Muriuki v Republic (Criminal Appeal E099 of 2024) [2025] KEHC 6606 (KLR) (21 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E099 OF 2024

RM MWONGO, J

MAY 21, 2025

BETWEEN

JOSEPH MURIUKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising from the decision of Hon. J.W. Gichimu, in Runyenjes MCSO No. E003 of 2021 delivered on 13th June 2022)

JUDGMENT

The Charge

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. Particulars are that on diverse dates between 05th and 14th June 2020 at [Particulars withheld] Market in Embu East sub county within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PN, a child aged 13 years.

2. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on diverse dates between 05th and 14th June 2020 at [Particulars withheld] Market in Embu East sub county within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of PN, a child aged 13 years.

3. At the trial, the appellant pleaded 'not guilty' to the charge. A full hearing was conducted and the appellant was subsequently convicted and sentenced to 20 years imprisonment.

The Petition of Appeal

4. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal dated 20th October 2024, seeking orders that the appeal be allowed, conviction quashed, the sentence of 20 years imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:

    1. The learned trial magistrate erred in both law and fact by failing to observe contradictions on the prosecution side hence relying upon insufficient evidence to mete out the sentence of 20 years imprisonment;

    2. Section 8(1) and 8(3) of the *Sexual Offences Act* denied the trial magistrate the power to exercise judicial discretion rendering the whole trial unfair; and

    3. The learned trial magistrate erred in both law and fact by failing to consider the minimum mandatory sentence, thus, falling afoul of Articles 25 and 50 of *the Constitution*.

Summary of the Evidence in the Trial Court

5. SM, victim's mother, testified as PW1. She stated that the victim is non-verbal and cannot walk. The appellant is her husband but not the biological father of the victim. The victim is fully dependant on her for feeding and diaper changes since birth. She used to leave the victim in the house when she went to look for casual jobs. When she returned, she used to find some pieces of wood removed from the wall in the victim's room. When she asked the appellant, he said that the victim used to kick the walls.

6. Shortly after she enquired about the loose wood from the walls, the appellant left SM. In January of 2021, the victim was taken to the hospital where she gave birth to a child prematurely. SM did not know who the father of the child was but she suspected the appellant. She produced the victim's birth certificate as evidence. She stated that the DNA test results revealed that the appellant was the father of the child. Upon cross-examination, she stated that sometimes, when she went to look for casual jobs, she used to leave the appellant with the victim at home.

7. PW2 was Dr. Mwenda Isaac. He testified that when he worked at Kieni Mission Hospital, he attended to the victim who had gone to the hospital to deliver a baby. He filled a P3 form after he found out that the victim had been defiled. He stated that the victim suffers from cerebral paralysis and she cannot speak or move.

8. PW3 was PC Irene Kivito of [Particulars withheld] Police Post, the investigating officer. She stated that PW1 reported that her child had been defiled and had given birth. She recorded PW1's statement and noted that the victim could not walk or talk. PW1 told the police that she suspected that it was the appellant who had defiled the victim. The appellant was arrested in connection with the offence. A DNA test was done on him and it was confirmed that the appellant was the father of the child borne by the victim. In cross-examination, she stated that the appellant did not resist arrest and he agreed to have his blood drawn for DNA purposes.

9. PW4 was Nelly Papa, a Government Analyst at the Government Chemist. She testified that her office received blood samples from the appellant, the victim and the victim's child for purposes of DNA testing to ascertain the paternity of the child. The analysis revealed that the appellant is 99.99% the likely father of the child. She produced the report as evidence. In cross-examination, she confirmed that the appellant was the victim's child's father and that the results came from examination of the samples received from the police.

10. At the close of the prosecution's case, the trial court put the appellant to his defense. As DW1, the appellant stated that he was surprised to learn that he was charged with defiling his own child. He stated that when he was arrested, someone else was also arrested but was released, although only his blood was drawn for DNA testing purposes. He did not know why the other arrested person was released. He denied the DNA results saying that they were not his and he said that the blood sample labeled with his name was drawn from someone else.

Parties' Submissions

11. The court directed the parties to file written submissions and they complied.

12. In his submissions, the appellant stated that PW1 should have been faulted for locking the victim in the house while she went out to look for work. This was a risk in that the victim, who was mute, could not call for help in case of danger. He argued that it is possible that the victim suffered some kind of danger which caused her to kick the walls to the wooden house until they came apart. He denied that the prosecution had proved its case to the required standard. He relied on the cases of John Barasa v Republic Kitale Criminal Appeal No.22 of 2005, Christopher Ochieng v Republic [2018] KECA 59 (KLR) and Evans Wanjala Wanyonyi v Republic [2019] KECA 679 (KLR) and the text by Kent Roachi in Vol 1 & 2 Osgood Law Journal, 368 (2001).

13. The respondent relied on sections 2 and 8(1)&(3) of the *Sexual Offences Act* and argued that the evidence adduced proved the offence. It relied on the cases of DS v Republic [2022] KEHC 2502 (KLR) and Edwin Nyambaso Onsongo v Republic [2016] KEHC 4738 (KLR). It was its submission that the elements of the offence were all proved beyond reasonable doubt and the conviction is safe. Moreover, that the victim's child is his child according to the DNA evidence. It argued that the sentence imposed was as prescribed under the *Sexual Offences Act*. It urged the court to dismiss the appeal.

Issues for Determination

14. The issues for determination are as follows:

    1. Whether the offence was proved beyond reasonable doubt; and

    2. Whether the sentence meted out to the appellant was harsh and excessive.

Analysis and Determination

15. In the case of Okeno v Republic [1972] EA 32 the Court of Appeal set out the duties of a first appellate court 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 court's finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

16. The offence of defilement herein is provided for under section 8(1) and (3) of the *Sexual Offences Act* as follows:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ....
>
> (3) 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.."

17. From the foregoing provisions, the elements of the offence that must be proved are as follows:

    1. The age of the complainant- that the complainant was a child;
    2. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;
    3. The perpetrator was positively identified.

18. PW1 produced the victim's birth certificate as proof that she was 13 years old at the time of the incident. This is sufficient proof of her age. The Court of Appeal in the case of Mwalango Chichoro Mwanjembe v Republic (2016) eKLR as follows:

> "The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

19. PW2 produced a P3 form indicating that the victim was defiled. He filled out the P3 form after he had attended to the victim who had visited the hospital to deliver a baby. He noted the circumstances of the case and concluded that the victim was defiled, since she was a minor. The testimony of PW2 satisfies the requirement of proof of penetration since the victim fell pregnant following sex.

20. The final issue is identification of the victim's assailant. PW1 testified that sometimes when she was away from the house, she left the victim with the appellant alone at home. When the victim fell pregnant and was about to deliver the baby, PW1 stated that she suspected that the assailant was the appellant and he reported to the police. After his arrest and before the trial began, a DNA test was conducted on blood samples of the appellant, PW1 and the complainant. The purpose was to prove the paternity of the child born of the victim. PW4 produced the DNA test results which prove that the appellant sired the child.

21. In this case, the mother of the victim testified that the victim is non-verbal, thus, it was not possible for the trial court to hear her testimony first hand. However, the prosecution tied the loose ends by conducting a DNA test to prove paternity of the victim's child. The DNA test results indicate that the appellant was 99.99% the father of the victim's child. Those results are enough to be considered as critical circumstantial evidence in identifying the person whose seed resulted in bearing the child, that is, the perpetrator. In fact, it is the best evidence in this case since it happens to be evidence by an expert with scientific exactitude.

22. In applying circumstantial evidence, a court must satisfy itself that the evidence forms a strong chain that only leads to an inference of guilt. This was the position in the case of Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR), where the Court of Appeal held:

> "However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"
>
> (See also the case of Chiragu & another v Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR).)

23. The appellant contested the DNA evidence stating that the blood was drawn from another person, but was labelled with his name. However, he provided nothing to back this suggestion. In this appeal, he has focused his challenged to the findings of the trial court mostly on his sentence. On conviction, he stated through his grounds of appeal, that the prosecution evidence was contradictory. On a careful re-examination of the same prosecution evidence, I am unable to see the alleged inconsistences. Indeed, the evidence is, in my view, consistent and flows towards a safe conviction.

24. The appellant also sought that the sentence should be reviewed. Here, the sentence imposed is as prescribed under section 8(3) of the *Sexual Offences Act*. Although the trial court could apply discretion on the issue of sentencing, the mandatory minimum prescribed by Section 8(3) is Twenty years. The provision is as follows:

> "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..."

The trial Court meted the minimum sentence. It was entitled to mete a higher sentence.

25. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) rendered itself on the sentences prescribed under the *Sexual Offences Act* and stated that only parliament is mandated to review the sentences as the law-making body. It was held thus:

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

26. The Supreme Court reiterated its findings in that case through its recent decisions in the cases of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition

E002 of 2024) [2025] KESC 20 (KLR). It held that until parliament reviews the sentences imposed in statute, the court has no mandate to review them. Therefore, the sentence imposed by the trial court is legal and it cannot be reviewed by this court in the circumstances.

Conclusions and Disposition

27. I have found that the prosecution proved the age of the complainant; and that there was penetration by virtue of the birth of a child by the victim whose DNA 99.99% pointed to the appellant as the father; it is clear that the conviction was justified, and the trial court's decision therein stands.

28. On the sentence, the trial court meted the prescribed statutory minimum sentence. This Court cannot review that sentence other than upwards.

29. The appeal therefore fails in its entirety and is hereby dismissed.

30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21ST DAY OF MAY, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant Present in Court.

2. Ms. Nyika for Respondent.

3. Francis Munyao - Court Assistant