



REPUBLIC OF KENYA



KENYA LAW
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**Mgudi v Republic (Criminal Appeal E029 of 2021)
[2022] KEHC 12348 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E029 OF 2021
RE ABURILI, J
JUNE 21, 2022**

BETWEEN

COLLINS OMONDI MGUDI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence delivered by the Hon S W Mathenge on December 7, 2021 in the Principal Magistrate's Court at Bondo in Sexual Offence Case No15 of 2020)

JUDGMENT

1. The appellant herein Collins Omondi Mgudi was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 9th day of February 2020 at about 1900hrs at [Particulars Withheld] Centre in Bondo sub-county within Siaya County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SA a child aged 5 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
2. The appellant pleaded not guilty to the charge and the matter proceeded to full trial where the prosecution called 6 witnesses. Placed on his defence, the accused gave sworn testimony.
3. In his judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted the appellant and after considering the mitigations, sentenced him to serve life imprisonment.
4. Aggrieved by the trial court's finding of guilt and sentence, the appellant filed his petition of appeal on the 17.12.2021 wherein he states that he intended to appeal against the sentence of life imprisonment passed against him. However, the other grounds of appeal challenge the conviction hence this court will consider all the grounds of appeal as submitted on, both against conviction and against sentence.



5. The appellant's petition raises the following grounds of appeal:
- a. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.
 - b. That the trial court failed to consider that my fundamental constitutional rights was/were violated and thus no ample time was the appellant given to defend himself.
 - c. That the trial court did not consider that the investigation tendered was shoddy.
 - d. That the trial court failed to consider that the subject was based on fabrication and afterthought.
 - e. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in the Article 50(2)(p) of the Constitution.
 - f. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

Submissions

6. The appeal was canvassed by way of written submissions. The appellant filed his submissions on April 4, 2022. The Respondent did not file any submissions. The appellant was self-represented.
7. On the evidence of recognition, the appellant submitted that the evidence in issue was contradictory and that it was not clear from the record how the complainant identified the appellant yet on the other hand, she was not having any carnal knowledge of the appellant during, before and after the said offence. (sic). The appellant further submitted that the complainant's sentiments in court shared an opinion that she was coached on what to say in court.
8. The appellant further submitted that the evidence adduced by the complainant was solely based on dock identification. Reliance was placed on the case of Gabriel Kamau Njoroge v Republic (182-88) 1KLR where the court held *inter alia* that dock identification was worthless and that the complainant should be asked to give a description of the assailants and or whether she was conversant with appellant during, before and after the alleged incident.
9. According to the appellant, the light was not favourable for positive identification of the person who allegedly defiled the complainant. That the complainant's evidence was not truthful and that it was contradictory. That the complainant stated that somebody picked her and not the appellant herein hence the appellant was not properly identified or recognized to be the assailant. The appellant maintained that the complainant only identified him in the dock which is a worthless identification. He relied on the cases of Gabriel Kamau Njoroge v Republic [1982-1988]1 KLR. Maitanyi v R [1986] KLR 198 and R v Turnbull [1967]3ALLER 549.
10. On sentence imposed, the appellant submitted that a life sentence was a long time to serve where the issues were not clear and therefore this court ought to consider the mitigating factors where the appellant was a breadwinner with a disabled wife and that the appellant's long incarceration would ruin his life and his young family too.

Analysis

11. The role of this appellate Court of first instance is well settled. As was held in the case of Okemo v R (1977) EALR 32 and further by the Court of Appeal in the case of Mark Oiruri Mose v R (2013) eKLR



that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

12. The evidence before the trial court was as follows: The complainant, SA also called baby, a PP2 child was taken through voire dire examination and found to be understanding of telling the truth and taking an oath. She testified on oath as PW1. It was her testimony that on the 9.3.2020 at 7pm, she was outside as her mother had sent her to the shop when somebody went and took her by the hand and told her that he was taking her to her mother. The complainant testified that the person took her into the bush where he removed her clothes and put his penis into her vagina at which point she cried and the person told her he would beat her. She testified that the person then took her to his home where he began doing bad manners to her again.
13. The complainant testified that a friend of her defiler arrived and stood by the door but her defiler hid her in the blankets and he told him that there was no problem then the defiler's friend left, after which she put on her clothes and her defiler took her to her aunt's place and bought her some biscuits and left her outside her aunt's home. She testified that she told her aunt what had happened and her aunt called her father, who went to where they were and that a report was made to the police station. She testified that she showed the police her defiler's house where they found two men and she identified her defiler to the police by pointing at him after which the police took the man to the cell and afterwards they escorted her to the hospital.
14. The complainant stated that she did not know the man but she could see him doing bad manners on her. She identified the person who was doing bad manners on her among the five people she saw in the court and pointed at him in the dock.
15. On being cross examined, the complainant stated that it was the accused person who did bad manners to her and that there were no houses nearby and she could not remember the exact time she was returned by the accused; that he wore a black trouser and a brownish Shirt on the material day when he defiled her and that by the time they got home with her father, all the shops were closed but they met some people on the way and her mother was asleep. She further stated that she tried to scream but the appellant threatened to beat her up.
16. PW2 OOO, the complainant's father testified that the complainant was 5 years old as she was born on April 14, 2015. He identified a baptismal card from Church which was produced as PEX 1. He further testified that on the 9.2.2020 at about 7:00pm he was from work in Usenge when he received a call from his sister YA who asked him what had happened to his daughter before informing him that his daughter had run to her place because she had been late and on her way she met a person who convinced her to take her to her place and on her way with the man, he took her into the bush and defiled her, took her to his house and defiled her again from there.
17. PW2 testified that he rushed to Y place and took his daughter to Usenge Police station and her statement was recorded. He said that she was then taken to Got Agulu Sub County Hospital where she was treated and returned home at about midnight. PW2 further testified that the Officer in charge of the Police Station tried to probe his daughter to find out the house where she had been defiled and she directed them to a house where when the OCS opened the door, they found two people sleeping so the OCS and the police officer entered and called SA to point at the man who had defiled her and SA pointed at one man who was taken into custody to the Police Station.



18. PW2 testified that the following day they went to Got Agulu Hospital where her P3 form was filled. He further stated that his daughter's defiler was the accused in the dock. On cross examination, he stated that he was the father to the complainant and he did not witness the defilement.
19. PW3 YA testified that the complainant was her niece and that on February 9, 2020 at about 8:00pm she was in her house having sent her son B to go and unhang some clothes. She testified that her son found the complainant outside so she went outside and asked the complainant where she had come from. It was her testimony that she interrogated the complainant who revealed that her mother wanted to beat her so she ran away and that on her way to her aunt's house, a man took her and defiled her. PW3 testified that she called the complainant's father and inquired whether he knew of his daughter's whereabouts and informed him of what the complainant had told her. She testified that the complainant's father went to her home and they re-narrated what had happened. She stated that she did not go with them when they went to report to the Police and that she later recorded her statement at Usenge Police Station. In cross-examination, PW3 stated that she did not witness the defilement and that she was in court because the complainant showed up at her place.
20. PW4 LA, the complainant's mother testified that the complainant was 5 years old having been born in 2015. She stated that on February 9, 2020 at about 1930hrs, she was at her home and the complainant had not returned home so she looked for her while holding a stick as she wanted to beat her but decided to forgive her. It was her testimony that she looked for the complainant in the house unsuccessfully after which she decided to call her father who said he had not seen her and so she went on with the search.
21. PW4 testified that later on, the complainant's father called to inform her that the complainant was at Y place and that later at 1:00am, the complainant returned with her father so she woke up and opened the door. It was her testimony that the complainant's father told her not to wash SA and upon inquiry from the complainant as to her whereabouts, the complainant informed her that she had been defiled by somebody in the bush and in his house. PW4 testified that she inspected her daughter and saw sperms on her private parts but did not photograph them. She said that the following day, the complainant's father took her to the hospital and that she recorded her statement at Usenge Police Station.
22. On cross examination, PW4 denied threatening the appellant on the 6.2.2020 with suing him and further stated that she did not witness the defilement but saw sperms on her daughter's private parts. She testified that she knew the person the appellant shared a house with.
23. PW5 Jared Opondi a Clinical Officer at Bondo Sub County Hospital testified that he had the P3 form for S.A. which was filled by his acquaintance Mr. Ombwak, the former Medical superintendent at Got Agulu Hospital who had since proceeded for further studies been transferred. He testified that the complainant was aged 5 years old and went to the hospital accompanied by her father and the police officers, with a history of defilement on the 9.2.2020. He testified that on examination, her genitals were tender and bruised, the labia majora and minora were swollen, she had bleeding, and hymen was freshly broken. He further testified that the discharge was bloody and they took samples which turned negative when tested for HIV and Hepatitis B. He stated that the VDRL showed no syphilis.
24. PW5 testified that a genital swab and urinalysis showed pus cells, Red blood cells but no spermatozoa. It was his testimony that the conclusion made was that the minor was defiled. PW5 also had the complainant's Post Rape Care Form which had the same information as per the report and her treatment notes with similar findings which he produced as exhibits before court. Got Agulu treatment Notes PEX2, PRC form PEX3 and P3 Form PEX4.



25. On cross examination, PW5 stated that the girl had blood stains which he could not present in court and that he was reporting what was recorded by Dr. Ombwak who was a professional and so he had no reason to depart from the findings. He denied a suggestion that a hospital stamp was forged.
26. PW6 No. 111611 PC (W) Caroline Langat of Usenge Police Station, the investigating officer testified that on February 9, 2020 at about 9.30 pm, the complainant arrived at the station accompanied by her father O reporting a case of defilement and stated that Collins Mgudi a person she knew defiled her on her way to her aunt's place after her mother threatened to beat her. PW6 testified that at about 10:30 pm, she escorted the complainant to Got Agulu Hospital where she was examined and treated because it was an emergency and that the complainant took them to the accused person's home and that at his house, they found two men and the complainant positively identified the appellant as her defiler.
27. It was her testimony that on February 10, 2020 they took Collins and the complainant to Got Agulu Hospital where they were examined and P3 form filled. She stated that on February 12, 2020 she charged the appellant with the offence before court. It was her testimony that in her investigations, she established no filial relationship between the appellant and the complainant. She further testified that the appellant was arrested in a rental house. She testified that she was given a baptismal card for the complainant which showed that her age was 5years.
28. On cross examination, PW6 stated that she visited the scene, near Usenge primary school and stated further that the village elder was not informed of the matter because a report had been made to the police station and that the complainant positively identified the appellant at the police station and lastly that she took the complainant to the hospital immediately because it was an emergency.
29. Placed on his defence, the appellant gave sworn testimony in which he stated that on February 9, 2020, he was in his shop when two police officers arrested him and took him to the police station. That he was taken to court and that he was not aware of anything concerning the charges pressed against him. It was his defence that PW4 was his customer who defaulted paying for a jiko which she bought from him indicating that she only paid a down payment and when he asked her for the money, PW4 responded by saying that she needed not to be pushed. The appellant testified that he told her that he would go and report to the Chief but that he was suddenly arrested before he could go and report.
30. In cross-examination, the appellant admitted that he knew the complainant's mother and not the complainant. He admitted that he was neighbours with the complainant.

Determination

31. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. I have also considered the submissions filed by the appellant. I find the issues for determination are:
 - a. Whether the appellant was denied ample time to give his defense.
 - b. Whether the prosecution's case was proved beyond reasonable doubt and
 - c. Whether the appellant's sentence was excessive and harsh.
32. On the first issue, the appellant pleaded that his constitutional right was violated as he was not given ample time to give his defence. Article 50 (2) provides for an accused's right to a fair trial while clause (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.
33. From the trial record, it is evident that after plea taking on the 12.2.2020, the appellant was provided with all the material statements of witnesses and documents that the prosecution intended to rely



- on. Further, I note that the hearing commenced on the 27.7.2020, 5 months after the appellant was provided with the evidence that the prosecution intended to rely on. This was ample time for the appellant to prepare his defence. I therefore find that in this case, there was no violation of the appellant's right under Articles 50 (2) (c) of the *Constitution* of Kenya.
34. On the second issue as to whether the prosecution proved its case beyond reasonable doubt against the appellant, the appellant laments that he was not properly identified by the complainant, that the case against him was based on fabrication and that the investigations carried out were shoddy.
35. 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. The age of the complainant was settled by the baptismal card produced as PEX1 by the complainant's father that showed that the complainant was born on April 14, 2015 thus placing her age at the time of the offence at 5 years old. The complainant's mother corroborated this in her testimony stating that the complainant was born in 2015.
36. On proof of penetration, the complainant testified and reiterated under cross-examination that the appellant defiled her by inserting his penis in her vagina. The complainant vividly recalled that the appellant defiled her twice, first in the bush then in his house.
37. The complainant's testimony was corroborated by the medical evidence adduced by PW5 that her genitals were tender and bruised, the labia majora and minora were swollen, she had bleeding, and hymen was freshly broken leading the examining officer to conclude that the complainant was defiled.
38. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the *Evidence Act* makes this quite clear:
- “Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” [Emphasis added]
39. From the evidence adduced in the trial court, and based on section 124 above, it is my opinion that prosecution proved penetration beyond reasonable doubt.
40. As to the appellant's identification, I observe that the complainant testified and that evidence remained uncontroverted that it was the appellant who defiled her. PW6 testified that the complainant was able to escort them to the house of the appellant where they found two men sleeping therein and that the complainant picked out the appellant from his house mate when they first went to the scene of the offence.
41. Contrary to the submissions by the appellant, the complainant did not identify him in the dock but had previously identified him at the scene of the offence when she picked him out from his housemate. The dock identification suggested to by the appellant was thus secondary to the initial identification of the appellant



42. I find no reason to doubt the complainant’s testimony as to the appellant’s identity as her defiler. I further rely on section 124 of the evidence act as to the probative value of the complainant’s testimony.
43. It is for the above reasons that I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt.
44. Finally, as to whether the sentence imposed on the appellant was excessive and harsh and whether that sentence violated Article 50 (2) (p) of the Constitution.
45. Article 50 (2) (p) of the Constitution provides that:
- “ Every accused person has the right to fair trial, which includes the right.”
- (p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence”
46. In *Alister Antony Pariera v State of Maharashtra*, as cited in the case of Margrate Lima Tuje v Republic [2016] eKLR, the court held that:
- “Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”
47. In the instant case, the appellant was charged with defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act which provides that:
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) 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.
48. The trial court found the appellant guilty as charged and proceeded to sentence him to life imprisonment in accordance with section 8(2) of the Act. The mandatory sentence provided in section 8 (2) of the Sexual Offences Act is lawful.
49. Furthermore, the circumstances of this case warrant a harsh punishment considering the appellant took advantage of the complainant, a very young child aged 5 years old and this is likely to cause the complainant untold physical and psychological trauma for the rest of her life.
50. I therefore find no reason to interfere with the sentence imposed on the appellant.
51. The upshot of the above is that I find the instant appeal both against conviction and sentence lacking in merit. It is hereby dismissed in its entirety. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JUNE, 2022

R E ABURILI

JUDGE

