



REPUBLIC OF KENYA



KENYA LAW
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**Turi v Republic (Criminal Appeal E055 of 2022)
[2023] KEHC 287 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E055 OF 2022
LN MUGAMBI, J
JANUARY 27, 2023**

BETWEEN

JOHN GITARI TURI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against conviction and sentence of the Senior Principal Magistrate's Court at Siakago (J. Omwange, SRM) dated 1st March, 2017 in Criminal Case No. (S.O) No. 20 of 2017)

JUDGMENT

1. The appellant John Gitari Turi 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.
2. The particulars of the offence were that the appellant, on the 1st day of March, 2017 in Mbeere North District within Embu County intentionally committed an act which caused a penetration with his male genital organ (penis) into female genital organ (Vagina) of (SM) a child aged six (6) years.
3. In the alternative, the appellant 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 of the alternative charge being that on 1st March, 2017 in Mbeere North District, in Embu County unlawfully and intentionally committed an act of indecency with (SM) a minor child aged six years by touching her genital organ namely, buttocks.
4. The appellant was found guilty of the main offence and sentenced to twenty-five (25) years imprisonment.
5. The appellant was dissatisfied with the conviction and the sentence and thus filed this appeal. He raised the following grounds in his petition: -



1. That the learned trial magistrate erred in both law and fact by imposing a harsh and excessive sentence without considering that the appellant was 1st offender.
 2. That the pundit trial magistrate erred in both matters of law and fact by failing when he imposed an excessive sentence without considering the circumstances in which the offence was committed.
 3. That the pundit trial magistrate erred in both matters of law and facts by rejecting appellant's defence without giving cogent reasons.
 4. That the pundit trial magistrate erred in both matters of law and facts by failing to take into consideration the purpose and principles of sentencing under criminal law being to promote rehabilitation of the offender.
6. The complainant, a girl of six years, testified on oath after a voire dire examination conducted by the trial court. She narrated how on the material date she was sent to the posho mill together with her brother L, (PW3, a boy of same age) by their mother, PW2. As they left the posho mill for home, the appellant, (Gitari) whom they knew well appeared. Along the way, the complainant saw a mango tree and climbed to pluck some mangoes. At that point, the appellant hurled insults to the complainant's brother (PW 3) and chased him away. When she climbed down the appellant started lifting her clothes and a short while later knocked her down. He removed her underpants, then his own pant and inserted his male genital organ into hers (the trial court noted that the complainant pointed at her private part).
 7. The complainant told the trial court that the appellant asked her if she was feeling any pain and she affirmed. He then rose and walked away towards C's home. By that time, her brother had vanished.
 8. The following day her brother (PW 3) informed her mother (PW2) what he had witnessed the previous evening. The mother asked the complainant and she confirmed. The mother reported the matter to Ishiara Police Station. The complainant was thereafter taken to Ishiara Level 4 Hospital where she was treated and samples taken from her for examination.
 9. Her evidence on identification of appellant was as follows: -

“I have known the accused for a while. She used to harvest mangoes for MK and he hit me with mangoes so I had a grudge with him.”
 10. The complainant's brother, (PW3), said he was walking home from the posho mill together with the complainant when the appellant appeared. The appellant abused him and chased him away. When he turned as he walked away, he saw him lifting her sister's clothes and then removed her pant. He reported what he had witnessed to their mother the following morning. He said he had no grudge with the appellant.
 11. PW2 was the mother to the complainant and PW3. She said are twins. She recalled that on 1/3/2017 at about 8.00 pm she sent her two children to the posho mill which was 500 metres away. The two of them took long to return but Lewis (PW3) was the first to arrive. He appeared shaken. The following day as she prepared them to go to school, Lewis (PW 3) opened up and told her what he had witnessed the previous evening. She then inquired from her daughter (PW1) who confirmed the same.
 12. She checked her private parts and noticed bruises in her genital organ which also appeared swollen. She thus decided to go and report to Ishiara police station.
 13. Later, she took her to Ishiara general Level 4 hospital where a P3 Form and PRC Forms were filled. She stated that the complainant was born on 16/6/2010 and identified the birth certificate in court.



14. On cross-examination, she denied a suggestion by the appellant that she once contracted and paid him Kshs.4000 to make bricks for her.
15. Police Officer Kennedy Khayege (PW4) produced the birth certificate.
16. Irene Wachira, (PW5) a Clinical Officer at Ishiara Level 4 Hospital, produced the P3 Form and PRC forms. She said on examination, the complainant's labia had tear but the hymen was still intact. She had difficulty walking. Her clothes were soiled and the pants had little blood stains. Laboratory investigation showed pus cells and lacobites. There was also minor vaginal bleeding.
17. In his sworn statement of defence, the appellant told the trial court that he could not recall anything that happened on the date of the incident that is, 1/3/17. Nevertheless, he said that on 17/5/2017, he was arrested on allegations that he had defiled the complainant. He denied he committed that offence and blamed the mother for framing him because she had contracted him to make bricks for her but he had refused.
18. This being the 1st appellate court, I am obligated to re-examine the entire evidence and draw my own independent conclusions being mindful of the fact that I did not hear or see the witnesses when they testified, (See *Okeno v R* (1972) EA.)
19. The two sides (appellant and respondent) submitted. The appellant mainly challenged the harshness of the sentence. He also said there were inconsistencies in the evidence of prosecution witnesses.
20. He singled out PW5's evidence and said that while in examination in chief she testified that the hymen of complainant was intact but during cross examination she said the hymen was absent.
21. He also faulted the trial court for not considering that the complainant and her mother were motivated by grudge citing the fact that the complainant had stated in her testimony that:-

“ he (appellant) hit me with mangoes so I had a grudge with him.”
22. In reply, the State (respondent) submitted that the three critical elements of the offence namely: penetration, age of the complainant, and identification of the appellant had been firmly established by the prosecution evidence on record.
23. The State also submitted that the sentence passed by the trial court was in accordance with the law.

Determination

24. I have examined the lower court record and find that it correctly identified the key elements of the offence of defilement namely; penetration, age of the complainant and, positive identification of perpetrator of the offence.
25. On whether there was penetration, the complainant's evidence was as follows: -

“Upon opening and lowering his overall, and also removed his pant and removed his genital organ and put it inside her (witness points towards her female genital organ). He then sought to know if it was painful. I told him yes, then he rose and headed towards Caleb home.”
26. The medical evidence contained as per the P3 Form produced by PW 5 showed a tear in complainant's labia but the hymen was intact. She had difficulty in walking. She had minor vaginal bleeding and her pant was slightly blood stained.



27. In his submissions, the appellant took issue with the fact that hymen was intact. Does that mean that penetration did not occur?
28. Under Section 2 of *Sexual Offences Act*, penetration is defined as follows: -
- “Penetration means the partial or complete insertion of genital organ of a person into genital organ of another person.”
29. In *George Owiti v R* 2010 eKLR the court stated: -
- “There was superficial penetration because there was injury on vaginal opening and medical evidence has indicated further there was whitish yellow foul-smelling discharge seen on the genitalia... it remains therefore there can be penetration without going past hymen membrane... It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration...”
30. Applying these principles into this case, it is my finding that penetration was proved.
31. The appellant also submitted that the clinical officer, (PW5) had in her evidence contradicted herself by stating that while testifying in chief that the hymen was intact but during cross-examination she said it was absent.
32. As has been observed in numerous judicial pronouncements, it is not every small inconsistency that will affect the credibility of a witness. The court is entitled to ignore minor inconsistencies. Inconsistencies are only if fatal they point to deliberate falsehood especially where they affect the substance of the prosecution case.
33. In *Richard Munene v R* (2018) eKLR the Court of Appeal observed as follows: -
- “It is settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to its case. It was only when such inconsistencies are substantial and fundamental to the main issues in question and thus created some doubt in the mind of the trial court that accused person will be entitled to benefit from it ...”
34. Applying this principle to the contradiction cited by the appellant, I do not any reason to attach any weight to it and thus disregard it. The clinical officer was testifying while referring to a document (P3 Form) which did not have the said contradiction.
35. The issue of identification of the appellant was raised. He had stated in his defence he could not recall anything that day. The complainant knew him well and she kept referring to him by his name as the person who penetrated her. Her brother (PW3) whom he even insulted and chased away also identified him by recognition.
36. The appellant faulted the trial court for finding that there was bad blood between him and the complainant. This was because of a statement made by the complainant, that he (the appellant) “had hit her with a mango hence she harboured a grudge against him.”
37. It should be noted from the prosecution’s evidence on record that the mother (PW2), did not even know of this incident from the (complainant) first. It was the brother L, (PW3) who informed her the following morning then she asked the complainant who then acknowledged what the appellant did.



38. It cannot therefore be true that the young complainant decided to frame the appellant to the mother to avenge an incident when the appellant had hit her with a mango.
39. In any case, the complainant's evidence of penetration is buttressed by medical evidence. It was not fiction, it was factual, it happened, she knew who did it, her brother witnessed her pant being removed by the appellant too. They both knew him well by his name. It was during the day.
40. The appellant's defence was that he could not recall anything that happened on the material date. This was a mere ploy by him to run away from stark reality that confronted him after he was positively nailed by the two minors for committing this offence.
41. In view of the foregoing reasons, I find nothing to warrant interfering with the conviction of the appellant by the trial court. The offence against him was proved beyond any reasonable doubt.
42. On sentence, the appellant faulted the trial court for imposing an excessive sentence without considering he is a first offender.
43. The respondent on the other hand argued that the sentence that the court meted was in accordance with the law.
44. The submission by the appellant that the trial court did not consider he is a 1st offender is incorrect. The lower court record during sentence shows the magistrate remarked:
“ the accused is a 1st offender.”
45. Section 8(2) of *Sexual Offences Act* specifies that the sentence for a person who defiles a child of 11 years or less is life imprisonment. The appellant was given 25 years after conviction for defiling a child of six (6) years.
46. Was the sentence excessive?
My take is that it was not. Defilement is a serious crime. To take away the innocence of such a young girl (6 years of age) is reprehensible and the punishment meted must be proportionate to the nature of the offence committed.
47. Looking at the sentence meted by the trial court, I do not see any tangible reason why I should interfere with the same. The appeal on both conviction and sentence is dismissed.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JANUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of :-

Coram:

Court Assistant: Kinyua

Appellant: Present

DPP for Respondent: M/s Mary Gakuo

COURT

Judgment delivered virtually.

L.N. MUGAMBI



JUDGE

