



REPUBLIC OF KENYA



**Muange v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 1204 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E035 OF 2023
TM MATHEKA, J
FEBRUARY 14, 2024**

BETWEEN

JULIUS KWAKE MUANGE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against judgment imposed by Honourable E.M Muiru, (PM) in
Kilungu Criminal Case (S.O) No. 12 of 2021 delivered on 28th July 2021.)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 26th day of March 2021, at around 13:00hrs at [particulars withheld] Village in Kyamwalye Sub-location in Kee Location within Makueni County intentionally caused his penis to penetrate the vagina of one M.K.N.A a child aged 16 years.
2. In the alternative charge, he was charged with committing an indecent act with a child contrary to section (1) of *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 26th day of March 2021 at around 13:00hrs at [particulars withheld] Village in Kyamwalye Sub-Location in Kee Location within Makueni County unlawfully and intentionally touched the vagina of M.K.N a child aged 16 years with his penis.
3. He pleaded not guilty.
4. The matter went through a full trial where the prosecution called five witnesses. The complainant M.K.N was 16 years old girl at the time. On the material day, 26/03/2021 about 1:00 pm her grandmother Pw2 B.K sent her to untie the goats and take them to the river to water them. She went, untied the goats and allowed them to graze alittle (it is called kusii) so that they could graze freely. That



is when someone grabbed her from behind, covered her mouth and told her that he had admired her for a while. She immediately recognised the voice of the accused who was their neighbour and a distant relative. He did not waste time he felled her

to the ground – dropped her panty and his trouser and inserted his penis into her vagina – he defiled her and she felt pain. She bled a little. It was her first time. On finishing he told her he would see her again. When he left she was in pain but she took the goats to the river, she then went home and told her grandmother. B.K testified that M.K.N came home crying – she told her what happened and she reported to the chief then took the child to hospital at Kola. The chief was Pw3 and he testified how BK called him around 1:00 pm that afternoon and told her that the granddaughter had been raped by Julius Muange. He told her to take the child to hospital and alerted nyumba kumi officials to go and arrest the appellant – which they did and took her to Kola police station. No. 63065 Cpl Ernest Malelu the Investigating Officer told the court that the complainant was taken to the police station by the grandmother on 26/3/2021 and reported a case of defilement. PC Leah escorted her to Kola Level 3 hospital where she was treated and P3 compiled. He established that she was born on 3/5/2005 and produced her certificate of birth. The Clinical Officer Eric Kasiamani examined the complainant, found that hymen was perforated and vagina was wide open. He concluded that she had been defiled.

5. The appellant was put on his defence. He gave a sworn statement and told the court that the allegations against him were not true.
6. The learned trial magistrate upon analysis of the evidence and guided by *Fappyton Mutuku Ngui – vs R* Machakos Criminal Appeal No. 296 of 2010, the court observed that courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J. Heydon evidence: cases and materials 2nd ed Butterworths London 1984, 84, the reasons were put thus: First, a child's powers of observation and memory are less reliable than an adult's. However, the court also took note that when it comes to sexual offences, Kenyan people through their Parliament passed Criminal Law (Amendment) Act 2003 in Legal Notice No. 5 of 2003 which amended Section 124 of the *Evidence Act*. The proviso to that section now states: Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth and found the complainant a truthful witness, convicted the appellant and sentenced him to 15 years imprisonment.
7. The appellant was aggrieved and filed his appeal on the grounds:
 1. That he pleaded not guilty to the charges during trial.
 2. That the prosecution case is replete with monumental inconsistencies and contradictions which would have attracted acquittal verdict.
 3. That the trial court erred both in law and facts by failing to conduct holistic scrutiny of the whole evidence on record to base its conviction and sentence.
 4. That he could not recall all that transpired during trial hence pleads to the Hon. Court to furnish him with lower court proceedings and judgment transcripts.
 5. That upon receipt of the transcripts do hereby pray that if need be he should be accorded leave to file additional supplementary, substituted or either amended grounds of appeal pursuant to section 350(v) of the Criminal Procedure Code.
8. Parties argued the appeal orally.



9. The appellant submitted that the allegations were not true – he urged the court to reduce his sentence. He submitted that he had not been given the PRC for.
10. The state through Prosecutor Counsel Mr. Tanui urged the court to dismiss the appeal for want of merit and to uphold the conviction and sentence.
11. The duty of this court as the first appellate court is to re-assess, re-analyse the evidence on record and draw its own conclusion, always alive to its disadvantaged position of not having heard or seen the witnesses. See *Okeno v R*.
12. The only issue for determination is really whether there is any reason to upset the judgment of the lower court.
13. The appellant appears to have abandoned all the other grounds and only argued the ground on sentence. Be that as it may – was there any error in law/fact on the part of the learned trial court?
14. It is noteworthy that the appellant and the complainant were known to one another. They were from the same village and distant relatives. The offence happened in the day about 1:00 pm – and the complainant was able to identify her assailant.
15. On the same day – she told her grandmother about it – and that it was the appellant – Julius Muange who had defiled her – her grandmother reported to the chief immediately and appellant was arrested the same day. The complainant was taken to the hospital on the same day – and the clinical officer formed the impression that she had been defiled.
16. Clearly therefore the circumstances of the offence, point to the fact that a defilement took place – and it was the appellant who defiled the complainant. Her testimony – though not requiring corroboration is credible – and supported by the rest of the evidence – it is clear that there is reason why the appellant abandoned the rest of the appeal and only argued on sentence. Was the sentence lawful – yes – because section 8(4) of the *Sexual Offences Act* provides for a minimum sentence of 15 years’ imprisonment. The only issue is that the learned trial magistrate sentenced the appellant to the mandatory minimum sentence. The prevailing jurisprudence is that the court has an obligation to consider the circumstances of the offence and make out the appropriate sentence.
17. I have considered the circumstances of the offence – that the appellant was a first offender. However, the trial court also had the discretion to increase the sentence but gave the minimum. I find that it a safe sentence.
18. However, the action of the appellant of actualising his admiration of the complainant in the manner he did is despicable and must be discouraged. However much a man may admire or desire a woman does not mean it is mutual. And in this case a child was involved. The sentence of 15 years is sustained,
19. In view of the above the Appeal is dismissed.
20. The conviction is sustained and sentence of 15 years is upheld to take into account the period the appellant spent in remand.
21. Right of Appeal 14 days

DATED, SIGNED & DELIVERED THIS 14TH DAY OF FEBRUARY, 2024.

MUMBUA T. MATHEKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Court Assistant: Nelima/Elizabeth

Appellant: Present

Prosecutor: Tanui

