



REPUBLIC OF KENYA



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**BGW v Republic (Criminal Appeal 12 of 2019)
[2023] KEHC 18676 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 12 OF 2019
SC CHIRCHIR, J
MAY 31, 2023**

BETWEEN

BGW APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Hon. E.M Kagoni (SRM) delivered
on 19th August 2014 in Kangema Criminal Case Number 11 of 2013)*

JUDGMENT

1. The Appellant herein was charged with the offence of defilement of a child contrary to section 8 (1) as read with 8 (2) of the [Sexual Offence Act](#) No 3 of 2006. (The Act)
2. The particulars of the offence are that on April 3, 2013 in Kangema district within Murang'a County, he intentionally caused his penis to penetrate the vagina of MWG a child aged 3 years
3. He was faced with an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act
4. At the conclusion of the trial, he was found guilty and sentenced to life imprisonment. He was dissatisfied with the outcome and proffered this Appeal.

Grounds of Appeal

5. The Appellant Grounds of Appeal are paraphrased as follows:
 1. That penetration was not proved



2. That the prosecution Evidence was marred with inconsistencies and contradictions, rendering the evidence on record unsafe to base a conviction on.
3. That the learned trial magistrate erred in matters of law and fact by failing to consider the Appellant's mitigation.
4. That the sentence meted out to him was harsh and inappropriate under the circumstances.

Appellant's submissions

6. The Appellant submitted that the penile penetration of the complainant was not proved. He cast doubts on the credibility of the testimony of PW5 who testified that on examining the complainant she found her to have dried up discharge, and reddened area in the vagina, laceration and a broken hymen. He argues that the injuries could have been much older than the what was presented. He asserts that the injuries, specifically the presence of the pus cells, was not consistent with defilement.
7. He also submits that the evidence on record is contradictory and inconsistent He argues for instance that while PW2, PW3 and PW4 testified having observed blood on the complainant's genitalia, this was denied by the Doctor (PW5). He further points out that while PW3 testified the complainant got out of the Accused's house while crying, PW2 stated that she was not.
8. On sentencing, it is the Appellant's submission that while the trial court stated that its hands were tied as the sentences prescribed are mandatory, there has been development in the law, following the high court decision in the case of *Edwin Wachira & others vs Republic (2022) eKLR*. (Mom High court petition No 97 of 2021). This development, he contends, gives the court the discretion to mete out any sentence.
9. He finally submits that the Honorable court be pleased to consider his mitigation and substitute the life sentence with a determinate sentence and to order that calculation of such a sentence commence from the date he took plea on April 5, 2013 in compliance to section 333 (2) of the *Criminal Procedure Code*.

Respondent's submissions.

10. On the alleged inconsistencies and contradictions, the Respondent points out that the same have no bearing on the fresh testimonies as the hearing was ordered to start denovo and the alleged inconsistencies were apparent during the previous proceedings. They argued that such inconsistencies cannot be used to impeach the fresh hearing. In this regard they have relied on the case of *John Nduva Mutua Vs republic (2019) e KLR*.
11. On whether the prosecution case was proved beyond reasonable doubt the prosecution's submission is that all the elements that constitute defilement was proved. On penetration it is submitted that the evidence of PW4 who rescued the complainant was corroborated by the evidence of pw5 who examined the complainant and established that she had dried up discharge on her genitals, redness, laceration and a broken hymen.
12. On identification it is submitted that PW2 and PW3 identified the Appellant as being their neighbour, and therefore identification was by way of recognition.
13. It is the prosecution's final submission that the Appellant's testimony was indeed considered by the trial court, but found wanting



Summary of the Evidence

14. PW1 was the complainant. After a voire dire examination was conducted on the minor, the court determined that she was too young to comprehend what was going on. She was therefore disqualified from testifying.
15. PW2 told the court that she was PW1's classmate. she was with PW1, when they met G, the Appellant and that she knew him prior to the incident since he was a neighbor. She recalled that the accused carried PW1 to his house; that she was outside their house as there was no one at home and she was waiting for her mother to bring the keys to the house.
16. She further told the court that when her mother came, she told her that G had taken PW1 into his house. Her mother then went to the Appellant's house and asked him to let the minor go as her father was looking for her. That is when the Appellant emerged while holding the minor. She recalled that when PW1's mother came, she called her mother and they went to the police.
17. PW3 was the complainant's mother She told the court that she came back home at 4. 00 pm, and found many people in her house. PW4 told her that her daughter had been taken to the Appellant's house and was probably defiled. She took the child and went to report at the AP post at Kiruri then went to the dispensary. From there, they were referred to Kangema Hospital where the child was examined and treated. She then proceeded to Kangema Police station where she was issued with a P3 form. She testified that her daughter was 3 years old and produced a birth notification as evidence. She told the court that she knew the accused as a casual labourer and a neighbor to PW4. She testified that she checked the child private parts and saw something like semen on her thighs, that the child was feeling pain on passing urine.
18. On cross examination, she told the court that she had come from delivering tea leaves when she found a crowd and that PW4 told her she was needed in karuri . She narrated to the court what PW4 had told her about the events of that day.
19. PW4 testified that on April 3, 2013 at about 1600 hours, she came home and found her daughter (PW2) outside their house. The daughter told her that PW1 had been locked in the house by G. She peeped into the Appellant's house since they shared a wooden wall.
20. She stated that she saw the Appellant in bed with the child who was undressed, the Appellant was lying on the child and he did not have a trouser and when he saw her peeping, he retreated into a corner. He told him to let go of the child. The Appellant then dressed the child, put on her shoes and came out holding the girl. she stated that he took the child to the gate and went away
21. She further testified that she called the girl's mother and they went to the police. She informed the court that she knew the Appellant since they were neighbours . She knew the Appellant as having no family of his own and had stayed in the neighborhood for for three months.
22. On cross examination, she reiterated that she peeped into the house and saw the Appellant. She called the child's mother at 4.00 pm and that they went to hospital, then to the police station.
23. PW5 was a clinical officer at Kangema Sub- district hospital. He testified that the complainant had been defiled on April 3, 2013 at 4.00 pm at kiruri Centre. she was treated at Kiruri and then taken to Kangema the next day. He testified that her clothes had been changed and she was in fair general condition. On examination, he noted that there was dried up discharge and secretion on the labia minora, there was reddened areas with a degree of penetration, there were lacerations and the hymen was broken;that there was no blood but dried discharge from the child's vagina. He concluded that



- there had been penetration. He filled the P3 form on May 29, 2013 which he produced as exhibit and a copy of a treatment card issued at Kangema sub- district hospital. He also produced the birth notification that showed the complainant was born on February 9, 2010.
24. PW6 recalled that on April 3, 2013 at about 4.00 pm she was on her way to the shop and she saw a crowd and heard them saying that child M W, had been defiled by the Gichege. she took the child and looked at her private parts and noticed there was blood on her vagina.
 25. On cross examination, she clarified that she was going to the shop when she noticed a crowd and on listening to what was being said she heard that the child had been defiled. She testified that she knew the child and she checked her private parts and noticed bruising and blood in her private parts.
 26. PW 7 was PC Mwasamani Nzau No xxxx attached to Kangema police station and the Investigating officer on the case. He recalled that on April 4, 2013 at about 6.00 pm he was assigned the subject case. The accused was in custody at the AP office then. He recorded the statement of the girl who was accompanied by her mother.
 27. PW8 recalled that on April 3, 2013 at about 4 pm he was on duty when three women with a girl came to report that the complainant had been defiled by one Gichege Wanjiku. They booked the report and they were referred to kiruri dispensary. At about 11pm, he arrested the Appellant in his house whom he found packing his items in an attempt to get away.
 28. On being put in his defence the Appellant told the court that on April 3, 2013, he woke up and prepared for work. That a lady called Wamboi who is their neighbor came and asked for money. He gave her the money. He testified that he came back home at 4.15 pm and that later at about 7 pm the same wamboi came back with some children. He further testified that at 11 pm an officer came to inform him that he had been charged with the offense of defiling a 3-year-old girl. He asked to be examined but the police refused and he was escorted to Kangema police station.
 29. On cross examination, he confirmed that Wambui Risper (PW4) was her neighbor. That the complainant is among the 3 children who accompanied the Adults to his house that evening. He stated that PW4 had been his neighbor for 5 months and the daughter was DW (PW2) whom he could recall had testified. He told the court that that he and PW4 belonged to the same clan. He testified that he had no previous disagreement with her.

Determination

30. This is a first Appeal and the role of this court is to relook at the Evidence, do its own evaluation and arrived at its own independent finding. (see *Oneko vs Republic(1972) EA 72*
31. In my view the following issues lend themselves for determination:
 - a). Whether the charge of defilement was proved
 - b). Whether there were contradictions and inconsistencies in the prosecution's case
 - c). Whether the Accused defence was considered
 - d). Whether the sentence was too excessive.

Whether defilement was proved

32. The ingredients that make up the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.



33. The complainant's mother (PW3) testified that the complainant was aged three years old and produced a birth Notification in support of her assertion. The complainant was therefore a child within the context of the children's Act and for purposes of section 8(1) and 8(2) of the Sexual Offences Act, age was proved.
34. The identity of the Appellant herein is not in dispute. Nevertheless, Pw2 and PW4 testified that she very well knew the Appellant prior to the incident. PW4 stated that the Appellant was their neighbor and known to them. It was PW2 evidence that she saw the Appellant take the complainant to his house and locked the house. She was firm that upon seeing that she told her mother, PW4 who went and peeped through the wooden wall and saw the complainant and the Appellant in bed. The Appellant himself admitted that PW2 and PW4 were his neighbours and that PW4 and him belonged to the same clan. PW4 told the court that the Appellant emerged from the house holding the child. The incident herein took place in broad day light and there could have been no room for any mistaken identification. This was therefore a case of identification by recognition.
Am satisfied that the Appellant was positively identified.
35. On the issue of penetration, the clinician, who examined the complainant found that there was dried up discharge and secretion on the labia minora. That there were reddened areas with a degree of penetration in her vagina and laceration, the hymen was broken. That there was no blood in the vagina but dried discharge. He concluded that there had been penetration. The clinical findings on examination are consistent with the testimony of PW4 and PW5.
36. In view of the foregoing , am satisfied that the all the ingredients of the charge of defilement were proved beyond reasonable doubt

Whether there were inconsistencies and contradictions on the prosecution's case.

37. The Appellant submitted that there were several contradictions in the evidence of the witnesses. The contradictions that the Appellant has referred is to the question of whether the complainant had blood in her genitals and whether or not she was crying when she left the complainant's house.
38. The way to treat contradictions in a case is as was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twabangane Alfred -Vs- Uganda CR Appeal No 139 of 2002 (2003) UGCA,6 where it was held that 'with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained, will usually but not necessarily, lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case'.
39. Both contradictions in my view were immaterial. The conviction was founded on the medical evidence of defilement and the testimony of PW2, PW4 and PW5

Whether the Accused defence was considered

40. The record shows that the Appellant 's defence was indeed considered, only that the trial court was not satisfied with it.

Sentencing.

41. The Appellant was charged under Section 8(1) as read with section 8(2) of the Sexual Offences Act. The section provides as follows:



- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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.
42. The Act provides for a minimum sentence of life imprisonment if one is convicted for the offence of defilement under section 8(2). The Sentence is not illegal, as it is founded on law. The Appellant has relied on the case of Edwin Wachira & others vs Republic(2022)e KLR to make a case for a lesser sentence. The finding in Edwin Wachira's case (supra) borrows its reasoning in Muruatetu case (Francis Muruatetu & Ano vs Republic, Supreme Court petition No 15 &16 (consolidated). However, the Supreme Court in Muruatetu case (supra) was unequivocal on the application of their finding. It stated:'We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.'

In conclusion , the Appeal fails on all grounds and it is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY 2023.

S. CHIRCHIR

In the presence of:

Susan- Court Assistant

Appellant- present

Ms. Muriu for the Respondent

