



REPUBLIC OF KENYA



KENYA LAW
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**Musucha v Republic (Criminal Appeal 13 (E038) of 2021)
[2022] KEHC 12483 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 13 (E038) OF 2021
LK KIMARU, J
JULY 25, 2022**

BETWEEN

DOMINIC WESONGA MUSUCHA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of conviction and sentence of Hon. M.N. Osoro
(Resident Magistrate) in Kitale Chief Magistrate's Court Criminal
Case (S.O) No. 244 of 2021 delivered on 24th February 2021)*

JUDGMENT

1. Dominic Wesonga Musucha, the Appellant herein, 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 16th October 2019 at [Particulars withheld] village Kwanza Sub-County within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SN, a child aged three and a half (3½) years old. In the alternative, the Appellant was charged with the offence of 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 16th October 2019 at [Particulars withheld] village Kwanza Sub-County within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of SN, a child aged three and a half (3 ½) years old. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to life imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. In his amended Petition of Appeal, the appellant accused the trial court of violating his Constitutional right to legal representation. In support thereof, he cited Articles 10, 27 and 50 (2) (g) and (h) of the Constitution as read with Section 43 of the [Legal Aid Act](#) as having violated. He faulted the trial court for convicting him yet the Prosecution had failed to discharge its burden of proof. He added that the trial court ought to have considered



- his defence. Finally, he asserted that the trial court's sentence was excessive since the charges preferred against him were not proved to the required standard. He therefore urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.
3. The Appeal was heard on the basis of the parties' written submissions. Learned Counsel Mr. Teti submitted on behalf of the Appellant that his constitutional rights were violated following the trial court's failure to inform him of his right to legal representation. This was critical as the offence he was charged with was serious and carried a life sentence. He submitted that the trial court occasioned a miscarriage of justice on the failure to uphold the objectives enshrined in the [Legal Aid Act](#) as read with the Constitution. On identification of the perpetrator as an ingredient to the offence of defilement, the Appellant submitted that there was no nexus to established that 'Tony', identified as the perpetrator by the Complainant, was the Appellant. That since the investigation officer failed to testify, this ingredient was not established to the required standard of proof. Additionally, the Appellant submitted that the fact of the Complainant crying when she saw the Appellant in court was irrelevant as to establish identity of the perpetrator. Learned Counsel submitted that the court ought to have interrogated the Appellant's decision to remain silent when he was called upon to put his case in his defence. Finally, he submitted that the Appellant ought to have been given an opportunity to submit on the Prosecution's submissions after its case was closed.
 4. Miss. Kiptoo, Learned Prosecutor, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. On whether the trial court denied his right to legal representation, she submitted that the court did not. She maintained that the trial court discharged its mandate lawfully. On whether the trial court ought to have considered the Appellant's silence as his defence, Learned Counsel submitted that the trial court duly complied with Section 211 (1) of the Criminal Procedure Code. She further stated that the trial court's sentence lawful. She urged the court to uphold the conviction and affirm the sentence that was imposed on the Appellant.
 5. The Prosecution called a total of three (3) witnesses in a bid to establish the charge preferred against the Appellant. The Complainant SN, (PW2) had developed a tendency to stay at the shop during the day. She was thus at the said shop on 16th October 2019 where the Appellant found her. She recognized him as their neighbour. The Appellant then took the Complainant to his house where he sexually assaulted her.
 6. During the said ordeal, PW1, JN, an aunt to the Complainant noticed that PW2 was not at the shop. She met D, a seven (7) year old girl (now deceased) who informed her that she had seen the Appellant and PW2 going towards the direction of the Appellant's house. PW1 testified that she spotted PW2's shoes at the Appellant's house. She picked PW2. On their way home, she noticed that PW2 had wrongly worn her trouser. In explaining the reasons for that, PW2 informed PW1 that the Appellant had defiled her.
 7. The Complainant was taken to Kitale County Hospital on the same day. She was seen by Peter Masake, PW3 clinical officer. His observations were that the minor's private parts had a foul smelling discharge. There was the presence of whitish stuff on her inner wear. There was tenderness in her private part; the injuries were fresh. A urinalysis revealed the presence of pus cells in her urine. He confirmed that the Complainant was defiled with partial penetration. He then treated the Complainant. He produced the treatment notes and P3 form in evidence as Prosecution Exhibits 2 and 3 respectively.
 8. After close of the Prosecution's case, the trial court found that the Appellant had a case to answer. He was placed on his defence. However, the Appellant chose to remain silent.
 9. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate 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* [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the Prosecution discharged its burden to the required standard of proof being beyond reasonable doubt that the Appellant committed the offence that he was charged with.

10. In order to sustain a conviction on a charge of defilement, the Prosecution must establish all of the following three ingredients:
 1. Age of the Complainant
 2. Penetration
 3. Identification of the perpetrator
11. The first ingredient is that of the Complainant's age. The Prosecution relied on the statements disclosed in the P3 form. In it, it was disclosed that the Complainant was three and a half (3 ½) years old at the time of the offence. This court confirms the evidence captured in the P3 form sufficiently established the age of the Complainant. The Complainant was a child within the meaning ascribed to the term under Section 2 of the *Children Act*.
12. 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."
13. The Complainant's testimony was that on 16th October 2019, the Appellant defiled her at his home. When seen by PW3, she observed that the minor's private parts had a foul smelling discharge. There was the presence of whitish stuff on her inner wear. There was tenderness in her vagina; the injuries were fresh. A urinalysis revealed the presence of pus cells in her urine. His conclusion was that the Complainant had been defiled. There was evidence of partial penetration. This court holds that the Prosecution had established the ingredient of penetration to the required standard of proof.
14. The last ingredient that the Prosecution had to establish was the identity of the perpetrator. The Complainant testified that the Appellant was her neighbour as at the time of the offence. She testified that on 16th October 2019, the Appellant took her to his home. He then sexually assaulted her. PW1 found PW2 at the Appellant's home. The trial court relied on the evidence of PW2 who was the sole eye witness to the offence. The trial court further observed that the Complainant started crying when she saw the Appellant in open court. The Learned magistrate's conclusion was that this amounted to a sign of recognition and hence identity.
15. It is generally understood that a court will not convict an accused person on the evidence of a victim alone unless corroborated by material evidence. Section 124 of the *Evidence Act* however sets out an exception to this general rule. Where the victim is a survivor of a sexual offence, the trial court may convict an accused person if the court is satisfied as to the evidence of the victim provided the said victim is telling the truth. The trial court observed that the Complainant identified the Appellant as her neighbour. She started crying when she saw the Appellant during her testimony. The court concluded that was a sign of recognition thus affirming that identity was established to the required standard of proof beyond any reasonable ground. This court sees no reason to disturb that finding.
16. This court has considered the Appellant's grounds in support of his Appeal. On whether the Appellant was prejudiced by not being informed of his right to legal representation, this court is not convinced that the absence of informing the Appellant of his right to legal representation occasioned a miscarriage



of justice. Put differently, no substantial injustice occurred. This court takes the second approach as deciphered by the court in *NMT alias Aunty v Republic* [2019] eKLR which held as follows:

“ There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.”

17. On the Appellant’s election to remain silent, this court finds that the Appellant exhausted his right to appeal against his decision to remain silence as he was given an opportunity to raise a defence. The upshot of the above reasons is that this court finds that the Prosecution established the ingredients of defilement to the required standard of proof beyond any reasonable doubt. Consequently, the Appellant’s appeal against the conviction lacks merit. It is hereby dismissed.
18. The Appellant was under the *Sexual Offences Act* sentenced to life imprisonment. In his mitigation at trial, the Appellant stated that he provided for his parents and a blind sister. Taking into account the recent decision in Pet No. E017 of 2021; Philip Mueke Maingi & 5 others versus the AG and another, this court shall interfere with the sentence. The Appeal against the sentence succeeds. The sentence of life imprisonment is hereby set aside and substituted with a determinate sentence of thirty (30) years imprisonment.

It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L. KIMARU

JUDGE

