



**Muindi v Republic (Criminal Appeal E047 of 2022)
[2024] KEHC 13054 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E047 OF 2022
PN GICHOHI, J
OCTOBER 29, 2024**

BETWEEN

LIVINGSTONE MUINDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence in judgement dated 23rd June 2022
by Hon. R. Ombata (SRM) at Nakuru Law Courts in S.O Case No. 165 of 2019)*

JUDGMENT

1. Before the trial court, Livingstone Muindi was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on diverse dates of 19th September 2019 and 20th September 2019 in Njoro Sub -County within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of SK a child aged 12 years which caused penetration.
2. In the alternative, he was charged with the offence of Committing an Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on diverse dates of 19th September 2019 and 20th September 2019 in Njoro Sub -County within Nakuru County, unlawfully and intentionally committed an indecent act to SK a child aged 12 years by touching her genital organ namely vagina with his genital organ namely penis.
3. He denied the charges and the matter went for full trial with the Prosecution calling four (4) witnesses while the Appellant was the only witness for his defence case.
4. The facts as relied on by the prosecution were that on 19/09/2019 at about 6.00 am, the complainant (PW1) who was then aged 12 years, was heading to [Particulars Withheld] Primary School where she was a Std 5 pupil. She met the Appellant whose name he did not know but his house was near the



- road on the way to school. He stopped her and asked her to accompany him to his house where he was to give her something.
5. She followed him to his single room- house and locked it from inside. He lifted her school uniform and removed her pant. He placed her on the bed and removed his trousers and boxer. He lay on her and inserted his thing for urinating into her thing for urinating. She felt pain but she could not scream as the Appellant had covered her mouth with a white shirt. He held her both hands.
 6. After he was done, he told her to get dressed which she did. He then gave her Kshs. 60/= in form of fifty shillings note and a 10-cent coin and told her to go to school. He asked her if her stomach could carry a baby. She went to school.
 7. She was on her way to school the following morning when she again met the Appellant. He asked her to accompany him to his house. He gave her Kshs. 35/= and they both went to his houses and he again did what he had done to her the previous day. He defiled her. He told her to go to school but warned her not to tell anyone or else he would kill her.
 8. She however disclosed to her Kiswahili Teacher one Mr. A who in turn informed the Deputy. The Deputy then called the Nyumba Kumi people and she narrated what had happened to her and that she did not know the Appellant's name but knew his face. She took them to the Appellant's house that evening where she pointed the house to them but he was arrested the following day. The Appellant was arrested and complainant was called to identify him which she did.
 9. Her mother (PW2) later took her to Njoro sub- county Hospital where she was examined, treated and the PRC and P3 Forms filled on 3/10/2019 by Dr. Nancy Njenga. The complainant was found to have pus cells and her hymen was torn. The Clinical Officer Kipkurui Cheruiyot (PW4) produced the documents on behalf of Dr. Nancy Njenga whose handwriting he was familiar with having worked with her for over three years.
 10. The investigations were carried out by No. 90783 PC. Jane Chepchumba of Njoro Police station. She recorded statements from the witnesses and interrogated the Appellant who was arrested on 4/10/2019 by Nyumba Kumi members of the public. He claimed that the complainant had consented to the act of defilement.
 11. The Investigating Officer compiled the file. The complainant's Birth Certificate was availed to her and she established that the complainant was aged 12 years. She charged the Appellant with this offence.
 12. In his unsworn defence, the Appellant simply questioned why the money he allegedly gave the complainant was not availed in court. He stated that witnesses gave hearsay evidence and that there was no evidence tendered to prove defilement.
 13. After trial, the court found the Appellant guilty of the offence of defilement, convicted and sentenced him to serve 20 years imprisonment.
 14. Aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on ten (10) grounds which can be condensed into three grounds as follows: -
 1. The learned magistrate erred in law and fact when he relied on contradictory and hearsay evidence to convict the Appellant.
 2. The learned trial magistrate erred in law and fact when he relied on insufficient medical evidence to convict the Appellant.



3. The learned trial magistrate erred in law and fact when he relied on evidence that did not show any nexus between the Appellant and the alleged offence.
15. The Appellant therefore urged this Court to allow the appeal, quash the conviction, set aside the sentence and set him at liberty forthwith.

Appellant's Submissions

16. In his submissions filed on 04/07/2024, the Appellant stated that he is appealing against the sentence only and on the grounds that: -
 1. The sentence imposed was excessively harsh and unjust considering that he was a first offender and a young man who needed a lesser sentence.
 2. The sentence imposed did not follow the Sentencing Policy guidelines.
 3. The Appellant is remorseful and regrets his actions and is repentant.
 4. Before his conviction and sentence, the Appellant was a Standard 7 pupil.
17. He therefore urged the court to consider the mitigating grounds and accord him circumstances sets aside the sentence of 20 years imprisonment and set him at liberty or substitute it with a lesser sentence it deems favourable in the circumstances including a Probation Sentence or a Community Service Order.

Respondent's Submissions

18. In the submissions filed on 19/03/2024, the Respondent maintained that through the evidence adduced by the four prosecution witnesses, the evidence was properly corroborated and proved the ingredients of the offence of defilement being age, identity and penetration.
19. On the issue of nexus between the Appellant and the offence herein, it was submitted that without wavering, the Plaintiff pointed to and identified the Appellant as the person who defiled her twice and that evidence was corroborated by the complainant's mother, the investigating officer and the medical evidence that she was indeed defiled.
20. Regarding the issue of medical evidence alleged to be hearsay, it was submitted that the medical reports were procedurally produced by a witness who was familiar with the handwriting of the maker with who he had worked for over three years. That the reports confirmed that the complainant's hymen was broken.
21. Regarding alleged contradiction on age of the complainant, it was submitted that the only document that the Court ought to rely on are the Birth Certificate, age assessment or Notice of Birth and therefore, in this case, the Birth Certificate confirmed that the complainant's age was 12 years.
22. Regarding the Appellant's allegation that he was a Primary School Student at time he is said to have committed the offence, this Court was urged to re-look at the issue to confirm if the Appellant was a minor or not as the issue did not come out during trial.

Analysis And Determination

23. As the first appellate Court, this Court has a duty to re-evaluate and assess the evidence adduced by the trial court and come up with its own conclusions but bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify - See *Okeno v Republic* [1972) EA.



24. As the Court embarks on that analysis, it definitely considers both the conviction and sentence in event that the Appellant jumbled up his intentions in this Appeal as he initially appealed against conviction and sentence but later changed to say he is appealing on sentence only.
25. Regarding the charge the Appellant was charged and convicted on, the prosecution had to prove three ingredients that is: - the age of the complainant, that there was penetration and that the Appellant was identified as the perpetrator.
26. The record shows that complainant gave a sworn statement on 21/01/2020 after voire dire examination was carried out by the trial court. Regarding her age, she told the court that she was 12 years old and in Standard 5. Her Birth Certificate produced in evidence as P Exhibit. 1 shows that she was born on 09/03/2007. The offence against the complainant was said to have been committed on two days that is 19/09/2019 and 20/09/2019. The charge sheet indicates that she was a child aged 12 years.
27. The mother (PW2) testified that the complainant was 12 years old and her date of birth was 29th March 2007. This Court is satisfied that the complainant's age was properly corroborated by both oral and documentary evidence and that the slight discrepancy noted in PW2's evidence on date of birth is immaterial.
28. On whether there was proof of penetration, the Appellant grievance is that reliance was placed on the finding that hymen was torn yet the maker of that medical documents was not called as a witness. There was no objection raised by the Appellant on production of the medical documents by the clinical officer instead of the maker who is a doctor. There was no prejudice caused to the Appellant at all.
29. Further, the complainant's evidence that she was defiled twice was tested in cross-examination by the Appellant and she remained consistent. It was not material that no other injuries were seen except the broken hymen. Penetration was easily proved.
30. On identity of the perpetrator, the complainant was firm in her evidence. She was consistent in her narration as to how the Appellant lured her to his house on the first day defiled her. It was daylight and she saw his face. He even asked her if her womb would carry a baby. He repeated the following day.
31. In its judgment, the trial court held on this issue: -

“When cross examined by the accused, the complainant confirmed that though she did not know the name of the man who defiled her, she recognised his face since he had defiled her twice and that she also knew where he lived.

From the evidence hereof the complainant clearly recognised the man who had defiled her. There is no doubt in my mind that she correctly identified her assailant. She had seen him twice when he allegedly defiled her and she knew and was able to locate the scene of crime- the man's mud house. The complainant's evidence is without a doubt consistent and truthful. The accused did not raise any issue of a grudge, or vendetta on the part of the complainant. Believe the evidence of PW1 and as provided for under Section 124 of the Evidence Act. The court can convict on the basis of the complainant's evidence if the court believes that the witness was telling the truth.”
32. This court is satisfied with that reasoning. There was no mistaken identity in this case. The Appellant was the perpetrator. The Appellant's defence did not affect the prosecution case. The conviction was safe and is hereby upheld.



33. Upon conviction, Section 8 (3) of the *Sexual Offences Act* provides that “A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
34. The Appellant was treated as a first offender. In mitigation, he stated: - “Since being arrested, I have transformed. I have joined church. I sat for KCPE and scored 315 marks. I would like to proceed with my studies.”
35. The court then proceeded to sentence the Appellant and held: -
“I have carefully considered the mitigating circumstances, however the sentence imposed under the offence is mandatory one, the court’s hands are tied. Consequently, accused herein is sentenced to twenty (20) years imprisonment. Period spent in custody to be taken into consideration.”
36. Whereas the trial court appears not to have had discretion on the sentence which he passed on 23/06/2022, this Court notes the gravity of this offence. The Appellant took advantage of a minor but he now seems to imply that he was also a minor at the time of commission of this offence.
37. However, from the court record, he did not raise the issue that he was a minor. Being in Standard Seven at the time as he claims here does not automatically mean that he is a minor. In the charge sheet, he is described as an adult.
38. Further, the trial court’s record contains a pre-bail report dated 26/05/2021 and said to have been prepared by Carol Irungu Probation Officer Nakuru and availed to court pursuant to the court order dated 24/03/2021. It bears the Appellant’s name and his age is indicated as 23 years.
39. On the section for personal history, the report states: -
“The subject was born in 1997. Upon attaining school going age, he enrolled in to Simboi Primary School unto to class 8. He joined Kisangula high school up to form four. He didn’t proceed to college due to lack of finances. He came to Nakuru to work in the flower farm in Njoro. The accused has no wife.”
40. His submissions that he was a school going child before conviction and sentence is not factual. He was not a child or a minor at the time he committed this offence. The sentence was lawful. There is no reason to interfere with it.
41. Regarding the Appellant’s prayer that the period spent in custody be considered, it is apparent that the trial court had in mind Section 333 (2) of the *Criminal Procedure Code*, but it was not sufficient for the court to simply state that such period be considered. It was imperative for the court to specify that the said period runs from the date of arrest being 4/10/2019 since the record shows that the Appellant never went out on bond.
42. In conclusion, this Court makes the following orders: -
1. The appeal on conviction is hereby dismissed.
 2. The sentence of 20 years imprisonment be and is hereby affirmed.
 3. The sentence above be computed from the date of arrest being 04/10/2019.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF OCTOBER, 2024



PATRICIA GICHOHI

JUDGE

In the presence of:

Livingstone Muindi - Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant

