



**Bukachi v Director of Public Prosecutions (Criminal Appeal
19 of 2020) [2022] KEHC 11417 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 19 OF 2020
WM MUSYOKA, J
JULY 29, 2022**

BETWEEN

BENSON BUKACHI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal from the judgment of Hon. G. Ollimo, Resident
Magistrate, in Butere SRMCSO No. 42 of 2018, delivered on 3rd June 2020)*

JUDGMENT

1. The appellant had been convicted of defilement, contrary to section 8(1), as read with section 8(2), of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya. The allegation was that he had intentionally caused his penis to penetrate the vagina of EA, a child aged eight years. He had denied the offence, and a trial ensued, with seven witnesses testifying. He was sentenced to serve twenty-five years in jail.
2. PW1 was the complainant. She described how the appellant lured her to a maize farm, where he defiled her. She said that was not the first time the appellant defiled her. PW2 was the father of PW1. He said that she was taken to hospital, and he reported the matter to the police. He said she was eight years old at the time of the incidence. PW3 was the mother of PW1. She was stood down before she could say much. PW4 was the clinical officer, who treated and attended to PW1. He concluded that there had been defilement. PW5 was the local Chief. He arrested the appellant. PW6 was a child of seventeen years of age. He said he found the appellant in the act of defiling PW1. PW7 was the investigating officer. The appellant was put on his defence. He gave an unsworn statement. He called DW2 and DW3, who said that the case was a frame-up.
3. In his petition of appeal, filed herein on June 19, 2020, the appellant appeals only against the sentence, on the basis of its severity. In his written submissions, filed on September 12, 2020, he raises the issue of the sentence, the age of PW1, the medical evidence, penetration and the defence.



4. On sentence, under section 8(2) of the *Sexual Offences Act*, where the victim of defilement is aged eleven (11) years or less, upon conviction, the accused ought to be sentenced to imprisonment for life. This is a mandatory sentence. PW1 was said to have been aged eight years. However, in sentencing the court was guided by the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR(Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) on sentencing with respect to mandatory and minimum sentences. Of course, as at June 3, 2020, the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR(Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) did not apply by dint of in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ), but the High Court has since May 17, 2022, given, in *Philip Mueke Maingi & others vs. Director of Public Prosecutions & another* Machakos HCPet No E017 of 2021 (Odunga J), directions similar to those given in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR(Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ). Consequently, I find, going by *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HCPet No E017 of 2021 (Odunga J), that the trial court properly considered sentences other than the mandatory life imprisonment prescribed by section 8(2) of the *Sexual Offences Act*. The trial court considered that the appellant had been in custody throughout his trial, and that he was epileptic. It had also considered the sentencing policy guidelines issued by the Judiciary, the mitigation and aggregating factors, before arriving at the sentence of twenty-five years in jail. I am persuaded that the trial court properly exercised discretion in sentencing; and I shall not interfere with the sentence of twenty-five years in jail.
5. On age, PW1 said she was in Class 3 at [Particulars Withheld] Primary School, and she gave a sworn statement and was cross-examined. PW3 was the maternal uncle of PW1 and lived with PW1. He said she was eight years and nine months old. PW3 was her biological mother. She said PW1 was nine years in 2019, having been born in 2010. The P3 form placed on record, as Exhibit No 2, put her age at eight years. The treatment notes placed on record reflected her age as eight years. There is ample evidence that PW1 was aged eight years at the time the offence was committed, and that brought the charge of defilement within the realm of section 8(2) of the *Sexual Offences Act*.
6. On the matter of the medical evidence being doubtful, because PW2 allegedly worked at the health centre from which the same was generated, there is nothing on the record which points to PW2 working at the said health centre. He was not cross-examined on that issue; and in defence, neither the appellant nor DW2 and DW3 said anything about his working at the medical centre. In any case, the mere fact of his working there, if at all, cannot be a basis for discounting the scientific evidence obtained from the tests done, without any evidence that they were manipulated.
7. On there being no proof of penetration, PW1, the victim himself, testified and talked of the appellant putting his private parts inside hers. PW4, the medical officer, conducted a high vaginal swab, which revealed multiple epithelial cells. He said the uterine walls were reddened, which was an indication of forced penetration. He concluded that there was defilement, PW6, a child of seventeen years, found the appellant lying on top of PW1. The evidence on record established penetration beyond reasonable doubt. The only issue should be whether the appellant was responsible. PW1 says he was. PW6 saw him on top of PW1. The appellant was well known to both PW1 and PW6.
8. On his defence not being considered, I note, from the judgment, at pages 4 and 5 (pages 64 and 65 of the record of appeal), that the testimonies of the appellant (DW1), DW2 and DW3 were recited. The submissions by the defence were also recited. The defence was analysed, at page 8 of the judgment (page 68 of records of appeal), but was dismissed as not credible.



9. Overall, I find no merit with appeal herein, and I hereby dismiss the same. I uphold the conviction, and confirm the sentence. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
29TH DAY OF JULY, 2022**

W M MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Benson Bukachi, appellant in person.

Ms. Kagai, instructed by the Director of Public Investigations, for the respondent.

