



REPUBLIC OF KENYA



**Mwasura v Republic (Criminal Appeal E103 of 2021)
[2023] KEHC 22799 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E103 OF 2021
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

BENJAMIN SHIKUKU MWASURA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate's
court at Gatundu in Criminal case no. 25 of 2020)*

JUDGMENT

1. The genesis of the appeal is on the conviction and sentence of the appellant in Gatundu Criminal Case No. 25 of 2020. The appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars were that on the 1st day of March 2020, at [particulars withheld] village in Gatundu North Sub-County, within Kiambu County, the accused person intentionally and unlawfully did an act which caused penetration with his genital organs into the genital organs of a child namely J.M a child aged 14 years.
2. The accused also faced an alternative count of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* particularized that on the 1st day of March 2020, at [particulars withheld] village in Gatundu North Sub-County, within Kiambu County, the accused person intentionally and unlawfully touched the buttocks and vagina of J. M a child aged 14 years.
3. The appellant denied the charges, which lead to the full trial and the prosecution called 5 witnesses in support of its case. At the close of the prosecution case the trial magistrate found a *prima facie* case had been established and placed the appellant on his defence.



4. At the end of the trial, the trial magistrate convicted the appellant in count 1 and acquitted him on the alternative count. After considering the appellant's mitigation the trial magistrate sentenced the appellant to 20 years imprisonment.
5. Dissatisfied by the trial magistrate's judgment, the appellant filed the instant appeal challenging both the conviction and sentence, he pleaded for a lenient sentence.
6. The appeal was heard by way of submissions, in which both parties filed submissions.

Appellant's submissions

7. The appellant in a rebuttal of the respondent's submissions contended that the prosecution failed to prove the elements of defilement to wit penetration, age and identification. The evidence of the complainant was not credible, and the prosecution failed to adduce exhibits supporting its case. The medical report fails to record the time and scenes where the offence was committed.
8. According to the appellant the prosecution witnesses were coached in a manner to fix him. The appellant contends the trial magistrate erred in discarding the appellant's defence which was to exonerate him from the charge.
9. The appellant states the trial court proceedings are full of doubt that qualifies the case to remain unproved to the required standard. That the prosecution failed to adduce a watertight case that incriminates the appellant.
10. In conclusion, the appellant urged the court to allow the appeal and review the sentence of the trial magistrate.

Respondent's submissions

11. In opposing the appeal, the state counsel submitted that the prosecution proved the elements of defilement against the appellants beyond a reasonable doubt. The victim (Pw1) testified she was 14 years at the time of the commission of the offence, the same was corroborated by Pw5 who adduced the birth certificate which indicated the victim was born on 13th December 2006.
12. The second ingredient of penetration was proved by the victim and corroborated by the medical evidence in the P3 form, PRC form and treatment cards produced by Pw4. As well as the DNA produced by Pw3, which confirmed the appellant as the father to the child born by the victim.
13. The appellant was well known to the victim as he was his father and were living in the same house. Pw1 was rescued from the appellant's house in Bungoma by Pw5 where they lived as husband and wife.
14. Counsel submitted the sentence of 20 years meted on the appellant is within the law and the trial magistrate did not act on the wrong principles. Counsel urged the court to affirm the conviction and sentence and dismiss the appeal.

Analysis of the trial court evidence

15. The duty of the first appellate court is to re-evaluate and re-analyse the evidence tendered in the trial court. I will first analyse the trial court evidence.
16. Pw1 - JM testified she was born on 13th December 2006 and was aged 15years. That the accused is her father. In March 2020 she went with the accused to his home in Bungoma. The accused married her for 3 weeks. They had sex often and she got pregnant. She discovered she was pregnant in May 2020. She delivered on 25th January 2021. Her mother discovered her pregnancy later.



17. In cross-examination she told the court she did not love the accused as she did not understand anything. She denied lying about her age. She denied having been coached to lie by her mother. She told the court she did not want to get married as she was still in school.
18. Pw2 - GK testified she lives in Muchakai. She is a mother of two and picks tea as a livelihood. The accused is her ex-husband while the victim is her child aged 15 years. She met the accused in 2019 and they were together only for a year. She only got to know of the affair after the girl eloped with the accused.
19. Pw3 - JK the government analyst produced the DNA report. She confirmed the results of the appellant and the child Blessing matched at 99.97 per cent. The results confirm the accused is the father of the child.
20. Pw4, the doctor from Igegania Level 4 Hospital filled the P3 form on 6th July 2020. There was a history of defilement. That the girl had been rescued from the accused home where she was living as a wife. On examination, the child was found she was pregnant. The hymen was broken and the vaginal walls and orifice were open.
21. Pw5 - PC Erickson Gesore testified he was the investigating officer. The defilement case was reported on 24th June 2020. The accused was a father to the complainant who took advantage of his position and defiled the complainant. The complainant was a student at [particulars withheld] Secondary School. The accused eloped with the victim to his rural home and would defile the complainant and she got pregnant. They were both traced in Bungoma where the accused was arrested and the victim taken to hospital. She was treated and P3 filled. She was found to be pregnant. Pw5 adduced the victim's birth certificate.
22. The accused in the lower court gave an unsworn statement, he denied committing the offence. He told the court he was a manager and hired the complainant's mother and when she was due for transfer to Kanyoni the complainant's mother indicated she was not available but the complainant was. He went to Kanyoni with the complainant where she was working and they became friends. That she would occasionally visit him in his house. Later the complainant told him she was pregnant and was afraid to tell the mother. The accused said he promised to marry her. They travelled to Bungoma and lived as husband and wife. He agreed the baby was his and that he thought the complainant was an adult as even in her clinic card she had stated she was 19 years.

Determination

23. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment. Having re-evaluated and assessed the trial court's evidence, this court is obligated to make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. (See *Okeno v Republic* [1972] EA 32).
24. The issues for determination in this appeal are:
 - i. Whether the prosecution proved its case to the required standard.
 - ii. Whether the sentence meted is proper.
25. According to Section 8 (1) of the *Sexual Offences Act* the prosecution must prove beyond a reasonable doubt the following ingredients of the offence of defilement:
 - i. Age of complainant
 - ii. Prove penetration



- iii. Positive identification of assailant.
26. In the instant case, the victim testified she was aged 15 years at the time of the commission of the crime, the age of the victim was proved by the mother and corroborated by the birth certificate which shows the victim was born on 13th December 2006. From the evidence, it is clear the victim was 14 years at the time of the commission of the offence. The age of the victim was therefore proved by the prosecution beyond a reasonable doubt.
27. On the issue of penetration, it was the victim's case that she eloped with the appellant and they were living together as husband and wife before she was rescued in Bungoma. The appellant submitted that he while a manager at Kanyoni he worked with the victim before a relationship ensued between them and they moved in and were staying together as husband and wife. The appellant he denied the victim was a minor and that she conducted herself as an adult. The DNA samples taken from the appellant prove that he is the father of the child born by the victim. The evidence by the prosecution leaves no doubt that there was penetration by the appellant.
28. On the issue of identification, the complaint told the trial court the assailant was his father and they had lived together. The evidence was corroborated by Pw2 the mother of the victim. The appellant was well known to the victim and they lived together. The appellant did not object to the identification by the victim.
29. The defence by the appellant that the victim conducted herself as an adult does not hold water. The appellant lived with the victim, he was the father to the victim and was entrusted to protect and care for the victim. He however opted to elope with the minor who was school-going. The appellant cannot, therefore, claim to not know the age of the minor. I find the defence of the appellant and the submissions herein to be an afterthought.
30. In the upshot, therefore, this court finds that the prosecution proved its case beyond a reasonable doubt. The appeal on conviction is therefore dismissed.
31. On the issue of sentencing, Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* provides:
- “8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- 8(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.
32. The appellant argues the sentence is excessive. The Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR stated as follows:
- “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that 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 a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”



33. This court considers the seriousness of the offence and the fact that the accused defiled a child whom he was entrusted to protect by virtue of being the father, but instead eloped with her to his rural home and married her. In the circumstances, therefore, this court is not persuaded to alter the sentence. The is that the sentence of 20 years imprisonment is not excessive and is upheld.
34. I have perused the trial court file and note that the trial magistrate did not mention as to whether the pre- conviction period was considered as per Section 333(2) of the Criminal Procedure Code which provides:
- (2) Subject to the provisions of section 38 of the Penal Code 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.
35. Further, the Judiciary Sentencing Policy Guidelines [2014] also provides guidance on this as follows:
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
36. The appellant was arrested on 5th July 2020 and was in custody throughout the period of trial.
37. Final Orders
- i. The appeal lacks merit and dismissed.
 - ii. Trial court’s conviction and sentence upheld
 - iii. The prison sentence imposed will be effective from the date of the appellant arrest that is 5th July 2020.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

P.M. MULWA

JUDGE

In the presence of:

Kinyua/ Duale – Court assistants

Appellant – present (virtually from Kamiti Maximum)

Mr. Gacharia - for the State/Respondent

