



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Republic (Criminal Appeal E140 of 2021)
[2023] KEHC 2643 (KLR) (Crim) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 2643 (KLR)

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

CRIMINAL

CRIMINAL APPEAL E140 OF 2021

JM BWONWONG'A, J

JANUARY 30, 2023

BETWEEN

JOHN MUINDE MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal against the conviction and sentence delivered by Hon. J. Kibosia, PM, on 17th November 2021 in Makadara Chief Magistrate's Court in Sexual Offences Case No. 151 of 2018 Republic vs John Muinde Mutua))

JUDGMENT

1. The appellant was charged and convicted of the offence of defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#), No 3 of 2006.
He was sentenced to serve life imprisonment.
2. Being dissatisfied with his conviction and sentence, he filed a petition of appeal, in which he raised seven (7 grounds).
3. The main grounds raised are as follows. In a coalized form in grounds 1, 2, 3, 4 and 7 the appellant challenged the totality of the prosecution's evidence as insufficient to warrant a conviction, which he claims is riddled with inconsistencies.
4. In ground 5 the appellant stated that his defense was disregarded and therefore the court arrived at a wrong conclusion.
5. In ground 6 the appellant contended that the trial magistrate failed to appropriately exercise her discretion in sentencing the appellant, who was a first offender and applied the wrong principles of law.



6. In response to the appeal, the respondent filed grounds of opposition dated April 19, 2022. The grounds raised are that the appeal lacks merit, is misconceived and is unsubstantiated. The sentence imposed by the trial court is lawful. The appellant was properly convicted after a full trial.
7. As this is the appellant's first appeal, the role of this appellate court of is well settled. It was held in the case of *Okeno v Republic [1972] EA 32* and further in the Court of Appeal case of *Mark Oruri Mose v R [2013] e-KLR*, that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
8. MM (name withheld) (PW 1) made an unsworn statement after a voir dire examination. He stated that on June 24, 2018, as he was going to church alone, he met the appellant at Reli. The appellant asked him to go with him and buy shoes. He was however lured to the appellant's house, where he made him tea and mandazi. The appellant asked him to play 'cha baba' and 'cha mama'. The appellant then undressed him and inserted his penis into the complainant's anus. When he was done, he gave him Kshs 35 and escorted him to church.
9. He told the court that he informed his teacher (H) who informed his parents. He was taken to hospital and the appellant was arrested and charged. He also testified that the appellant used to frequent the neighbourhood and identified him by the scar on his head.
10. SO (PW 2) testified that he is the complainant's father. That on the material day, he was informed that the complainant was lured by the appellant to his house and defiled. He reported the incident to a church elder. The elder reported the incident at Lungalunga Police station and also took the complainant to hospital. The complainant spotted the perpetrator a month later and he was arrested by the police.
11. RN (PW 3) testified that she is the mother of the complainant. She testified that the complainant was born on September 3, 2009. She further testified that on June 24, 2018 the complainant had gone to church but she did not come back at 1.00 pm, as was expected. At 3.00 pm she received a call from PW 2 who informed her that the complainant had been defiled and taken to hospital.
12. On July 22, 2018, the appellant was arrested after he was identified as the perpetrator of the crime.
13. RN (PW 4) testified that she is neighbour to PW 3. On July 22, 2018, while she was in her vegetable shop, she received a call from PW 3 who informed her that the perpetrator of the offence against the complainant had been spotted at Reli. She told the court that she closed her shop and went to the scene. There she found the appellant, the complainant and they were surrounded by a mob, who wanted to lynch the appellant.
14. Murunga Hillary (PW 5), a clinician at Makadara Health Centre gave evidence on behalf of Purity Kioi, his colleague for 3 years. It was his evidence that the complainant was examined at their facility on June 24, 2018, after a case of alleged sexual assault. Upon physical examination, no physical injury was noted. On genital examination, the finding was that: the scrotum was normal, the anal opening was enlarged with a fresh tear at 9 o'clock, no spermatozoa were seen. The PRC form was filled and a medical certificate was issued.
15. No xxxx Cpl Edna Nakeri (PW 6), the investigating officer testified that on June 24, 2018, a case of sexual assault on a minor was reported at Makadara Police station. She took the complainant to Makadara Health Centre for examination. There the P3 form was completed. The complainant had indicated that he was lured by the appellant into his house and defiled and given Kshs 35. He thereafter



went to church, where he informed the church elder, who also told his parents. The appellant was spotted one month later and was arrested. She produced the complainant's birth certificate.

16. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and he was put on his defence. In his defence he gave sworn evidence and he did not call any witnesses. In his defence, he denied ever defiling complainant. He testified that the complainant's mother (PW 2), who was also his former girlfriend had a grudge with him after he ended their relationship. He maintained that he was framed.
17. The appellant was convicted and sentenced to life imprisonment for the offence of defilement.

Analysis and determination

18. In a coalized form in grounds 1, 2, 3, 4 and 7 of the appeal, the appellant challenged the weight of the prosecution's evidence relied upon. He contended that the elements of the offence of defilement were not proved and his conviction was improper. In his submissions, the appellant submitted that there was no evidence tendered to show that the complainant suffered physical injuries on his genitalia as PW 5 had testified.
19. Further that penetration was never proved. He argued that PW 5 had confirmed on cross-examination that the tear on the complainant's anus may have been caused by the passing of hard stool and not necessarily penetration.
20. In rebuttal, the respondent submitted that the complainant narrated to court how he was defiled by the appellant. The clinical officer's findings of examination of his anal region was that there was evidence of anal penetration due to the tear and its enlargement.
21. From the record, the complainant narrated to court how the appellant lured him to his house and defiled him on June 24, 2018. He reported the ordeal to a church elder, whom he identified as H, who informed his father (PW 2).
22. He was taken to hospital for examination on the same day of the sexual assault. The clinical officer concluded that there was penetration. In addition, the age of the complainant was proved having been born on September 3, 2009 and was therefore 8 years old and a child during that incident. He also positively identified the appellant as the perpetrator of the offence.
23. I therefore find that the elements of the offence of defilement were proved beyond reasonable doubt.
24. In ground 5 the appellant complained that his defense was disregarded and therefore the court arrived at a wrong conclusion. He submitted that the complainant's mother had framed him for ending their relationship. In his defence he maintained that he never defiled the complainant. From the record, the trial magistrate was of the view that the appellant did not avail any evidence as proof of the affair. This was a misdirection on point of law. The reason being that the trial court shifted the burden of proof to the appellant. But this misdirection did not occasion a failure of justice in view of the abundant evidence in support of the conviction. The same was considered and found to be unbelievable. The ground therefore fails and is hereby dismissed for lacking in merit.
25. In ground 6 the appellant contended that the trial magistrate failed to appropriately exercise her discretion in sentencing him to life imprisonment for he was a first offender and applied the wrong principles of law. He submitted that the court failed to take into consideration the time he spent in the pre-trial remand custody. Further, the court did not take into account his mitigation. He urged court to resentence him considering his mitigation and the duration he spent in the pre-trial remand custody. The appellant was sentenced to life imprisonment.



26. It is trite law that although sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.
27. The punishment prescribed by the law for the offence of defilement for a child of less than 11 years is life imprisonment, which is the minimum prescribed mandatory sentence. The court record shows that the appellant was a first offender. In this case, the trial court allowed the appellant time and opportunity to present his mitigation. The court also called for a pre-sentencing report, which was prepared by the probation officer.
28. Upon receipt of the report, the learned trial magistrate was of the view that she was bound to impose the minimum mandatory sentence.
29. Having received the mitigation from the appellant, and the pre-sentencing report, the court effectively decided that the mitigation and the report counted for nothing. Prior to the Supreme Court's decision in the case of *Francis Karioko Muruatetu & Another v Republic [2017] e-KLR*, the courts imposed the prescribed mandatory sentence, just like the trial court herein did. However, as the Supreme Court held, the mandatory nature of prescribed sentence of death upon conviction for the offence of murder was unconstitutional, because it took away the court's discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.
30. However, I hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning extends to mandatory sentences such as those in section 8 of the *Sexual Offences Act*. I am unable to see any distinction between the mandatory nature of the sentence for the offence of murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require. Accordingly, I do hereby set aside the sentence of life imprisonment, which I find to be manifestly excessive.
31. I now proceed to give due consideration to the mitigation, the Probation Officer's report and the circumstances in which the offence was committed. In the circumstances, I hereby sentence the appellant to 30 years' imprisonment for the offence of defilement;
32. I further direct pursuant to section 333 (2) of the *Criminal Procedure* (Cap 75) Laws of Kenya, that the sentence shall run from his date of conviction being November 17, 2021 less the period he spent in the pre-trial remand custody, which is three years (3), three months (3) and four (4) days.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JANUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Mr. Kisini for the appellant

The applicant in person.

Ms. Chege for the respondent.

