



**Mwangi v Republic (Criminal Appeal E079 of 2021)  
[2022] KEHC 12981 (KLR) (Crim) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12981 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E079 OF 2021**

**LN MUTENDE, J**

**SEPTEMBER 22, 2022**

**BETWEEN**

**MICHAEL MACHARIA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the original conviction sentence in Criminal Case No. E3603 of 2015 at the Chief Magistrate's Court Makadara by Hon. Kithinji A. R. on 2nd September 2021)*

**JUDGMENT**

1. Michael Macharia Mwangi, the Appellant, was charged with defilement of a girl contrary to Section 8(1) as read with Section 8 (3) of *Sexual Offences Act* No. 3 of 2006. Particulars of the offence being that on the 3<sup>rd</sup> day of December, 2015 in Huruma Corner is Starehe Sub-County in Nairobi County, intentionally and unlawfully cause his penis to penetrate the vagina of GK a girl aged 4 years.
2. In the alternative he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 3<sup>rd</sup> day of December, 2015 in Huruma Corner in Starehe Sub-County within Nairobi County, intentional and unlawfully assaulted GK by touching her private parts namely vagina.
3. Evidence adduced by the Prosecution was that, GK a minor was playing with a friend, K, when the appellant asked her to accompany him to his house in order to do bad manners. She complied and while inside the house he molested her. She cried and Rita went to her assistance.
4. PW2 Aloisia Kessy was called by a neighbour and when she returned home, she found people having crowded around the house of the appellant, her neighbour. He was being accused of having defiled the complainant. They took the appellant to the Police Post while the minor was taken to hospital.



5. The child was examined by Dr. Kajuju who found her having sustained a fresh tear at the posterior fourchette and was bleeding on touch though the hymen was normal and intact. Similar results were given by PW4 Dr. Joseph Maundu of Nairobi Surgery who also examined the minor. At the Police Station PW5 No. 58578 PC Samuel Kariuki re-arrested the appellant. PW6 No. 235837, Inspector Rose Katana investigated the case and formed the opinion to charge the appellant.
6. Upon being placed on his defence the appellant testified to have been with his house-mate, Kinyua and another, Mwangi, on December 8, 2015 after work. That they drunk and he went to sleep, having asked Kinyua to lock the house from outside.  

As he slept, he was woken up by four men who broke the door and assaulted him for allegedly having defiled a child, a neighbour. He was taken to the Police Station where he was detained for five (5) days. He was subjected to medical treatment but the report was negative; and that there was a woman where they lived who wanted to make money from him.
7. The trial court considered evidence adduced and found the child having been truthful, therefore, concluded that the age of the child; act of penetration; and, fact of identification of the culprit having been proved to the required standard hence the conviction for the offence of defilement. In the result the appellant was sentenced to serve thirty (30) years imprisonment.
8. Aggrieved, the appellant appeals on the grounds that:
  1. That, the trial Magistrate erred in law and fact by convicting the appellant pursuant to Section 124 of the Evidence Act having ignored the medical report which indicated that the complainant's hymen was intact.
  2. That, the trial Magistrate erred in law and fact for not considering that charges were defective since a person who is convicted under Section 8 (1) as read with Section 8(3) of the S.O.A cannot be sentenced to serve 30 years imprisonment.
  3. That, the trial court rejected the appellant's alibi defence which was not displaced by the prosecution per Section 212 of the CPC (Cap 75 laws of Kenya) and there were irregularities which occurred during the trial contrary to Article 50(2) of the Constitution 2020 and 49 (1) (f) of the Constitution.
9. The appeal was canvassed through written submissions. It was urged by the appellant that the alleged bad manners by the complainant was not described, a fact that did not give rise to the offence of defilement as the act of penetration was not proved. That the charge sheet was defective having cited Section 8(1) as read with Section 8(3) of the Sexual Offences Act which attracts a sentence of twenty (20) years but not thirty (30) years imposed; a defect that contravenes Article 50(2) of the Constitution as the appellant was sure of a sentence of twenty (20) years if convicted.
10. Finally, that the trial court erroneously failed to consider the alibi defence put up; as the burden was on the prosecution, it was questionable if the issue was handled in accordance with the law.
11. The Respondent through learned Prosecution Counsel, Mr. Ishmael Kiragu Maingi, opposed the appeal. He urged that the age of the complainant was proved by evidence of a Clinic Card which established that the complainant was born on October 20, 2010 such that at the time of the offence she was almost 5 years old. That medical experts confirmed the fact of penetration and the appellant was well known to the complainant.
12. On sentence, he urged that the court misdirected itself hence urged this court to consider the age of the minor and substitute the thirty (30) years meted out with life imprisonment.



13. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 as follows:
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *Shantilal M. Ruwala v. R* [1957] EA 570. 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 courts’ findings and conclusions; it must make its own findings and draw its own 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 - *See Peters v. Sunday Post* [1958] EA 424”.
14. The offence of defilement is created by Section 8(1) of the [Sexual Offences Act](#) that provides thus;
- A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
15. The ingredients of the offence are therefore:
- a. The age of the victim
  - b. The act of penetration
  - c. Positive identification of the culprit.
16. In the case of *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2020 (UR) the court of Appeal stated that:
- “Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.
17. In the case of *Francis Omuroni Vs. Uganda, Appeal No. 2 of 2000*, the Court of Appeal held that
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”
18. Evidence was adduced of a clinical card issued to the minor. It was confirmed that she was born on October 20, 2010. This child was known to the appellant who did not dispute her age. It is apparent that at that time of the incident the complainant was aged four(4)years, ten(10) months hence of an apparent age of five (5) years.



19. On the question of penetration, it is defined by Section 2 of the [Sexual Offences Act](#) as:
- The partial or complete insertion of the genital organs of a person into the genital organs of another person;
20. In the case of *Bassita vs. Uganda*, SC Criminal Appeal No. 35 of 1995 it was held that:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”
21. At the time of testifying the minor complainant was six (6) years old. The court observed that she was too young to be sworn such that it made her give unsworn evidence and was subjected to cross-examination. She testified how the assailant undressed by removing his trousers, and, that he did bad manners to her. She proceeded to demonstrate what she meant by bad manners, in that the appellant placed his penis into her vagina.
22. The appellant complains that the trial court ignored medical evidence presented but relied on Section 124 of the [Evidence Act](#) in reaching the decision to convict him. The alluded to provision of the law provides that:
- Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (Cap. 15), where the evidence of the alleged victim is 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
23. Upon medical examination, it was found that the child’s hymen was intact save that she had a tear at the posterior fourchette which is the thin fork-shaped fold of the skin that stretches at the bottom of the entrance to the vagina. The child alluded to the penis having been placed on her vagina. She did not state that there was penetration whether partial or complete. Therefore, it is doubtful if the offence of defilement was committed.
24. On the alternative Count, it is alleged that the assailant touched the private parts of the complainant namely vagina which was committing an Indecent Act with a child. Section 2 of the [Sexual Offences Act](#) defines an Indecent act as:
- ...an unlawful intentional act which causes
- (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- (b) Exposure or display of any pornographic material to any person against his or her will
25. The complainant was a minor who upon being taken through cross examination answered question appropriately. She was rescued from the house where the act was committed by members of public. PW2 found people who had rescued her still at the scene of the incident. The learned trial Magistrate who had the opportunity of hearing her and observing her demeanor in compliance with Section 124



of the *Evidence Act*, opined that the court conducted a *voire dire* examination on the minor and was satisfied that she was truthful. From the explanation given by the complainant as to what happened, the assailant's penis came into contact with her vagina. And, this fact is corroborated by medical evidence adduced. In the premises an Indecent Act was committed on the person of the complainant.

26. On the question of identification of the assailant, the appellant argues that the alibi defence put forward was rejected. Putting up an alibi defence is an argument that the individual could not have committed the offence as he was elsewhere. In the case of *Republic vs. Sukha Singh and others* (1939) 6 EACA 145 the Court of Appeal stated that:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

27. The appellant was represented by Counsel at trial who had full instructions from him. PW2 found the appellant and the complainant; and there was a crowd at the premises. The appellant having been their neighbour, it was not suggested that he was elsewhere. Although the appellant was arrested on the same date of the incident, December 3, 2015, in his defence he alluded to December 8, 2015 at 4.00 pm as the date of his arrest, yet, he was produced in court on the stated date. The trial court considered the defence put up and dismissed it as it was not an explanation to what transpired. The appellant cited Section 212 of the *CPC* that provided thus:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

28. The Prosecution could not have been expected to call evidence in reply of a defence that was not explained.
29. The appellant faults the trial court for not considering purported defects in the charge and in the result convicting him, yet, Article 49(1) (f) of *the Constitution* was not complied with. The alluded to the provision of the law provides thus:

An arrested person has the right-

To be brought before a court as soon as reasonably possible, but not later than

- i. Twenty-four hours after being arrested; or
- ii. If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

30. In the case of *Julius Kamau Mbugua Vs. Republic*, CRA No. 50 of 2008 the court stated that:

“However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise



the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.”

31. I note that the appellant was arrested on December 3, 2015, but was arraigned in court on December 8, 2015. The question of being held in custody beyond the required time prior to being produced in court and the allegation of having been assaulted were raised before the trial court. But, the breach of a right being a breach of a civil right should be addressed by a Civil Court with a view of awarding damages. A culprit would not be acquitted because his rights as envisaged by *the Constitution* were violated.
32. From the upshot, it is apparent that the complainant was not a stranger to the appellant. They were neighbours, and following the act, the appellant was caught immediately, therefore the identification of the assailant was positive.
33. As a fore found, I find that the prosecution proved the alternative count against the appellant. Therefore, I set aside the conviction and sentence imposed on the main charge which I substitute with a conviction on the alternative charge of committing an Indecent Act with a child. Consequently, I sentence the appellant to ten (10) years imprisonment that will be effective from the date of conviction and sentence, the 2<sup>nd</sup> day of September 2021.
34. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Court Assistant - Mutai

Appellant

Ms. Chege - ODPP

