



**Musango v Republic (Criminal Appeal E052 of 2021)
[2023] KEHC 2937 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E052 OF 2021
A. ONG'INJO, J
MARCH 27, 2023**

BETWEEN

DAVID NZINE MUSANGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision by Hon. Ruguru (SRM) on 15th July 2014
in Mombasa Criminal Case No. 2854 of 2012, Republic v David Nzine Musango)*

JUDGMENT

1. The Appellant David Musango Musango was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars are that on the 29th September 2012 in Mombasa within Coast Province the appellant unlawfully and intentionally attempted to defile GM a girl aged 4 years.
3. The trial Magistrate analyzed the evidence of the prosecutions witnesses and weighed it against the appellant's evidence and found the appellant guilty for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#).
4. The Appellant was sentenced to serve life imprisonment after the trial Magistrate considered the nature and gravity of the offence and the character of the appellant in mitigation. The trial Magistrate said he had no option but to sentence the appellant to the mandatory life sentence in Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
5. The Appellant was aggrieved by the conviction and sentence and he filed the appeal herein on the following amend grounds filed by the Appellant namely:-
 - i. That the learned trial Magistrate erred in law by convicting and sentencing the Appellant yet failed to find that his constitutional rights to fair trial under Article 50(g) and (h) were violated.



- ii. That the learned trial Magistrate erred in law and infact by failing to find that the appellants identification was not positive.
 - iii. That the learned trial Magistrate erred in law & infact by failing to appreciate that penetration was not correctly proved.
 - iv. That the learned trial Magistrate erred in law & fact by failing to appreciate that the appellants defence was cogent.
 - v. That the sentence imposed was harsh & excessive since it was applied in mandatory terms as provided by the statute.
6. The prosecution's case was that the complainant was left under the case of PW 2 at home on the material day when she disappeared. She reported to her mother. PW 1 who was at her food kiosks & together they went to report at Makupa Police Station. Later they received a phone call from the police station informing them a child had been found and taken to police station by members of public. On return to the police station they found the Complainant who only had a T-shirt on & her shorts and underwear were missing. That the child had sperms in her mouth, ears & thighs that her throat and cheeks were bruised. The Complainant was taken to Coast General Hospital where she was treated and the doctors confirmed injuries on her vagina and anus.
 7. PW 2 said she was shown the suspect at the police station and she was told he had been caught defiling the Complainant. PW 3 was called by Erick & Wambua who told her that there was a child being defiled in a bush at the railway line. That they proceeded to the scene and found the appellant defiling the Complainant. That she used a torch to examine the girl and saw sperms on her eyes, ears, vagina & whole body. That the child was also smeared with feaces as the place was bushy and used by people to relieve themselves.
 8. PW 3 rescued the girl and arrested the appellant and escorted him to Makupa Police Station. PW 3 identified the appellant as well as the child she rescued while being defiled by the Appellant. She said she found members of public had detained the Appellant and were beating her. PW 3 said she was village elder of Shimanzi estate but the Appellant was not a resident of her jurisdiction. She said she had a torch that she used to identify the appellant.
 9. PW 4 Dr. L. Ngomo from Coast General Hospital examined the Complainant for purposes of filling P3 form which he produced as an exhibit. He said that PRC form had been filled earlier indicating the Complainant child had lacerations on the face and neck and her hymen was broken. That she had lacerations on her genital organs and on anal region – EXP 2.
 10. PW 5 Dr. Samuel Kiptalam did examine the Complainant on 1/10/2012 at Coast General Hospital and filled PRC Form which he produced – EXP. 3. He said the complainant 4 years old child had bruises on the face and left eye and neck was bruised. She also had lacerations on her vagina & her hymen was broken. That she had inflamed vagina.
 11. PW 6 Sergeant Magdaline Ajiambo from Makupa Police Station investigated the offence and preferred charge of defilement against the Appellant. PW 6 said that when she accompanied the Complainants mother to Coast General Hospital Gender Desk the child was in a state of shock and afraid to talk. That the child had been porched on the whole body. PW 6 visited the scene which was bushy where and the appellant had made a shanty using tree branches. PW 6 confirmed the age of the Complainant from clinic card – EX. P1. PW 6 said it took months before the 4 years old child could talk again when placed on defence the appellant gave sworn testimony and said that on 29/09/2012 he was at work and he left at 7.00pm to go to Shimanzi where he lived.



12. That he alighted from a matatu and started running as he needed to reach home to go and fetch water. That he met people running from the bush and when he asked what was the matter, they said “he is the one”. That they asked why he was running if he was not the one. That he was arrested and beaten. That he took the people where he lived in Shimanzi but they didn’t believe him and they continued beating him. That a person who knew him came and wanted to know why he was being beaten and they told him he had defiled a child. The person persuaded them to take him to the police station instead of beating him. That he was taken to the police station together with the child and he was charged.
13. In cross examination Appellant said he worked in a hotel to which did not have a name. He said he was not found with the child. He said the people who arrested him didn’t know him and did not have a grudge against him.
14. The appeal herein was canvassed by way of written submissions. The Appellants submissions are to the effect that his right to legal representation under Article 50(2)(g) & (h) were violated as he was not informed of the same by the trial Magistrate of that right before or during trial.
15. On issue of identification, the Appellant submitted that PW 3 was told by Erick and Wambua that there was a child being raped in a bush at the railway line and that PW 3 did not see him defile the child. That Erick and Wambua were not called as witnesses or to attend identification parade. It was submitted this was a grave error as the evidence of the 2 was pivotal in just determination of the case.
16. The Appellant argued that PW 3’s evidence was hearsay and could not have the same effect and veracity as that of Erick & Wambua who allegedly found him red handed. The Appellant relied on the holding in *Bukenya & Others vs Uganda* [1972] E.A. 549. Appellant said his explanation on how he was arrested was unrebutted. That his evidence raised serious doubts and that suspicion however grave cannot be relied on to find a conviction.
17. It was further submitted that PW 3 found the appellant having been subjected to mob injustice and as such it cannot be said he was positively identified as conditions prevailing at the time were difficult to ascertain correct identification.
18. On penetration the appellant submitted that PW 1, PW 2 & PW 3 were not possessed of any scientific knowledge that made them know that what they saw on the complainant was sperms. It was submitted that the findings of PW 5 were not declared to be defilement and being the victim didn’t testify her evidence was not tested as to its veracity pursuant to Section 124 of the [Evidence Act](#). The Appellant also submitted that his defence was not considered.
19. He further submitted that the sentence against him was harsh & excessive. The appellant also argued that the trial Magistrate recorded 2 sets of mitigation and he sought the interpretation of the court on effect of two rulings on sentence for a single offence. The Appellant also argued that he was sentenced under the mandatory sentence in Section 8(2) of the [Sexual Offences Act](#) which denied him the right to fair trial under Article 50 of [the Constitution](#) and Article 25(c). He argued that imposing mandatory sentence was discriminatory in nature and that life sentence imposed on him was not commensurate with facts and circumstances of the offence. He prayed that the sentence be quashed.

Respondents submissions

20. The Respondent’s submissions were filed on 20th January 2023. The submissions were to the effect that the age of Complainant, the identity of the perpetrator & fact of penetration was proved by the prosecution beyond all reasonable doubt.



21. On the issue of contradictions Counsel Anyumba contended that the same did not shake the weight of prosecution case and they should be ignored as they were minor contradictions. The holding in Phillip Nzaka Watu vs Republic (2016) eKLR was relied upon where the Court of Appeal expressed itself as follows:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

22. It was argued that witnesses cannot be expected to follow the sequence of events that happened so unexpectedly and narrate them later with scientific exactitude – See Erick Onyango Odeng vs Republic (2014) KLR as stated by the Court of Appeal,

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze the contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers”.

23. The state argued that the appellants defence was considered and did not cast doubt on the prosecution’s evidence, it was submitted that the appellant failed to disclose where he was working and there was no evidence he had come from work at the time he was arrested.

24. On sentence the state argued that same was proper as the offence was committed against a child of tender years and the same was going to have long lasting effect on the child and the court should not lose sight of this fact.

Analysis and determination

25. This being the first appellate court, I am guided by the principles in David Njuguna Wairimu v Republic [2010] eKLR where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

26. Having considered the evidence of records in the trial court the judgment of the trial Magistrate and the ground of appeal and respective submissions, the issues for determination are:-

- a. Whether the Appellant rights to fair trial under Article 50 (g) & (h) of *the Constitution* of Kenya 210 was violated.



- b. Whether the Appellant was properly identified as the perpetrator
 - c. Whether the Prosecution beyond any reasonable doubt that the Complainant was defiled.
 - d. Whether the Appellant defence was considered by the trial Magistrat
 - e. Whether the sentenced meted out by the trial Magistrate was harsh and excessive
27. Article 50(2) (h) & (g) provides:-
- “ Every accused person has the right to a fair trial, which includes the right—
- (g) to choose, and be represented by, an advocate,
- and to be informed of this right promptly;
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly”.
28. Under Article 25 of *the Constitution* of Kenya the right to fair trial is one of those fundamental rights and freedom that may not be limited. The right Court therefore, had the duty to inform the accused of the right to choose and be represented by an Advocate. A perusal of the proceedings in the trial court does not indicate that after the charge was read to the Appellant he was informed of his right. The trial proceeded and the prosecution called 6 witnesses who were cross examined by the Appellant and throughout the trial the Appellant did not have legal representation. This court cannot therefore find that the Appellant was accorded fair trial.
29. On the other hand, was the 4 years old girl who was the Complainant in this matter and who also has the right under Article 50(1) which provides:
- “ Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.
30. Article 25 also provides that the freedom from torture and cruel in human or degrading treatment or punishment may not be limited, the Complainant was found to have been subjected to degrading & inhuman treatment by a person who was suspected to be the Appellant herein. PW 5 found that she has been defiled and had bruises on the left eye, neck and lacerations on her vagina & anal area which were inflamed. Her hymen was broken.
31. This court view is that these competing rights can only be realized by this court referring the matter back for retrial before the Chief Magistrate’s Court to enable the Appellant to get an Advocate of his choice and the prosecution to avail witnesses in support of the charge of defilement which witnesses will be subjected to cross examination by the appellant’s advocate so as to realize the justice of the case.
32. The Appeal therefore succeed to the extent that the Appellant was not informed of the right to choose & be represented by an Advocate but being that right does not supersede the complainant’s right this matter is remitted back for re-trial in the Chief Magistrate Court at Mombasa.
33. Mention on 10.04.2023 before Chief Magistrate Mombasa.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF MARCH 2023



HON. LADY JUSTICE A. ONG'INJO
JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Ngire for State

Appellant – Present in person

HON. LADY JUSTICE A. ONG'INJO
JUDGE

