



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Muthama v Republic (Criminal Appeal 3 of 2018)  
[2022] KECA 1214 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1214 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 3 OF 2018  
W KARANJA, K M'INOTI & J MOHAMMED, JJA  
NOVEMBER 4, 2022**

**BETWEEN**

**JOHN MUTHAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Kajiado  
(Nyakundi, J.) delivered on 24th May, 2016) In HC CR. A. No 34 of 2014)*

**JUDGMENT**

1. The appellant, John Muthama was charged and convicted by the Principal Magistrate's Court at Kajiado of the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) and sentenced to life imprisonment. His first appeal to the High Court was unsuccessful, hence this second appeal.
2. The jurisdiction of this court on a second appeal is well settled. In *Njoroge v Republic* [1982] KLR 388 this court held that:  

' On this second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.'
3. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-evaluated by the High Court in reaching the impugned judgment, to place the instant appeal in context.
4. The particulars of the offence were that on January 5, 2014 at [particulars withheld] in Loitoktok District within Kajiado County, he unlawfully used his penis to penetrate the vagina of AM (name withheld), a child aged 10 years.



5. The prosecution called five (5) witnesses to prove its case including the minor complainant. In brief, PW1, the complainant testified that she was ten (10) years old and that on January 5, 2014 at about 1.00 pm she was sent by her mother (PW2) to the posho mill. That on her way there, someone ran after her and forcibly took her to a nearby house where he defiled her. It was her further testimony that the perpetrator subsequently took her to a thicket on the hill side and defiled her for the second time. That she felt pain and lost consciousness. Her mother (PW2) found her at 11pm and when she gained consciousness, she informed her mother that she had been defiled.
6. PW2 testified that the complainant was 10 years old. That she became concerned when PW1 did not return from the posho mill. That she decided to look for her whereupon she found her on the roadside, unconscious, with her torn inner wear and biker beside her. It was PW2's further evidence that she reported the matter to the XXXXX Police Post where APC BK(PW4) referred them to XXXXX Centre for medical examination and treatment.
7. Dr SM, (PW3), a medical doctor based at Loitoktok testified that he examined the complainant who was 10 years old. His examination revealed that her clothes were blood stained, she had pain on the chest, stomach and waist. It was his further testimony that the complainant had blood in her vagina, her hymen was broken and there were injuries on the vagina which was torn. Further, that there were anal injuries which were blood stained. He formed the opinion that the complainant had been defiled.
8. APC BK (PW4) testified that on January 5, 2014, PW1 and PW2 reported that PW1 had been defiled and he referred PW1 to the hospital for medical treatment. The following day, PW1, PW2 and members of the public took the appellant to the police post claiming that he had defiled the complainant. The appellant was thereafter taken to the police station.
9. PC EM (PW5) was the investigating officer. It was her testimony that she took the complainant to the hospital where she was treated. That a P3 form was filled and an age assessment carried out which confirmed that the complainant was 10 years old. In cross- examination, PW5 testified that she recorded a statement from the appellant's neighbour who confessed that the house where PW1 was defiled belonged to the appellant.
10. When placed on his defence, the appellant denied the offence and gave an unsworn statement and did not call any witness. He stated that in October, 2013, PW2 employed him to plant tomatoes for her but she did not pay him his dues despite his demands.
11. The trial court convicted the appellant and sentenced him to life imprisonment as aforesaid. Aggrieved by that decision, the appellant filed an appeal to the High Court.
12. The High Court (Nyakundi, J) was satisfied that based on the evidence, the appellant's conviction and sentence were well founded and dismissed the first appeal.
13. Undeterred, the appellant filed this second appeal on the grounds inter alia: that the prosecution evidence was not proved to the required standard and that essential witnesses were not called.
14. At the hearing of the appeal, the appellant who was unrepresented relied on his written submissions and contended that: that the essential ingredients of the offence of defilement were not proved; and that essential witnesses were not called including at least one member of the public who effected the arrest on the appellant to clarify the circumstances leading to his arrest.
15. In opposing the appeal, Ms Ngalyuka, the senior assistant director of public prosecution (ADPP) for the state submitted that the prosecution evidence tendered against the appellant was sufficient and met all the necessary requirements to prove a charge of defilement. It was counsel's further submission



that there was proof of penetration as tendered in the medical report produced by the doctor, which confirmed that there was penetration.

16. Ms Ngalyuka further submitted that there was sufficient proof of the age of the victim as 10 years of age by her mother and the age assessment report. Further, that the appellant was properly identified by PW1 in broad daylight. It was counsel's further submission that there is evidence that the complainant took her mother to the appellant's house; and that the appellant was known to PW2 and the complainant.
17. It was counsel's further submission that the appellant was placed at the scene of crime by the complainant and he was known to be the occupant of the house where she was first defiled. It was counsel's submission that the evidence tendered against the appellant was sufficient to prove the offence of defilement against him.
18. Counsel further submitted that no particular number of witnesses should be called by the prosecution to prove its case. Counsel relied on section 143 of the Evidence Act in support of this proposition.
19. Counsel concluded that the 1<sup>st</sup> appellate court carried out its duty and arrived at the right conclusion as all the ingredients of the offence of defilement were present. Counsel urged us to dismiss the appeal.
20. We have carefully considered the record of appeal, the submissions, the authorities cited and the law. Sections 8(1) and 8(2) of the Sexual Offences Act provide that:

- ' 8 A person who commits an act which causes penetration with a child is guilty
- (1) of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'

21. The appellant was charged with the offence of defilement. It is now settled law that to warrant conviction for an offence of defilement under section 8(1) of the Sexual Offences Act, three elements should be satisfied before conviction of an accused person can arise. These are penetration, apparent age of the victim and identity of the perpetrator. In John Mutua Munyoki v Republic [2017] eKLR, this court stated that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

- i. The victim must be a minor, and
- ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.
- iii. Proof of the identity of the perpetrator.

22. In the circumstances of this case, the prosecution was required to prove that the victim was below the age of 18 years at the time of the commission of the offence; and that the appellant committed an act which caused penetration with a female person who to his knowledge was a minor. As for the complainant's age, it is common ground that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge as the prescribed sentence is dependent on the age of the victim. In the case of Hadson Ali Mwachongo vs Republic [2016] eKLR the court stated that:

- ' The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an



essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim.'

23. In our evaluation, the issues for determination in this appeal are:
  - a. Whether the ingredients of the offence of defilement were proved to the required standard; and
  - b. Whether the sufficient number of witnesses were called.
24. On the question of the age of the complainant, it is on record that the complainant testified that she was 10 years old at the time that she was defiled. PW3 produced an age assessment report which indicated that the complainant was 10 years old.
25. On the question of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence. It was confirmed by the medical doctor (PW3) that from the nature of the injuries that she suffered, she had been defiled. The two courts below cannot therefore be faulted for relying on the medical evidence that was adduced to conclude that there was penetration.
26. Regarding identification, the complainant identified the appellant as the person who defiled her. The complainant took her mother to the appellant's house where she had first been defiled. The appellant was identified by a neighbor as the occupant of the said house. Further, the appellant was known to PW2 as he had previously worked for her.
27. The trial court believed and accepted the complainant's testimony as truthful. The 1<sup>st</sup> appellate court found that the complainant's identification of the appellant as the perpetrator was proper.
28. The proviso to section 124 of the [Evidence Act](#) provides as follows:

' Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'

In the circumstances, we are satisfied with the concurrent findings of the two courts below regarding the appellant's positive identification and are not inclined to interfere with that concurrent conclusion.
29. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence.
30. On the question whether the material witnesses were called, section 143 of the [Evidence Act](#) provides:

' No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.'
31. In the circumstances, we are satisfied that the prosecution called the sufficient number of witnesses required to prove its case.
32. From the foregoing, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence denying having committed the offence was properly rejected. His conviction was therefore sound.
33. Having found that the elements for the offence of defilement have been proved beyond reasonable doubt, we find no basis to interfere with the findings of the trial court and upheld by the High Court. The upshot of the foregoing is that the appeal is dismissed in its entirety.



DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2022.

W KARANJA

.....

JUDGE OF APPEAL

K M'INOTI

.....

JUDGE OF APPEAL

J MOHAMMED

.....

JUDGE OF APPEAL

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

