



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Appeal 6 of 2020)
[2023] KEHC 2975 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 6 OF 2020
SC CHIRCHIR, J
MARCH 29, 2023**

BETWEEN

WILSON KARUCHI MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal arising out of conviction and sentence in the judgement of the Senior Principal Magistrate's Court at Kangema in Sexual Offence Case No. 1 of 2019 delivered by Hon. I Guchobi SRM)

JUDGMENT

1. The appellant was charged with defilement contrary to section (8)(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars are that on the 1st day of January 2019 at Mathioya Sub-location within Murangá county, intentionally caused his penis to penetrate the vagina of EN a child aged 12 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. He was found guilty of the 1st charge and sentenced to 20 years in prison. This appeal is against the said conviction and sentence.

Grounds of Appeal.

3. The appellant has listed 7 grounds of Appeal which I have summarized as follows; -
 1. That he was not examined to establish if he was the perpetrator of the crime.
 2. That the trial court failed to take into account the fact that all the witnesses were from one family.
 3. That the prosecutor's case was full of contradictions, inconsistencies, and was based on malice.



4. That the period he had spent in custody was not taken into account during sentencing contrary to section 333(2) of the *Criminal Procedure Code*.
5. That the trial court erred in shifting the burden of proof to him.

Appellant's Submissions

4. On record is what the appellant has called "supplementary Appellant's written submissions" implying that there were other submissions that had been filed. However, I do not see any other submissions on the part of the Appellant except the supplementary submissions. I also notice that he Appellant has confined his submissions to issues of sentencing.
5. It is submitted that the court should take the cue from the decisions of *Philip Mainigi Muneke & others vs R* Machakos HC Petition No 017/2021 and *Edwin Wachira & Others Vs Republic* Mombasa High Court Petition No 97/2021 and review the sentence.
6. The appellant has also relied on the case of "Muruatetu" to buttress his submissions on sentencing.
7. The appellant further submits that since he was imprisoned, he has changed for the better; that he has undertaken several courses which has readied him to re-integrate with family and society.

Respondent's Submissions

8. It is the respondent's submissions that all the ingredients of defilement were proved, namely the age of the victim, penetration and identification of the offender.
9. On the alleged inconsistencies and contradictions, the respondent submits that they do not materially affect their case.
10. On identification, it is the Respondent's submissions that the Appellant was positively identified by the complainant.
11. As to whether the complainant was coached to implicate the Appellant, the prosecution submitted that the complainant arrived home when she was crying, an indication she was distressed about that had happened. On the amendment of the charge sheet, it is submitted that the amendment was in respect to the age of the child and which amendment did not occasioned prejudice to the Appellant.
12. The Respondent admits that most of the prosecution witnesses were related but there was no evidence of any bad blood between the complainant's families the Appellant's and therefore the relationship of the witnesses was non-issue.
13. On the key witness not allegedly not summoned, the Respondent's submission is that the six (6) witnesses called were sufficient to prove its case beyond reasonable doubt.
14. On the defence of alibi, the respondent submissions is that it was brought at the tail-end of the proceedings giving no chance to the applicant to investigate it, that the defence of *alibi* was merely an after thought. The prosecution has relied on the case of *Republic vs GNK*(2017)eKLR and *Festo Androa Asema vs Uganda* Cr App No 1 of 1998 to buttress their submissions.
15. On sentencing, the respondent argues that the trial court considered all facts and submissions by both parties when mitigating out the sentence.



Determination

16. I have considered the grounds of appeal and the respective submissions. Though part of the appellant's submissions are missing, it is the responsibility of the court to determine the appeal lack of submissions notwithstanding. The duty of this court as the first appellate court, it to look at the evidence afresh, re-evaluate it and come up with its own findings. However, it must give allowance for the fact that trial suit had the benefit of seeing and, hearing the witnesses first hand. (see *Okeno vs Republic* (1972)EA 32).
17. In my view, the following issues come up for determination.

1. Was the appellant positively identified as the perpetrator (Ground 1)

The complainant told the court that "On January 11, 2019, I had been sent to call a man to pick tea at my auntie's farm, he is called Maina" "On my way Wislon held my hand and led me to his house..... He held my hand and led me to his house it is on the lower side She went on "at 4.am I told him I wanted to go home..... He escorted me up to gate....."

Then on reaching home "they asked me where I had spent the night and I told them at Wilson's house....." I met with Wilson at 6pm..... it wasn't dark.... I was able to identify Wilson... I saw him as he held my hand. Wilson is the person on the dock. .. on cross-examination by the appellant, she stated. "you used to come work at our home."

18. PW2 was the complainant's father. He told the court that he knew the accused as they belonged to the same clan. On cross examination by the accused he stated "I have known you since you were a child." From the testimony of the complainant and the father, it is evident that the appellant was well known to the complainant and PW2 prior to the commission of the offence. I therefore find that there was a positive identification of the appellant, by way of recognition

2. What about the fact that the witnesses were from one family? (ground 2)

There is no law barring relatives from testifying and the Appellant never mentioned in his testimony that there was any bad blood between him and the family of the witnesses, or that there was a bad motive behind his arraignment for the charge. This complain is not valid in my view.

3. Whether the prosecution's case was full of contradictions, inconsistencies and tainted with malice (ground 3)

19. Query was raised as to the whereabouts of the complainant from 4am when she allegedly left the complainant's house up to 8am when she allegedly arrived at her home. From the testimony of the complainant in cross examination, it appears that the 4am reference came from the Appellant. The contradiction in my view, does not materially affect the prosecution's case. The discrepancy on the time estimates does not go into the substance of the case.

Did the trial court shift the burden of proof to the appellant?

20. I have carefully read, the judgment by the trial court and nowhere do I see the court shift the burden either directly or indirectly to the accused person. I find this assertion to be untrue.
21. On the defence of *alibi*, I do find as did the trial court, that the Appellant's line of cross examination of the prosecution, witnesses particularly the complainant betrays him. He placed himself in the events of that evening.
22. In view of the foregoing, I find that the appellant was properly convicted



Sentencing

23. The Appellant was sentenced to 20 years in prison being the minimum sentence provided for under section 8(3) of the *Sexual Offences Act*. Sentencing is an act of discretion and the appellate court will not interfere with a sentence unless the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account, some wrong material or acted on wrong principles.
24. I have considered the submissions of both parties in this regard. I am also alive to the fact that; minimum mandatory sentences are now unconstitutional pursuant to the High Court Decisions in the case of *Edwin Wachira & others vs Republic* Petition No 97 of 2021, *inter alia*. The lower court record shows that the trial court took into account the mitigation of the Appellant, the age of the victim and the potential risks the victim was exposed to.
25. I therefore do not find fault with the sentence imposed. It is my understating that *Edwin Wachira* Case (*supra*) did not take away the mandate of the court to met out a minimum sentence if circumstances call for it. In my view of the foregoing, I find no fault on the imposition of 20 years.
26. However, under Section 333(2) of the *Criminal Procedure Code*, the court is required to take into consideration the period that an accused person has spent in custody. There is nothing on the record to indicate that the trial court complied with the aforesaid provisions. Consequently, the said sentences are now reduced by one year being the period the appellant had spent in custody prior to conviction and sentencing.
27. Orders
 1. The appeal on conviction and sentence is dismissed.
 2. The Appellant will serve 20 years in prison from January 2, 2019.

DATED, SIGNED DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF MARCH 2023

S. CHIRCHIR

JUDGE

In the presence of ;

Susan – Court Assistant

Appellant – Present

Ms. Miniu for the Respondent

