



REPUBLIC OF KENYA



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**Abubakar v Republic (Criminal Appeal E001 of 2020)
[2024] KEHC 9773 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E001 OF 2020
WM MUSYOKA, J
JULY 31, 2024**

BETWEEN

**OSMAN IBRAHIM ABUBAKAR ALIAS GEOFFREY ONYANGO
ASIRIGWA APPELLANT**

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CMCSOC No. 126 of 2019, of 24th September 2020)

JUDGMENT

1. The appellant, Osman Ibrahim Abubakar alias Geoffrey Onyango Asirigwa, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 8th October 2019, at Busia Township Location, within Busia County, he intentionally and unlawfully caused his genital organ to penetrate the genital organ of G, a child aged 2 years. The appellant denied the charges, and a trial ensued, where 7 witnesses testified.
2. PW1, who identified herself as T, was the minor complainant. She said that she knew the appellant. He took her to the bushes, where he undressed her, and hurt her on her genitals. She said that he had given her a soda drink and a bun or mandazi. PW2, Samuel Wafula, saw the appellant emerge from the bushes carrying PW1, who was holding a bun. He claimed that the child was his, while the child said the appellant was not her father. Whereupon, PW1 took the child to the police, while the appellant was arrested by members of the public, and was handed over to the police. He said that the dress of the minor complainant had blood. PW3, Peter Baraza, also saw the appellant emerge from the bushes carrying PW1, whose dress was bloodstained. He, and others, questioned the appellant about the child, who they wanted to examine, but the appellant resisted. They forcefully took the child from him, and



- established that the child was bleeding from her genital area, whereupon they concluded that the child had been defiled. They took the child to the police. The appellant was assaulted by members of the public, who later escorted him to the police.
3. PW4, Grace Adokorach, was the mother of PW1, who she said was born on 23rd May 2016. She was a Ugandan. PW1 went missing, and she reported the matter to the police in Uganda. She later got information that a man had been seen carrying PW1, and was headed for Kenya. She made a report the following day, to the police in Kenya, where she established that PW1 was at a hospital at Busia, Kenya. She found that the child had been defiled. PW5, Dr. Derrick Olando, examined PW1, and established that she had been defiled, for her hymen had been perforated, and her vaginal wall and diapers were bloodstained. PW6, No. 56664, Senior Sergeant Scholastica Mwangale, was the investigating officer. PW7, Esther Makadia, was the clinical officer who attended to PW1. He noted that blood was oozing from her genital area, the hymen was freshly broken, there were hyperhemorrhagic marks on the labia, with bruises on the opening of the vagina, and her clothes were bloodstained. He testified that the suspect was also brought to the hospital, but he did not examine him.
 4. The appellant was put on his defence, vide a ruling that was delivered on 3rd September 2020. He made an unsworn statement, on 10th September 2020, and did not call witnesses. He denied the charges. He said that on the material day, he spent the whole day at work, and on his way home, he was waylaid by people who beat him unconscious. When he regained consciousness, he went to the police, to report the assault, but he was locked up in the cells instead.
 5. In its judgment, delivered on 24th September 2020, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to life imprisonment.
 6. The appellant was aggrieved, and brought the instant appeal, revolving around the investigations being shoddy; the charge being defective; and the expert evidence being doubtful.
 7. Directions were given on 9th May 2024, for canvassing of the appeal by way of written submissions. .
 8. In his submissions, the appellant indicates that he has no issue with the conviction, but the sentence of life imprisonment. He cites Julius Kitsao *Manyeso vs. Republic Malindi CACRA No. 12 of 2021* (Nyamweya, Lesiit & Odunga, JJA), which he says declared the life sentence unconstitutional, arguing that there were mitigating circumstances that ought to have been taken into account. He states that the court did not call for a pre-sentence report. He submits that he was a first offender, who was only 20 years old at the material time. He also submits that he had been in custody, throughout his trial, and that ought to be taken into account. He cites the Court of Appeal, in Ahmad Abolfathi Mohamed & another vs. Republic [2018] eKLR (K. Kariuki P, M’Inoti & Murgor, JJA. Much of what the respondent submits on is not relevant, as it touches on conviction, which the appellant has dropped, limiting himself only to sentence. I note that the respondent has not submitted on the sentence.
 9. A conviction, for defilement of a minor of tender years, attracts a mandatory sentence of life imprisonment, according to section 8(1)(2) of the Sexual Offences Act. Of course, mandatory and minimum sentences for sexual offences were declared unconstitutional in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021* (Mativo, J). Then, in Julius Kitsao *Manyeso v Republic Malindi CACRA No. 12 of 2021* (Nyamweya, Lesiit & Odunga, JJA), the sentence of life imprisonment itself was declared unconstitutional, with the court holding that no one should face an indefinite sentence. In *Evans Nyamari Ayako v Republic Kisumu CACRA No. 22 of 2018* (Omweng’u, Omondi & J. Ngugi, JJA)(unreported), it was held that a sentence of life imprisonment should translate to a maximum of 30 years imprisonment.



10. The appellant pleads, no doubt going by Maingi and Wachira decisions, that the trial court ought to have exercised discretion, by taking into account mitigating or extenuating circumstances, arguing that he was a first offender, who was aged only 20. I doubt whether any mitigating circumstances would be reckoned here, given the circumstances of the case. In the Manyeso vs. Republic case, which had been decided before the Evans Nyamari Ayako v Republic case, the appellant had been sentenced to life imprisonment, for defiling a 4 year old child, and, upon declaring the life imprisonment sentence unconstitutional, the Court of Appeal substituted the sentence with 40 years in jail. A similar situation played out in the Evans Nyamari Ayako v Republic case, where the minor victim of defilement was aged 8, and the life sentence was substituted with 30 years in jail.
11. An adult of 20 years, who defiles a 2 or 3 old minor, cannot possibly claim that he was too young and foolish, for even a 13 year old would be expected to understand that there would something utterly not right with having sexual contact with a 2 or 3 old baby. The fact that the appellant was young would not matter. It would not matter either that he was a first offender. On whether a pre-sentence report should have been called for, given the age of the victim, and the circumstances of the offence generally, whatever would have been recorded, in such a report, would not have swayed the court not to impose the most severe penalty available.
12. In view of everything that I have said above, and guided by the Manyeso vs. Republic and Evans Nyamari Ayako vs. Republic cases, I do hereby set aside the life imprisonment sentence, imposed on the appellant, on 24th September 2020, in Busia CMCSOC No. 126 of 2019, and substitute it with a sentence of 30 years imprisonment, to run from the date when the appellant was detained in custody, after his arrest on 8th October 2019. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 31ST DAY OF JULY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Osman Ibrahim Abubakar alias Geoffrey Onyango Asirigwa, the appellant, in person.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

