to the shops came back, the appellant released her to go home. At home, she told SW (PW2), her sister that the appellant had sexually assaulted her which information was conveyed to her grandmother, who thereafter, reported the incident to Kathuku Police Post the following day.
3. On her part, PW2 who also stays with the same grandmother, reiterated the evidence of PW1 in material particulars. Suffice to add that on a Sunday, she went to the appellant's house and the appellant told her to go to the shops and buy sweets while he remained with PW1 and upon returning, PW1 told her that the appellant had assaulted her sexually but asked her not to tell anyone. PW3, FN the mother to PW1 testified that her daughter was aged 8 years old at the time of the incident and that she stayed with her mother. That on June 2, 2011, she was informed by her mother that PW1 had been defiled by the appellant.
  4. When she interrogated her, PW1 narrated how she had been defiled by the appellant. PW1 then took her to hospital for examination and treatment. The case was investigated by PC Kenneson Onyango Obongo, (PW4), who testified that a report was made by PW3 that her daughter had been defiled by a person known to her. He interviewed PW1 who told him how the appellant had lured her to his house and sexually assaulted her. He arrested the appellant. Lastly, there was PW5 Dr. Nduati Robison who testified on behalf of Dr. Murimi who had filled the P3 form. That the doctor who filled the P3 form had opined that she had been defiled as there were lacerations on labia majoria.
  5. The appellant in his unsworn statement of defence stated that on June 5, 2011 he went to Delmonte area and returned home in the evening. That he did not find his wife at home and when he went to look for her at the river he was arrested by two men who took him to the police station where he was charged. The appellant claimed that the charges were maliciously instituted against him due to a grudge with PW3.
  6. The trial court, after thorough evaluation of the evidence found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. The appellant was aggrieved by the conviction and sentence and appealed to the High Court. After consideration of the appeal, the High Court agreed with the findings of the trial court and dismissed the appeal in its entirety. The appellant has now preferred this appeal on the grounds that the High Court made an error in law by failing to scrutinize the medical evidence sufficiently and find that there was no evidence of penetration, and, in any event, the said medical evidence was admitted in total violation of Article 50(4) of the Constitution; the prosecution case was not proved to the required standard; the first appellate court failed to re-evaluate the evidence tendered, and finally, that the charge sheet was defective.
  7. In his submissions, the appellant submitted that the trial court did not appreciate the purpose of voire dire examination and the same was not properly conducted thus their evidence should not have been received, in which event the offence was not proved. It was also submitted that the charge was defective as it did not contain the words "intentionally and unlawfully" in the particulars. The appellant further submitted that the P3 form was produced in violation of the law as the PW5 did not state how long he had worked with the maker of the document or whether he was familiar with his signature. Further the appellant was not asked if he objected to its production. Finally, the appellant submitted that the trial court failed to faithfully, impartially and rationally analyze the evidence tendered as a whole to determine his criminal culpability. The evidence adduced fell short of the standard required in a trial of this magnitude and the circumstantial aspects relied upon were incapable of sustaining a conviction. He therefore prayed for the appeal to be allowed.
  8. In opposing the appeal, Mr Edward Kakoi, Principal Prosecution Counsel, submitted that penetration was proved and more particularly that upon re- evaluation of the evidence on record afresh, the trial court concurred with findings of the subordinate court and proceeded to uphold both the conviction



and sentence and that this Court should not interfere with those concurrent findings. Reliance was placed on the case of *Karingo & 2 Others vs Republic* [1982] eKLR for the proposition.

9. According to counsel, the particulars of the offence were straight forward and free from ambiguity. The contents of the P3 form tendered in evidence corroborated the evidence of PW1 that she was defiled. There was clear finding of penetration and laceration in the complainant's genitalia, and that the appellant was known to the PW1. It was therefore, a case of recognition of the appellant by PW1. Counsel therefore, urged us to dismiss the appeal in its entirety.
10. As already stated, this is a second appeal and cognizant of our mandate set out elsewhere in this judgment, we discern that the only issue of law falling for our determination is; whether there was sufficient evidence to sustain the conviction of the appellant on the offence charged. The grounds of appeal regarding voire dire examination, defectiveness of the charge sheet, re-evaluation of the evidence and the tendering of the medical evidence are all subsumed in this broad issue.
11. The appellant's main contestation was that penetration as an ingredient of the offence of defilement was not proved as required by law. We agree with the appellant that penetration is a pertinent consideration in an offence of defilement under section 8 of the *Sexual Offences Act* and must be proved to the required standard for if there is no penetration, whether complete or partial, there will be no defilement.
12. The first appellate court after re-analyzing the evidence adduced before the trial court made similar findings as the trial court and pronounced itself as follows:

“Dr. Nduati Robinson (PW5) from Thika Level 5 Hospital testified on behalf of Dr. Murimi who had examined the complainant and filled in the P3 form. The doctor gave the complainant's age at the material time as 7 years. The doctor's opinion was that the complainant had lacerations in her genitalia and the conclusion was that the complainant had been defiled.

The P3 form was filled in the normal course of duty. Dr. Nduati (PW5) informed the trial court that the doctor who filled the P3 form was away pursuing a Master's Degree. The Appellant had the opportunity to cross-examine the doctor (PW5) on the contents of the P3 form.

13. Besides the foregoing, there was the evidence of PW1 herself as to what the appellant did to her which the trial court accepted as truthful. PW3 also testified as to the injuries she observed in PW 1's private parts that were consistent with defilement. Contrary to the assertion of the appellant therefore, penetration was proved as required. In any event, there were concurrent findings on the issue by the two courts below. Nothing has been brought to our attention that would persuade us to depart from those concurrent findings. The age of the PW1 was not in contest as it was established to be 8 years by her mother who produced her birth certificate in court which was buttressed by the P3 form. In a nutshell therefore, all the ingredients of the offence were proved contrary to the submissions of the appellant. It is not a mandatory requirement that a maker of a document must be the one who must produce it at the trial. There may be occasions when that is not possible as was the case here as the doctor who examined the victim and filled the P3 form was not readily available.
14. Further, PW5 testified of his acquaintance with the said doctor and his handwriting having worked with him for a considerable period of time. In any event, the appellant did not raise any objection to the witness producing in evidence the document. Again he cross-examined the witness. What prejudice then did he suffer? In any event, section 77 of the *Evidence Act* caters for such scenario.



15. On voire dire examination, we are unable to discern the appellant’s misgivings. He has not pointed out exactly what was wrong with the way it was administered. On our part and having reviewed the record, we are satisfied just like the first appellate court that the voire dire was properly administered, and, even if it was not, it cannot be a basis for impeaching the conviction. See the case of *Maripett Loonkomok vs. Republic* [2016] eKLR.
16. On the defectiveness of the charge sheet, section 8 of the *Sexual Offences Act* defines defilement as an act which causes penetration with a child. Nowhere are the words “intentionally and unlawfully” anticipated. Indeed, those words are only reserved for the offences of rape, attempted rape, sexual assault compelled or indecent acts under sections 3, 4, 5, 6 and 7 of the *Sexual Offences Act*. In the premises, this complaint is devoid of merit. On re-evaluation of the evidence by the first appellate court, the record speaks for itself. It cannot be gainsaid that this was perfectly done.
17. In our view, this appeal boils down to the inevitable conclusion that the appellant’s conviction was safe and the appeal against both conviction and sentence is totally devoid of merit and is hereby dismissed.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of February, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**G W NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

