



**Muinde v Republic (Criminal Appeal E085 of 2022)  
[2024] KEHC 977 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E085 OF 2022  
TM MATHEKA, J  
JANUARY 26, 2024**

**BETWEEN**

**DAVID MUINDE ..... APPELLANT**

**AND**

**VERSUS REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence of Hon. J. Mwaniki (CM) in Makueni Chief Magistrate's Court Sexual Offence Case No. E010 of 2021 delivered on 6th July 2022)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the year 2020 and 10<sup>th</sup> June 2021 at [Particulars Withheld] Location in Makueni Sub-County within Makueni County, the appellant intentionally caused his penis to penetrate the vagina of DMV, a child aged 17 years.
2. In the alternative, he was charged with the offence of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that during the same period and at the same place, the appellant intentionally touched the vagina of DMV, a child aged 17 years.
3. The appellant pleaded not guilty and there was a full trial. The prosecution called 4 witnesses to wit; the complainant (PW1), the complainant's sister (PW2), investigating officer (PW3) and the Clinical Officer (PW4). The exhibits produced were; Immunization Card (P. Ex 1), P3 Form (P. Ex 2), Lab Results Form (P. Ex 3) and PRC Form (P. Ex 4).
4. The learned trial magistrate convicted him on the main charge and sentenced him to 10 years' imprisonment.



5. Aggrieved by that decision, the appellant his appeal on the following grounds;
  - a. That he was convicted and sentenced to serve imprisonment when no plea of guilty was entered.
  - b. That the evidence given by the prosecution was not enough.
  - c. That false allegations were used to frame the case on him.
6. It is now settled that my duty as a first appellate Court is to reconsider, review and scrutinize the evidence on record during the trial, make my own findings and draw my own conclusions always keeping in mind that unlike the trial court, I neither saw nor heard the witnesses.
7. The prosecution's case was that the appellant was a neighbour to the complainant's family. At the material time she was a form One student. According to the complainant she had met the appellant along the way and she had given him her phone contact. He then came up with the idea of marrying her, promising to take her for a tailoring course. He told her not to disclose this to her parents. On 15<sup>th</sup> May 2021, she left her home and went to the home of the appellant. They then left for [Particulars Withheld] and on 16<sup>th</sup> May 2021 they went to [Particulars Withheld]. She said she was the appellant's wife for 31 days. That they had sex once on the 23<sup>rd</sup> May 2021. She told the court that she removed her clothes and he removed hers and they had sex. She said they were arrested when her sister reported their whereabouts. She was taken to the hospital and examined. She identified in court her birth certificate, a P3 form, PRC form and lab results.
8. On cross examination she told the court that she never told the appellant that her parents molested her. She said that he was the one who asked for her phone number, that the appellant looked for a house at [Particulars Withheld] and that they had sex at [Particulars Withheld]. That he left her at [Particulars Withheld] to come to work in [Particulars Withheld]. He later took her to his house at [Particulars Withheld]. On reexamination she told the court that she had not fallen out with her parents. That they lived in [Particulars Withheld] in May and later left for [Particulars Withheld] where they were arrested.
9. The 2<sup>nd</sup> witness for the state was one EM. She claimed that the complainant was her sister and that in June 2021 her parents called her and told her that her sister had run away from home in Kitui. She told the court that she conducted her investigations and found that they were at Mbovu. She went to Mbovu and found that she had run away to [Particulars Withheld]. She reported the matter to the Police and the complainant was traced to Malawi Estate in the company of the appellant. She testified that the appellant was her estranged husband and they had two children. That the appellant had defiled their daughter and gone underground and emerged after some years went to Kitui and took away her younger sister. She told the court that she was offended by the appellant's action of defiling her sister after doing away with her. On Cross examination she told the court that the appellant was her husband and they had two children.
10. PW3 was no. 261838 PC Bernard Kipnetich based at Makueni Police Station. He testified that on 10<sup>th</sup> June 2021 PW2 went to the Police Station and told him that her sister the complainant had disappeared from home and she suspected that she was at Malawi Estate in [Particulars Withheld] Town. He said that they went to Malawi Estate and traced the complainant in the accused's house. He said that the complainant was a student aged 17 years as per her immunization card. She was taken to hospital and her P3 completed. He said that there were allegations of defilement.
11. On cross examination he said that he found the appellant and the complainant and arrested him. He also said he had found that the appellant had previously married PW2.



12. PW4 Stella Nthambi Muasya was the clinical officer who filled the P3. She told the court that the complainant had a history of defilement. That she examined her on 11<sup>th</sup> June 2021 and filed the P3. She found that the complainant had a broken hymen. She produced the P3 as evidence.
13. The learned trial court upon considering the foregoing evidence formed the view that the prosecution had established a prima facie case to warrant the appellant being placed on his defence. The appellant elected to give sworn evidence and not to call any witnesses. He testified that he was a residence of Kitui. He said he knew the complainant by name. He confirmed that (PW2) was his estranged wife, and the complainant's sister. He denied committing the offence. He told the court that the complainant used to visit the sister (PW2) during her marriage to the appellant. That at the material time the complainant found him on his way to work and he welcomed her to his house and then left for work. That the complainant stayed in his house for only 8 hours. That the complainant went to Mbovu first as she knew his home which he had already abandoned. He denied marrying the complainant. On cross examination he told the court that PW2 was his estranged wife since 2019. That the complainant came to his house saying that she had come to visit her sister. He testified that he was arrested at a construction site near his home.
14. From this evidence the trial court found him guilty for defilement and sentenced him to 10 years' imprisonment prompting this appeal.
15. The parties elected to canvass the appeal through written submissions and appropriate directions were given.
16. The appellant filed submissions and argued all the grounds together. He submitted that the trial magistrate ought to have realized that the case was fabricated on him by PW2 who was his estranged wife. That the prosecution did not provide sufficient proof of defilement beyond a reasonable doubt. That the evidence of the doctor of a broken hymen was not proof of defilement. That this was a revenge mission by PW2 .
17. The State, through Prosecution Counsel Margaret Muraguri, opposed the appeal in its entirety. She reminded the court of its duty as a first appellate court and placed reliance on the case of Okeno – v- R (1972) EA 32. The court was also reminded of the ingredients of defilement as set out in George Opondo Olunga v Republic [2016] eKLR as identification /recognition of the offender, penetration and the age of the victim.
18. She submitted that the complainant knew the appellant well as he was the estranged husband of her sister. That the issue of identification was not disputed by the appellant. She relied on the case of Wamunga – v- R (1989) KL 424 where the Court of Appeal stated;  

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”
19. With regard to proof of penetration, she submitted that the victim testified that the appellant had sex with her on 23<sup>rd</sup> May 2021 and described how they removed their clothes and the appellant inserted his penis in her vagina. That the medical evidence corroborated the complainant's evidence and the clinical officer testified that the hymen was broken.



20. With regard to proof of age, she submitted that the complainant's evidence was that she was born on 8<sup>th</sup> August 2003 and that she was 17 years at the time of testifying. That a child immunization card was produced as exhibit 1. It was therefore her submission that age was sufficiently proved.
21. Further, she submitted that the appellant's defense corroborated the complainant's testimony that she was first at his house in [Particulars Withheld] before going to [Particulars Withheld]. That he did not deny the fact that the complainant was found in his house by PW2 and the Investigating Officer. That he claimed that the complainant had gone to visit her sister yet on cross examination, he stated that he had separated with PW2 since 2019. Further, she submitted that no evidence whatsoever was adduced on the presence of a grudge between him and PW2. It was therefore her submission that the defense was a mere denial and that the trial court exercised its discretion judiciously in arriving at the sentence.
22. In conclusion, she submitted that the appellant failed to establish that he deserved the reliefs sought.
23. From the foregoing the only issue for determination is whether the prosecution had established the charge of defilement beyond a reasonable doubt.
24. There is no doubt that the appellant was known to the complainant. He was married to her sister. However, a red flag went up when from the record she began by telling the court that she had met the appellant along the way then he had asked for her contact. She went on to describe him as her neighbour. It is also evident from the record that the learned trial magistrate expressed concern that she was behaving in a manner to suggest that she was turning into a refractory witness and even warned her from turning into a refractory witness.
25. The court did not follow up on why the witness was behaving in the manner she was. As a child in the cross roads of the dispute between her sister and her former brother in law, anything could have happened.
26. The complainant's sister PW2 told the court that she felt very bad and offended that accused would defile her younger sister after doing away with her. She also told the court that the appellant had defiled their daughter before he disappeared, only to show up and disappear with her sister.
27. The expectation is that PW2 would be hunting the appellant down for defiling their daughter. The question that comes to mind is when as she alleges her sister went missing, what made her think that her sister was with the appellant? She simply states "I made my own investigations and came to know she was at Mbovu". She does not tell the court what was at Mbovu and why her sister would go there. She does also not tell the court how she learnt that her sister had 'run away to [Particulars Withheld]'. Evidently, she had a grudge against the appellant for having left her after defiling their daughter. This inconsistency brings the credibility of this witness to a doubt. It gets even worse because upon the arrest of the appellant the allegation of defiling their daughter does not arise. The same is not told to the police officer so that the two cases can be investigated together and action taken against the appellant. Upon conviction the prosecution states that he is a first offender, meaning he had never been charged with that offence and no charges were pending anywhere.
28. A court of law should not rely on the evidence of a witness who appears untrustworthy to convict an accused person. The Court of Appeal said this in *Ndungu Kimani v Republic* (1979) KLR 282 at page 284

"The witness upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise suspicion about his



trustworthiness or do or (say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

29. PW2 is to me such a witness, who by her testimony raised suspicion that she may have been driven by other motives in this case. The possibility of that makes it unsafe to rely on her testimony.
30. The complainant’s testimony also raised doubts as to her credibility. Was she testifying on her own volition? The manner in which she described the appellant: one as a fundi who she had met along the road, that the appellant had made her his wife for 31 days.
31. The charge sheet states that the defilement took place ‘...on diverse dates between the year 2020 and 10<sup>th</sup> June 2021 at Makueni Sub County within Makueni County... ‘The charge sheet states that the whole period between 2020 and the 10<sup>th</sup> June 2021 the complainant was living at Malawi Estate with the appellant. On cross examination she says they engaged in sex at [Particulars Withheld] on 23<sup>rd</sup> May 2021. Yet it is her testimony that she went to appellant’s home in [Particulars Withheld] on 15<sup>th</sup>, they left on 16<sup>th</sup> for [Particulars Withheld]. So where did the offence take place. Was it at Malawi Estate in [Particulars Withheld] or [Particulars Withheld] wherever that was?
32. The 31 days’ number does not add up. The complainant says she left her home on the 15<sup>th</sup> May 2021 and went to the home of the appellant. There is no evidence of any relationship/interaction between the appellant and the complainant in 2020 and before the 15<sup>th</sup> May 2021. Why was the date 2020 included in the charge sheet? Is it that she had disappeared from home in 2020 and was only found on 10<sup>th</sup> June 2021? Where was she all this time. According to the parents, when did she disappear from her home? These questions were not answered by the prosecution.
33. The appellant denied very element of the charge. The prosecution needed to establish every aspect of the charge. The prosecution did not explain this specific date of the year 2020 to 15<sup>th</sup> May 2021 as stated in the charge sheet. Neither does the prosecution explain the 31 days the complainant alleges that the appellant had made her a wife. From 15<sup>th</sup> May to 10<sup>th</sup> June is not 31 days.
34. The court must not only consider the key ingredients of the offence by the circumstances as well. Section 33 of the *Sexual Offences Act* provides:

Evidence of surrounding circumstances and impact of sexual offence Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove-

  - (a) whether a sexual offence is likely to have been committed-
    - (i) towards or in connection with the person concerned;
    - (ii) under coercive circumstances referred to in section 43; and
  - (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.
35. The age of the complainant was established via a clinic card though the complainant identified a certificate of birth in court. Where did it go. The appellant was known to complainant. There is no doubt about that because he was married to the sister.
36. Was penetration proved? The complainant told the court that they had sex one at [Particulars Withheld] on 23<sup>rd</sup> May 2021. In the same breath she said they left [Particulars Withheld] on 16<sup>th</sup> May



2023 for [Particulars Withheld]. The charge sheet says she was defiled severally between 2020 and 10<sup>th</sup> June 2021. It has been held that a broken hymen per se is not proof of defilement. And the proviso to s. 124 gives the court the discretion to convict on the evidence of the victim only. This is not one of those cases due to the many gaps in the case for the prosecution.

37. I have carefully considered the defence by the appellant. In my considered view there was not sufficient evidence to place him on his defence in the first place. He had no obligation to prove his innocence. The prosecution had the onus to prove the charge and the same was not done.
38. In the circumstances, I find that the appeal has merit. The conviction is quashed, and the sentence is set aside. The appellant be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JANUARY 2024**

**MUMBUA T. MATHEKA**

**JUDGE**

CA Mwiwa

Appellant

For Respondent

