



REPUBLIC OF KENYA



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**Kimani v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 2233 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E023 OF 2022
G MUTAI, J
FEBRUARY 24, 2023**

BETWEEN

MARTIN KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon L. A. Mumassabba (RM)
in Mavoko Principal Magistrate's Court Sexual Offences Case No. 9 of
2013; Republic versus Martin Kimani delivered on 27th December, 2013)*

JUDGMENT

1. The Appellant was charged with the criminal offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006 (hereafter "the Act"). The particulars of the said charge were that on 16th July, 2013 at Kajiado County the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one LW, a child then aged 13 years.
2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary with section 11(1) of the Act.
3. When he was arraigned in Court on 19th July, 2013 the Appellant pleaded not guilty to both counts. He was given a bond of Kes. 200,000.00 with a surety of similar amount. The Appellant was unable to raise the said amount and thus remained in custody throughout the trial.
4. He was tried before the Hon. L. A. Mumassabba, Resident Magistrate, at Mavoko Law Courts. In support of the Prosecution's case 5 witnesses were called. At the close of the Prosecution's case the Court determined that he had a case to answer and put him in his defence. The Appellant gave a sworn testimony and also called 3 witnesses.



5. The Appellant was found guilty of the offence of defilement. The Court acquitted him on the alternative charge. He was sentenced to 20 years imprisonment, the minimum sentence under section 8(3) of the Act for the offence the Appellant was convicted.
6. The Appellant did not file an appeal against the conviction and sentence immediately. On the 22nd day of April, 2022 he filed a chamber summons application *vide* which he applied to be “allowed to file his appeal out of time and as a pauper”.
7. The said application was allowed by the Court (per G.V Odunga, J (as he then was)). Pursuant to the said leave the Appellant filed the Amended Grounds of Appeal and Submission which raised 9 Grounds of Appeal which are listed below: -
 1. The age of the Complainant was not proved by the Prosecution;*
 2. Prosecution failed on their side to prove whether there was penetration;
 3. The forensic result obtained from the expert on medical analysis was negative;
 4. The case was not proved to the required standard due to unproved penis penetration;
 5. The trial Court erred in law by relying on the evidence of a child of tender years;
 6. Some prosecution witnesses were hostile;
 7. There was violation of section 329 of the *Criminal Procedure Code*;
 8. There wasn't sufficient corroboration of the offence; and
 9. There was insufficient identification of the perpetrator.
8. In addition to the foregoing 9 grounds the Appellant also invited, in his submissions, this Court to review his sentence and to grant him a more lenient custodial term.
9. In my opinion the 9 grounds of Appeal mentioned above can be condensed into 3: -
 1. Was the offence of defilement of the Complainant contrary to section 8(1) as read with section 8(3) of the Act proved beyond reasonable doubt?
 2. Was there a violation of section 329 of the *Criminal Procedure Code*?
 3. Was the sentence passed against the Appellant reasonable and lawful?
10. It is settled law that to prove the offence of defilement the prosecution must prove the following: -
 1. The Complainant must be of the prohibited age;
 2. There was penetration of the Complainant's genitals; and
 3. The penetration of the genitals of the Complainant was done by the Accused Person.
11. Section 8(1) and 8(3) of the Act reads as follows: -
 - “1. A person who commits an act which causes the penetration with a child is guilty of an offence termed defilement



3. 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”

Evidence Adduced Before the Trial Court

12. As earlier stated the prosecution called 5 witnesses. There were 3 witnesses for the defence, including the Appellant. I will set out the evidence adduced below.
13. The Prosecution 1st witness (hereafter “the PW1”) was a clinician working at Kitengela Health Centre. PW1 testified that the Complainant was brought to him on 18th July, 2013 having been allegedly assaulted and defiled by a person known to her. PW1 stated that he carried out medical examination on the Complainant which showed that she had a torn hymen with blood clots and her vagina had white mucoid, sticky discharge that was non foul smelling. His conclusion was that the Complainant had been defiled. He produced the test sheet and the P3 form. On cross examination by the Appellant PW1 said that the Complainant was 13 years old and that it wasn’t necessarily the case that a defilement would lead to pregnancy.
14. The Complainant was the second witness of the Prosecution. Being a child of tender years the learned Resident Magistrate subjected her to *voir dire* examination to establish if she understood the nature of the oath that was about to be administered and the need to be truthful when testifying. Upon the conclusion of the *voir dire* examination the learned Resident Magistrate was convinced that the Complainant understood the meaning of taking an oath. She was thus sworn.
15. It was the testimony of the Complainant that she lived in Kitengela at the material time and that she was a pupil at [redacted] Primary School where she was in Class 7 at the time of her testimony. She testified that on 16th July, 2013 at around 7.30 pm she was asked to carry out some chores by her mother. Upon completing the tasks, she had been given she went to the place where her mother sold chips to get charcoal. On the way, just outside her family’s gate, she met the Appellant. The Appellant lured her into a “kibanda”, where he then proceeded to defile her after removing her pants. The Complainant testified that she was threatened with death by the Appellant and as a result she didn’t raise an alarm. A woman who had been watching what was happening shouted “kujeni muone vile huyu mtu anafanya mtoto wa shule”. When he heard that the Appellant ran away. The Complainant testified that slept at her aunt’s place that night as she was afraid of going home as she felt that her parents wouldn’t believe her, but would conclude that she had consented to the act of defilement. When she went home the next day the Complainant was assaulted by her father. She was then taken to Pona, Kitengela and thereafter to the Police Station. The Police referred her to health facility for treatment and testing. PW2 positively identified the Appellant.
16. On cross examination the Complainant was adamant that she knew the Appellant well. She insisted that the Appellant had tried to talk to her in the past and that on the material day he lured her into a kibanda in a place with little lighting. The kibanda was in a location that was ordinarily visited by few people. He claimed, she testified, that he wanted to send her to buy chips for him from her mother. Once she got into the kibanda the Appellant defiled her. She stated that it was only after Miriam (the PW3) screamed that he ran away. She further testified that she was wounded on her back as she had been laid on wood and that she had pain in her vagina.
17. Miriam Nyanya was the prosecution’s 3rd witness (hereafter the PW3). She testified that she was a casual worker. On 16th July, 2013 at around 8pm she was informed by a Ms. Nyaboke that the Complainant was with the Appellant in the kibanda. She went to the kibanda and peeped in. The kibanda was covered with black paper bags. PW3 testified that she looked through the window of the kibanda



and saw the Appellant with the Complainant. The Accused was leaning on the window while the Complainant was standing with her skirt up. PW3 testified that she shouted “huyu kijana anafaa ashikwe anafanya kitendo mbaya.” The PW3 identified the Appellant as being the assailant he had seen defiling the Complainant. Ms. Nyanya identified the cloths both the Appellant and the Complainant had been wearing during the assault. She denied having a grudge against the Appellant.

18. [redacted], the mother of the Complainant was the 4th witness (hereafter the PW4). She testified that she sells chips in Kitengela, a business she does alone. On the 16th day of July, 2013 PW3 came to see her and reported that the Complainant had been found with the Appellant. Since she and the Appellant knew each other she called him thrice. On each occasion he didn't pick. She then sends him a text message. It is after she sent the text message that the Appellant called and insulted her. That night the Complainant didn't come home. She came home the next day. The matter was reported to the Kenya Police Service. The Complainant was taken to the police station and thereafter to the Hospital for treatment. The Appellant was arrested at a hardware shop not far from the *locus in quo*. PW4 further testified that the Appellant had been luring her children with money. She identified the Appellant. She testified that she was present when he was arrested and that he knew him well as the Appellant used to sell her firewood.
19. PW4 denied that she had a grudge with the Appellant. She also denied that she fabricated a case against him. She stated that she had never had a relationship with the Appellant. She admitted that she had borrowed money from him prior to the incident. She however stated that he had declined to give her the loan.
20. PC Alice Mureithi, the investigation officer was the 5th witness of the Prosecution (hereafter “the PW5”). She testified that the Complainant was brought to her on 18th July, 2013. Upon examination PW2 was found to have been defiled by a person known to her. The Appellant was arrested at his place of work. The child was subjected to age examination which established that she was 13 years old at the time of the incident. She produced the certificate of age assessment as exhibit 3. On cross examination PW5 stated that she didn't take the Appellant to hospital for examination as she was satisfied with the evidence. She also did not take the witness statement of the Appellant.
21. The Appellant gave a sworn testimony. He claimed that while in remand his father was approached by the father of the Complainant with the proposal that if they paid him (the father of the Complainant) Kes.250,000.00 they (the Complainant's family) would decline to testify. He further stated that PW4 had always wanted to be in a relationship with him and would call him to go to her house whenever the husband was away. It was his testimony that the evidence against him was fabricated and that it was shoddily done. He denied committing the offence. He stated that he had a wife and 3 children.
22. John Wachira Wambugu (hereafter “the DW2”) was the Appellant's employer. He testified that he had heard on 17th July, 2013 that the Appellant had been accused of defilement. When he inquired from the Appellant he, the Appellant, said that PW4 had been pursuing in search of a romantic relationship and that he had declined her advances. He testified that he wasn't at his shop on 16th July, 2013 when the assault occurred.
23. The Appellant's last witness was his father Paul Muchina Njehia (hereafter “the DW3”). The DW3 testified that he met the Complainant's father and sought to have the matter resolved amicably. The Complainant's father however asked for Kes. 200,000.00 to do so. DW3 stated that it is at this point that he realized that the case was fabricated. He thereafter declined to have any further dealings with the Complainant's father as he saw the charges as being “business”.



Analysis of the facts and the law

24. It is settled law the duty of the first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses that testified (see *Selle & Another versus Associated Motor Boat Co Ltd & Others* [1968]EA123, *Okeno versus Republic* [1972]EA32).
25. Thus although I am not bound by the findings of fact of the trial court, in reconsidering and re-evaluating the evidence so as to draw my own conclusion I must bear in mind that I neither saw nor heard the witnesses. I must therefore make due allowance in that respect.
26. I must also be convinced that the 3 elements necessary to secure conviction in cases of defilement were proved to the require standard. As they are central in this appeal I must restate them below for clarity: -
 - 26.1. There was a penetration of the complainant;
 - 26.2. The penetration was done by the accused person; and
 - 26.3. In respect of a charge of defilement of a child of between the ages of twelve and fifteen, that the Complainant was in the said age bracket at the time of the penetration.
(see *George Opondo Olunga versus Republic* [2016] eKLR)
27. In the case of *Charles Wamukoya Karani versus Republic* Criminal Appeal No. 72 of 2013 the court stated that “the critical ingredient forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant”.
28. The Complainant was subjected to age assessment at the Athi River Health Centre. The certificate of age assessment was produced before the trial court as Prosecution Exhibit 3. The same shows that the Complainant was 13 years old when the offence was alleged to have been committed. That being the case the 1st element was proved to the required degree.
29. Was there a penetration of the vagina of the Complainant? The Appellant submitted in his submissions that this element wasn’t proved. He argued that the PW1 did not find spermatozoa upon conducting the high vaginal swab tests sufficient to prove penetration. Had there been spermatozoa, he argued, there would have been sufficient evidence of penetration.
30. I have looked at the exhibits produced during trial at the subordinate court, in particular the Treatment Note dated 18th July, 2013 (Prosecution Exhibit 1) and Medical Examination Report/P3 (Prosecution Exhibit 2). Both exhibits show that the Complainant had torn hymen with blood clots, white mucoid sticky discharge, non foul smelling and visible blood clots. Her right thigh was bruised, swollen and tender, whereas her left arm was also bruised swollen and tender. In my opinion there is sufficient evidence proving that there was penetration of the Complainant. I am persuaded that the learned Resident Magistrate was right to believe the evidence of the Complainant and her witnesses.
31. Did the Appellant penetrate the vagina of the complainant with his penis? The only witness of the act was the Complainant herself. Was it safe to convict the Appellant based on the evidence of a minor complainant?
32. Section 124 of the *Evidence Act* provides as follows: -

“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 relieve 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

33. The Court noted during the testimony of the Complainant that “child very firm and consistent”. I have examined the record of the proceedings carefully. The Complainant was emphatic that she knew the Appellant well enough. She gave a very detailed account of what transpired before, during and after the sexual assault. Her evidence wasn’t shaken on cross examination. I find and hold that the learned Resident Magistrate was justified to base the conviction of the Appellant on the evidence of the Complainant.
34. The Complainant and the Appellant knew each other well. The Appellant was also well known to members of the Complainant’s family. The Appellant cast aspersions on the PW4 (the mother of the Complainant). He testified that she had tried to seduce him into having an affair with her. I do not believe the said account. In my opinion the Appellant’s allegations in that respect were diversionary.
35. Although there were minor discrepancies in the evidence presented by the prosecution I do not think that such discrepancies were so material as to displace the finding of guilt. The court of Appeal in *S.O.O versus Republic* [2018] eKLR stated thus: -

“That notwithstanding a bit of inconsistencies in the evidence of a child of 10 years, which does not go into the core of the case and which is not material as was in this case. That in itself did not in manner distort or dislodge the defilement of the material day subject of the charge and of the other days as there was indeed a penetration. The court must consider the evidence adduced as a whole and not selectively and the victims age and ability to recollect in a concise form ought to be factored in ...”
36. Similarly, in *Simon Oduor Oloo versus Republic* [2022] eKLR Aburili, J stated that “I find no ground upon which to differ with the trial court’s finding of fact that the complainant was firm in her identification of the Appellant even though she testified that the Appellant was not known to her prior to the defilement”
37. I am not persuaded by the argument made by that Appellant that the prosecution witnesses lacked credibility. They all gave evidence which were materially consistent and all of which point to the Appellant as the culprit. The prosecution was able to adduce evidence of sufficient cogency and believability with the witnesses they called. The evidence adduced by the witnesses of the Appellant, on the other hand were inconsistent and lacked probative value.

Was there a violation of section 329 of the Criminal Procedure Code? Was the mitigation of the Appellant Considered during sentencing?

38. In ground 8 of his appeal the Appellant states that “my mitigation was not considered by the trial court and it was part of trial”. He then goes on to state that “... I was a first offender and a bread winner of the family. My Lordship if the trial magistrate could consider my mitigation could have awarded me lesser punishment rather 20 years imprisonment.”
39. I have perused the record. I am satisfied that the Appellant was given a chance to mitigate. As was held by the Supreme Court in *Francis Karioko Muruatetu & Another versus Republic* [2017] eKLR



mitigation is an integral part of fair trial. That said all the trial court is required to do is to consider the mitigation. It is not under any obligation to believe what is stated in mitigation. As an exercise of discretion the court must act judiciously and not whimsically. Nothing was placed before me showing that the learned magistrate acted whimsically when considering the Appellant's mitigation.

40. In any case, the learned Magistrate made her decision in 2013 at that time the mandatory sentences in sexual offences had not been declared unconstitutional. The Learned Magistrate's only option at the time, after finding the Appellant guilty, was to pass a sentence of 20 years imprisonment, or more, against the Appellant, the statutory minimum sentence in section 8(3) of the *sexual offences Act*. I cannot fault her for having complied with the law as it then was.

Was the sentence passed by the learned Resident Magistrate reasonable and lawful?

41. I fault the Learned Resident Magistrate for not having complied with section 333(2) of the *Criminal Procedure Code* which provides as follows: -

“(2) subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.

Provided that where the person sentenced under subsection

(1) has prior to such sentence been held in custody the sentence shall take account of the period spent in custody”.

42. The sentence notes say that the “Accused to serve 20 years”. The sentence does not take into account the fact that the accused was in custody during his trial having failed to meet the bond terms. A sentence that does not accord with the law calls for review.

43. I am in full agreement with the decision of Mativo, J (as then was) in *Edwin Wachira & Others Versus Republic*; Mombasa High Court Petition No. 97 of 2021 that

“To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the Sexual Offences Act deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under Article 50(1) of the Constitution of Kenya, 2010.”

44. Based on the foregoing I dismiss the Appellant's appeal on conviction. I find and hold that the conviction of the Appellant was safe.

45. His appeal on sentence is however merited. I set aside the sentence of 20 years imprisonment meted out by the learned Resident Magistrate and substitute the same with a sentence of 15 years imprisonment. The said sentence shall take into account the period he was in remand prior to his conviction.

46. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF FEBRUARY, 2023

GREGORY MUTAI

JUDGE



In the presence of: -

The Appellant (in person);

No appearance for the Respondent;

Court Assistant – Winnie

