



REPUBLIC OF KENYA



**Machete v Republic (Criminal Appeal E015 of 2023)  
[2024] KEHC 2256 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2256 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E015 OF 2023  
A. ONG'INJO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**SOSPETER AMBOKA MACHETE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. D. Odhiambo Resident Magistrate on 6th April 2022 in Shanzu Senior Principal Magistrate's Court Sexual Offence No. E094 of 2021, Republic v Sospeter Amboka Machete)*

**JUDGMENT**

**Background**

1. The Appellant Sospeter Amboka Machete was accused of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars were that on diverse dates between 13<sup>th</sup> May 2021 to 23<sup>rd</sup> June 2021 at Nyali and Bombolulu areas in Nyali Sub-County within Mombasa County the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of H.N. a girl aged 15 years.
3. He was also charged with an alternative count of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The trial Magistrate considered evidence of 5 Prosecution witnesses and the appellant's defence and found him guilty. He was convicted and sentenced to serve 20 years jail term.
5. Being aggrieved with the judgment of the trial magistrate, the Appellant through his advocates, Ms. Wambo Muyala & Co. Advocates, filed an undated petition of Appeal on 26<sup>th</sup> February 2023 on the following grounds: -



- i. That the Learned Magistrate erred in law & fact by failing to conduct *voire dire* on the victim/complainant who was a minor to test on her credibility and probative value that would attach to the evidence she adduced.
- ii. That the learned Magistrate erred in law & fact in failing to resolve the contradictions in the evidence of the Prosecution in favour of the Appellant.
- iii. That the Magistrate erred in law and fact in convicting the Appellant in total disregard of the evidence on record more so the complainant stated she had cleared form four and was waiting to join university which evidence vindicated the Appellant.
- iv. That the trial Magistrate erred in law & fact by failing to consider that the evidence of the doctor may be referring to a different victim other than the one in the current appeal. More so that the name of the victim is different from that the doctor has stated in the P3 form.
- v. That the Learned Magistrate erred in law in failing to consider all the facts & circumstances surrounding the case by approaching the case with a predetermined mindset of guilty on the Appellant.
- vi. That the learned Magistrate erred in law in finding that the prosecution had proved their case beyond reasonable doubt.
- vii. That the learned Magistrate proceeded on the wrong basis of law.
- viii. That the learned trial Magistrate erred in law & fact in the exercise of his discretion by imposing a harsh & severe sentence in light of the circumstances of the case notwithstanding the mitigation by the Appellant.

### **Prosecution's Case**

6. The complainant who was 15 years old left home on 13<sup>th</sup> May 2021 after disagreeing with the mother, PW2, who had told her to do some house chores against her will. That while looking for her friend she got lost and met the Appellant sitting somewhere. That the Appellant called her and asked if she was lost. That he told her she could sleep in his house and leave the next day. She said it was 5.00 pm. The complainant said she agreed to and went to the Appellants house. She said the Appellant was a guard at an apartment where he was also staying in a single room. That the Appellant brought for her Soda and bread and she slept on his bed. That when the Appellant came back he found her asleep and woke her up and started telling her she was beautiful and wanted to marry her. That he told her to remove the jeans trouser and white blouse she was wearing.
7. That she refused to undress but he forced her and she removed the blouse and trouser and remained with panty and bra. That the Appellant removed her bra and panty and inserted his penis in her vagina and she felt pain and screamed. She said the Appellant's colleague heard her scream but did not come. That after appellant had sex with her he went away as she remained and went to take a shower. She said she bled after the act. She said she did not tell the appellant to take her home. That she remained in his house and he brought for her supper and then went to work and returned at night. She said they had sex the 2<sup>nd</sup> night whereby she removed clothes on her own.
8. The complainant said she left the appellant's house on 7<sup>th</sup> June 2021 and went home. She said she did not tell the appellant she was going home. That when she went home, she told her parents she was with a friend from school. That she was taken to police and to hospital. On 23.06.2021, the Complainant called the Appellant and gave him directions to her home. That the appellant came and gave her a deep kiss in the mouth and they had sex in her bedroom as there was no one at home.



9. That after they had gone back to the sitting room they heard a knock at the door and the appellant got scared and went to hide in the bedroom. That when the mother asked whose shoes were at the door she lied it was for someone who had left. That the mother went to look and found the Appellant in the bedroom. The complainant's father was called and he came with police who arrested the accused and took him to the police station. Complainant was taken to Coast General Hospital and treated. PW1 said she did not know the appellant prior to meeting him. She said when the appellant called and offered to show her where to sleep she thought she was going to sleep alone.
10. PW2, Dr. Ali, produced the P3 and PRC forms in respect to the medical examination and treatment of the complainant in which it was observed that her hymen was broken and there were cuts on the vagina.
11. PW3, SM, the complainant's mother, testified that the complainant went missing on 13<sup>th</sup> May 2021. She said the complainant was waiting to go to Form 1 when she did not find the complainant. That she called her husband and they started searching, and they reported to the police. That the complainant returned home on 7<sup>th</sup> June 2021 and told her she had gone to visit her friend from school. She was taken to the police and to hospital.
12. That on 23.6.2021 when PW3 returned from work, she found male shoes at the door. When she asked whose shoes they were, PW1 said the owner had left. She also noticed there were 2 phones and one was not hers. She suspected there was someone in the house. She started looking everywhere and when she opened the wardrobe, she found someone she did not know. She called her husband who came with the police and the person was arrested. That the complainant was taken back to hospital. That it is then that the complainant told them she had sex with the Appellant in her bedroom on the material day and when she had disappeared. That the complainant then led them to the appellant's house where she had been staying.
13. PW4, Lenox Mwangundi, testified that the Appellant was a guard at Sunrise Apartments where he was working as a gardener. That on 7.6.2021 they were paid their wages and their Supervisor Gabriel told them there would be no work. PW4 said the appellant had been staying with a lady for 3 weeks. That on 24<sup>th</sup> June 2021, the police vehicle came and he was asked if he knew the lady who was in the vehicle and he confirmed she was familiar. That he was asked to accompany the police to go and record a statement. On the way to the police station, they went to the appellant's house and the lady picked her clothes.
14. That a colleague asked the girl about herself and she said she was waiting to join university. That before the Appellant left they had disagreed and the appellant swore he would ensure that PW4 was dead before he leaves. But he later asked for forgiveness and the matter was settled. PW4 said the Appellant left with the lady on 7.6.2021 when he was told there was no longer a job for him. PW4 said he did not know the complainant.
15. PW5, PC Florence Ngina, of Nyali Police Station investigated the offence of defilement and preferred the charge against the Appellant. PW5 said the appellant was dismissed from work for keeping an underage girl in the premises where he was guarding. That he then moved to Timboni with the girl. The girl's clothes were found in the house in Timboni and recovered – ExP3. PW5 also produced the phones that were recovered at PW3's home and one was identified as belonging to the appellant.

## **Defence Case**

16. When placed on defence, the appellant gave sworn statement and said that the case was a set up to destroy his life. He said he had lent Kshs. 500,000/= to Susan Mbula who was to pay him back with profit. He said that SM was his friend from January to June 2021. That around June 2021 when SM, PW3, was supposed to refund the money she called him to her house to pay the money he had lent her.



That he went to the house around 11.00 am and found M's daughter who told him to wait. That when S returned and found his shoes at the door she started making noise and asking why he had entered her house without her permission.

17. That PW3 started abusing him and threatened to call a mob to beat him. That PW3 called her husband who came with the police and he was taken to the police station and it was alleged he had sex with their daughter. That he asked to be taken to hospital for DNA but they refused and the child was taken to hospital and he was put in custody. He said he did not commit the offence. He said he was fabricated as a ploy not to refund his money. He said PW3 warned him not to mention about their relationship or else he would kill him.
18. In cross examination, the appellant said he had worked as a security guard at an apartment for 20 years. He said he did not ask PW3 about money when she was testifying. He said it was the first time he was talking about issue of money and threats. He said he knew S for 6 months and did not know HM. He said Hellen did not go to his house.
19. This appeal was canvassed by way of written submissions.

### **Analysis and Determination**

20. This being the first appellate court, this court is guided by the principles in [\*David Njuguna Wairimu v Republic\*](#) (2010) eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

21. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -
  - i. Whether failure to conduct *voire dire* examination was fatal to the prosecution's case
  - ii. Whether there were contradictions in the evidence of the prosecution in favour of the Appellant
  - iii. Whether the prosecution proved their case beyond all reasonable doubt
  - iv. Whether the sentence was harsh and severe in light of the circumstances and whether the appellant's mitigation was considered

### **Whether failure to conduct *voire dire* examination was fatal to the prosecution's case**

22. *Voire dire* examination is conducted for minors who are 14 years and below as per holding in exception of sexual offences under Section 124 of the [\*Evidence Act\*](#).



### **Whether there were contradictions in the evidence of the Prosecution in favour of the Appellant**

23. PW1 said she was going to see D at Nyali Plaza where she got lost and met the Appellant. PW1 said when the Appellant defiled her she felt pain and screamed but the Appellant's colleague did not respond.
24. PW4, the colleague of Appellant, confirmed that the Appellant stayed with the girl for 5 weeks and it is on 7.6.2021 when he was told he would no longer have a job that he left with the girl and the girl returned home on the material day. PW4 was never questioned on whether he heard PW1 scream when defiled by the Appellant and it cannot be assumed he did not hear or heard her scream.
25. PW1 said the Appellant defiled her twice on the 1<sup>st</sup> and 2<sup>nd</sup> day she spent in his room at the apartment and on 23.06.2021 when he visited her in her parents' house. Medical evidence confirmed PW1's hymen was broken and she had healed laceration on the vagina/cuts on the vagina. PW4's evidence that the complainant said she had completed KCSE and was waiting to join the University was not clarified how it was inconsistent. PW4 did not say who is the colleague who asked PW1 about herself before she responded. PW1 was never asked if she said she had completed her KCSE.
26. The person who allegedly asked PW1 about herself did not testify. The evidence on record was adequate to find that the appellant defiled the complainant. The appellant not only stayed with PW1 for 3 weeks where he was working and had a room where he resided but after he had been sacked on 7.06.2021 he left with the complainant and subsequently he visited her in her parents' house and sexually defiled her in the said house. He was found hiding in the wardrobe in the complainant's bedroom.
27. The P3 form indicates the patient as (name withheld) aged 15 years. The charge sheet gives the initials as H.N. aged 15 years. The birth certificate similarly has similar names for the complainant. The complainant was identified by the mother and certificate of birth – ExP5 produced. There was no dispute as to identity of the complainant. The contradictions and inconsistencies alleged by the Appellant are not material and do not go to the root of the offence of defilement. This court therefore finds that the same cannot stand or warrant unsettling conviction of the Appellant.

### **Whether the prosecution failed to prove its case beyond reasonable doubt**

28. For the offence of defilement to be proved, the prosecution requires to establish that the perpetrator was properly identified, the age of the complainant and penetration.
29. On the age of the complainant, she said that she was 15 years and her mother, PW3, confirmed and produced certificate of birth to show that the complainant was indeed 15 years at the time the offence was committed as per ExP5.
30. On whether the ingredients of penetration were proved, the complainant said the Appellant defiled her on the 1<sup>st</sup> and 2<sup>nd</sup> day when she was in his house within the Apartment and when he visited her in their house when the mother was away. Medical evidence was produced and it showed that the complainant's hymen was broken with vaginal abrasions. The PRC form was also filled confirming that the complainant had broken hymen and vaginal abrasions.
31. On whether the Appellant was properly identified, PW4, his workmate at Sunrise Apartment, confirms he stayed with the complainant for 3 weeks before he was sacked and left the apartment together with the complainant. The complainant said that the Appellant had sexual intercourse with her on the 1<sup>st</sup> and 2<sup>nd</sup> day that she stayed in his room at Sunrise Apartment. On 23<sup>rd</sup> June 2021, the Appellant was found hiding in the wardrobe in the complainant's room within her parents' house and



the complainant confirmed to her parents that the Appellant had defiled her shortly before her mother arrived at home. There was therefore no dispute as to the identity of the Appellant as the perpetrator of the offence herein.

32. The Appellant alleged in his defence, that this court was a setup to destroy his life as the complainant's mother had borrowed Kshs. 500,000 from him and it is the day he went to get his money that he was arrested on allegations that he had defiled the complainant. The trial Magistrate considered his defence and said that the same was raised at the tail end of his case and was therefore an afterthought and a futile attempt to discredit the prosecution. This court has considered the evidence of complainant and her mother and confirm that the Appellant did not question them about the alleged debt that the complainant's mother owed and the complainant's mother said it was the 1<sup>st</sup> time that she was meeting the Appellant inside her house on 23<sup>rd</sup> June 2021 where he was hiding inside the wardrobe in the complainant's bedroom. Apart from being an afterthought, the complainant's mother refuted the Appellants allegations. This court therefore finds that all 3 ingredients of the offence of defilement were sufficiently proved by the prosecution to the required standards.

**On whether the sentence was harsh and severe, and whether the Appellant's mitigation was considered**

33. Section 8(3) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years. The Appellant was sentenced to serve 20 years in prison after the trial Magistrate said he had considered his mitigation. The sentence was therefore lawful since the trial Magistrate exercised his discretion to pass the same. However, in consideration of sentences meted out in the Court of Appeal under Section 8 (3) of the *Sexual Offences Act*, 20 years is set aside and substituted with 10 years.
34. In conclusion, this court finds that this appeal has no merit and the same is dismissed. Right of Appeal – 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Etropia - Court Assistant

Mr. Ngiri for the Respondent

Ms. Fwaya H/B for Ms. Wambo Muyala & Co. Advocates for the appellant

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

