



**Kaburu v Director of Public Prosecutions (Criminal Appeal
E091 of 2023) [2024] KEHC 6163 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E091 OF 2023
TW CHERERE, J
MAY 23, 2024**

BETWEEN

GEORGE MUTEGI KABURU APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal against judgment, conviction and sentence in Nkubu
Criminal S. O No. E030 of 2021 by Hon. E.Ayuka (PM) on 29th March, 2023)*

JUDGMENT

1. G M K (Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The offence was allegedly committed on 12th August, 2021 against K.M a girl aged 15 years' old. He also faced an alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 by unlawfully touching K. M's vagina.
2. Appellant was tried, convicted on the main charge and subsequently sentenced to 20 years' imprisonment.

Appeal

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal mainly on two grounds:
 1. Medical evidence did not link him to the offence
 2. The sentence imposed on him is unconstitutional
4. Ms. Rotich opposed the appeal on the grounds that complainant was found with a broken hymen which was evidence of penetration.



Analysis and determination

5. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See *Okeno vs. Republic* [1972] E.A.32).
6. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant. (See *C.W.K v Republic* [2015] eKLR).
7. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In *Kaingu Kasomo vs. Republic* Criminal Appeal No. 504 of 2010 the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.
8. Complainant certificate of birth reveals that she was born on 05th September, 2006. The trial magistrate’s finding that she was 14 years when she was allegedly defiled was therefore well founded.
9. Section 2 of the *Act* defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”
10. Concerning medical evidence, the P3 form PEXH. 3 revealed that complainant had a broken hymen and inflammation of the vaginal orifice from which it was concluded that she had been defiled. Complainant explained that Appellant who defiled her was called George and even identified the house where she was defiled.
11. I therefore find as did the trial magistrate that penetration had been proved and Appellant identified as the perpetrator.
12. Whereas Accused’s defence was that she was framed by complainant’s mother, it is worth noting that Appellant did not cross-examine her concerning the said allegation. The allegation was only raised at the time Accused gave his defence thereby denying the teacher the opportunity to confirm or deny the allegation that she framed him. Having considered the defence, I find as did the trial magistrate that the defence was an afterthought that did not cast doubt on the evidence by the complainant that was corroborated by medical evidence and it therefore rightly is rejected.
13. My perusal of the record confirms that the Appellant was given an opportunity to tender his mitigation, which counted for nothing in light of the mandatory sentence.
14. The jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* has found expression in cases such as *Maingi & 5 others vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and *Edwin Wachira & Others vs. Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was). The rationale behind this is pegged to the fact that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out sentence.



15. From the foregoing, I find that there is need to interfere with the mandatory sentence meted out on the Appellant the same has been declared unconstitutional.
16. Taking all the foregoing factors into consideration, it is hereby ordered:
 1. The conviction is upheld
 2. The 20-year imprisonment term is set aside and substituted with a 10 years' imprisonment term, which shall be computed from 29th June, 2023 when he convicted and sentenced.

DELIVERED AT MERU THIS 23rd DAY OF May 2024

WAMAE. T. W. CHERERE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

