



REPUBLIC OF KENYA



**Kanyi v Republic (Criminal Appeal E046 of 2021)
[2023] KEHC 197 (KLR) (Crim) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 197 (KLR)

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

CRIMINAL

CRIMINAL APPEAL E046 OF 2021

LN MUTENDE, J

JANUARY 25, 2023

BETWEEN

SAMUEL MURAGE KANYI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 3635 of 2012 at the Chief Magistrates' Court Makadara, by Hon. T. Okello - (SPM) on 23rd July 2014)

JUDGMENT

1. Samuel Murage Kanyi, the Appellant, was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act*. Particulars of the offence were that on the 15th day of July, 2012, at [Particulars Withheld] Slums, he intentionally and unlawfully caused his penis to penetrate the vagina of MWN a child aged eleven(11) years.
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* No. 3 of 2006. Particulars being that on the 15th day of July, 2012, in Nairobi County, he intentionally touched the vagina of MWN a child aged eleven(11) years with his penis.
3. Facts of the case were that on 15th July, 2012, MWN the complainant, with her younger sister went to their grandfather's place, and upon arrival encountered the appellant, their grandfather's neighbour. He gave the complainant's sister Ksh.50/- and sent her to the shop. As soon as the child left, he held the complainant, covered her mouth, undressed and molested her sexually. He dressed up and made her put on her clothes as well, then warned her not to tell anyone what happened lest he made her his wife. However, on her way home she encountered her mother, PW3 VW whom she told that she had



been defiled. She raised an alarm and people responded to her call of distress. Irate members of public wanted to lynch appellant, but, he was arrested and taken to the Police Station.

4. The complainant was taken to Medecins Sans Frontieres(MSF), a sexual violence recovery center where she was examined and the labia majora was found to be hyperemic(reddish). Subsequently, she was examined by PW4 Dr. Joseph Maundu on the 17th April,2013 who filled the P3 in that regard.
5. Upon being placed on his defence, the appellant denied the allegations and explained that on the material date while leaving the house he encountered a lady who had disagreed and fought his wife, who raised an alarm. He added that during the fight he went to separate them, an act that prompted the lady to insult him and he slapped her. That her children took his keys and phone which they hid. That the children would put dirt at his door, and, in case he complained, it would be an issue.
6. The trial court upon evaluating evidence adduced found that there was proof of penetration and the appellant was identified as the perpetrator. It convicted and sentenced him to serve life imprisonment for the offence of defilement.
7. Aggrieved, the appellant appeals on grounds that he was forced to proceed with the case without statements contrary to the requirement of the Constitution; two ingredients of the offence were not proved beyond reasonable doubt; key witnesses were not availed to testify; and, that, the sentence meted out was harsh and excessive.
8. The appeal was canvassed through written submissions. It was urged by the appellant that he was not furnished with witness statements before commencement of trial despite having requested for the same and failure to be informed of the right to representation violated his rights. That evidence tendered did not establish if PW1, PW2 and PW3 were credible witnesses. That age was not proved; a reasonable inference should have been drawn following failure to call witnesses who were mentioned, and, the trial court failed to analyze the defence put up.
9. The appeal is opposed by the Respondent. It is submitted that the testimony of the victim was corroborated by evidence of the clinical officer who on examination of the victim found a strain on the vulva that looked like mucous, while the inner wall of the labia majora was hyperemic. That age was proved by evidence of the victim's mother who was present at birth as held in the case of Manguyu v Republic Criminal Appeal No. 28 of 2010 (Nakuru) in which Ouko J.(As he then was) stated as follows:

“It is instructive to note that a conviction and sentence under Section 8 aforesaid depends on the age of the victim. It is therefore essential that the age be proved beyond reasonable doubt. However, personally I do not subscribe to any requirement that insists that age can only be proved by means of a birth certificate or any other such documentary evidence. If that were to be so, then a good majority of children victims of sexual offense will never get justice as it is common knowledge that such documents are not generally available to the rural or even urban families. In my view, it is enough that the court be satisfied that there is some other evidence proving the age of the victim”

And the appellant was positively identified as the perpetrator as the offence was committed in broad daylight, and, by a neighbour.

10. On the question of fair trial it was urged that the court ordered the State to supply the appellant with statements, he was given the opportunity to cross examine the complainant and other witnesses, therefore, the trial was fair. On the issue of calling crucial witnesses, it was urged that the prosecution



only calls relevant witnesses; and, that the defence put up was considered and sentence as prescribed in law meted out.

11. This being a first appellate court, this court is duty bound to re-evaluate afresh evidence adduced before the trial court and come up with its independent conclusions bearing in mind that it did not have the opportunity of seeing or hearing witnesses who testified. This was well stated by the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted afresh and exhaustive examination (*Pandya v Republic* [1957] E.A. 336) and the appellate court’s own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v Republic* [1957] E.A. 570). It is not a function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

(see *Peter v Sunday Post* [1958] E.A. 424).”

12. The offence of defilement is defined by section 8(1) of the [Sexual Offences Act](#) (SOA) as follows:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

13. Therefore Ingredients to be proved to establish the offence of defilement are:

- (i) The age of the victim.
- (ii) The act of penetration.
- (iii) Positive identity of the perpetrator of the act.

14. It is urged that the age of the complainant was not proved. In the case of *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000, the Court of Appeal held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

15. PW3 the complainant’s mother told the court that she was born on 30th October, 2001, and, was a pupil in class 2. Although evidence of a birth certificate was not tendered, the victim was examined by the Doctor who filled the P3 form, he estimated the age of the victim to be eleven (11) years. The trial court had the opportunity of observing the victim and was satisfied that she was of an apparent age of eleven(11) years.

16. In the case of [Mwalengo Chichoro Mwajembe v Republic](#), Criminal Appeal No. 24 of 2015 the Court of Appeal stated that:

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card



or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof...”

17. A parent would also be better placed to tell the age of a child. The court adopted the age as given by the mother of the complainant. When PW3 testified regarding the age of the complainant, it was not disputed at trial and the appellant did refer to the victim as a child.
18. Section 2 of the *Children Act* defines a child as:

“ Any human being under the age of eighteen years;”
19. The Sexual Offences Act adopts the definition of a child in the Children Act. Therefore, having been eleven (11) years old at the time, the complainant was a child.
20. Penetration is defined by the section 2 of the *Sexual Offences Act* as:

“ ... the partial or complete insertion of the genital organs of a person into the genital organs of another person;”
21. The complainant stated that the assailant inserted his penis into her vagina and after he ejaculated, he used a lasso to wipe himself and also wiped her. Upon being examined at the outset, she had there was a strain at the vulva that looked like mucous while the labia majora was hyperemic.
22. In the case of *Kassim Ali v Republic* (2006) eKLR it was stated that the fact of rape can be proved by oral evidence of a victim or by circumstantial evidence.
23. The hymen of the complainant herein was found to be intact on examination. The fact of having had no visible physical injuries called for some other evidence to prove that the fact of penetration.
24. In the case of *Bassita v Uganda*, S.C. Criminal appeal No. 35 of 1995 it was stated that:

“The act of sexual intercourse or penetration may be 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 a 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.”
25. Upon being examined at the outset, a vaginal swab was carried out and it was established that there was a stain at the vulva that looked like mucus. The inner wall and labia minora were hyperemic and reddened. As correctly found by the trial court, this was consistent with penetration. Therefore, evidence adduced by the complainant regarding penetration that occurred is confirmed. This was proof of penetration having occurred.
26. The Appellant denies having been the perpetrator of the act. He was well known to the complainant and her family. In his defence he alluded to bad blood having existed between him and the complainant’s mother. The appellant alleged that the charges were trumped up because the complainant’s mother fought his wife. It is surprising that the alleged wife did not confirm the allegations. The offence in issue was committed in broad daylight, Therefore, identification of the perpetrator of the act in question was cogent.



27. The appellant complains that the trial was not fair. It is urged that the appellant was forced to proceed with the case without prosecution witness statements. Article 50(2)(c) of the Constitution provides thus:
- (2) Every accused person has the right to a fair trial, which includes the right—
- (c) to have adequate time and facilities to prepare a defence;
28. On the 18th January, 2013, prior to the case proceeding to hearing, the appellant sought to be furnished with witness statements and the trial court ordered disclosure of the statements, and, the case did not proceed severally until the appellant was ready, having so indicated.
29. On the question of key witnesses having not been availed to testify, Section 143 of the Evidence Act provides:
- No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.
30. In the case of Donald Majiwa Achilwa & 2 others v Republic [2009]eKLR the court stated that:
- “The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.”
31. The appellant contends that the prosecution did not call the grandfather of the complainant, the child who purportedly told the victim that she had been defiled as captured in evidence adduced by PW2, and at least one of the persons who arrested the appellant. Evidence tendered by the complainant indicated that while in company of her younger sibling they returned from church, but, they did not find their father at home. Therefore, decided to go to their grandfather’s place. Upon arrival they found the appellant standing along the way and he sent her sister to the shop as she stayed waiting for the key, that is when the appellant seized the opportunity to hold and take her to his house. That after the act she encountered her mother and informed her. As they were leaving the gate she saw her grandfather coming but she did not tell him about the defilement. There was nothing to suggest that her grandfather witnessed the act in question, therefore, failure to call him as a witness was immaterial.
32. On the allegation of a child who purportedly told the complainant about being defiled. PW 2 Irene Guri Nyamache was a clinical officer who examined the complainant at the Gender-based Recovery Center. She stated that they examined the complainant following allegations that the victim had been told by a child that she was defiled. The allegation was not tested through cross examination at trial to establish what she actually meant, to be interrogated at an appellate stage. However, this evidence did not emanate from the complainant and the most important evidence from such an expert was her findings following examination done.
33. With regard to the issue of members of public who arrested the appellant having not been called to testify, it is not in dispute that the appellant was arrested and ultimately arraigned, therefore, failure to call people who helped PW3 arrest the appellant was not detrimental to the case.



34. The appellant complains that his defence was rejected. It is urged that the trial court failed to analyze evidence adduced by the defence in respect of the alleged bad blood between the appellant and the family of the complainant. This being a criminal case, the prosecution was required to prove the appellant's guilt beyond reasonable doubt.
35. Section 124 of the Evidence Act provides that: Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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.

36. The victim herein a child of tender age gave evidence that was not challenged. The trial court considered evidence adduced and opined that the child appeared candid and truthful such that the court had no reason to believe that the victim would frame the appellant with such a serious offence. Having reconsidered evidence adduced at trial, I find that the prosecution proved all ingredients for the offence of defilement, and, the explanation given by the appellant did not dislodge the account of the prosecution.
37. On sentence, Section 8(2) of the SOA provides thus:
- (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.
38. In the case of *Ogola s/o Owoura v Reginum* (1954)21,270 the court stated as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge, unless, as was said in *James v Republic* [1950] 18 E.A. CA 147.

“It is now settled law that sentence is a matter of discretion of the trial court and must be based on the facts and circumstances of each case. An appellate court will normally not interfere with sentence unless the sentence is manifestly excessive or is based on wrong principles.”

39. The sentence meted out was what is provided in law. However, in the current dispensation, courts are of the view that life imprisonment is unconstitutional. In the case of *Evans Wanjala Wanyonyi v Republic* [2019]eKLR the Court of Appeal stated that:

“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in *Christopher Ochieng v R* [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in *Jared Koita Injiri v R*, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in



Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under article 25 of the Constitution”

40. Guided by the superior court, I affirm the conviction, but, call to this court the sentence of life imprisonment meted out, which I set aside and substitute with a sentence of twenty (20) years imprisonment, to be effective from the date of arrest, the 15th day of July, 2012.

41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 25TH DAY OF JANUARY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Mutuma for DPP

C/A -Mutai

