



**Ngalu v Republic (Criminal Appeal 72 of 2018)
[2022] KEHC 564 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 72 OF 2018**

**LK KIMARU, J
MAY 31, 2022**

BETWEEN

MOSES WANJALA NGALU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of conviction and sentence of Hon. P. K. Mutai
(Senior Resident Magistrate) in Kitale Chief Magistrate's Court Criminal
Case (S.O) No. 163 of 2017 delivered on the 7th day of September 2018)*

JUDGMENT

1. The Appellant, Moses Wanjala Ngalu, was charged with the offence of defilement of a child contrary to Section 8 (1) as read together with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 24th December 2017 within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of CC, a child aged eleven (11) years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the 24th December 2017 within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of CC, a child aged eleven (11) years. The Appellant was subsequently arraigned before court. He pleaded not guilty to the charges. After a full hearing, the Appellant was convicted on the main charge and sentenced to serve life imprisonment.
2. The Appellant was aggrieved by both his conviction and sentence. In his Petition of Appeal, the Appellant challenged the trial court's process as not having afforded him a fair trial. He stated that the Prosecution relied on contradictory evidence. He added that the conviction was based on evidence of witnesses who were relatives hence unfair. He questioned the reasoning behind the trial court's decision not to subject the Complainant to cross examination. Finally, he complained that his defence was not



considered. He urged this court to allow the appeal, quash the conviction, set aside the sentence that was imposed on him.

3. The Appeal was heard on 21st April 2022 where parties relied on their rival written submissions. According to the Appellant, the age of the Complainant was not proved to the required standard of proof. On the ingredient of penetration, the Appellant submitted that the medical report was inconclusive and thus unreliable. He cited contradictions in the testimonies of the Prosecution witnesses and dismissed the investigations conducted as shoddy. He concluded that based on the foregoing, the Prosecution failed to discharge its burden of proof to the required standard of proof. On sentence, the Appellant submitted that the same was harsh and excessive and was against the dictates of the Constitution and the Criminal Procedure Code. In the circumstances, he urged this court to review his sentence.
4. Learned Prosecutor on the behalf of the State, Mr. Kiptoo, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. On the defence of the Appellant, Learned Prosecutor submitted that the same was weak, an afterthought and baseless. On the allegation that the witnesses were relatives, it was submitted that their evidence was sufficient to sustain a conviction as properly found by the trial court. He relied on Sections 124 and 143 of the *Evidence Act* in support of his submission to the effect that the evidence adduced by the prosecution witnesses was sufficient. Finally, he submitted that the sentence was lawful. He urged the court to uphold the conviction and affirm the sentence that was imposed on the Appellant.
5. The Prosecution called a total of five (5) witnesses in a bid to establish its case against the Appellant. On 24th December 2017, PW1, CR, went to work. He is a Bodaboda operator. He left his children, amongst them, the Complainant, PW2, CC, a class one (1) pupil at [Particulars Withheld] Primary School at home. Adjacent to their house was the Appellant's home with whom they shared a compound. During the day, the Complainant stepped outside to play with other children. While at it, the Appellant emerged from his house and lured the Complainant with a sweet and Kshs. 5/= . He then asked the other children to disperse. He led the Complainant to his house and placed her on the bed. He commanded her to stop screaming. He then removed his clothes and those of the Complainant. He then sexually assaulted her. Since the Complainant felt pain, she screamed. This prompted the Appellant to place his hand over the Complainant's mouth. When he was done, the Appellant pushed the Complainant through the window and cautioned her not to tell anyone of the ordeal.
6. The Complainant left the house walking with difficulty. Her private part was aching and oozing blood. This left blood stains on her green skirt and black and white underwear. The Complainant then sat on a bench that was placed outside the house. She started crying. The Complainant's mother later returned home and noticed that her daughter was crying. She informed her mother what had transpired. She then reached out to the Appellant's wife and informed her what she had been told by the complainant.
7. The Appellant's wife then called PW1. He was informed that PW2 had been defiled. On hearing this, PW1 returned home immediately and found the Complainant. On examining her, he observed that she was bleeding from her private parts. He clothes were stained with blood. The Complainant then disclosed what had transpired.
8. News of the offence soon spread to the area residents including PW3, Evans Kiligua Wanyonyi the village elder. He rushed to the scene in the company of some vigilantes. He found the Appellant being attacked by a mob of women. He noticed that the Appellant had sustained serious injuries. PW3 was forced to intervene and rescue the Appellant for fear that he would be lynched. He then escorted the Appellant to the Kitale Police Station.



9. The Appellant was booked at the Police Station at 3:00 p.m. on the same day. PW4, PC Esther Wathula testified that the Appellant was taken to hospital for treatment of the injuries he sustained. Investigations were subsequently conducted. The outcome of the same resulted in the preference of the present charges against the Appellant.
10. In the meantime, the Complainant was taken to Kitale District Hospital by PW1. She was seen by PW5, Kirwa Labat, a clinical officer. He examined that she was an eleven (11) year old child. He observed the clothes she had worn at the time of the offence. She was admitted on 24th December 2017 and discharged on 26th December 2017. Further observations to her genitalia revealed that her hymen was torn and fresh looking. It had blood stains. There were blood cells and epithelial cells showing erosion on the private parts. His conclusion was that there was penetration. He filled the P3 form which was produced into evidence. He also produced the treatment notes as well as Complainant's age assessment form in evidence on behalf of his colleague Dr. Mukira. Its conclusion was that the minor was eleven (11) years old at the time of the offence.
11. After close of the Prosecution's case, the trial court found that the Appellant had a case to answer and placed him on his defence. His sworn testimony was that he was not at the scene at the time of the offence but was at work. He was later arrested while asleep. He believed that he was implicated by his wife with whom they had a disagreement. He denied committing the offence.
12. This being a first appeal, it's the duty of this court to re-consider and to reevaluate the evidence adduced before the trial magistrate so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge v Republic* [1983] KLR 197). In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence.
13. The prosecution must establish that the following three (3) ingredients in order to prove the charge of defilement:
 1. Age of the Complainant
 2. Penetration
 3. Identification of the perpetrator
14. The first ingredient is the age of the Complainant. PW2 in her *voire dire*, testified that she was eight (8) years old. She then testified in her evidence that she was nine (9) years old. PW1 testified that his daughter was eleven (11) years old at the time of the offence. This was corroborated by the age assessment report produced in evidence. For these reasons, the Appellant challenged this element to the extent that the minor and other witnesses gave contradictory evidence as to the age of the Complainant. This court observes that while indeed PW2's own testimony as to her age was inconsistent, her father, PW1 and the age assessment report were in consonance that the minor was eleven (11) years old at the time of the offence. This court finds the contradiction to be minor as the age of the Complainant still fell within the ambit of the provisions of Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act](#). She was a child within the meaning ascribed to the term under Section 2 of the [Children Act](#) at the time of the offence. This court therefore holds that the age of the victim was established to the required standard of proof.



15. The second ingredient is that of penetration. Section 2 (1) of the *Sexual Offences Act* defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
16. The Complainant’s testimony was that on 24th December 2017, the Appellant lured her into his home and sexually assaulted her. On the same day, the complainant was taken to hospital for medical treatment. The observations of PW5 corroborated the complainant’s testimony in regard to the fact that she was penetrated. According to PW5, the Complainant’s hymen was torn and fresh looking. She suffered injuries and had blood stains in her genitalia.
17. As a result of the assault, the complainant was admitted in hospital for two days. His conclusion was that there was penetration. The trial court, on that account, found that the element of penetration was proved to the required standard. This court, on re evaluation of the evidence in that regard, reaches the same conclusion that penetration was established to the required standard of proof.
18. The last ingredient that the Prosecution had to establish was the identity of the perpetrator. In this case, the Complainant testified that the Appellant lured her with a sweet and Kshs. 5/= into his home while she was playing with other children. He then chased away the other children. The Complainant was taken to the house where the Appellant sexually assaulted her. The Complainant recognized and knew the Appellant as their neighbour. They shared the same compound. The trial court found that the Complainant’s testimony was credible and consistent with her account of events. The trial court also found that the complainant was a candid witness. This court had no reason to depart from the trial court’s assessment of the evidence on identification. This court thus finds that the Prosecution proved that the Appellant was positively identified as the perpetrator of the sexual assault.
19. Ultimately, the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. Consequently, the Appellant’s appeal against the conviction lacks merit. It is hereby dismissed.
20. The Appellant was under the *Sexual Offences Act* sentenced to serve life imprisonment by dint of Section 8 (2). The wordings of the said provision are couched in mandatory terms. Consequently, the trial court did not have any discretion given the nature of the mandatory sentence provided therein. However, this court notes the recent decision in HC Pet No. E017 of 2021; *Philip Mueke Maingi & 5 others v AG & another* regarding sentences imposed in respect of Sexual Offences. Although the decision is persuasive, this court agrees with the ratio *decidendi* of the case. In his mitigation, the Appellant maintained that he was at his place of work at the time the incident is said to have occurred. He has also not demonstrated any remorse. Taking into account the above factors, this court shall interfere with the mandatory sentence imposed on the Appellant. This court substitutes the sentence of life imprisonment with a determinate sentence of 25 years imprisonment. The period of the Appellant’s sentence shall run from the date of conviction by the trial court.
21. It is so ordered.

DATED AT KITALE THIS 31ST DAY OF MAY 2022.

L. KIMARU

JUDGE

