



**Mudi v Republic (Criminal Appeal 32 of 2023)
[2024] KEHC 5583 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 32 OF 2023
DR KAVEDZA, J
MAY 21, 2024**

BETWEEN

KENNEDY IMBOHA MUDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. D. Kuto (PM) on 24th September 2021 at Kibera Chief Magistrate's Court, Sexual Offences Case No. 93 of 2016 Republic vs Kennedy Imboha Mudi)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the subordinate court for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 20th August 2016 and 17th September 2016 within Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of KI, a child aged 13 years. He was sentenced to serve 20 years' imprisonment.
2. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal dated 18th October 2021.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal and submissions, the Appellant has raised four grounds of appeal. In a condensed form, the appellant complains that the prosecution failed to prove its case beyond reasonable doubt and that the



prosecution's case was riddled with contradictions and inconsistencies. He further complains that the trial magistrate erred by failing to consider his defence. Additionally, the trial court failed to consider his mitigation and handed out a harsh sentence. He urged the court to quash the conviction and set aside the sentence.

5. In response, the respondent filed grounds of opposition dated 16th February 2024. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process. The prosecution discharged their burden of proof beyond reasonable doubt. The appeal should be dismissed for lacking in merit.
6. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
7. The prosecution called six (6) witnesses in support of their case. The complainant, KI, (PW1) gave evidence after voir dire examination. She told the court that on 20th August 2016, she was from school and went to the appellant's house who was their neighbour to watch television. Around 4.30 pm, the appellant chased her friends away leaving her in the house. He pulled her to his bed, undressed her, and inserted his penis into her vagina. She was in a lot of pain He gave her Kshs. 20, and threatened to kill her if she reported the incident. This incident happened again on 17th September 2016 and a third time on an undisclosed date.
8. When she went home after the third incident, she informed her grandmother (PW2). Her grandmother took her to Nairobi Women's Hospital for treatment and the incident was reported to the police.
9. In her testimony, PW1 gave clear and graphic testimony of the ordeal. She remained steadfast that it was the appellant who took her to his bed and subjected her to the act of sexual assault. Besides, she knew the appellant as their neighbour. Additionally, despite the incident happening on three different occasions, it was only after the third incident that she reported having been previously threatened against disclosing what had happened to her. I therefore hold that the Appellant is the one who committed the act of sexual assault.
10. The testimony of PW1 did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why the trial magistrate believed the child was telling the truth. In this case, the trial magistrate recorded in her judgement that the complainant aptly described the events in question. She added that the complainant was clear on where and how the defilement happened and that she had no reason to doubt her testimony. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, despite being subjected to thorough cross-examination by the appellant.
11. Regarding additional corroborating evidence, the prosecution called PW2, the grandmother of PW1. She recounted that in August and September 2016, she noticed a message on the complainant's phone from an unknown individual discussing issues of sexual intercourse with the complainant. She interrogated the appellant who informed her what had been going on. She reported the incident to the police and took the complainant to Nairobi Women's Hospital for treatment.
12. The prosecution also called John Njuguna a clinical officer at Nairobi Women's Hospital and Dr. Kizzie Shako who examined the complainant and prepared the PRC and P3 forms respectively. Upon examination, the findings were consistent that her hymen was broken with multiple tears. This was conclusive proof of penal penetration. These medical findings of PW3 and PW4 corroborate PW1's testimony regarding the incident and conclusively proves penetration.



13. Additionally, the appellant complained that his defence was not considered by the trial court. The appellant gave sworn testimony in defence and did not call any witnesses. He denied knowing the complainant and maintained his innocence. He maintained that the messages found on the complainant's phone were not produced as prosecution exhibits. In addition, the evidence presented was not corroborated. He also denied living in the same premises as the complainant at the material time. The trial court considered the defence and found it to be baseless. In addition, PW1 had no reason to falsely accuse the appellant of defiling her. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court.
14. On the age of PW1, the trial court considered the birth certificate produced in evidence by the investigating officer PW6, which indicated PW1's date of birth as 20th April 2003, being thirteen years old at the time of the incident. There is no doubt that PW1 was a child. The conviction on the main charge of defilement is therefore affirmed.
15. On the appeal against the sentence, the appellant submitted that in light of emerging jurisprudence, section 8(3) of the *Act* is unconstitutional as it takes away the discretion of the court in determining the appropriate penalty. He relied on the case of *Taiifa v Republic* (Criminal Appeal E018 of 2022), where the court held that the sentence provided for in section 8(3) of the *act* is lawful but not necessarily mandatory.
16. The appellant was sentenced to serve twenty years imprisonment. Section 8(3) provides that a person who commits an offence of defilement with a child between 12 years and 15 years is liable upon conviction to an imprisonment of not less than twenty years.
17. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court in this case, was lawful but, considering that the appellant was a first offender, and his youthful age (20 years), he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.
18. For the above reasons, I hereby set aside the sentence of (20) years' imprisonment and substitute it with a sentence of ten (10) years' imprisonment. The sentence shall be run from the date of conviction, 24th September 2021.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Munyambi h/b for Dr. Khaminwa (SC) for the Appellant

Mr. Mong'are for the Respondent

Joy Court Assistant

