



REPUBLIC OF KENYA



**Momanyi v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 9620 (KLR) (Crim) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E011 OF 2023**

LN MUTENDE, J

JULY 31, 2024

BETWEEN

SAMUEL MOMANYI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Samuel Momanyi, the appellant, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 23/2/2022 at about 1700hours at [particulars withheld] Sub County within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.K. a child aged 9 years old.
2. In the alternative he faced the charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act*, the particulars being that on 23/2/2022 at 1700hours at the afore mentioned area within Nairobi County, he intentionally and unlawfully committed an indecent act with N.K. a child aged 9 years by touching her vagina with his penis.
3. He was taken through full trial convicted on the main charge of defilement and sentenced to serve thirty (30) years imprisonment.
4. The facts of the case were that PW1, the victim knew the appellant as a neighbor on the plot where they lived at Tassia. That on 23/2/2022 she returned home from school at about 5:00pm, then went to the toilet which was upstairs and that the appellant pulled her to his house. He covered her mouth with a cloth, took her to bed and took off her clothes. She was wearing a trouser, a pantie, a T-shirt and a sweater.



5. The individual who wore a trouser, T-shirt and a jacket proceeded to violate her sexually. The victim explained in swahili that :

“ *allingiza* (the accused) *kitu yake ya kususu*“

as she demonstrated by pointing at the front part of her private parts. She was in pain and her mum called her. She dressed up and ran out of the house. On being asked where she was, she said that the accused had taken her to his house and had done bad manners to her by inserting his “*kitu ya kususu*” into her private parts.

6. PW2 EM, her mother, confirmed having called her on seeing her sweater on the drying line and school bag behind the door. When she called her she came from upstairs and narrated what had befallen her. The matter was reported at Tassia Police Post and they were picked by an ambulance that took them to Mama Lucy hospital where the victim was examined. Investigations were carried out which culminated into the appellant being charged.
7. Upon being placed on his defence, the appellant opted to remain silent. In mitigation, he stated that he had a small child and that his brothers had passed on.
8. The appeal was canvassed through written submissions. The appellant submitted that the complainant evidence was not credible and was also inconsistent. That PW2 stated that the sweater was outside on the drying line and that penetration was also not proved.
9. That the sentence was harsh, considering the circumstances surrounding the case and the spirit of Article 50 (2) (p) as the aim of sentence is to rehabilitate and reintegrate offenders back to society.
10. The prosecution submitted that the crime of defilement is proved or disproved by evidence of an intact or ruptured hymen, the actus reus is complete with penetration however slight. That the victim’s evidence does not need corroboration.
11. That the sentence was within statutory limits and was within the limits of the minimum sentence, hence it was not disproportionate to the offence committed. That the age of the victim and the gravity of the offence matched the sentence.
12. I have considered rival arguments. The duty of the first appellate court is to evaluate the evidence as a whole to a fresh and exhaustive examination and to arrive at its own decision on the evidence, while making allowance for the fact that only the trial court had the advantage of hearing and seeing the witnesses. (See the case of *Pandya v. R* (1957) EA 336 and *Ruwala v. R* (1957) EA 570).
13. To prove the charge beyond reasonable doubt the provision of the law must be considered, Section 8(1) of the [Sexual Offences Act](#) provides that:
- 8.
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
14. The prosecution must therefore prove that the person accused committed an act of penetration, the victim was below 18 years and that the perpetrator was positively identified. (See the case of *George Opondo Olunga v Republic* [2016] eKLR).



15. A birth certificate was produced in evidence which proved that the child was born on 27/12/12. The victim was 9 years at the time of the offence. At the outset the victim explained what happened to her, she told PW2 that the assailant did “*tabia mbaya*” translated to mean “bad manners” to her. In *Daniel Arasa v Republic*, HCRA 1035 of 2013 [2014] eKLR it was held that:

“It is common knowledge in this country and the court may thus take judicial notice that the words “*Tabia Mbaya*” i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as “*Tabia Mbaya*” perhaps due to shyness or they may not know what description to give to such act.

Suffice to hold that “*Tabia Mbaya*” is euphemism for sexual intercourse in sexual offences.”

16. Penetration is defined as partial or complete penetration of the genitalia. Section 2 of the *Sexual Offences Act* provides that:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

17. In this case, the act of penetration was described in PW1’s sworn testimony that the accused “*alliningiza kitu yake ya kusu*”. She also described the act to her mother when she stated that the accused did bad manners to her. The child pointed at her private parts in court, the trial court also found her testimony to be truthful and cogent.

18. Section 124 of the *Evidence Act* provides that:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

19. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal explained the import of 124 of the *Evidence Act* on sexual offences cases. It stated that:

“as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”



20. The minor's testimony was further corroborated by PW3 Dr. Farah Mohammed, who adduced medical evidence to the effect that

“..... reddening of the vaginal wall , which had been noted on examination of the child's genitalia , can be caused by forceful penetration.”

That an intact vagina, also meant that the virginity was still intact.

21. The medical evidence describes partial penetration which is also evidence of defilement under Section 2 of the *Sexual offences Act*.

22. The appellant was positively identified, in this case the child knew him as a person who lived in the same plot with her. She also described the appellant's house and stated that it was about 5:00pm when she had returned from school and the appellant pulled her into his house. The offence took place in broad daylight and in a familiar environment.

23. The prosecution evidence proved the charges beyond reasonable doubt, the appellant did not rebut the case and further evidence which placed him on the scene on the date of the offence and that he was also known to the victim of the defilement.

24. On the question of sentence being harsh and excessive; in the case of *Bernard Kimani Gacheru v Republic* (2002) eKLR it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

25. The statutory sentence under Section 8(2) is set at life imprisonment. The appellant was heard on his mitigation statement which the court must have considered before settling for 30 years imprisonment. The appellant prays for a lesser sentence and suggests 15 years imprisonment.

26. The trial court exercised discretion and was also lenient, this court on the other hand does not have the power to mete out other sentence outside the statutory minimum sentence period in the Sexual offences Act. This was well captured in *Republic v Joshua Gichuki & 4 Other* , Petition No. 18/2023, where the Supreme Court recently held that:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the



Legislature should then act. Suffice to say, where Parliament enacts legislation, the judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

27. The court is bound within the statutory limits of the *Sexual Offences Act* until all matters relating to or connected to the legality or constitutionality of the sentences under the *Act* are determined and appropriately resolved.
28. In the upshot, the appeal is unmerited and is accordingly dismissed.
29. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 31ST DAY OF JULY, 2024.**

L. N. MUTENDE

JUDGE

