



REPUBLIC OF KENYA



**Luvi v Republic (Criminal Appeal E051 of 2021)  
[2022] KEHC 3140 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E051 OF 2021**

**A. ONG'INJO, J  
JUNE 23, 2022**

**BETWEEN**

**SAID ZUMA LUVI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the judgement and sentence of Hon.  
Amwanyi (SRM) in S.O 76 of 2020 delivered on 10th August 2022)*

**JUDGMENT**

1. The Appellant was convicted and sentenced to 50 years in prison for the offence of defilement contrary to section 8(2) of the *Sexual Offences Act* No.3 of 2006 in Sexual Offences No. 76 of 2020 by Hon R. Amwanyi (SRM) at the Chief Magistrates Court in Mombasa.
2. The particulars of the offence were that on the July 29, 2020 in Likoni Sub- County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina and anus of VN a child aged 10 years.
3. Aggrieved he appealed against conviction and sentence and filed an undated Notice of Motion that was supported by an Amended grounds of appeal reproduced herein;
  - a) That the learned magistrate erred in law and fact not considering that the issue of visual identification under recognition was just left under mere assertions.
  - b) That the learned trial Magistrate erred in law and fact for not noticing that the evidence of PW4 thus the primary victim was so divergent, inconsistency and best sketch to be relied upon for safe conviction.



- c) That the learned trial magistrate erred in law and fact for failing to consider that the prosecution investigations were so shoddy more so frivolously approached as to ascertain any truth of this matter.
  - d) That the learned trail magistrate erred in law and fact for not considering that the source of my arrest had no any connection with the present matter but I was just placed on that line only to conceal what transpired before I and the father of the victim.
  - e) That the learned trial magistrate erred in law and fact for achieving to a conclusion of this matter while based on mere assertions of the prosecution witness which had no proof.
  - f) That the learned trail Magistrate erred in law and fact for not noticing that the sentence was harsh unsustainable.
  - g) That the learned trial magistrate erred in law and fact for demising my defense evidence without any legal bases whereas it was not initiated by the prosecution party.
4. The Appeal was opposed by the Respondent in its entirety vide grounds of opposition dated 16<sup>th</sup> May 2022. There are reproduced herein; -
- a) Identification of the Appellant was established.
  - b) The age of the minor was proved at the trail court
  - c) The fact of penetration was proved
  - d) The trial court guaranteed the Appellant right to a fait trial
  - e) That the Appellant defense was considered by the trial court and a finding made on the same.
  - f) The prosecution proved its case beyond reasonable doubt.
  - g) The sentence meted by the trial magistrate was lawful.

### **Summary of Evidence By Prosecution**

- 5. The prosecution called four witnesses.
- 6. PW1 was JMM' father to the victim. He produced the victims birth certificate. He testified that victim was 10 years of age. That on July 30, 2020 he noticed that the victim was having difficulties walking. He asked one of his female neighbors to inquire from the victim what had happened and the victim confessed to her that she had been defiled. The victim took him to about three plots from their house where the incident had happened and identified the Appellant as the person who had defiled her. He then took the victim to shelly police station and later to Likoni hospital. PW1 testified that Appellant went missing when he got wind of why he was being sought after but he got arrested on August 7, 2020.
- 7. PW2 was Stephen Kalali a clinical officer at Likoni sub county hospital. He testified that he attended to the victim on August 4, 2020. The victim reported that she had been defiled. On examination he observed that victim had a healing abrasion on her vagina wall; broken hymen; fresh laceration on her anus and lose sphincter muscles. He produced the treatment notes, PRC form and P3 form. He further testified on cross examination that she did not examine the Appellant.
- 8. PW3 was No. 232169 PC Mwana Ayisi Ibrahim. She testified that on August 2, 2020 PW1 reported to the station that his daughter had been defiled. The following day he came with the victim to the station who told her that a man who she used to refer to as 'uncle' had had sexual intercourse with her and had



penetrated her vagina and anus on 29<sup>th</sup> July 2020 in the morning and during lunch time. The man had threatened to kill her if she told anyone and had later bought her biscuits in the evening. The following day she had difficulties walking and the father inquired the reason for this. Due to fear she lied that she had a boil. The pain persisted for three days prompting PW1 to check her leg but he did not see anything. PW1 called Mama Badi and Mama Yaya and requested them to check the victim's thighs, but they did not see any boil. After this the Victim confessed what had happened. The victim took PW1 to the Appellant's house and pointed him out as the man who had defiled her and a scuffle ensued. PW3 then took the victim to hospital and it was confirmed that she had been defiled and there was evidence of penetration in her anus and vagina. The P3 form was filled. PW3 then went to the station and recorded the statements of the victim and PW1 but the two ladies refused to record a statement. The Appellant was arrested on 7<sup>th</sup> August 2020.

9. PW4 was the Victim VN A voire dire was conducted and the Court made the assessment that she was knowledgeable enough to give sworn evidence. She testified that in 2020 she was living with her father and he used to leave for work at 7 am and come back at 7pm. And that he used to give her money for breakfast and lunch. On 29<sup>th</sup> July she was taking breakfast from a hotel. She passed near the Appellant's house where he was sleeping at the door. He called by name. He grabbed her hand and pulled her into the house and locked the door. He took her to the bedroom and removed her skirt and underwear and used his penis to penetrate her in her vagina and anus. She told him she needed to go for a short call and he opened the door for her and she went home. It was about 10 am and she took a shower and went to play. At lunch hour she went back to the hotel and she found Appellant standing at his door. He held her by the neck and blocked her mouth and took her to the bedroom where he penetrated her in the vagina and anus. After, she went home. She had a lot of difficulty in walking and the father noticed and called the neighbors Mama Badi and Amani and she confessed to them that she had been defiled. She took the father to the Appellant's house and pointed to him as the one who had defiled her. She was later taken to the police station then to hospital. She recorded her statement. She identified the Appellant at the dock as the man who had defiled her.
10. At the close of the Prosecution's case the Court vide a ruling on April 27, 2021 found that the Appellant had a case to answer and he was put on his defence.

### **Defence evidence**

11. Defence called three witnesses
12. DW1 was the Appellant. He gave unsworn evidence. He testified that on 10<sup>th</sup> July 2020 he went to a shop to buy charcoal and found a man who dropped his phone and after made allegations that the Appellant had stolen it. They had a disagreement and he went home. The man then came to his house with five people who beat him up and he went to report it to the village elder. After five days he went to the village elder and police came and arrested him and took him to the police station. He was charged with defilement to his dismay as he knew nothing about the alleged offence.
13. DW2 was Appellants sister, Salama Zula. She testified that the Appellant was at a shop when a man's phone fell down. The brother gave her the phone and he told her he had stolen it. The man reported the matter to the village elder and they later came to beat up the Appellant. Later he was arrested. On cross examination she testified that she did not know the make of the phone; she did not witness the Appellant picking up the phone neither did she know the man's whose phone had been stolen.
14. D3 was Marium Chaka, the Appellant's Aunt. She testified that on 29<sup>th</sup> July 2020 the Appellant told him that he had had a disagreement with some people in regards to a mobile phone that they claimed that he had stolen. The Appellant reported the matter to the village elder. On 22<sup>nd</sup> July a group of



people came at 8 pm and demanded that they open the door and people assaulted the Appellant. He reported the matter to the village elder. He was later arrested by the police.

15. Appellant tendered undated submissions. In a nutshell it was submitted that he was not positively identified as the Assailant and his was a case of mistaken identity. It was further submitted that the reason for his arrest was not in connection with the offence of defilement. It was also submitted that sentence meted out against him was extremely harsh and the period he spent in custody was not considered.

### **Analysis and Determination**

16. This being a first appeal, it is the duty of this Court to re-evaluate the evidence adduced before the trial court and to arrive at its own independent conclusion whether or not to support the findings of the trial court. Duties of the first Appellate Court are well articulated in the Court Appeal case of *Kiilu & Another v Republic* [2005]1 KLR 174 where the Court opined, “An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”
17. Having evaluated evidence on record and pleadings filed from both parties I find that issues for determination in this appeal are as follows:
  - a) Whether the prosecution proved its case to the required standard.
  - b) Whether the sentence meted out was legal
  - c) Whether the prosecution proved its case to the required standard?

### **Whether the prosecution proved its case to the required standard?**

18. It is the law in Kenya as entrenched in *the constitution* under Article 50 (2) (a) that an Accused person is presumed to be innocent until the contrary is proved. The *evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus: “whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.” It is the onus of the prosecution to prove the guilt of Accused persons.
19. The Court of Appeal in CRA 32 of 2017 *G.O.A vs Republic* (2018) stated what elements are required to be proved by the prosecution in a charge of defilement. It stated thus, “The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.”

### **Age of Complainant**

20. Age of complaint was not in dispute in the present case. The birth certificate of the complainant was produced as pexh -1 by the investigating officer PW3. Complainant was born on 5<sup>th</sup> May 2010 making her 10 years 2 months and 24 days old at the time when the alleged offence happened on 29<sup>th</sup> July 2020.



### **Proof of penetration**

21. The complainant PW4 testified the Appellant penetrated her vagina and anus using his penis. The PRC form and medical examination corroborated PW4 testimony as it was observed that the complainant's hymen was broken and had signs of repeated penetration. Her anus had bruise at the 12 o'clock and had loose sphincter muscles and fresh lacerations. PW2, the clinical officer corroborated these assertions in his testimony as well. I find that this ingredient was proved to the required standard.

### **Proof that Appellant was the perpetrator of the offence happened**

22. It's the Appellants assertion that he was mistakenly identified and he was arrested for another offence that had nothing to do with the present case. However, the complainant PW4 positively identified the Appellant as the man who defiled her. She further testified that the Appellant was known to her as 'uncle' as they lived in the same village. PW1, Father to PW4 also testified that PW4 took him to the house of the Appellant and pointed him out as the person who had defiled her. I find that this element was proved beyond reasonable doubt.

23. In regards to the Appellant's defence, there was no linkage made by the defence to the happenings of the current offence. The Appellant also did not report the assault he suffered on allegations of theft and there was no way of ascertaining if those events ever took place or not. I find that he failed to exonerate himself in the present offence.

24. In light of the foregoing it is my finding that the conviction made by the trial court was proper and safe.

### **Was sentence meted out legal**

25. Under Section 8(2) of the *Sexual Offences Act*, where the victim is less than eleven years, like PW4 was, upon conviction, one is, liable' to be sentenced to life imprisonment." What does "shall be liable" mean in law?" The court of Appeal for East Africa in the case of *Opoya v Uganda* [1967] EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only and the courts have discretion to impose sentences of death or imprisonment. It follows that for the present offence the maximum sentence is life imprisonment. The Appellant was sentenced to serve 50 years in prison. This was not illegal as it was within range and as per the Magistrate's discretion. However, I find that the term of 50 years will not meet all objectives of sentencing as provided in the Judicial sentencing and policy guidelines particularly the objective of rehabilitation as the sentence leans more on the retribution aspect. I therefore substitute it with a sentence of 30 years to begin when Appellant was placed in custody on August 10, 2020.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD JUNE 2022.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**IN THE PRESENCE OF: -**

Mr Ngiri for the Respondent

Appellant present in person

Ogwel, Court Assitant.

