



**Mugambi v Republic (Criminal Appeal 85 of 2023)
[2024] KEHC 13947 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 85 OF 2023
BK NJOROGE, J
SEPTEMBER 26, 2024**

BETWEEN

SIPRIANO NGURUNI MUGAMBI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is an Appeal arising from the decision delivered by Hon. J.A Agonda (P.M) in Ruiru S.O Case No. 017 of 2021. The Appeal is against conviction and sentence of Life Imprisonment passed against the Appellant.

The Charge

2. 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* No. 3 of 2006. The facts being that the Appellant on the first day of February, 2021 within Kiambu County intentionally and unlawfully caused his penis to penetrate the vagina of CB a child aged eleven (11) years.
3. The Appellant faced an alternative charge of indecent act with a child contrary to Section 11(a) of the *Sexual Offences Act* No. 3 of 2006. The facts being that on the 1st day of February, 2021 within Kiambu County, he indecently and unlawfully committed an indecent act with a child named CB aged eleven (11) years old by touching her private parts namely vagina by use of his penis.

The backgrounds facts

4. The Prosecution presented a total of 7 witnesses against the Appellant. The Minor testified that she was 12 years old. That the Appellant whom she referred to as “Guka” took her to his home. He placed her on the bed, removed her skirt and blouse. Then removed his Kadudu which is used to pee. He inserted it in her vagina. That’s when Chamadede discovered that the Appellant had a child in the



house, the Appellant hid her in the main house. The child's father and the Police came and searched for her but did not find her. The Appellant was nevertheless arrested and taken to the Police Station. Later the Police took his house keys and went and found her. The child said she did not scream because she was threatened. That was the first time that the Appellant raped her. The child was taken to the Police Station and later to hospital for treatment and medical examination. She identified the Appellant in Court.

5. The Mother of the Child PW2, produced the Child's birth certificate.
6. The Father confirmed that he had received a report from one A that she had found the Appellant alone in his house with the Child.
7. The Police Officer testified to receiving the report. They also confirmed that a search at the Appellant's house did not find the child. However, there was a main house in the same compound. The Appellant was living in the servants' quarters. The Police later received information that the Appellant had the keys to the main house. They retrieved the keys from the Appellant's underwear. The child was found locked in the main house.
8. The testimony from the Clinical Officer and the Doctor was to the effect that the child had been defiled. That though there was no presence of spermatozoa or broken hymen, there were bruises and reddening of the vagina.
9. The Trial Court delivered a Ruling that a prima facie case had been disclosed. The Appellant was put on his defence. He opted to give a sworn statement.
10. He described himself as a night watchman. That on the material day he woke up at 11.00 a.m. and was called by the Police who demanded that he produce the girl who was in the house. He was not hiding any child. He let in the Police who searched the house and found no child. The Police searched the entire compound and even the main house. No girl was found. That he was nevertheless arrested. He had told the Police he wished to be examined by a doctor as he was being accused falsely. That no doctor examined him. In essence, he denied the incidence or committing the offence.
11. The Trial Court found that the Prosecution had proved the Case beyond reasonable doubt. It proceeded to convict the Appellant.
12. After hearing the Appellant's mitigation, the Court proceed to hand him the mandatory sentence of Life Imprisonment. This is what has triggered this Appeal.
13. This matter was flagged down for the Rapid Results initiatives (RRI) for the month of June 2024. This Appeal was disposed of by way of written submissions. The Court has perused the Appellant's submissions dated 4th June, 2024. The Respondent has also filed their submissions dated 4/6/2024, together with a case digest of the same date.
14. The Memorandum of Appeal filed raises 5 grounds as follows
 - a. That, the Learned Magistrate erred in Law and fact by failing to find that the elements of the offence of defilement i.e. identification was not proved beyond reasonable doubt as required by the Law.
 - b. That, the Learned Magistrate erred in matter of Law and fact by failing to note and find that there was substantial violation of Article 50(2)(j) of *the Constitution* where the Appellant was not issued with statements of PW1; the complainant.



- c. That, the Learned Magistrate erred in Law and in fact by failing to observe that crucial exhibits were not produced to clearly prove the offence.
- d. That, the Learned Magistrate erred in Law and in fact by failing to interrogate the Appellant's alibi defence which vividly shows that he was not at the scene of the alleged offence.
- e. That, the Learned Magistrate erred in Law and in fact by failing to find that the prosecution's case was filed with contradictions which impugns the credibility of the witnesses.

Analysis

15. The duty of the Court as the 1st Appellate Court is to carefully examine and analyse afresh the evidence presented before the Trial Court and draw its own conclusions. An Appellant on a 1st Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate Court's own decision on the evidence. See *Pandya -vs- Republic* (1957) E.A 336.
16. The case of *George Opondo Olunga -vs- Republic* [2016] eKLR sets out the 3 key ingredients to sustain a conviction on a charge of defilement. They are the age of the child, proof of penetration and lastly the identity of the perpetrator.
17. For purposes of this Appeal, the Court frames issues for determination as follows;
 - a. Was the Prosecution's case proved to the required standard?
 - b. What orders lie from this Appeal?
18. The Court proceeds to determine the two issues framed in seriatim as follows;
 - a. Was the Prosecution's case proved to the required standard?
19. The Court proceeds to look at and analyse the 3 key ingredients to the charge in relation to the evidence and the submissions filed by the Parties.
20. The Appellant has sought to amend his Petition of Appeal to include 8 fresh grounds. No leave was sought prior and no Amended Petition has been filed. Later the Appellant has sought to effect the amendment by way of his written submissions filed 4/6/2024. This offends the provisions of Section 350 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. The Registrar of the Court has had no notice of such an amendment.
21. The Respondent will be prejudiced as no notice was given to them. Having perused the Respondent's submissions, they have not responded to these fresh grounds. The Court proceeds to reject the attempts to amend the Appeal in this manner. The Court will restrict itself to the initial grounds.

i. Age of the child/victim

22. The submissions by the Appellant do not challenge the evidence of the age of the child. This does not in any way lessen the duty of the prosecution to prove its case.
23. The child testified that she was born on 5th April, 2009. Her birth certificate exhibit No. 4. Supports this date of birth. She would have been 11 years as at the date of the incident. The Court is satisfied that the age of the Child was proved beyond reasonable doubt.



ii) Proof of Penetration

24. The Court notes that the Trial Court conducted a voir dire examination, prior to taking the evidence of the Minor. She was sworn. She described that the Appellant removed his Kadudu which is below the stomach and used for peeing. That the Appellant place/inserted it into the vagina. The act happened in the Appellant's house. The child said that the Appellant had promised her money if she went to his house. Her testimony was that this was the first time that the Appellant raped her.
25. The Appellant did not cross-examine the child on the truthfulness of her evidence. In his submissions, he now complains that the Court made the following comment,
- “The Complaint did not appear to have been coached and her evidence remained firm in cross-examination.”
26. To the Appellant this is proof of biased, prejudicial pre-determination on the part of the Trial Court.
27. This Court has evaluated the evidence produced before the Trial Court. The Appellant has not challenged the record of proceedings recorded by the Trial Court. Court proceedings are sacrosanct. The proceedings show that the Appellant did not cross-examine the child. The veracity of the testimony to the child before the Trial Court went unchallenged.
28. This evidence of penetration is corroborated by the Medical evidence. The testimony of Barbara Okere PW5 a Clinical Officer states that the vagina was reddish but hymen not broken. There were no spermatozoa. There was redness on the vagina. The Appellant did not cross-examine her. The witness produced the Post Rape Care Form as exhibit No. 1.
29. PW7 Dr. Beth Gachangi produced the P3 Form as exhibit No. 3. The same had been prepared by a Dr. Kinyua who was on a study leave. The Appellant did not object to the production. The Medical findings were;
- “External genitalia redness on both external vagina. The hymen was red and margins was smooth and hymen not broken... no sperms n from the discharge.”
30. To the Doctor, the Child had sustained bodily harm.
31. In response to the Appellant's cross-examination, the Doctor stated that there were bruises and reddening of the vagina. As per the child's history and Doctors examination there was something that had been inserted in the child's vagina that was a blunt object.
32. This Court reaches the same conclusion as the Trial Court. The evidence of the child is that there was penetration. This is corroborated by the Medical evidence. The child's description of the male organ used for peeing leaves this Court with no doubt it refers to a penis. She told the Trial Court that this is the organ that was “placed/inserted into her vagina.”
33. The Court notes the decision of Sammy Charo Kirao -vs- Republic [2020] eKLR which quotes with approval a decision of the Supreme Court of Uganda in Bassita -vs- Uganda S.C. [Criminal Appeal No. 35 of 1995](#).
- “The act of sexual intercourse or penetration maybe proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in



every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

34. Section 2 of The *Sexual Offences Act* defines “penetrate” as is the partial or complete insertion of the genital organs of a person into the genital organs of another person,
35. In the case of Alex Chemwotei Sakong -vs- Republic [2018] eKLR, the Court held that so long as there is penetration, whether only on the surface, the ingredient on the offence is demonstrated and penetration need not be deep inside the girl’s organ.
36. A review of the evidence leads this Court to the conclusion that the child sufficiently described the act of penetration. The medical evidence also supported this evidence. The lack of spermatozoa is not by itself an indication of lack of penetration. See Mark Oiruri -vs- Republic Criminal Appeal No. 295 of 2012 [2013] eKLR.

(ii) The identity of the perpetrator

37. The Appellant was identified by the Child. She described “Guka’s” house as near her house. She did not know his name before the incident. In her evidence she referred to him as “Guka”. This is a Kikuyu word used to describe a grandfather. It has also acquired notoriety in the urban culture and slang language to refer to an elderly person. The age difference between the Appellant and the child would properly lead the child to call him grandfather. The accused was arrested by the Police at his own house. The Child was found in that home. The child said that once she was discovered to be in the house by A, the Appellant moved and hid her in the main house. The main house was near the Appellant’s house. This is the house said to belong to the Appellant’s employee.
38. The keys to the main house were found in the Appellant’s underwear. The Child was later found to be in the main house.
39. This Court notes that pursuant to Section 124 of the *Evidence Act*, the sole evidence of a Child is sufficient to convict if the Court is satisfied that the child is telling the truth.
40. The evidence of PW3 the arresting officer places the Appellant in his own house. This is the scene where the defilement took place. This is supported by the evidence of PW2 and PW4 the parents of the child. the Court finds that the identity of the Appellant as the perpetrator was sufficiently proved.
41. The Court has looked at the defence offered by the Appellant. He gave a sworn statement. It confirms that he was arrested by the Police at his own house. This placed him at the scene of the defilement. He was not able to explain how the child was found in the main house, after the keys were found in his underwear. This lends credibility to the evidence by the prosecution. That he had hid the child in the main house, after they had been discovered in his house by A. That would explain why the earlier search in his house did not yield any child.
42. The defence offered did not exonerate the Appellant from the strong evidence led by the prosecution.
43. The Court having reviewed the evidence of the Child sees no reason to doubt it. Her credibility was not impeached at all during the trial.
44. To this Court, the prosecution proved its case beyond reasonable doubt.
45. The Appellant now complains that there was a violation of Article 50(2) (j) of *the Constitution* as he was not availed with statements of PW1. A review of the proceedings of the Trial Court shows an order was made on 8/02/2021 that he be supplied with statements. This was on the date he took the plea.



Thereafter there were several mentions when no complaint was raised that such statements had not been supplied.

46. On 18/8/2021 when PW1 testified, the Appellant indicated he was ready to proceed. He did not complain that he had not been supplied with witness statements. He opted not to cross-examine PW1. This ground seems to be an afterthought and is rejected.
47. The ground that crucial exhibits were not produced to prove the offence is similarly declined.
48. The crucial exhibits that were not produced are not indicated. PW3 Barbara Okere produced the PRC Form as exhibit No. 1 as the Sexual Violence Recovery Report was produced as exhibit No. 2. PW7 Dr Beth Gachangi produced the P3 Form as exhibit No. 3. PW6 P.C Jane Wanjiku Maina produced the birth certificate as exhibit No. 4.
49. The Appellant also states that the Court did not interrogate his alibi to show that he was not at the scene of the offence. The Court has reviewed the defence presented by the Appellant. It did not provide any alibi. In any event his own testimony on oath places him in his house. The same house that was said to be the scene of the defilement.
50. Lastly, the Appellant argues that the Prosecution case was filed with contradictions. The Court having reviewed the evidence sees no such contradictions. This ground is similarly declined.

b. What orders lie from this Appeal?

51. The Court notes that from the Appellant’s submissions filed, the Appellant did not address the grounds raised in the Memorandum of Appeal dated 11/11/2022. Instead he opted to dwell on the fresh grounds that were filed without leave.
52. The Court is not convinced that this Appeal has any merits. The Court finds that the Appellant was lawfully convicted. He was also handed the minimum statutory sentence as provided for by the Law. Until and unless the Supreme Court pronounces itself otherwise on the legality of minimum sentences in sexual offences, they remain legal and valid sentences.

Determination.

53. The Court finds that the conviction and sentence were arrived at properly. The Appeal lacks merit and the same is hereby dismissed.
54. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

Court Assistant:

