



REPUBLIC OF KENYA



**Ngumbao v Republic (Criminal Appeal E023 of 2021)
[2022] KEHC 14698 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E023 OF 2021
A. ONG'INJO, J
OCTOBER 25, 2022**

BETWEEN

ALI MASHA NGUMBAO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence by Hon R M Amwayi,
Senior Resident Magistrate on 6th May 2020 in Mombasa Chief
Magistrate's Court SO Case No 85 of 2018, Republic v Ali Masha Ngombao)*

JUDGMENT

1. Ali Masha Ngombao was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006. The particulars are that Ali Masha Ngombao on diverse dates of September 9, 2018 to October 12, 2018 at [Particulars Withheld] area in Jomvu sub-county within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of GE a girl aged 13 years old.
2. In the alternative count, the Appellant was also charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars of the offence are that Ali Masha Ngombao on the diverse dates of October 9, 2018 at [Particulars Withheld] area in Jomvu sub-county within Mombasa County intentionally and unlawfully caused his penis to rub the vagina of GE a girl aged 13 years old.
3. The trial magistrate considered the evidence of the four prosecution witnesses and the sworn statements of three defense witnesses and convicted the appellant who was sentenced to serve 20 years imprisonment.
4. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds filed on June 21, 2022: -



1. That the learned trial magistrate erred in law and fact by convicting me yet the evidence of the Complainant is at variance with the charge rendering it defective.
 2. That the learned trial magistrate erred in law and fact when he convicted me yet the prosecution failed to call in evidence of the doctor who mentioned the name of the perpetrator to PW2.
 3. That the learned trial magistrate erred in law and fact when he failed to consider that this case was fabricated in order to conceal the case which he had reported to the village elder.
 4. That the learned trial magistrate erred in law and fact by convicting the Appellant yet the prosecution had failed to prove that the Complainant had gone missing as alleged.
 5. That whether the sentence imposed on me was constitutional.
5. The Appellant prayed that this court sets aside the conviction and sentence and to direct that he be set at liberty. The Appellant filed written submissions to that effect.

Appellant's Case

6. PW1, GE stated that she was aged 15 years and a student at [Particulars Withheld] in form one. She stated that on diverse dates between September and October 2018, she remembered that the Accused (pointing at him) was a bodaboda rider. That the Accused met her on the road while coming from the church at about 2.00 pm. That he then carried her on the motorcycle and took her to a certain house which belonged to his aunt. That he asked her to get in the house and he took a leso and tied her mouth. That the Accused took a condom and wore on his penis and removed her clothes including her panty. That he then penetrated her vagina using his penis and forcefully had intercourse with her. That he did it severally while in the house and that PW1 was in the house for one month. PW1 stated that one day she was feeling unwell and begged him to take her to hospital. That while at the hospital, she talked to the doctor and managed to talk to her mother and she ran away. That the house was in a secluded place and it looked like an abandoned house as there were no neighbours. PW1 stated that when she went home, she found her mother had gone to church and that she was called and told that PW1 was back home. That when her mother went home, PW1 told her that she was not feeling well but she did not tell her what had happened as she did not ask.
7. PW1 stated that she was taken to hospital by her mother who also wet and reported to the village elder. That the Accused took a letter to PW1's mother saying she was needed by the village elder. That the village elder by the name Naomi later called PW1 and asked her what had happened which PW1 narrated to her. That the village elder then called PW1's mother and told her what had happened. That they then reported the matter to Jomvu Police Station and the following day to Changamwe Police Station. That PW1 was taken to Makadara Hospital where she was examined and the doctor confirmed that there was penetration of both the vagina and the anus. That the document issued by the police was given to her mother. PW1 stated that the Accused went to the village elder and reported that they were spreading malicious rumours against him. PW1 stated that she had known him as Ali, a bodaboda operator and that was the first time that he was taking her to his house. PW1 stated that when the Accused carried her on the motorbike, PW1 had taken it so that he could take her home and for her to pay him for the service. That however, the Accused did not take her home. That PW1 never asked why the Accused why he locked her in the house. PW1 positively identified the Accused in court by pointing at him.
8. On cross examination, PW1 stated that she used to see the Accused operate a bodaboda but she did not know his name. That he forced her into the house by pushing her in and locking her in the house from the outside using a padlock. That PW1 tried to scream but the Accused threatened to kill her. PW1



stated that the Accused carried her during the day at 2.00 pm and that she had paid for the bodaboda services. That the incident happened when she was in primary school.

9. PW2, RN stated that on October 12, 2018 at about 11.00 am, her daughter had gone missing on the said date. That a boy went and told her that she was needed in hospital. PW2 stated that her daughter had gone missing for a month and when she got to hospital, she was told that her daughter had been taken to hospital by a certain man. That the doctor told PW1 who the man was and she proceeded to the Accused's home where she found his wife. That they went to look for him and PW1 as the doctor told PW2 that they had left. That PW2 met the Accused on the way and when he was asked where PW1 was, he denied knowing. PW2 stated that she went and reported the matter to the village elder. That they then went with the village elder to the Accused's home. That they found the Accused's mother who was told to inform the Accused to take the child to the village elder and this happened on Friday. PW2 stated that on Sunday she received a phone call and she was told that her daughter was at the door. That when she got home, she found PW1 and opened the door for her then proceeded to the village elder and informed her what had happened. That on Tuesday, the Accused took a letter to PW2 from the village elder that he had reported her. PW2 produced the letter dated October 16, 2018 as exhibit Pexh 1. That PW2 then went to the police and reported the matter. PW2 stated that she took PW1 to Makadara where she was examined and treated and some documents filled. That she then took the documents back to the police. That before the Accused took the letter to her, PW1 had not informed PW2 that she was with the Accused. That the Accused was arrested and taken to Changamwe Police Station. PW2 stated that when her daughter went missing, she reported the matter at Jomvu and was given OBN No 19/16/10/2018. That PW2 was in good terms with her daughter before she went missing. That she was born on June 3, 2005 and aged 14 years and PW2 produced the original birth certificate as exhibit Pexh 2. PW2 positively identified the Accused in court.
10. PW3, Dr Nafisa Seig from Coast General Hospital produced the P3 Form filled by Dr Aisha who was away on Study leave. PW3 stated that the patient was called EG aged 14 years old who reported to having been defiled by a person well known to her for a period of one month. That the perpetrator rented a room for her and had sexual intercourse with her. PW3 stated that the patient had broken hymen, had internal bleeding at the time of examination and healing laceration. That blood swabs were taken and several tests done. That HIV and syphilis were negative. That at the point of examination, the juvenile had changed cloths and reported to the police. The PRC form was filled on October 17, 2018 and produced as Exhibit Pexh 3. PW3 stated that she had a P3 Form signed by Dr Aisha. She stated that she had worked with her and conversant with her handwriting and signature. That the patient complained that she was sexually assaulted by a person well known to her. That the hymen was broken with healing lacerations. The doctor concluded that there was penetration and the type of weapon was human penis. That the degree of injury was harm.
11. PW4, No 93588 PC Sava Laiki stationed at Changamwe Police Station at the time and the Investigating Officer stated that on October 18, 2018 she was in the gender office when she was called by the OCS CIP Busienei and informed him that a case of defilement had been reported and the suspect was already in the cells and that she was to investigate the case. PW4 stated that she then called the Complainant and interrogated her. That she was called GE aged 13 years old and she told PW4 that she had already been treated at Coast General Hospital. PW4 stated that she then proceeded to Coast General Hospital for the PRC Form. That she recorded the statement of the Complainant, the mother and the Accused Person. That the Accused had already been arrested on October 17, 2018 while at Jomvu and brought to Changamwe police station. That during investigations, PW4 established that the incident took place in [particulars withheld] in a house for several days. PW4 stated that the person who committed the offence was before court, he was positively identified by the Complainant before and after arrest. That the Accused and Complainant were not related.



Defense Case

12. The Accused, Ali Masha Ngumbao stated that he is a bodaboda operator, understands the charges against him and stated that on October 15, 2018 while on normal duties he met three passengers who stopped him. That he carried the Complainant and dropped her at her destination then went back to the bus stop. That while there, the Accused was told that there was a lady looking for him. That he went there and found the lady with a small child and the lady told him that her daughter had gone missing for two months and that she had heard that the Accused was seen with the child. That the Accused took the lady to where he had dropped the child on that day. That after she alighted, she told him to inform her in case he saw the child. That the Accused requested for her phone number to call her in case he saw the child. The Accused states that she left and went back to his home in the evening with other people. That the following day in the morning, the Accused went and reported the matter to the village elder that the lady had threatened him. That the Accused was given a letter to take to her which made her go to the village elder. The Accused stated that the issue of tenants and spreading rumours was sorted out. That the Accused was later taken to the police station and later the lady went to the police cells and told the Accused to admit. That the Accused was taken to court and charged with the offence which he denies.
13. DW2, Christine Asha Ngumsaid stated that the Accused is her husband. That on October 15, 2018, she was at home when a lady not known to her went and asked if the home belonged to Ali and she confirmed. That she then told DW2 that her daughter had gone missing for two months. That the lady had been told that her child had been seen with Ali. That while she was still there Ali arrived and she told Ali that she had heard that Ali had been seen with her child. That Ali said he had dropped the child with another man at some place. That they went there but did not find the child. That the said lady then told Ali to look for the child. That in the evening of the same day, the lady went back and asked for Ali and said Ali will know her. That DW2's father-in-law then advised Ali to report the matter to the village elder. DW2 stated that Ali went and made a report. That she then found the lady, the girl, the police, and Ali was arrested. On cross examination, DW2 stated that she does not spend time with her husband during the day and she would not know if he committed the said offence or not.
14. DW3, Masha Kansa stated that the Accused is his son and that on October 15, 2018, they were at home when a lady went and asked if she could be assisted. That the lady said that she was looking for Ali Masha's home. That the lady was told that she had arrived and she told them that her daughter was missing but had been seen with Ali on a motorcycle shortly Ali went home. That they then talked for a while and left on a motorcycle for Ali to show her where he had left the child. That later in the evening, the same lady went back with other women saying that she will deal with Ali. That Ali had not gone back home from work and when Ali arrived, DW3 told him to go and report the matter to the village elder. That Ali was given a letter when he went to the village elder. That the lady went with the police and the Accused was arrested.

Analysis and Determination

15. This being the first appellate court, the court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think



there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

16. After considering the grounds of appeal Records of trial court, submissions and circumstances of the case, issues for determination are as follows: -
 - i. Whether the charge sheet was defective
 - ii. Whether failure to call the doctor who filled the P3 form was fatal to the prosecution’s case
 - iii. Whether the charge against the Appellant was fabricated (Whether the prosecution proved its case beyond all reasonable doubt)
 - iv. Whether the sentence was lawful

Whether the charge sheet was defective

17. The reason why the Appellant claims that the charge sheet is defective is because the Complainant testified that during the period when he kept her in incommunicado in an isolated house, he had forceful penetrative sexual intercourse with her both to the vagina and anus.
18. According to the *Sexual Offences Act*, "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person; while "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.
19. From the above definitions, the evidence by the Complainant and the evidence in the P3 Form that the Complainant’s hymen was broken and that she had a healing laceration around the anal orifice cannot be construed to be a defect in the charge sheet.

Whether failure to call the doctor who filled the P3 form was fatal to the prosecution’s case

20. PW3 Dr Nafisa produced P3 Form on behalf of Dr Asha who examined the Complainant and filed the P3 Form. Dr Aisha who was said to be away on study leave at the University of Nairobi for five years and the P3 Form which was produced under Section 77 of the *Evidence Act* which provides: -
 - "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
 - (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
 - (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."
21. The prosecution laid a basis for production of the P3 Form by a person other than the maker in that the maker was known to PW3 who was familiar with her handwriting and signature and that the attendance of the maker of the P3 Form was going to take over 5 years and therefore would have delayed the expeditious trial of the Appellant.



Whether the charge against the appellant was fabricated (Whether the prosecution proved its case beyond all reasonable doubt)

22. By a letter dated October 16, 2018, the Village elder Kasiwa Ngasho summoned PW2 to attend to her on October 17, 2018 at 10.30 am and she was told to attend with her daughter. The Appellant had reported that PW2 was spreading malicious rumours against him by alleging that he had been seen with her daughter. PW1 went missing on September 9, 2018 and PW2 reported the matter at Jomvu Police Station and the report was booked. It turned out that the Appellant had abducted the Complainant and locked her in an isolated house where he kept her for over one month during which period he defiled her severally.
23. Prior to the Complainant escaping from the Appellant, PW2 was told that the Appellant had been seen with the Complainant and she went to their home and met his father and wife and later the Appellant found PW2 at their home and he lied that he had dropped the Complainant with another man at some place. He took PW2 on his motorbike to show her where he had allegedly dropped the child on the day she disappeared. That the Appellant promised to call PW2 in case he came across the daughter. When PW2 went back to the Appellant's home in the evening concerning the same issue of her missing daughter, the Appellant decided to report to the village elder and PW2 was summoned.
24. It is therefore not true that the issue of PW2's missing daughter was fabricated. She reported to the police on the 3rd day when her daughter went missing. She went to the Accused Person's home on learning that he had been seen with the child and when the Accused took the Complainant to hospital, the doctor who attended to the child identified him as one who accompanied the child to the hospital in the morning. The Complainant also testified that the Appellant carried her on his motorbike and instead of taking her to her home took her to a house in an isolated place where he kept her for a period of over one month.
25. Apart from the fact that there is evidence confirming the Complainant was missing, medical evidence also confirms that she was defiled and she identified the person who defiled her as the Appellant. Being that the Appellant carried the Complainant in broad daylight at 2.00 pm and being that he stayed with her for a period of over one month, there cannot be a possibility of mistaken identity and there was no fabrication.

Whether the sentence was lawful

26. After consideration of the circumstances of the case, mitigation of the Accused Person and the law in place, the trial magistrate Hon R. Amwayi (SRM) sentenced the Accused to serve 20 years imprisonment.
27. Section 8 (3) of the *Sexual Offences Act* provides, "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."
28. From the sentencing proceedings in the trial court of May 6, 2020, the trial magistrate said that the Appellant's mitigation had been considered and went ahead to impose a sentence of 20 years imprisonment. There is no indication that the sentence was imposed as a result of lack of discretion. The sentence was therefore lawful and this court finds no reason to unsettle it save that the same is ordered to run from October 19, 2018, the first time that the Appellant was arraigned in court and it is apparent that he remained in remand custody during the entire period of his trial.
29. In conclusion, this appeal lacks merit and is dismissed. Right of appeal 14 days explained.



**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 25TH DAY OF OCTOBER 2022
HON. LADY JUSTICE A. ONG'INJO
JUDGE**

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Ms. Ongeti Advocate for the Appellant

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO
JUDGE**

