



**Mwandali v Republic (Criminal Appeal E121 of 2022)
[2024] KEHC 17134 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E121 OF 2022
TM MATHEKA, J
APRIL 24, 2024**

BETWEEN

JOSHUA MGWANA MWADALI APPLICANT

AND

THE REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon. C. Mayamba (PM) in the Principal Magistrate's Court at Makindu Criminal Case No.E018 of 2022, delivered on 18th November 2022)

JUDGMENT

1. The appellant Joshua Mwandali was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. It was alleged that on diverse dates between February 2022 and March 2022 at [Particulars Withheld] Location Kibwezi Sub-County, Eastern region intentionally caused his penis to penetrate the vagina of EMM a child aged 14 years old. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the same code. That in same period of time, place – he caused his penis to penetrate the vagina of EMM a child aged 14 years.
2. The appellant denied the charges and the matter went to full trial. He was put on his defence – found guilty, convicted and sentenced to 20 years imprisonment on 18/11/2022.
3. Aggrieved he filed this appeal on the grounds:
4. That the learned magistrate erred in law and in fact when convicting the appellant when there was no evidence to support the convictions.
5. That the judgment of the court was not supported by adequate evidence and indeed the decision is wholly against the weight of the evidence.



6. That the learned magistrate erred in law and in fact in convicting the appellant on the charge of defilement despite complete want of adequate evidence to support the charge and/ or the allegations made by the complainant.
7. That the learned magistrate erred in law and in fact by convicting the appellant despite lack of any collaborating evidence from key witnesses witness mentioned in the testimony of the prosecution witnesses.
8. That the learned magistrate erred in law and in fact to convict the appellant without considering the prosecution's evidence was contradictory and full of inconsistencies contrary to section 163 of the Evidence Act. The contradictions and inconsistencies inter alia are as follows:-
9. There was no specific dates and/or time for the commission of the alleged offence.
10. No lesso or pant allegedly worn by the complainant were produced as exhibits herein.
11. No mention of the appellant removing his clothes and or the types of clothes he was wearing.
12. There are various causes for a broken hymen – in the instant case there was an old scar (P3 form and evidence of Pw3), thus cannot be attributed to the appellant noting that the alleged offence occurred on 22/3/2022 and the complainant was examined on 23/3/2022 (a period of one day).
13. There was no report of alleged previous incidents.
14. No evidence of penetration on the date of the incident (i.e. 23/3/2022).
15. No independent witness was called to verify the allegations made by the complainant and / or the prosecution witnesses.
16. That the learned magistrate erred in law and in fact by failing to consider that it is common knowledge that where both the complainant and appellant were staying, there is a common bathroom or toilet outside and therefore other people would have witnessed the alleged incident herein.
17. That the learned magistrate erred in law and in fact by admitting a copy of birth certificate (Exh.1) which was not certified as a true copy of the original which raises doubts as to the veracity of the same to ascertain the actual age of the complainant.
18. That the court erred in law and in fact by not granting the appellant adequate time to prepare for defence hearing considering that the appellant availed his wife as a defence witness but was not allowed or given a chance to testify in court hence denied him his constitutional right to a fair hearing.
19. That having regard to the totality of evidence adduced herein and the documentary evidence produced as exhibits, it is clear that the charges was not proved to the required standards (i.e. beyond reasonable doubts) and as a consequence thereof all the findings and entire judgment cannot be sustained and ought
20. to be quashed. Reasons wherefore the appellant prays that the conviction herein be quashed and the appellant be set at liberty.
21. Both the appellant and the State proceeded by way of written submissions.
22. I have carefully considered the record, the grounds of appeal and the submissions by the appellant and the ODPP – the only issue for determination is whether the charge was proved beyond a reasonable doubt before the trial court.



23. It is settled that on a 1st appeal an appellant is entitled to a re-evaluation of the evidence and the court is expected to draw its own conclusions from that evidence – keeping in mind that it never saw or heard the witnesses.

24. The record speaks for itself.

25. On the 1st day of trial, the record shows that this is what the complainant stated:

“I am EM. I live at [Particulars Withheld]. I school at [Particulars Withheld] school class 6. I am 16 years old. I know I am in court. I go to church. I know the importance of the oath is to tell the truth. I swear in the name of God if I swear and lie I can get a curse.

B.n Ireri – SPM

Court: I am satisfied the minor understands importance of an oath. She is sworn.

B.n Ireri – SPM

Pw1 sworn proceeds:

I am EMM. I live at [Particulars Withheld] and I am at [Particulars Withheld] school class 6. I am 16 years old. I recall in February, 2022 I was at home. I live with my uncle Stephen and Mercy Mueni. I was coming from the bathroom at the plot when I saw Joshua who had come from brushing his teeth. It was around 4:00 pm and we met in the corridor and the wife to the said Joshua later told my aunt she suspected I was with Joshua that evening and heard the wife to the accused and my aunt talk. I did not hear what had happened and my aunt called my father and we went to the police station. My uncle and my aunt to report. I told the police I did not have sex with the accused person whom I can see in court.

B.n Ireri – SPM

Court Prosecutor Kombe: Your honour the witness may have been couched to retract her statement. I apply to stand her down and if she insists to proceed with her testimony, I will apply for treat as a hostile witness.

B.n Ireri – SPM Pw1 is stood down for now. Mention on 19/10/2022”.

26. On the 2nd day of trial, the record says:

“ Minor: I am EM.

Court: How old are you?

Minor: I am 16 years old. Court: Do you go to school?

Minor: I go to [Particulars Withheld] school in class 6. Court: Do you go to church?

Minor: I go to maximum miracle centre Court: What are you taught in church?



Minor: I am taught to be truthful and avoid going to Satan.

Court: The minor is very intelligent. She understands the meaning and nature of oath. To give sworn testimony.

“I am called EMM. I am 16 years old. I was born on the 28/11/2008. I am 14 years old. This is my birth certificate. It has my names. It is serial number xxx. I do pray to mark the birth certificate as MFI 1. I go to [Particulars Withheld] school in class 6. I do recall on diverse dates between February 2022 and month of March 2022 I had gone to shower. I was at home. Joshua followed me. I was going to take a shower in the outside bathroom. I closed the door but he pushed the same open. He entered inside and closed. I asked him what he wanted. He did not respond. He removed my clothes. I was tying a lessso but also had a panty. He removed the lessso and pant. Accused was wearing a short trouser which he also removed. He raped me. He forced me. He did bad things to me. He inserted his penis into my vagina. We were all standing when he inserted. He did not stay for long. The wife to the accused came out and asked him what he was doing to someone’s child. I was screaming. The wife informed my aunt MN. My aunt called my uncle who took me to the police. We went to [Particulars Withheld] police station. I was referred to the hospital. I was escorted to the hospital by my aunt and the police. We came back to the police where I recorded my statement. I knew accused as he was our neighbour. He is before court. I know him by names and physical appearance.

Cross examination by accused

Your wife was in the house when you did that thing to me. The house was not far off from the bathroom. Yes your wife was in the house. Yes, I screamed for help when I felt pain. You followed me I went to the bathroom. You were brushing outside.”

27. PW3 the aunt to PW1 MS told the court that in the month of February/March she had come from work – when the wife of the accused told her to ask her niece what she had done with the accused in the shower. That the complainant denied any wrong doing – but when her uncle was called she told them that accused had been with her. They reported to police, took her to hospital for treatment.
28. PW3 clinical officer testified –

“I am called Rosemary Mombo. I am a clinical officer based at [Particulars Withheld] hospital. I have a diploma in clinical medicine from KMC Mombasa. I have been in practice for 10 years. I have been at [Particulars Withheld] for 5 years. I do treat patients and also fills medical legal documents. I have P3 form for EMM aged 14 days. I filled the P3 form on 23/3/2022. Her clothes were not torn or stained with blood. She was in general physical condition with no signs of injury. The approximate age of injury was a day old. The probable type of weapon was human penile organ. Treatment accorded included PEP, postinor2 and antibiotics. The age of injury was harm.

The nature of offence was defilement. Her estimated age was 14 years old. No bruises on the labia majora and minora. There were no fresh sign she had mild vagina discharge which was mild in smell ... epithelial cells noted. No evidence of fresh defilement was but the girl had been penetrated. As pointed at reported defilement. I do tender the P3 form as Pex2. I also have the PRC form which has the same information and do tender as Pex3. I do also tender treatment notes as pex4.”



29. Pw5 no.105091 PC Charity Sanayan told the court that she established that the complainant had been defiled in the bathroom over ten times by the accused person from the month of February.
30. The appeal was heard by way of written submissions.
31. The ODPP considered the foregoing evidence and conceded the appeal submitting that though the age of the complainant and identity of the alleged perpetrator were established, the act of penetration had not been established to warrant the conviction.
32. It was submitted that the complainant’s testimony was that the accused who was a neighbour would follow her to the bathroom and defile her. However, the clinical officer who testified told the court that she did not find any evidence of recent penetration though she examined the complainant within a day of the alleged defilement. That the description of the manner in which the offence was committed did not add up and that there ought to have been an independent witness.
33. For the appellant it was argued that no specific dates were given for the alleged defilement, and there was no evidence of the alleged forceful defilement – that the evidence of the clinical officer was not binding – court was referred to *Shah & Anor –vs- Shah (2003) I EA 290*.
- “..the opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so ..”
34. That despite the presence of a certificate of birth the complainant told the court she was 16 years old.
35. It was submitted that what the complainant told the court the 1st time she testified was the truth – and it is what she told the court later that was the outcome of coaching – the appellant relied on *Duncan Mayodi Asenji –vs- Republic (2016) e KLR*, where the court quoted the case of *Terekali –vs- Son of Korongozi & Others vs- Regina (1952) EACA 259* in which the court speaking about first statements held;
- “Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others”.
36. That there was no evidence to prove the alleged numerous acts of defilement and that the contradictions in the evidence of the complainant on the manner in which the offence was allegedly committed were eminent for instance she told the police– that he by force lifted the dress she was wearing in her statement, and in court– that he removed her lessa and pant.
37. That there must have been other tenants in the plot where the complainant’s family and that of the appellant live who could have heard her screams.
38. That despite the provisions of Article 50(2) (c) of *the Constitution* which guarantees the accused the right, “to have adequate facilities to prepare a defence”, the court failed to give accused time to prepare his defence case for prosecution was closed on 15/11/2022 and he was put on his defence on



16/11/2022 thus denying him fair trial as per Article 50 of the constitution. Defence relied on the Indian case of *Natasha Singh v CBI (15) (sisc)* it was held that: -

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person’s right to fair trial be jeopardized”.

39. The State having conceded the appeal, my role is to determine whether it was conceded on reasonable grounds.
40. From the onset of the trial, the ODPP did not do the right thing - true the complainant may have gone off the script of the written statement – however, the position taken by the prosecution was wrong that if the complainant continued to deviate from her statement he would treat her as a hostile witness cannot be right. A child victim of any offence or a child witness is a child in need of care and protection and before she can be treated as a hostile witness, the first obligation for the ODPP and the court is to safeguard the child’s welfare because the opposite could also be true – that she has been coached to fix a person. It is evident that the complainant’s testimony that she did not have sex with the appellant was supported by the evidence of the clinical officer. It is also telling that there was not a single specific date in this whole case even the date when the last incident allegedly happened if it did. In addition, the investigation officer told the court that she established more than 10 incidents between the complainant and the appellant – but did not give the description of any of them.
41. The complainant’s testimony on how the incident happened as depicted in her three statements: the one to the police, the one made on day one of trial and the one made on day two of the trial all give different scenarios and create a doubt as to whether this incident actually happened. The charge sheet is so vague in particulars that even the evidence from the witnesses could not prop it up. The medical evidence did not support the alleged defilement as there was no evidence of recent penetration or use of force on the body of the complainant, and. From the description of the living circumstances, I agree with the prosecution there ought to have been other witnesses.
42. I agree with the ODPP and the submissions by the appellant that indeed one of the ingredients of the charge of defilement, penetration was not proved. Had the learned trial court applied its mind on the evidence this would have come out clearly.
43. From the foregoing, the appeal succeeds.
44. The conviction is quashed and the sentence is set aside.
45. The surety be and is hereby discharged and the security be released to the depositor.

DATED SIGNED AND DELIVERED IN OPEN COURT ON 24/04/2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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