**Nduva v Republic (Criminal Appeal E055 of 2021)**
**[2024] KEHC 1651 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1651 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CRIMINAL APPEAL E055 OF 2021**

**GMA DULU, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**KIETI NDUVA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From the conviction and sentence in Sexual Offence Case No. 11 of 2020 at Taveta Law Courts delivered on 30th July 2021 by Hon. Khapoya S. Benson (PM))***

## JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 2nd July 2020 at around 1600hours within Taveta Sub County in Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of JW a girl child aged 10 years.

2. He was charged with a second substantive count of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*, the particulars of which being that on 2nd July 2020 at around 1600hours within Taveta Sub County in Taita Taveta County unlawfully and intentionally attempted to cause his penis to penetrate the vagina of MP a girl child aged 9 years.

3. In the alternative to each of count 1 and count 2, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, on the same date and place on each of the two girls respectively.

4. He denied all the charges. After a full trial, he was convicted for defilement under count 1. With regard to count 2, he was convicted on the alternative charge of committing an indecent act with a child. He was then sentenced to life in prison under count 1, and to imprisonment for 10 years for indecent act, the alternative charge to count 2.

5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-

    1. That the learned trial Magistrate erred both in law and facts by convicting the appellant in the present case of claiming of two girls defilement and alternative charge of indecent act.

    2. That the learned trial Magistrate erred both in law and facts by failing to evaluate and see that (there is) no way one person can defile two girls at once at the same place and he is not armed with any weapon.

    3. That the learned trial Magistrate erred both in law and fact by failing to find that the evidence adduced in court by two girls are contradicted and it had discrepancies and cannot base a conviction and also it contains lies.

    4. That the learned trial Magistrate erred both in law and facts by failing to find that PW1 and PW2 they were not in the same place.

    5. That the learned trial Magistrate erred both in law and fact by failing to evaluate the evidence of PW2 alleging that the appellant grabbed PW1 and locked the door and all the time she was there outside and she saw what happened inside.

    6. That the learned trial Magistrate erred both in law and fact by failing to find that no PRCR it was produced before court.

    7. That the learned trial Magistrate erred both in law and fact by failing to find that the case was poorly investigated.

    8. That the learned trial Magistrate erred both in law and fact by failing to find that the case was not proved to the required standard or beyond reasonable doubt.

    9. That the learned trial Magistrate erred both in law and fact by failing to evaluate the evidence of the Clinical Officer who said that the hymens of the girls were all broken long time ago or were of long outstanding.

    10. That the learned trial Magistrate erred both in law and fact by failing to find that the appellant was not examined to proof that it is true there was defilement.

    11. That the learned trial Magistrate erred both in law and fact by failing to find no spermatozoa were found from the vagina of girls to proof also the alleged defilement.

    12. That the learned trial Magistrate erred both in law and fact by failing to see that the lacerations can be caused by bicycle riding or by playing or walking or by hard working.

    13. That the learned trial Magistrate erred both in law and fact by failing to consider his alibi defence and also his mitigation during the conviction and sentence.

    14. That the learned trial Magistrate erred both in law and fact by failing to see that the evidence of the Clinical Officer says that in result of injury “No Harm.”

    15. That the learned trial Magistrate erred both in law and fact by failing to find that this is a case of a grudge between him and the mother of J.

    16. That the learned trial Magistrate erred both in law and fact by failing to evaluate the evidence of PW3, PW4, PW5 and also PW6 and see that their evidence does not corroborate.

6. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

7. This being a first appeal, I have to be guided by the principle stated consistently by courts, including the case of *Okeno v Republic* (1972) EA 32 – that a first appellate court is duty bound to evaluate all the evidence on record afresh and come to its own independent conclusions and inferences.

8. At the trial, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses.

9. The burden was on the prosecution to prove each of the charges for which the appellant was convicted. This is the statutory requirement under Section 107 of the *Evidence Act* (Cap.80). This being a criminal case, the standard of proof is beyond reasonable doubt.

10. From the evidence on record, the age of WM or MP the alleged victim for the conviction for indecent act under count 2 was proved beyond reasonable doubt, as a birth certificate was relied upon and testified to in evidence by PW3 MWJ the mother.

11. However, the age of JW the alleged victim in count I was not proved, as she merely testified in evidence that she was 11 years without stating the date or year of birth, nor did she rely on any documentary evidence. In addition, no relative testified in court, to clarify her age. Though PW4 PC Anne Becky Awuor the investigating officer of the case, purported to produce her birth certificate, not even the victim testified in court to own that birth certificate. I thus find that the age of JW was not proved beyond reasonable doubt.

12. With regard to penetration of a sexual nature, the evidence on the conviction for defilement in count 1, is that of PW1 JWM. She testified that the appellant lay her face downwards and put his "*dudu*" in her buttocks. From such evidence, it would appear that the sexual act was done through anus, thought he charge talks of the vagina.

13. The medical evidence, however relates to the vagina with the hymen having been perforated long ago. As such, the blood stains noted in the vagina, in my view did not necessarily arise from the alleged sexual act, as the witness did not say that she was penetrated in the vagina, but merely stated that she felt pain in the buttocks.

14. In those circumstances, I find that the alleged sexual penetration on JWM was not proved to the required standard.

15. Did the prosecution then prove that an indecent touch was committed on JW? In my view, with the evidence of PW1 the alleged victim, PW2 WM her girl companion, and PW3 MWJ that she met JW outside the house of the alleged culprit and that, with the alleged culprit present, I find that the evidence of PW1 was believable in as far as she stated that the culprit undressed her and touched her buttocks. I thus find that the prosecution proved that JW was indecently touched.

16. With regard to MP, I find that in view of the evidence on record from PW1, PW2, and her mother PW3, the prosecution also proved beyond reasonable doubt that she was indecently touched. I agree with the findings of the trial court on this.

17. I now turn to the identity of the culprit. From the evidence of PW1, PW2 and PW3 on record, in my view, the prosecution established that the appellant was the culprit. This is because the incident occurred in broad daylight and the appellant and PW1, PW2, and PW3 knew one another well before. The culprit was thus proved to be the appellant.

18. To sum up, from the totality of the evidence on record, I find that the prosecution proved the offence of committing an indecent act on each of the two victims. However, since the age of JW was not proved, I give the appellant the benefit of the doubt on age of the victim and find that the offence proved against JW was indecent act on an adult contrary to Section 8A of the *Sexual Offences Act*, and I will substitute the conviction accordingly.

19. Consequently and for the above reasons, I quash the conviction for defilement with regard to JW and substitute therefore a conviction for committing an indecent act with an adult contrary to Section 8A of the *Sexual Offences Act*. I uphold the conviction for indecent act on a child in respect of MP.

20. With respect to sentence, I set aside the sentence of life imprisonment for defilement, and instead order that the appellant will serve four (4) years imprisonment for indecent act on an adult (JW), from the date he was sentenced by the trial court. I uphold the sentence of ten (10) years imprisonment with regard to indecent act with a child on MP. The sentences will run concurrently, which is a total of ten (10) years imprisonment from the date he was sentenced by the trial court.

**DATED, SIGNED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2024 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Alfred – Court Assistant

Appellant

Mr. Sirima for State