



REPUBLIC OF KENYA



**Mauta v Republic (Criminal Appeal E072 of 2024)
[2025] KEHC 6749 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E072 OF 2024
A. ONG'INJO, J
FEBRUARY 20, 2025**

BETWEEN

WYCIFFE ONYYANCHA MAUTA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction and sentence by Hon.
V. M MOGUCHE Resident Magistrate Etago Principal Magistrate's
Court Sexual Offence Case No. E013 of 2023 delivered on 30.4.24)*

JUDGMENT

1. The Appellant Wyciffe Onyyancha Mauta was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offence [Act No. 3 of 2006](#).
2. Particulars are that on diverse dates of February 2023 and June 2023 at unknown time at Nyabera Sub- Location in Etago Sub-County in Kisii County the Appellant intentionally caused his penis to penetrate the vagina of N.K.S a child aged 8 years old.
3. In the alternative the Appellant was also charged with the offence of committing indecent act with a child contrary to Section 11 (1) of the Sexual Offence [Act No. 3 of 2006](#)
4. Based on the evidence of 4 Prosecutions witnesses and the Appellants unsworn testimony the trial Magistrate convicted the Appellant and sentenced him to serve 35 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he lodged his Petition of Appeal filed on 19th June 2024 on the following grounds:-
 1. The learned trial Magistrate erred in law and fact
 2. The learned trial Magistrate erred in law and fact



3. The learned trial Magistrate erred in law and fact
4. That the sentence meted on the Appellant was unconstitutional and not warranted on plea.
5. The learned trial Magistrate erred in law and fact
6. The Prosecution's case was 9 years old S.K was a pupil at Mirror Preparatory School in Grade 4. She informed the court that she was born on 20th February 2015 as per exhibit P1. She further stated that on a date in February the Appellant who was their teacher finished teaching them and then asked her to go his house. That when she followed him to the house he locked the door and asked her to undress. That she removed her pant and the Appellant did bad manners to her. She said she felt pain and the Appellant threatened her not to tell anyone. That she went back to class and it is Felicia who reported to the Head Teacher that the Appellant had defiled the Complainant and Felicia. The Complainant was taken to Etago Sub-County Hospital where she was treated and matter reported to the police. P3 and PRC forms were duly filled and produced as EX 3 and 4 respectively.
7. PW2 Benjamin Magero was a Director in Mira School Preparatory School and stated that he knew the Appellant as one of the teacher in his school. On 6/6/23 he was in Kisii town when the head teacher Naftal Obita called him to inform him that one of the teacher had defiled some children. PW2 left and went to school and found a parent by the name Tom Moruri had gone to report that the daughter Felicia had been defiled. That the Appellant was not in school and he went to Etago Police Station to report the matter and he called the Appellant who went and was arrested. PW2 further stated that he found out that the Appellant had defiled 5 children who were at the police station between the age of 8-10 and that Felicia's father was emotional. That it was Felicia who mentioned the other girls the Appellant had defiled. That on cross examination the Appellant stated that he was not in good terms with the head teacher.
8. PW3 Emily John a Clinical Officer at Etago Sub County Hospital produced the medical report on behalf of Dr. Aberi who examined the Complainant confirmed that she had been defiled severally. That on further examination her external genitalia was normal, though there was whitish discharge around the clitoris and the hymen was torn. That on laboratory examination the Doctor found that there was numerous pus cells and the complainant was put on medication. On cross examination the PW3 stated that the Appellant was not examined.
9. PW4 P.C. Emily Chemutai the investigating officer attached to Etago police station stated that she was not the first investigating officer as the initial investigating officer was transferred to Kisumu. That on 6/6/23 the Complainant was taken by the Head Teacher and another student and the complainant reported that they were defiled by the Appellant.
10. PW4 visited the scene and on their way they were informed that the Appellant wanted to escape and the Director also informed them that the he was with the Appellant at Sengera. They went and found the Appellant and arrested him. PW4 stated that the Complainants informed them that the Appellant after the morning lesson instructed the complainant to follow him to his house where he locked the door and asked her to undress. That the complainant undress and the Appellant also undressed and defiled her without protection. The Complainant told PW4 that she felt pain and that the Appellant threatened her not to say a word. PW4 produced Birth Certificate for the Complainant as Exhibit 1. She went further to say that the Appellant was charged for defiling 5 girls.
11. When the Appellant was placed on defence, he gave unsworn statement and said that he was a teacher at Mirror Preparatory. That in the month of February 2023 the Head Teacher called him to the office and asked if he knew what was happening in school. That the Head Teacher threatened him saying he would kill him and wore to make sure he was sacked. That the Head Teacher told him he had an



- affair with another teacher and he wanted to use his room. That when he told the school Director he was evicted from school for reasons he gets a lot of gifts during school closing days. That the school Manager motivated him not to quit.
12. That the Head Teacher again called him during break time and told him he wanted them to go on strike so that they get salary increase but he refused. That the Head Teacher said he would investigate him.
 13. That after one week he asked why a particular teacher used to come late. That the Head Teacher and the Director called him together with the madam teacher and said he was harassing the teacher and the Madam teacher said she would quit work.
 14. The Appellant also said that when the Head Teacher send students for school fees he asked him to send Perpetua away for school fees as he was not in good terms with her parents. That when he send the student away the father came back when sad and said his daughter should not be send away for school fees and he threatened the Appellant.
 15. That the Appellant moved to the school compound. That on 4.6.2023 at 4.00pm he was teaching a neighbours kid when he saw a car and 2 people the Director and driver alighted from it and went to the office and talked to the Head Teacher and he was called and the Director warned him not to ask any questions. He was told that the Head Teacher had called the Director and told him that he had been attacked by parents. That he was told to follow the Director to the car and when they got home he was told not to go back to school. That on 6.6.2023 the Director called and instructed that they should meet at the hardware but when he went the Director was not there. That when he came they went to a Catholic Church. That as they were talking he stepped aside to talk on phone. That someone else came and another came from the car near him. That one of the people was a police officer in civilian clothes. That he was arrested and taken to police station with 4 other officers. That on his way one female officer was sexually harassing him. That they went to his house in school and he found it was broken into. That he was taken back to the Police station and he was place in custody and that s when he saw the Complainants parents. He was subsequently arraigned in court and charged.
 16. This Appeal was canvassed by way of written submissions. The Appellants submissions are dated 27th November 2024. The Appellants Counsel submitted that the age of the Complainant was not proved as no document was produced to support the information in the charge sheet that she was 8 years. It was also contended that the Complainant was found during voir dire examination not to be fit to give sworn testimony and therefore her evidence was untruthful and therefore not credible to be relied upon to find a conviction.
 17. It was argued that the discrepancy regarding age was material as sentence in sexual offences depends on the age of the victim.
 18. Regarding penetration, the Appellants submissions were that there was no independent witnesses such as the mother of the victim, the Doctor who treated the victim, investigating officer or even the arresting officer. That the prosecution evidence was therefore insufficient as the only evidence available was that of the Complainant and it was unreliable.
 19. The Appellants Counsel argued that there was no proof of penile penetration and any other object including the finger of complainant's mother could have caused the same result. It was submitted that absence of spermatozoa or blood at the genitalia was not explained.
 20. The Appellant submitted that his defence was water tight but the trial court ignored it. He claimed that he was framed up by the Head Teacher but he did not attend to testify.



21. The Appellant also submitted that he was subjected to unfair trial in contravention of Article 50(2)(g) and (h) as he was not provided with an advocate to defend him.
22. Regarding sentence, it was submitted that the Trial Magistrate failed to exercise discretion as the term liable does not connote mandatory.
23. The Respondents submissions are dated 25th November 2024. The Respondent submitted that a birth certificate was produced to prove age of the victim and it confirmed she was 8 years at the time she was defiled.
24. On penetration the Respondent submitted that PW1 testified and gave detailed account of how the Appellant took her to his house and defiled her. That the child's evidence was corroborated by that of the Clinical Officer PW3 who testified the child had whitish discharge and the hymen was torn. That P3 and PRC forms together with treatment notes were produced to that effect.
25. On identification the Respondent submitted that the child testified that the Appellant took her to his house and defiled her. That the Appellant was properly recognized by the child as her teacher and the Appellant acknowledged that he was indeed a teacher at the school where the victim was learning.
26. Regarding alleged non-compliance with provisions of Article 50(2)(g) and (h) the Respondent submitted that the record clearly shows that the court promptly informed the Appellant of the right to legal representation when he took plea on 3rd July 2023
27. That the appointment of an advocate under Article 50(2) (j) is subject to the court's opinion that substantial injustice will be occasioned. The Respondent submitted that from the record there was no substantial injustice occasioned to warrant legal representation being provided for the Appellant. See SCOK case in Republic v Chengo and 2 *Others Petition No 5 of 2015*;

“...we must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available if substantial injustice would otherwise result.”
28. The Respondent also cited the holding in Manyeso v Republic CRA No 12 of 2021[2023]KECA827 where the Court of Appeal stated ;

“...However in the present appeal, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the Appellant participated in the trial and cross examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the Appellants arguments that their rights to a fair trial under Article 50(2)(g) and (h) of *the Constitution* were violated.””
29. The Respondent contended that the Appellant did not raise issue of legal representation before the trial court and cannot claim that the trial court erred.

Analysis and Determination

30. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;

“.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always



bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

31. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are :-
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether or not in the circumstances of the case, the sentence that was meted upon the Appellant by the trial court was lawful and/or warranted.
32. For the prosecution to establish that the Complainant was defiled they had a duty to prove the three ingredients which are age of the Complainant, penetration and positive identification of the assailant.
33. The complainant testified and informed the court that she was born on 20.02.2015 as per Exhibit 1 and that she was in Grade 4 at Mirror Preparatory School. The Appellant did not question the of age of the Complainant during cross examination and there is nothing to make this court doubt that the Complainant was 8 years old at the time that she was defiled.
34. On whether penetration was proved the Complainant said that on unknown date in February 2023 the Appellant who was her teacher called her to his house after class and defiled her after he locked the door and the lights were off. That after defiling her he warned her not to tell anyone and she ran back to class. When taken to Etago hospital she was examined and P3 form filled indicating that the Complainant had been defiled repeatedly without protection and she had a discharge on her clitoris with torn hymen. That after conducting Lab tests the Complainant was put on medication. Although the Appellant faulted the Trial Magistrate for convicting him when penetration was not proved this court finds that the Complainants evidence that she was defiled is corroborate by the evidence in the medical report produced by PW3.The Appellant claimed that the torn hymen could have been as a result of any other object or the Complainant’s mother’s finger being inserted was not also raised at trial to explain why the Complainants hymen was torn and this court can only base its finding on the evidence of the victim that the hymen was torn because of being penetrated by a human penis.
35. On whether the Appellant was positively identified as the assailant there was no dispute that the Appellant was known to the Complainant as he was her teacher at Mirror Preparatory School. It was the evidence of the Complainant that apart from her the Appellant had also defiled Felicia whose father went to School and reported that the teacher had also defied his daughter. That report was made to PW2 the Director of the school and he reported to police and the Appellant was arrested. PW2 said the Appellant had been reported to have defiled 5 girls in the school including the Complainant herein.
36. The Appellant claimed that he was fixed because he questioned why a certain female teacher was coming to school late and that the Head Teacher also had an affair with the Complainant’s mother who was a former teacher at the school but he did not put it to PW2 that he was fabricated because of differences with the Head Teacher. He did not also cross examine the Prosecution witnesses about the relationship between the Complainant’s mother and the Head Teacher. The court was told that it was the father of another pupil known as Felicia who reported her daughter was defiled and it turned out the Appellant had defiled other pupils too. In the Appellants unsworn statement he talked about a girl known as Perpetua whose father came to school when sad. The Appellant’s claim that he was fabricated does not hold water and that ground therefore fails.
37. As to whether the sentence was harsh and excessive Section 8 (2) of the Sexual Offence Act provides for a sentence of life imprisonment. The Appellant was sentenced to serve 35 years jail term after considering his mitigation and pre-sentence report. The Trial Magistrate said that the Appellant being



the Complainant's teacher was expected to protect her but instead took advantage of her. The trial Magistrate having exercised discretion to sentence the Appellant this court finds no reason to interfere.

38. This court finds that the appeal lacks merit and the same is dismissed. The Appellant has 14 days within which to appeal against this decision.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of February, 2025.

A. ONGINJO

JUDGE

Judgment delivered in the presence of:

