



**Mutai v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 25848 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E002 OF 2022
F GIKONYO, J
NOVEMBER 23, 2023**

BETWEEN

DAVID KIPROTICH MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. A.N. Sisenda
(R.M) in Narok SOA No. 46 of 2018 on 13th January 2022)*

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve life imprisonment for the defilement of a 9-year-old girl.
2. Being dissatisfied with the said conviction and sentence he preferred this appeal vide the memorandum of appeal dated 15.02.2022 and received in court on even date. The appellant filed amended memo of appeal under section 350(2)(iv) of the Criminal Procedure Code- received in court on 05.04.2023- setting out the following grounds of appeal;
 - i. That penetration was not conclusively proved.
 - ii. That there are glaring gaps in the prosecution case.
 - iii. That crucial witnesses were not called.
 - iv. That trial court merely dismissed the defence of the appellant without weighing it against the gaps by the prosecution.
 - v. That the sentence is too harsh and excessive.



Brief Background

3. The appellant was charged with an offence of defilement contrary to section 8(1) as read with section 8(2) of the [sexual offences act](#) no. 3 of 2006.
4. The particulars of the offence were that on 29.05.2018 at around 1600hrs in Narok south sub-county within Narok county intentionally and unlawfully caused his penis to penetrate the vagina of AC aged 9 years.
5. On the alternative the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#).
6. The particulars were that on the said material date the appellant intentionally and unlawfully touched the vagina of AC aged 9 years with his penis.
7. The appellant was found guilty of the offence and was convicted to serve life imprisonment.

Directions of the Court.

8. The appeal was canvassed by way of written submissions. Both parties have filed submissions.

Appellant's Submissions.

9. The appellant submitted that there is no hard evidence to show that there was penetration. The documents did not give an impression of defilement. The P3 showed that the hymen was intact. The appellant relied on the cases of [John Munyoki v Republic](#) [2017] eKLR., [Ogola V Republic](#) (Criminal Appeal No. 135 of 2017) [2013] KECA 39(KLR) 3 February 2023) (judgment) neutral citation: [2023] KECA 39 (KLR).
10. The appellant submitted that the P3 that was relied on was faulty. It is purported to have been filled at Ololulunga while the rubber stamp bears the Narok Referral Hospital name. The clinical officer who testified was working at Narok Referral Hospital. OCS Ololulunga sent the victim to MOH Ololulunga district on 30.05.2018 under the escort of the police officer but the name of the police officer is missing in the P3 form. PW1 testified that she was taken to a hospital in Megenyio. PW2 testified that they took PW1 to the Omegenyo clinic. It is not clear whether PW1 was treated at Ololulunga or Narok Hospital. The appellant contends that Section 77 of the [Evidence Act](#) and Article 25(c), 50(4) of the [Constitution](#) were contravened. The appellant relied on the case of [Green v United States](#), 355 US 184, 187-188(1957).
11. The appellant submitted that Shadrack Kimutai and the investigating officer who were crucial witnesses were never called to testify. Shadrack Kimutai was said to be present during the ordeal. The appellant relied on the case of [Ogola v Republic](#) (Criminal Appeal No. 135 of 2017) [2013] KECA 39(KLR) 3 February 2023) (judgment) neutral citation: [2023] KECA 39 (KLR).
12. The appellant submitted that due to the gaps in the prosecution case, the court could have analyzed the evidence in totality and gotten to the bottom line of the prosecution case. The appellant relied on the cases of the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013-[Public Prosecution v Zainal Abidin B. Maidin & Another, Joseph Ndungu Kagiri v Republic](#) High Court Criminal Appeal No. 69 of 2012, Nyeri; [Rattiram v State of M.P.](#) [2012] 4SCC 516.
13. The appellant submitted that in the court's view, the court does not have discretion in awarding an appropriate sentence other than the prescribed one. The appellant relied on the case of [Mwangi v Republic](#) (criminal appeal 84 of 2015) [2012] KECA 1106 (KLR) (7 October 2022) (Judgement) the



court of appeal, *Wilson Kipchichir Koskei v Republic* [2019] eKLR, *Baragoi Rotiken v Republic* [2022] eKLR.

The Respondent's Submissions.

14. The respondent submitted that to secure a conviction on a charge of defilement, the prosecution must prove all the three elements of defilement as set out in section 2 of the *Sexual Offences Act* and as highlighted in the case of *George Opondo Olunga v Republic* [2016] eKLR.
15. The respondent submitted that the age of the victim was proved during the trial and it was never disputed at all. PW5 a clinical officer produced an age assessment report (P Exh6) which confirmed that the victim was aged 9 years at the time of the ordeal. The respondent relied on the cases of *Fappyton Mutuku Ngui v Republic* [2012] eKLR, and *Nabayo Syprian v Republic* [2016] eKLR.
16. The respondent submitted that the issue of penetration was proven beyond reasonable doubt at trial. PW1 stated that she met the appellant on her way home from school when he asked her to greet him before he lifted her and took her to a nearby fence. He lifted her dress and pushed her panty to the side and did 'tabia mbaya' to her. That he put his penis into her body. She went ahead to point at her groin a fact that was noted by the court. PW5 a clinical officer noted that though her hymen was intact, she had bruises on the vaginal opening which was an indicator that there was superficial penetration. The appellant relied on the cases of *Muganga Chilejo Saba v R*, Criminal Appeal No.28 of 2016[2017] eKLR, *Mark Oiruri Mose v R* [2013] eKLR.
17. The respondent submitted that the prosecution did prove the identity of the appellant beyond reasonable doubt and therefore this could not be a case of mistaken identity. PW1 stated she knew the appellant as her neighbor. PW2 the victim's mother corroborated this evidence when she stated in her testimony that she knew the appellant as their neighbor. The appellant in his evidence confirmed that he was PW1's neighbor but that he did not harm her.
18. The respondent submitted that there is nothing to show that the prosecution had any oblique motive in calling the witnesses who testified against the appellant. The respondent relied on the case of *Julius Kalewa Mutunga v Republic*.
19. The respondent submitted that the sentence given was within the law. The appellant was sentenced to life imprisonment by the court considering his mitigation factors and the impact of the heinous act on the victim as well as her tender age. The respondent relied on section (2) of the *Sexual Offences Act*.
20. In the end, the respondent submitted that the case was proven beyond reasonable doubt. The trial magistrate did not err in conviction and sentence as the evidence adduced was solid. The respondent prayed that this appeal be dismissed in its entirety and that the conviction and sentence be upheld as it is within the law.

Analysis And Determination.

Court's Duty

21. As first appellate court will re-evaluate the evidence and make own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. Republic* [1972] E.A 32
22. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The main issues for determination are;
 - i. Whether the prosecution proved its case beyond a reasonable doubt.



- ii. Whether the appellant's defense was considered.
- iii. Whether the sentence was manifestly harsh and excessive.

Elements Of The Offence Of Defilement

23. Defilement is established in Section 8 (1) of the [Sexual Offences Act](#) as follows:

‘A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.’

24. The specific elements of the offence of defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:

- 1) Age of the complainant;
- 2) Penetration in accordance with Section 2(1) of the [Sexual Offences Act](#); and
- 3) The accused was the assailant.

25. See the case of *Charles Wamukoya Karani v. Republic*, Criminal Appeal No. 72 of 2013.

26. The respondent submitted that it was proved that A.C. was 9 years old, there was penetration supported by medical evidence, and the appellant was positively identified through recognition by PW1 and PW2.

27. What does the evidence portend?

Age of the Complainant

28. The trial court conducted a *voire dire* examination of PW1 and formed an opinion that the witness possessed sufficient intelligence to understand the nature of the oath and she therefore gave a sworn testimony.

29. PW1 testified that she was in class 2.

30. PW2 the mother of PW1 testified that PW1 was 9 years old. She produced a clinic card which showed that PW1 was born on 29.02.2010. The clinic card was produced as P Exh 1. She also stated that an age assessment was conducted.

31. PW5 a clinical officer produced an age assessment report (P Exh6) which indicated that PW1 was 9 years old.

32. Proof of age is not necessarily a certificate. Other evidence may be adduced to prove age ([Fappyton Mutuku Ngui v. Republic](#) [2012] eKLR).

33. Based on the evidence adduced, the court makes a finding that the age of the victim was proved to be 9 years at the material time.

Penetration

34. Section 2(1) of the [Sexual Offences Act](#) defines penetration as:

‘The partial or complete insertion of the genital organs of a person into the genital organ of another person.’



35. Penetration for purposes of the *Sexual Offences Act* was further explained in the case of *Mark Oiruri Mose v R* [2013] eKLR by the Court of Appeal as follows:
- “Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.” (Emphasis added).
36. The appellant submitted that penetration was not proved. The respondents argued that superficial or partial penetration was proved which is sufficient to found a conviction under *Sexual Offences Act*.
37. PW1 testified that the appellant did ‘tabia mbaya’ to her on his farm next to the fence. She was dressed in school uniform. He lifted her dress but did not remove her innerwear. He inserted his penis through the side into her groin. She so stated pointing at her genitals. Shadrack Kimutai who is their neighbor was weeding a shamba next to where she was with the appellant.
38. PW2 the mother of PW1 testified that she met one Shadrack Kimutai who informed her that he had witnessed a certain school girl being defiled by the appellant. PW1 told her that she met the appellant at his farm. The appellant did to her ‘tabia mbaya’. Upon inquiring further what she meant she said ‘alinioa.’ That he lifted her up, took her next to the fence, lifted her dress up, opened his trouser zip, and ‘akamuoa’. Upon examination of PW1 in the presence of the mother of the appellant, they saw whitish things on her private parts and also saw her private parts had widened. They later took PW1 to the Olmegenyo clinic where she was examined. They took the documents- to the police and the next day they went to Ololulunga Hospital and later to Ololulunga police station where the P3 form was filled.
39. PW3 APC Dennis Karisa attached to Ololulunga testified that he was previously attached to the Olmegenyo AP post. After hearing what the minor and the people who had accompanied her complained of. He referred the minor to the Olmegenyo dispensary.
40. PW4 APC Silas Kemboi was formerly attached to Olmegenyo AP Post. together with PW3, they referred the minor to Olmegenyo dispensary.
41. PW5 Benjamin Tum a clinical officer at Narok Referral Hospital. He had a P3 form from Ololulunga police station requesting for examination of the appellant. He was sent to Ololulunga sub-county hospital with allegations of defiling a minor. He filled out the P3 form on 31.05.2018. He stated that the appellant was sober and did not have injuries on his body. HIV and syphilis tests were negative and urine tests were normal. The clinical notes also indicated similar findings. He produced a p 3 form for the appellant as P Exh 1 and treatment notes as P Exh 2. He also had a P3 form for the AC. He observed that she did not have any injuries on her head, neck, thorax, abdomen and limbs. Her hymen was intact. She was tested for HIV and syphilis which was negative and urine analysis showed no spermatozoa. He filled her P3 on 31.05.2018. He produced the P3 form as P Exh3, clinical notes as P Exh4, treatment notes from Olmegenyo as P Exh5, and age assessment as P Exh6. He found there was no penetration. There were some bruises on her vulva, the region around the vaginal opening.
42. As was observed in the case of *Mark Oiruri Mose(supra)*, the perpetrator in this incident did not fully complete the sexual act during the commission of the offence. There was penetration only on the surface and evidence of some bruises on her vulva, the region around the vaginal opening support this



finding. Penetration need not be deep inside the girl's organ. It bears repeating that Section 2(1) of the *Sexual Offences Act* defines penetration as:

‘The partial or complete insertion of the genital organs of a person into the genital organ of another person.’ [Underlining mine for emphasis]

43. The evidence shows that there was partial penetration which is sufficient for purposes of the *Sexual Offences Act*. The prosecution proved to the required standard that penetration did occur of AC.
44. The appellant has challenged the p3 form stating that it is faulty. This issue of the P3 form was never raised during the trial and when PW5 testified on it. The objection does not detract from the integrity and substance of the P3 Form on the examination carried out on the victim. It is an afterthought that does not carry much weight.
45. Accordingly, it is this court's finding that the medical evidence as well as other evidence by witnesses proved penetration of the child. But by whom?

Was The Appellant The Perpetrator?

46. PW1 and PW2 confirmed that they knew the appellant as their neighbor. The incident occurred during the day. PW1 was able to see the perpetrator. PW2 testified that she was informed by Shadrack Kimutai who witnessed the incident that it was the appellant. PW1 testified that Shadrack Kimutai was weeding a shamba next to where she was with the appellant.
47. The appellant confirmed that they are neighbours with PW1 and PW2 and he knew PW1.

Whether The Appellant's Alibi Defense Was Considered

48. The appellant submitted that the trial court did not analyze his evidence.
49. It is noted from the judgment of the trial court that the appellant's alibi was considered.
50. The appellant gave unsworn testimony and did not call any witnesses. The appellant testified that he was on the farm the whole day from morning to evening when he was arrested by police officers for no reason.
51. The evidence by the prosecution placed the appellant at the scene together with AC. PW1 identified the appellant as the person who defiled her. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi that he was on the farm. The defense was a red herring and an afterthought. It is dismissed.
52. Therefore, the court finds that the appellant was properly convicted based on evidence which proved the case against him beyond reasonable doubt.
53. In the upshot, the appeal on conviction is dismissed.

On Sentence

54. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act* which provides that:

‘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.’
55. The prosecution submitted that the sentence was within the law.



56. It is now a principle that mandatory sentences deprive the court of discretion to impose appropriate sentence. Thus, inconsistent with the *Constitution*. The court takes the view that section 8(2) of SOA prescribes a mandatory sentence, but being existing law, it is read down that it only prescribes the maximum sentence. The sentencing court should therefore exercise discretion in sentencing under the section.

57. See the Court of Appeal in *Dismas Wafula Kilwake v. Republic* [2018] eKLR that: -

‘We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.’

58. It appears from the judgment of the trial court that the trial magistrate believed only one sentence is prescribed in law for the offence; a life sentence and to which the appellant was condemned. She stated, thus: -

‘ ... I have perused the pre-sentence report and noted the contents. I have also noted the circumstances under which the offence was committed. In sentencing, I am guided by section 8(2) of the *Sexual Offences Act* which provides for mandatory sentence upon conviction. The accused is therefore sentenced to serve life imprisonment.’

59. In so far as the trial court felt it did not have discretion, it fell into error of principle.

60. But, exercise of discretion in sentencing to impose the appropriate sentence is dictated by the circumstances and facts of the case.

61. The court has considered that the accused is a first offender, and is remorseful.

62. Other relevant considerations: The offence is serious. The victim was a child of tender age- she was 9 years old. The manner the offence was committed was brutal causing her injuries. Possibility of post-traumatic effects is real; and agonizing memories of the incident. The offence is prevalent.

63. Despite him being a first offender and remorseful, there is justification for a deterrent sentence but which also gives him an opportunity to be re-integrated back into society to eke a living and become a productive citizen a free man.

64. Opinion is divided on the constitutionality of life sentence. But, for reasons afore stated, life sentence is hereby set aside. In lieu thereof, the appellant is sentenced to serve 25 years imprisonment.

Section 333(2) CPC.

65. The trial court record show that the appellant was first arraigned in court on 04.06.2018. He was released on bond on 29.03.2019. The sentence should run from the date he was convicted by the trial court.



Conclusion And Orders

66. The appeal on conviction is dismissed.
67. The appeal on sentence is successful. Life imprisonment is set aside. The appellant is sentenced to 25 years' imprisonment.
68. The sentence will run from when he was convicted by the trial court.
69. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF NOVEMBER, 2023.

HON. F. GIKONYO M.

JUDGE

In the presence of

1. Mr. Muraguri
2. Ms. Koina for DPP
3. Appellant.

