



REPUBLIC OF KENYA



**Mutai v Republic (Criminal Appeal 10 of 2020)
[2024] KEHC 5169 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL 10 OF 2020**

**JR KARANJA, J
APRIL 18, 2024**

BETWEEN

ROBERT KIPROTICH MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against a judgement dated 24th January 2020 in Criminal (S.O.)
Case No. 23 of 2019 by Hon. A. Ajwang RM at Kericho, Chief Magistrate's Court)*

JUDGMENT

1. Robert Kiprotich Mutai, (Appellant), appeared before the Resident Magistrate at Kericho facing a charge of defilement, Contrary to Section 8(1) read with Section 8(2) of the *Sexual Offences Act*, in that on the 2nd July 2017 at about 23:00hours within Kericho County he defiled a girl referred as FC aged ten (10) years. Alternatively, he committed an indecent act with the child, Contrary to Section 11 (1) of the *Act*.
2. After the trial, the Appellant was convicted on the main count and sentenced to fifteen (15) years imprisonment.

Being dissatisfied, the Appellant filed this appeal on the basis of the grounds set out in the petition of appeal in which he complains that the trial court erred in law and fact by convicting him on evidence of the prosecution which was insufficient and fabricated and which was a result of shoddy investigations by the police.
3. The appeal was argued through written submissions presented by both sides. The Appellant represented himself while the state/ Respondent was represented by the Learned Prosecution Counsel, Mr. Karanja.



As is the norm, this court reconsidered the evidence with a view to arriving at its own conclusions while having in mind that the trial court had the benefit of seeing and hearing the witnesses. Therefore, having considered the appeal on the basis of the supporting grounds and the rival submissions, this court considered the evidence presented by the prosecution witnesses (PW1 to PW5) against that of the Appellant which was merely a statement to state that he had nothing to state.

4. It was clear from the evidence that the basic issues which arose for determination was whether the child Complainant (PW1) was actually defiled and if so, whether the Appellant was responsible for the offence.

Under Section 8(1) of the *Sexual Offences Act*, the offence of defilement is committed when a person does an act which causes penetration with a child. And, if the child is aged eleven (11) years or less the offender would be sentenced to life imprisonment.

5. In this case, there was no particular dispute that the Complainant, (PW 1) was at the material time a minor of approximately eleven (11) years old.

The immunization card (P. Ex. 30 indicated that she was born on 14th September 2007. There was also no dispute that she was defiled on the material date. Her evidence indicated that she was asleep at home when an intruder entered the house, carried her out of the house and sexually assaulted or defiled her.

6. Her mother, CS (PW2), was attending a meeting at a neighbours house when she was attracted by her screams. The mother rushed to the scene and saw the intruder running away. There was adequate moonlight to see and identify him. He fell down in the process of running.

The Complainant's mother (PW2) went close to him and he offered her some money not to report him. She went away to seek help from her brother in law and on her return found that the intruder had vanished.

7. The Complainant, was taken to hospital by the mother and her neighbour, WCT (PW3) and upon being examined by a Clinical Officer, Caroline Faith Chepngetich (PW4), she was found to have been defiled.

The matter after being reported to the police was investigated by CPL. MC (PW5), who caused the arrest of the Appellant after disappearing from the area for about two (2) years. He had been identified by the Complainant's mother (PW2) as the intruder who defiled the Complainant and who was locally known as "Samba".

8. The Appellant's identification by the Complainant's mother (PW2) was positive and reliable considering that there was adequate moonlight to create favourable conditions for identification. There was also adequate opportunity for the Appellant to be identified. He fell down and the Complainant's mother (PW2) approached him. He offered to buy her silence and escaped from the scene when she went to look for help.

9. Besides, the Appellant was a person known to the Complainant's mother. He was a friend of her husband. His identification by the Complainant's mother was therefore by recognition and the fact that he disappeared from the scene for two years immediately after the offence was strong circumstantial evidence that he was the offender and was positively identified as such at the scene of the offence.

10. From all the foregoing, it would follow that all the necessary ingredients of the charge were fully established against the Appellant. His conviction by the trial court was proper and lawful and is hereby upheld.



The sentence of fifteen (15) years imprisonment imposed by the trial court was lawful and most lenient considering that Section 8 (2) of the *Sexual Offence Act* provides for life imprisonment.

11. In sum, the appeal is devoid of merit and is hereby dismissed in its entirety.

However, pursuant to Section 333(2) of the *Criminal Procedure Code*, the period the Appellant spent in custody be taken into account in the computation of the sentence of fifteen (15) years imprisonment.

Ordered accordingly.

DELIVERED AND DATED THIS 18TH DAY OF APRIL 2024

J. R. KARANJAH,

JUDGE

