



**Muombe v Republic (Criminal Appeal 188 of 2019)
[2022] KEHC 12100 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 12100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 188 OF 2019
JM BWONWONG'A, J
APRIL 27, 2022**

BETWEEN

ELIAKIM KHISA MUOMBE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of Hon. G.A Ollimo SPM
delivered on 22nd November 2019 in Kimilili Chief Magistrate's Court
in Criminal Case No. 42 of 2019 Republic v Eliakim Khisa Muombe)*

JUDGMENT

1. In his petition of appeal, the appellant has appealed against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
2. In this court the appellant has raised six grounds of appeal in his petition of appeal and eight supplementary grounds which were filed together with his submissions. They are as follows:
 1. That the trial magistrate erred in law and fact by conducting the court proceedings that violated the rights of the appellant.
 2. That the trial magistrate erred in law and fact by convicting the appellant based on contradictory evidence.
 3. That the learned trial magistrate erred in law and fact in considering extraneous factors in the decision making.
 4. That the learned trial magistrate erred in law and fact in rejecting the alibi defence.



5. That the learned trial magistrate erred in law and fact in failing to put into consideration the meaning and interpretation of section 36 of the *Sexual Offences Act* No. 3 of 2006.
6. That the sentence imposed upon the appellant is harsh and excess.

The supplementary grounds of appeal

1. That the mandatory minimum sentence prescribed for the offence of defilement is unconstitutional and deprives the court of its jurisdiction to exercise discretion to sentence contrary to article 50(2) (p) and sections 215, 319 & 333 (2) of the *Criminal Procedure Code*.
2. That the amended charge sheet is still defective despite the amendment.
3. That age which is a major ingredient in sexual offences was not proved.
4. That the appellant was not accorded a fair trial since he was beaten and tortured during arrest contrary to article 25 (a) and 29 of *the Constitution* of Kenya.
5. That the appellant was never represented neither was he informed of his right to legal representation leading to unfair trial contrary to article 49 (1) and 50 (2) of *the Constitution* of Kenya.
6. That the present case was not proved to the required standard and it lacked probative value to sustain a conviction and sentence against the appellant.
7. That the evidence of Pw 1 is inadmissible and not binding in law as she was mentally ill.
8. That the appellant's defence was rejected without cogent reasons.

The submissions of the appellant

3. The appellant submitted that the sentencing magistrate did not consider his mitigation under the provisions of section 216 and 329 of the *Criminal Procedure Code*, which also violated his constitutional right under article 27 of *the constitution*. He submitted that the 20-year sentence was a breach of the fundamental right and freedom because it was harsh, excessive and unjust and was contrary to article 25 and against his right to a fair trial
4. Secondly, that the amended charge sheet upon which the appellant was convicted is defective. This is because the age of the complainant was 17 years and yet the birth certificate shows the complainant was born on 10.10.2001. Further that the offence is alleged to have occurred on April 9, 2019, when the complainant was over the age of 18 years. He further submitted that he was charged with defilement contrary to section 8 (1) (4) of the *Sexual Offences Act*, which is wrong in its form. In addition, the particulars of the charge sheet were also defective having omitted the word 'unlawful'. Finally, that the date of the proceedings was not indicated.
5. The appellant submitted that during his arrest he was beaten and tortured by members of the public contrary to his constitutional freedom against torture, cruel and degrading treatment or punishment. He also argued that he was not represented during trial and the trial court failed to inform him of that right. He submitted that he was not in a position to defend himself and should have been informed of the right to enable him adequately defend himself.
6. He also submitted that an offence under section 8(4) of the *Sexual Offences Act*, attracts a sentence of 15 years imprisonment, where the age of the complainant is between 16 and 18 years. That age is a key ingredient in the offence of defilement and he was prejudiced since the prosecution failed to prove beyond reasonable doubt the offence of defilement. On the evidence adduced by the prosecution, he



submitted that Pw 1 was mentally unstable and was not fit to testify unless she received treatment from a mental institution. Further that the court did not consider his defence yet the prosecution failed to rebut the same contrary to section 212 of the [Criminal Procedure Code](#).

7. In conclusion, the appellant submitted that he is 57 years old with 7 children who depend on him and prayed for a quick release. That while in custody, he has undergone training in life support skills and urged the court to allow the appeal and acquit him.

The submissions of the respondent

8. Mr. Samuel Mwangi Thuo, counsel for the respondent submitted that despite the victim suffering from mental infirmity she sufficiently recalled and recognized the appellant both during the incident and previously when he threatened her. She testified that as to how she was cornered in a certain room and the appellant inserted his penis into her vagina. When she raised an alarm, members of the public descended and administered mob justice. He submitted that her evidence was corroborated by other eye witnesses as well as the medical evidence
9. Counsel for the respondent submitted that the sentence of 20 years imprisonment imposed upon the appellant was not harsh and excessive. This is because the victim was 17 years old and the sentence should have been higher in accordance with the provisions of section 8(4) of the [Sexual Offences Act](#).
10. He urged the court to uphold the conviction and sentence and to dismiss the appeal.

Findings in respect of the grounds of appeal

11. In grounds 1, 2 and 3 the appellant has submitted that the evidence upon which his conviction was based was contradictory and the court erred in considering extraneous factors. Additionally, there was a violation of his right to a fair trial.
12. The complainant (Pw 1) was allowed to make an unsworn statement after conducting a voire dire examination, because she did not understand the meaning of taking the oath.
13. Pw 1 testified that the appellant defiled her after giving her Kshs. 100. She cried during the incident, which prompted members of the public to arrive at the scene and lynched him. They found the complainant in the appellant's house. She identified the appellant as the person who did 'bad manners' to her (defiled). During her testimony, the trial court conducted a voir dire examination. The court then allowed her to make an unsworn statement.
14. It was the evidence of the complainant's mother (RNK- Pw 2) that Pw 1 was born on October 10, 2001 and was 17 years old when the incident took place. Pw 2 testified that she rushed to the scene of crime upon receiving information. Upon arrival she observed that the trousers of the appellant were rolled down to his knees; while her daughter was laying on the floor with her clothes pulled upwards towards her shoulders. Her lower body was not covered. Members of the public pulled the appellant and her daughter out of the house. They then began to beat the appellant. The complainant was walking with difficulty. Pw 2 denied having a grudge against the appellant.
15. Pw 2 testified that the complainant is disabled and is mentally unstable. Further on the material day, she had been informed that her daughter had been found in the appellant's house. She testified that she went and found the mob who had started to lynch the appellant and told them to escort him to the police. She went to the police station and reported the matter and was issued with a P3 form which she took to the clinical officer on the next day.



16. Joseph Galson Barasa Simiyu (Pw 3) was allowed to make an unsworn statement after undergoing a voire dire examination. Pw 3 testified that he was a minor aged 12 years and that he was herding pigs and sheep alongside his brother when Pw 1 went into the mabati structure next to the appellant's house. That it was at this point that he raised the alarm and called neighbours who came and broke the door, where the appellant and Pw 1 were locked inside.
17. No. 65541 Cpl Benjamin Chelim (Pw 4) testified that he received a report on April 9, 2019 when the appellant was escorted by members of the public to the Mbakalo police station. The complaint was that the appellant had defiled Pw 1. That when the complainant and her mother came, he interrogated them and commenced investigations. Pw 4 established that the complainant was a pupil at [Particulars Withheld] special school and from the birth certificate produced she was 17 years old.
18. The complainant was examined by Patrick Koech Kemnai (Pw 5), a clinical officer at Bungoma referral hospital. Upon examination he made the following findings. The complainant was about 17 years old. Her hymen was absent. There was a whitish vaginal discharge. The pregnancy test was negative. Syphilis was negative. Urinalysis revealed epithelial cells. He produced the P3 form as exhibit 2 (a). He also produced the outpatient records dated April 10, 2019.
19. Upon being placed on his defence, the appellant (Dw 1) testified on oath and denied the charge. Dw 1 testified as follows. He is brick maker and worked for a person named Martin from where he delivered bricks to his premises. That two boys namely Wangila and Boy assisted him in arranging the bricks until 6 pm. That thereafter he proceeded to his neighbour's house to watch television until 9 pm when he retired to his house. He further testified that on his way he was accosted by a large crowd, who attacked him and escorted him to the police station accusing him of defiling the complainant. He testified that the mother of the complainant (Pw 2) holds a grudge against him.
20. I have re-assessed the entire evidence as a first appeal court. As a result, I find that the prosecution evidence to be credible that the appellant had sexual intercourse with the complainant, who was mentally challenged. I further find as credible the medical evidence of Patrick Koech Kemnai (Pw 5) a clinical officer that the complainant had penetrative sexual intercourse which was evidenced by a missing hymen. I therefore find as credible that sexual penetration was proved by both the evidence of the complainant and the medical evidence of Pw 5. Pw 3 also corroborated the evidence of the complainant that the complainant went into the appellant's house at the time the incident took place. I find on the evidence that the appellant was caught red handed.
21. I further find that the evidence of the appellant is incredible. His defence that the mother of the complainant framed him due to a grudge is equally incredible. I therefore reject his defence for being incredible.
22. In ground 4 the appellant alleges that the alibi defence was not considered by the trial court. In this regard, I find that the trial court disbelieved the evidence of the appellant because it was incredible. This was the justification for the rejection of the defence evidence. I therefore reject the appellant's submission in that regard. I find that the alibi defence was disproved and is without basis and is hereby dismissed.
23. Furthermore, I find as lacking in merit the submission of the appellant that there were inconsistencies in the prosecution case and the evidence was contradictory. The alleged inconsistencies were not pointed out by the appellant. I find that the evidence of the witnesses was not shaken on cross – examination and was amply corroborated.
24. The appellant also argued that the complainant was not of sound mind and as such her evidence should not have been considered without being treated at a mental institution. Pw 2 confirmed that indeed her



daughter was mentally challenged. Before her testimony was received by the trial court after conducting a voire dire examination. As a result, the court allowed her to make an unsworn statement, after the court found that she did not understand the meaning of the oath. The trial court found that she could understand right and wrong and could vividly recall the incident in issue. The trial court found that her evidence was not shaken under cross examination. It was therefore not necessary for her to undergo treatment before she testified. I find her testimony to be credible.

25. In ground 2 and 3 of the supplementary grounds, the appellant alleged that the charge sheet was defective and the age of the complainant was not ascertained. From the record, the charge sheet was amended upon the application of the prosecution. The offence the appellant was charged with was clear with the particulars clearly indicated. The failure to include the term 'unlawful' in the particulars of the charge is not fatal. As such, that argument fails. On the ground that the complainant was an adult at the time of the alleged incident, the birth certificate produced in court indicates that she was born on 10th October, 2001. The incident took place on April 9, 2019. A calculation of the age indicates that the complainant had not yet attained the age of 18 years and therefore the charge of defilement was proper. Consequently, that ground of appeal fails and is hereby dismissed for lacking in merit.
26. Finally, the appellant challenged the sentence of 20 years imprisonment imposed by the court as being too harsh and unlawful. Section 8(4) of the *Sexual Offences Act* provides for imprisonment for a term not less than fifteen years. The trial court in its determination stated why it imposed the sentence. The sentence is more than the 15-year statutory minimum imposed by law. Furthermore, I also do not have any discretion to interfere with sentencing discretion of the trial court.
27. In the circumstances, I find that the sentence imposed is authorized by law.
28. In the premises, I find no merit in the appeal which I hereby dismiss.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 27TH DAY OF APRIL, 2022.

J M BWONWONG'A

JUDGE

In the presence of: -

Kinyua court assistant

The appellant – present in person

Mr Oyiembo for the respondent

