



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndumbi v Republic (Criminal Appeal 37 of 2019)  
[2022] KEHC 11606 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11606 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 37 OF 2019  
HPG WAWERU, J  
JULY 27, 2022**

**BETWEEN**

**VICTOR MUNENE NDUMBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Conviction and Sentence in Nanyuki  
CM Sexual Offence Case No 49 of 2018 – N Thuku, PM)*

**JUDGMENT**

1. The Appellant herein, Victor Munene Ndumbi, was convicted after trial of defilement of a child contrary to section 8(1) & (2) of the *Sexual Offences Act*, No 3 of 2006. It was alleged in the charge that on 21/06/2018 at [Particulars withheld] area of Buuri Sub-County in Meru County, he intentionally caused his penis to penetrate the vagina of one KJM, a child aged 10 years. On 28/08/2019 he was sentenced to life imprisonment. He has appealed against both conviction and sentence.
2. In his petition of appeal the Appellant raised the following grounds of appeal –
  - i. That the charge was defective.
  - ii. That the evidence adduced by the prosecution was inconsistent, uncorroborated and contradictory.
  - iii. That the medical evidence on penetration was defective.
  - iv. That there was no DNA evidence adduced.
  - v. That there was bad blood between the complainant’s mother’s landlady and the Appellant, and that therefore the charge was trumped up.



- vi. That the trial court rejected the Appellant's defence without proper reason.
- vii. That the charge was not proved beyond reasonable doubt.
3. Together with his written submissions the Appellant filed "Amended Supplementary Grounds of Appeal" in which the following additional grounds appear –
  - viii. That the Appellant was not positively identified as the perpetrator of the offence.
  - ix. That penetration was not proved to the required standard.
  - x. That the trial magistrate conducted the trial "in a capricious, oppressive and callous manner that violated the Appellant's right to a fair trial as provided (for) under Article 50(1)(g) & (k) of *the Constitution* of Kenya."
  - xi. That the prescribed sentence imposed by the trial court violated Article 24 of *the Constitution*.
4. The learned counsel for the Respondent supported the conviction. He submitted that the charge in all its elements was proved beyond reasonable doubt. On the sentence he submitted that the same was mandatory as prescribed by law.
5. I have considered the written submissions of the Appellant and the oral ones of learned counsel. This being a first appeal, I have read through the record of the trial court in order to evaluate the evidence tendered there and arrive at my own conclusions regarding the same. I have borne in mind that I did not see and hear the witnesses myself, and have given due allowance for that fact.
6. The prosecution called five witnesses. The complainant (the defiled child) testified as PW1. Her testimony was unsworn after the trial court found that she did not understand the nature of the oath. She testified that she knew the Appellant well as he had been employed by their landlord and lived in the same compound as her. She narrated in graphic detail how on 21/06/2018 at about 2:00 p.m. the Appellant had found her playing by herself at her home, called her and led her to his own house. There he offered her food which she declined. He then led her to the bedroom and undressed her, then lay her on the bed and proceeded to forcibly push his erect penis into her vagina. When he finished he left on her a substance that looked like mucous that had come from his penis. He then told her to dress up and leave, warning her not to tell anyone what had happened or she would be arrested by the police.
7. SK (PW2) was the complainant's mother. She testified that on 07/07/2018 at about 7 p.m. when she got home from work she found that the complainant had gone to visit her aunt. PW2's landlady then came and asked her where the complainant was. The landlady then informed her that a young man called Victor had made enquiries about the complainant. The landlady cautioned her about Victor.
8. PW2 further testified that when her husband came home they contacted the complainant's aunt (who was called BK and was PW2's sister) and requested her to ask the complainant if Victor had defiled her. She said that her sister subsequently called and told her that the complainant had told her that indeed she had been defiled by Victor. She then asked her sister to bring the complainant home. She did so, and they all took the complainant to the police and then to hospital. Later the complainant led them to the house of Victor where he was arrested after being pointed out by the complainant.
9. PW2 stated that she knew Victor as he had been employed by her landlady and lived in the same compound as them. She identified him in court as the accused.
10. BK testified as PW3. She stated that on 07/07/2018 at about 7:00 p.m. her sister (PW2) called her and asked her to find out from the complainant if Victor had defiled her; that immediately she enquired from the little girl she started crying uncontrollably; that after she calmed down the complainant



narrated in graphic terms what Victor had done to her; and that after he had finished he had warned her not to tell anyone.

11. PW3 then took the complainant home to her parents and subsequently accompanied them to the police station and hospital, and later to the house of Victor who was arrested. She had not known Victor before.
12. Stephen Mugo (PW4) was a Clinical Officer. He stated that he examined the complainant on 21/06/2018 and filled up her Post Rape Care Form (PRC). He subsequently completed the complainant's medical report (P3) on 10/07/2018 using the PRC form. He had found evidence of penetration, which included a broken hymen and blood in the vagina.
13. PC Nelly Mungai (PW5), a police officer, essentially testified on behalf of the investigating officer who was said to have proceeded on maternity leave. All she did was to read the contents of the police file to familiarize herself with the case.
14. The Appellant gave a sworn statement in his own defence. He did not call any witness. He stated that he used to work for a certain employer whom he did not name and that he had left the job without the employer giving him the part of the salary that the employer had been saving for him; and that in the night of the day when he went to demand his money from the employer, the employer came accompanied by his landlord and police officers and he was arrested. He was not told the reason for his arrest, and he was subsequently charged. In cross examination he agreed that he lived in the same plot as the complainant and that he had free access to all areas of the plot.
15. That was the totality of the evidence placed before the trial court.
16. The charge of defilement as laid was good and there was no defect in it. In any event the Appellant did not point out any defect in his submissions.
17. Likewise this court found no bias or anything else in the conduct of the trial that would lead to a conclusion that the trial was not fair.
18. There is no dispute regarding the age of the complainant which was proved by her birth certificate produced in evidence. She was born on 09/06/2008. As the offence was allegedly committed on 21/06/2018, she was indeed ten (10 years old).
19. From the evidence, there is also no dispute regarding the identity of the alleged perpetrator of defilement. The Appellant was well-known to the complainant, a fact that he acknowledged.
20. This was an open-and-shut case. The complainant testified in clear and graphic terms and was not shaken in cross-examination. Her reaction on being asked about the defilement by PW3 (crying uncontrollably and then giving to her the story that she gave in court) provided good corroboration; likewise her leading her parents, PW3 and the police to the house of the Appellant where he was arrested was additional corroboration.
21. The testimony of the Clinical Officer (PW4) caused some confusion; he confused the date he examined the complainant and filled up the P3 (that is 07/07/2018) with the date when she had been defiled – that is 21/06/2018. It is however clear from the rest of the evidence that the complainant had been defiled on 21/06/2018 but was taken to the police and hospital on 07/07/2018. PW4 then filled up the medical report (P3) on 10/07/2018, using the information contained in the PRC form.
22. The findings of PW4, in both the PRC form and the P3, were that the complainant's hymen was broken and she had some blood in her vagina, both evidence of penetration that corroborated her testimony of defilement by the Appellant.



23. The trial court duly considered the Appellant's defence. That defence was that the charge was trumped-up on account of a grudge between the Appellant and his previous employer (who had cautioned the complainant's mother (PW2) about the Appellant enquiring about the complainant.). In light of the overwhelming evidence tendered by the prosecution, that defence was properly rejected by the trial court.
24. Upon my own assessment of the evidence placed before the trial court, I find that the charge of defilement contrary to section 8(1) & (2) of the *Sexual Offences Act* was proved beyond reasonable doubt against the Appellant. The conviction is safe and there is no merit in the appeal against it.
25. As for sentence, the Appellant got what the law provided, mandatory imprisonment for life. However, in the now notorious case known as Muruatetu, the Supreme Court of Kenya declared that the mandatory nature of the death sentence for murder (sections 203 and 204 of the *Penal Code*) is unconstitutional for interfering with the court's discretion in sentencing. There is no reason why the same reasoning should not apply to the mandatory imprisonment for life under section 8(2) of the *Sexual Offences Act*.
26. That life imprisonment awarded to the Appellant was clearly manifestly harsh and excessive, given the circumstances of this case. A substantial but definite term of imprisonment would better serve the ends of justice.
27. The sentence of life imprisonment imposed upon the Appellant is therefore set aside, and a term of imprisonment for twenty (20) years substituted. The same shall take effect from the date the Appellant was arrested, that is, 07/07/2018. To that limited extent only is the appeal against sentence allowed. It is so ordered. The appeal against conviction is hereby dismissed.

**DATED AND SIGNED AT NANYUKI THIS 20<sup>TH</sup> DAY OF JULY 2022**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 27<sup>TH</sup> DAY OF JULY 2022**

