



REPUBLIC OF KENYA



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**Kabaru v Republic (Criminal Appeal 41 of 2022)
[2023] KEHC 21644 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 41 OF 2022
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

STEPHEN MWANGI KABARU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. V. Ochanda
SRM at the chief Magistrate's court Muranga S O No.4 of 2020)*

JUDGMENT

1. The Appellant herein seeks to quash the conviction and sentence in Murang'a SRM SO Case 4 of 2020 where he was charged and convicted for the offence of sexual assault and defilement of a 6 year old girl contrary to Section 5 (1) (a)(i)(2) and section 8 (1) as read with section 8 (2) respectively of the [Sexual Offences Act](#) No. 3 of 2006 (The Act) and sentenced to life imprisonment.
2. On count 1 particulars of the offence were that on the 28th day of January, 2019 in Kiharu District within Murang'a County, unlawfully and intentionally used his fingers to penetrate the anus of S.W.C a child aged six years.
3. On count 2, he was charged with defilement contrary to section 8 (1) as read with section 8(2) of the [Act](#). The particulars of the offence were that on the 28th day of January 2019, in Kiharu District within Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of S.W.C a child aged six years.
4. He was charged with an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the [sexual offences Act](#) no. 3 of 2006.
5. After a full trial, the Appellant was convicted on both counts. He was sentenced to 20 years in on count 1 and life imprisonment on count 2.



6. He was aggrieved by the Judgment and has proffered this appeal against both the conviction and sentence.

Grounds of Appeal.

7. The Appellant has set out the following grounds of Appeal:
 - a). That the learned trial magistrate erred in law and fact by not noticing that the prosecution did not prove their case beyond a shadow of doubt.
 - b). failing to consider the defence case contrary to natural justice
 - c). That the trial magistrate erred in law and fact in admitting uncorroborated evidence which was marred with a lot of falsehood, mere inferences and conjecture without credible evidence proving the guilt of the accused person.
 - d). That the learned trial magistrate erred in law and fact by convicting the appellant while the prosecution case was poorly investigated and based on circumstantial evidence and suspicion.
 - e). That the learned trial magistrate erred in law and fact by misdirecting herself to refer on her judgment to persons who were alleged eye witnesses but were not procured as prosecution witnesses.
 - f). That the learned trial magistrate erred in law and facts by disregarding the facts raised in the appellant's defence that all the statements by the prosecution witnesses were based on hearsay as the prosecution did not bring all the alleged eye witness as a witnesses in the case.
 - g). That the trial magistrate erred in law and fact by convicting and sentencing the appellant without considering the facts of the case and the law provisions especially the P3 form produced by PW4 shown that there was nothing abnormal on examination of PW1.
 - h). That the learned trial magistrate erred in law and fact by misdirecting himself and convicting the appellant based on the purported evidence of two persons who were never eye witnesses.
 - i). That the trial magistrate erred in law and fact by not noticing that there existed a vendetta between the family of the complainant and the accused person.
 - j). That the trial magistrate erred in law and fact by sentencing the appellant to the unconstitutional life sentence.

Appellant's submissions

8. On the issue of identification, it is the Appellant's submission that the complainant was not asked to identify the Appellant before being arrested; that the name she gave conflicted with that of the person who was eventually arrested; that the rest of the witnesses simply gave the out the name as given to them by the complainant. In view of these contradictions, the Appellant submits, an identification parade ought to have been conducted.
9. The Appellant further points out that none of the witnesses knew the Appellant before the arrest.
10. It is the Appellant's further submissions that a crucial witness going by the name Fatuma Mwangi was never called to testify and asserts that Fatuma's evidence would have been unfavourable to the prosecution. The Appellant further asserts that the court should have taken the initiative to call the said Fatuma .



11. On the issue of penetration, it is submitted that the evidence of the clinical officer did not prove any penetration.
12. The Appellant argues that the defence of Alibi given by DW2 should have been countered by an eye-witness and that for this purpose, he argues, the complainant was not an eye-witness.
13. It is the Appellant's final submission that the court failed to consider his submissions and the court failed to appreciate that the sentence for the offence was not mandatory.
14. The Appellant has relied on several Authorities which I have perused.

Respondent's submissions

15. On the question of identification, the Respondent submits that the identification parade was not necessary as the evidence of the complainant, PW2 and PW3 point to recognition and not identification. The prosecution refers to the complainant's part of her testimony where she stated " I can see the accused, he is called stephen mwangi" and she maintained the same position during cross-examination. The Respondent further submits that identification is not just about names. The prosecution counsel invited the court to look at the evidence in totality including the evidence to the fact that the child would react with fear whenever she could see the Appellant.
16. On the prosecution's failure to call Fatuma, the respondent has relied on section 143 of the [Evidence Act](#) and submits that what is only required of them is to call such number of witnesses as are necessary to prove a fact and that the witnesses called were sufficient in proving the offence of defilement.
17. On the alleged acquittal of Fatuma in sexual offences case No. 3 of 2020, the respondent submits that, without the benefit of the proceedings in the said case, the reasons for her acquittal remain unknown.
18. On whether there was penetration, the respondent's response is that the fact that the medical examination was done 11 days later should explain the "normal" condition of the complainant's genitals but insist that the evidence of the clinical officer was that defilement had occurred.
19. It is further submitted that medical evidence is not necessary to prove penetration. They have relied on the case of [Daniel Kaberu vs. Republic](#) (2021) eKLR and [Mark Oiruri Mose vs. R](#) (2013) eKLR and [Geoffrey Kioji vs. Republic](#) NYR Crim. App. No 270 of 2010 (UR) in this regard
20. On the defence of alibi, the Respondent submits that it came at the tail -end of the hearing and the prosecution was not given a chance to interrogate, and thus the trial court was justified in dismissing it.
21. On the sentence, the prosecution submits that the age of the child was an aggravating factor, and that the sentence was appropriate not only in the interest of justice but also the best interest of the child.

Evidence in summary

22. PW1 was the complainant. She told the court that she could see the accused in court. She referred to him as steve mwangi. That she has seen him 30 times; that she started seeing him from November 10th. She told the court that on 28/12/19 somebody wronged her. He slept on her, from behind he put that thing of his inside her mouth, that thing he uses when he goes to urinate.; he put it in front and on the back. she was in his house, she was with a girl, she went with Fatuma. It was the first time for him to do that to her. She would go to the house alone or with Fatuma . He would buy him chips or sweets. Fatuma could get outside the house. The house had chairs, water and table. He did that to her on a mattress. His house was one room. She told her mother. She was born on 28th may 2013. she stated that she could see the person who wronged her in court. She stated, "there he is".



23. On cross- examination, she stated that the defilement took place at a place called Gym; That the house is close to the gym, it is on a first floor, that there were about 5 houses there. She stated that it was the first time for her to go to the house. That Fatuma was her friend; they entered the house and found steve. She did not know steve before. She did not tell her parents what happened. she had been threatened by Fatuma and steve that if she said anything, she will be killed. She told wambui; that she had been defiled severally. She got to know the Appellant's name the 2nd time. That wambui went and told Joy, and Joy told her mother. That she told the police that she was defiled by steve and denied ever giving out the name Kevin.
24. PW2, was the mother of the complainant. she testified that on 4/1/2020 a girl she had been staying with in her house reported that the complainant and Fatuma had been going to the Appellant's house.; that they referred to him as "uncle wa chipo" .
25. That evening she interrogated the complainant. The complainant admitted that she and her friend go to the Appellant's house; that he touches their private parts; that he removes her trouser; he lays her on her back, spreads her legs and puts his penis inside her vagina. The complainant further told her that this had happened severally. The complainant reported that the last incident took place on 28/12/2019.
26. On 6/1/2020 she took the complainant to hospital. The doctor examined her and told her the child had been defiled. She further told the court that the complainant was born on 28/5/2013. she produced the birth certificate. The complainant reported that the person who had been defiling her was called mwangi.
27. She decided to investigate. The complainant explained to her where the Appellant's house was, so she sent her friend to go with the complainant for her to point out the house. She further told the court that she first saw the Appellant when he was arrested. The police asked her to take the child and the child identified him.
28. On cross examination, she stated that when she recorded her statement, the 1st time, the child identified the perpetrator as Kevin "uncle wa chipo" but on further interrogation by the police, she told the police that it was Mwangi. She stated that she learnt of the incident on 4/1/2020, but she reported it on 6/1/2020 and that the doctors were not available over the weekend. She testified that she identified the Appellant's house, it was next to a gym. She went to the house but found no one. She stated that she knew the accused as Stephen but the first time, the complainant gave her the name Kevin. That she did her own investigations, she went along with the child. The child showed her where she used to be taken. She saw the Appellant come out of the same house.
29. On re-examination she told the court that when the Appellant was arrested, the child was the only one who was called in by the police to identify the Appellant.
30. PW3, was the elder sister to the complainant. She told the court that on 4/1/2020, they had gone to the hotel for breakfast when she asked the complaint who "uncle wa Chipo" was since she had mentioned him severally. She had noticed that the complainant had been coming home with chips and on being questioned she will say that Fatuma had given her; that Fatuma was being given money by her friend and the friend was kevin. When she asked her if "the kevin" had done bad things to her, she started panicking to the extent of the bread falling from her hand. she moved to hold her and decided not to question her further.
31. The same week she went to the named gym, with the complainant. she sat around chatting with her friends inside the gym. The complainant pointed out to her the house she had been going. The door was open. She instructed the complainant to tell her if she happen to see any person leaving the house. A



man walked out of the house and when she asked her if that was the man, she tensed up and pretended not to know him. They went home. The next day she met the same man. The description given by the child was “a tall man with big backside”. A tailor told her where the man works, when she went to the place with the complainant she found him there. the complainant was again tense when she saws the man. she then told the court that she had seen the Appellant twice before he saw him in court.

32. On cross- examination, she told the court that she started questioning the complainant about “uncle wa chipo” when she noticed that she was frequently coming home with chips. That the chips were being bought by Fatuma after the said Fatuma was given money by her friend and she gave the name as kevin mwangi. She gave the description of the Appellant’s house. That when the complainant saw the Appellant she did not say he is the one but the child only tensed up.
33. PW3 was the clinical officer. He told the court that he examined the complainant on 28/12/2019. The genitalia were normal, no laceration, no bleeding, no signs of fresh defilement. He formed the opinion that she could have been defiled before. The hymen was broken.
34. On cross- examination, he told the court that examination was done 11 days later, that the P3 form reads 28/12/2019 but examination was done on 7/1/2020.
35. PW5 was the investigations officer. She told the court that when she interrogated the child, she mentioned that Fatuma used to take her to the Appellants house. She looked for Fatuma and located her at Nyakahura secondary school. Fatuma admitted to know the minor but denied knowing the Appellant. Later Fatuma sought leave from school and went and assaulted the minor. She produced leave out sheets from Fatuma’s school.
36. On cross- examination, she stated that the child was not present when the Appellant was arrested. The complainant had provided the description, as being medium tall and fair in complexion. She admits that there was no identification parade; that when the minor was asked if he knew the Appellant she said he was “uncle wa chipo”
37. The Appellant was put on his defence at the close of the prosecution’s case. He testified on oath that on 28/12/2019 he was at work from 2am all the way to 6pm. He stated that he also worked throughout the lunch break. He denied committing the offence or knowing the minor.
38. On cross- examination he told the court that they do not normally sign in at work.
39. PW2 was the Appellant’s colleague. She told the court that the Appellant was at work from 7a.m to 6 pm on that day.

Analysis and determination

40. This is the first Appeal and the role of this court role is to consider the evidence tendered afresh, make its own analysis of the said evidence and arrive at its own conclusion (see *Okeno vs Republic* (1972) EA 32)
41. The following issues arise for determination in this Appeal:
 - a). whether the charges of defilement and sexual Assault were proved
 - b). whether failure to summon one Fatuma wanjeri was fatal to the prosecution’s case
 - c). Whether the defence of Alibi was considered
 - d). whether the sentence excessive and lawful in any event.



Whether the charge of defilement and sexual Assault were proved

42. The ingredients that form an offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.
43. The age of the complainant was not an issue during trial or in this Appeal and therefore there is no need to delve into it. It suffices to state that the birth certificate of the complainant was produced in evidence. There is no dispute therefore that the complainant was 6 years old during the time of the incident.
44. On identification the appellant's contention is that while PW2 and PW3 identified the Appellant as Kevin maina, the person who was charged was Stephen Mwangi; that no identification parade was conducted and that the minor was not present at the time of the arrest to identify him as the perpetrator.
45. The issue of identification came out in the evidence of PW1, PW2, PW3 and PW5. The complainant told the court that the Appellant was steve mwangi. She denied that she knew any one by the name kevin. PW2 told the court that PW1 initially told her it was "kevin wa chipo" but when she came from the hospital the child referred to him as mwangi. PW3 told the court that PW1 told her that the person was called kevin mwangi PW5 the investigations officer told the court that they arrested the Appellant based on the description given by the child; that the accused was brought to where the child was and the child identified him as "uncle wa chipo". Thus, the identification of the Appellant was by the complainant. She may have referred to him as kevin instead of Stephen but she consistently referred to him as "uncle wa chipo" which to my understanding is the sheng version of "the uncle who supplies chips/ French fries". PW3 had seen those chips a number of times to arouse her curiosity. Also, at the police station when the complainant was brought in to identify the Appellant, according to the investigation's officer, she identified him as "uncle wa chipo"
46. The complainant knew the Appellant's Residence as she was able to take PW3 there. The description of the location of the Appellant's house as given by the complainant was fairly consistent with what was given by PW3. PW3 took the complainant to the place and she pointed at a particular door. PW3 instructed her to tell her if any one exits from the said door. when a man emerged from the said house the child tensed up. PW3 told the court that when the man emerged, the child did not say whether the man was the perpetrator but her body language spoke, she tensed up. The complainant's reluctance to pinpoint the Appellant to PW3 is understandable, when considered against the threats she had received from Fatuma and the "uncle wa chipo", as narrated to the court.
47. It was a similar tense reaction that PW3 had noticed from the complainant earlier when she had asked her whether she had been defiled. It is instructive that PW3's testimony in this regard was not contested at cross- examination.
48. PW1, PW2, PW3, were consistent in that the Appellant's house was near a gym.
49. I do not consider the variation in names as significant. This was a 6-year-old child, and such confusion in the names may happen. What is significant is the fact that a witness is able to identify the perpetrator of a crime. In any case the name "uncle wa chipo" stuck with the child. She consistently referred to him by the name
50. Thus, identification was by recognition and in which case the identification parade would have served no purpose.
51. On the issue of penetration, the clinician (pw4) told the court that the hymen was broken, but not freshly. It was also his evidence that there were signs of penetration, again not freshly. The hymen



was not intact and the remnants were old. Since the complainant was examined 11 days after the incident occurred, any bruises or lacerations would have obviously by then healed and the tears in her hymen could not be fresh. The medical evidence of the old hymenal tears corroborated the element of penetration as narrated by the complainant.

52. Further section 124 of the *Evidence Act* allows the court to convict on the uncorroborated evidence of a child of tender years so long as the court records the reason for believing that the child is telling the truth. In this case, the complainant told the court that she had been to the house many times with Fatuma. On cross-examination, she told the court that she had been defiled severally. Other relevant portions of her testimony went as follows:” he slept on me, from behind. He put that thing of his inside my mouth. That thing he uses when he goes to urinate. He put it in the front and back. I use the front for urinating and back for big haja (stool). The complainant’s testimony in this regard was simple, straightforward and was never shaken in cross-examination. I have no reason not to believe her.
53. In view of the foregoing it is my finding that penetration was proved.
54. Thus, the all the ingredients of defilement were proved. The complainant also told the court that the Appellant put his penis in her mouth and her anus. Facts which were not contested. I do therefore find that the charge of sexual assault was equally proved

Failure to call essential witness

55. Another issue raised by the Appellant is that the Prosecution failed to call Fatuma, the girl who was consistently mentioned by the complainant. Section 143 of *Evidence Act*, provides as follows:-

143. Number of Witnesses

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.

56. In the Court of Appeal case of *Keter v Republic* [2007] 1 EA 135, Bosire, Githinji and Onyango-Otieno JJA held as follows:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

57. In the instant case, the evidence of PW1, the complainant was corroborated by the evidence of PW2, Pw3 and that of PW4, the clinical officer and the investigating officer was sufficient to prove beyond reasonable doubt that the Appellant committed the offence of defilement and assault.

58. The upshot of all the foregoing it is my finding that the charge of defilement and sexual assault were proved beyond reasonable doubt.

Whether the defence of alibi considered.

59. The trial court did indeed consider this piece of evidence. The Appellant’s defence was that he had been at work. He did not provide any proof, save the testimony of his colleague. In the case of *Rvs Sukha singh & others* (1939) 6 EACA 145 cited with approval in the case of *Republic vs GNK* (2017) e KLR it was held as follows:” If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has been preparing it in the interval, and secondly, if he brings it forward at the earliest, possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.” The Respondent complain is that the defence was being raised at the tail end of trial. The Appellant’s



submission was that that defence ought to have been rebutted by an eye- witness. He goes on state, without providing any reason for his assertion, that the complainant was not an eye- witness. In my view the totality of the evidence dislodges the Appellant’s defence of Alibi.

Sentencing.

60. The Appellant was convicted and sentenced to 20 years on the 1st count and life imprisonment on the second count. I uphold the sentence of 20 years on the 1st count as I have not found any reason to fault the trial court in meting out that sentence as to entitle me to interfere with it.
61. As for the 2nd count, the Court of Appeal in its recent decision in the *Julius Kitsao Manyeso vs Republic*, Malindi Criminal Appeal No. 12 of 2021 declared life sentence as unconstitutional.
62. Consequently, I hereby set aside life sentence meted by the trial court
63. In mitigation, the Appellant told the court that he was a young man of 24 years, sole bread winner of his family, he is taking care of his family and he was a first offender. Being a first offender is a mitigating factor. However, I also take note of the fact that the victim herein was a young child of 6 years at the time of the incident. The trauma she underwent was already evident from the testimony of PW3.
64. Considering the mitigating and aggravating factors as aforesaid, I hereby sentence the Appellant to 50 years in prison on the 2nd count.
65. In conclusion am satisfied that the Appellant was properly convicted and the conviction is upheld.
66. The Appellant is hereby sentenced to 20 years in prison on the first count and 50 years on the second count. The sentences will run concurrently, from the date of conviction at the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023.

S. CHIRCHIR

JUDGE

In the presence of :

Appellant- in person

Ms. Muriu for the Respondent.

