



REPUBLIC OF KENYA



**Munyu v Republic (Criminal Appeal E087 of 2023)
[2024] KEHC 5260 (KLR) (Crim) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E087 OF 2023
CM KARIUKI, J
MAY 2, 2024**

BETWEEN

MESHACK KIRIA MUNYU APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal against the Judgment of Honourable Hon H O BARASA –
Senior Principal Magistrate delivered on 22nd February 2023 in the Senior
Principal Magistrate Court at Engineer Sexual Offences Act Case No. E061 of 2022))*

JUDGMENT

1. The Appellant was charged with an offense of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence Act No. 3 of 2006. The particular being that on 4th February 2016, at Gathara village in Kinangop within Nyandarua County, he intentionally caused his penis to penetrate the vagina of P K M, a child of 11 years.
2. He pleaded not guilty, and the matter went into full trial. He was found guilty, convicted, and sentenced to life imprisonment.
3. This prompted him to appeal and raised essentially the grounds that the charge was not proved beyond reasonable doubt and that he ought not to have been handed down a life sentence, though not set as one of the grounds of appeal.
4. The Court directed parties to canvass appeal via submissions.
5. Appellant submissions.
6. He submits that the circumstances of the incident were not so grievous as to warrant life imprisonment.



7. Article 28 of *the constitution* enjoins the Court to ensure all persons enjoy the right to dignity. Failing to allow the judge discretion to consider the convict's mitigating circumstances, the trial court failed to consider the diverse character of the convict and the circumstances of the crime. Instead, it subjected the Appellant to a mandatory sentence, violating his dignity rights.
8. He relied on the cases of Joshua Gichuki *Mwangi vs Republic [criminal appeal No. 84 of 2015]* and the court of appeal decision in Jared Koita Injiri vs Republic [2019] eKLR; in these decisions, the superior courts gave courts the right to exercise discretion.
9. He submits that he was not accorded a fair hearing as provided Under Article 50 of *the constitution*, which guarantees every appellant person a right to a fair hearing. The Appellant did not cross-examine this witness because PW 1 tendered her testimony in chief. See pages 13 and 14. He did not also cross-examine PW2. See page 15.
10. Thus, failure to cross-examine PW1 and PW2 was prejudicial to his case. He submits that the evidence of PW1 on penetration does not state that she felt pain. The trial magistrate did not consider this version, as nobody witnessed the incident, bringing suspicion on whether she was defiled. He relies on the case of Ben Maina Mwangi vs Republic [Nairobi].
11. That the evidence of PW4 could not corroborate the evidence of PW1. As he stated that;

'The hymen appeared to be torn. It appeared to be a freshly torn hymen.' The reason is that she was defiled five days earlier. He concluded that there was penile-vaginal penetration.
12. Suppose the complainant, upon examination, did not have any bruises on her genitals. The examination was done after five days. Can the hymen still show that it was freshly broken after five days? PW4 does not state whether the state of urinalysis was non-reactive or reactive. Were there pus cells or spermatozoa?
13. Lastly, he submits that the trial magistrate did not note that the charge sheet shows that the offense was committed on 4th February 2016. While the complainant was 11 years old. The P3 forms show that PW1 was 13 years old, while the PRC forms show that the estimated age of the complainant was 35 years.
14. The PW4 in chief evidence clearly stated that the complainant was 11 years old. Forms should always reflect the P3 forms produced. Where did the doctor get the age of 11 years? While P3 shows 13 years? Should the Court assume the evidence of the P3 and PRC forms to prejudice the Appellant?
15. These disparities should be solved in favor of the Appellant before you.
16. The birth certificate produced shows the date of birth as 29/09/2004. Thus, in 2016 - PW1 was aged 12 years. By 2022, she was 18 years old. He relied on the case of Daniel Kamau V Republic Cr. App. No. 219 Of 2014- Hon.Kiarie Waweru Kiarie.
17. He urges the Court to quash the conviction and sentence of the chief magistrate as it was not based on sound evidence and set the Appellant at liberty.
18. Prosecution submissions
19. The prosecution submits that it proved the age, penetration, and identification of the victim. The age birth certificate shows the child was 11 years old. PW 1 victim testimony PW 2 her further Birth certificate form indicated the child was 11 years old.



20. Identity of Assault – P W 1 victim appellant was well known as he lived with his uncle, who lived 5 minutes away. The offence was committed at 5 am.
21. The Appellant called her into his house and defiled her. He threatened to kill if she screamed or told anyone. PW 2 (her father) Appellant used to work in their homestead. He was a caretaker of the victim's uncle's house in their homestead.
22. The penetration
PW 1 testified that she was in uniform when the Appellant called her. He then threatened her the following day. She had difficulties in going for short calls. PW1 gave PW 3 a report (her brother). PW 3 told PW 2 that women were called and confirmed defilement.
23. PW 4 Gynecologist confirmed defilement P3, and PCR forms were produced P exhibit 2 and 3. P W 1 and 4 confirm penetration.
24. Appellant was implicated. Hymen was perforated. She was 11 years old—exhibit 1 birth certificate. Appellant appellant just gave other stories about the arrest. On the date of the incident, he had never said anything. The defense was of a different day. The defense was considered lawful on sentence.
25. Section 8(1) (2) of Sexual offence Act 11 of age is life imprisonment. Page 13 of PW 1 Evidence paragraph 20 Her mother passed away in 2015. This affected her. She had not recovered, and the incident revived her torment from her mother's death. She was emotionally affected.
26. There is no law on interferences of Sexual Offence Act sentences. He should serve a life sentence.
27. Summary of the prosecution case.
28. PW I was the complainant/survivor in this case. When she was testifying, she had attained the age of majority. She was born on 29th September 2004. She testified that on 4th February 2016, at around 5.00 pm, she was from school and was passing near her uncle's house when the Appellant, his uncle's employee, called her.
29. When she got to where he was, he lied to her, saying that her brother had left something in his house and wanted her to collect the same for him. He then asked her to give him some time. Shortly after, he returned and proceeded to his house, where she followed him. She stood at the door, but the Appellant pulled her into the house.
30. He then lifted her, put her on his bed, and defiled her after warning her against telling anyone about the incident. He also covered her mouth so that she does not scream. She explained that the Appellant inserted his penis into her vagina and left it there for around five minutes. However, when he felt she was not cooperating, he withdrew it, put on his trousers, and after she wore back her clothes, he allowed her to go home.
31. She did not tell anyone what had happened on that day. She just washed her pant and clothes, but the following day at around 6.00 pm, when she went for a short call, she felt pain in her vagina, which also started bleeding.
32. She went to school, and when she returned in the evening, she told her brother's wife what the Appellant had done to her. Later, the matter escalated, and public members arrested the Appellant. The police were also informed of the incident. They came and re-arrested the Appellant, whom they escorted to Kinangop Police Station.



33. She was referred to Nyayo Ward/Engineer District Hospital, where she was examined and found to have been defiled. On 9th February 2016, she was issued a P3 Form, which a doctor filled out. She explained that she knew the appellant person before the incident and that he was living at her uncle's home and looking after the said home. At the time of the incident, she was a standard five pupil at Gathara Primary School.
34. PW2, the father to the complainant/survivor, informed the Court that the complainant herein was born on 19th September 2004. He testified that on 5th February 2016, in the evening, he was informed by his son and his wife that the Appellant had defiled the complainant herein.
35. Upon confirming the incident, he called the elders, and the police were informed of the crime. They then came to his place and arrested the Appellant. They also picked the complainant, whom they escorted to the Hospital, where she was examined and found to have been defiled. On 9th February 2016, the complainant was issued a P3 Form filled out by a medical doctor. He explained that the Appellant herein was a brother to his brother's wife. .
36. PW3, the wife of the complainant's brother, testified that on 4th February 2016, in the evening, she was at home preparing supper when the complainant came to her and told her that the Appellant had defiled her. She then informed her husband, who informed the elders and neighbors. After that, the Appellant was arrested and escorted to the Police Station.
37. PW4, a gynecologist, confirmed that he examined the complainant herein and filled out her P3 Form, which he had produced as evidence before this Court. He found that the complainant's hymen was freshly torn. He explained that the probable type of weapon was penile-vagina pressure. At the time she was examining her, she had been defiled five days earlier. He also produced in evidence the PRC Form, whose contents were similar to what was in the P3 Form.
38. PW5 is the one who investigated this case and had the Appellant herein charged with the present offense. She testified that on 6th February 2016, she reported on duty and found that this case had been assigned her to investigate. The matter had been reported at Kinangop Police Station.
39. As part of the investigation, she took the complainant's statement. She issued her a P3 form, which a medical doctor at Engineer District Hospital duly filled out. The Appellant, whom members of the public already arrested, was in the police cells. The P3 and PRC forms were filled out in favor of the complainant, who confirmed that she had been defiled.
40. She also obtained the complainant's Certificate of Birth, according to which she was born on 29th September 2004. After recording statements from the other witnesses, she caused the Appellant to be arraigned in Court and charged with the present offense.
41. Appellant Defence
42. In his unsworn statement of defense, the Appellant stated that he was nowhere near the crime scene on the alleged offense date. He had taken the cattle he was looking after to the stream. After that, he tied the animals to their usual place and went for lunch, and between 2.30 pm and 3.00 pm, he took the cows for milking.
43. From there, he went to town to buy some items and returned home. At around 11.00 pm, he retired to bed. A few minutes later, one Mutuma, who was in the company of many other people, knocked at his door. When he opened, he was arrested on allegations that he had committed the offense herein.
44. He was later taken to the Police Station, subsequently arraigned in Court, and charged with the present offense. .



45. Issues, Analysis of determination.
46. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its conclusions, considering that the appellate Court did not have the opportunity to hear and see the witnesses testify. See *Okeno v Republic* [1972] EA 32 at 36
47. In the instant case, the prosecution was required to prove the following: -
 - a. The complainant herein was a minor at the time of the alleged offense.
 - b. That the complainant was defiled.
 - c. The complainant identified the Appellant as her assailant.

Whether the complainant was a minor

48. The prosecution produced a copy of the Certificate of Birth, which showed that the complainant was born on 29th September 2004, as evidence. This means that as of the time of the present offense, she was eleven years old. In the case of *Peter Njerivs. Republic*(2016) e KLR, the Court held as follows as regards the issue of age in defilement cases: -

“Age is a crucial and critical ingredient for the offense of defilement; the question of age requires concrete and tangible proof.”

49. In the case of *Francis Omuroni Vs. Uganda Cr. Appeal No. 2 of 2000*, which was cited with approval in the case of *FMG vs. REPUBLIC* [2022] eKLR, the Court held:

“In defilement cases, medical evidence is paramount in determining the victim's age, but in the absence of any other evidence, age may also be provided by the birth certificate, the victim's parents or guardian, observations, and common sense.”

50. In the present case, the Certificate of Birth presented before the Court and the information by her father, who testified before this Court, leave no doubt that she was a minor at the time of the offense herein.

Whether the complainant was defiled.

51. The complainant explained unequivocally and consistently how the Appellant herein tricked her into going to his house, where he defiled her. From her explanation, it was clear that the Appellant threatened her and warned her of dire consequences if she told anyone about the incident. The trial court observed her as she testified and concluded that she did not give any impression that she was lying.
52. Through PW4, the prosecution produced in evidence a P3 Form and a PRC Form, which documents duly corroborated her evidence that she was defiled.
53. The injuries, as captured in the said documents, were consistent with injuries resulting from an act of defilement. There was, therefore, no doubt in the trial magistrate's mind that the complainant was defiled.

Did the complainant identify the Appellant as her assailant?

54. The Appellant claimed he was nowhere near the crime scene on the date of the alleged incident. From her testimony, however, the complainant left no doubt that the Appellant was well-known to her. He



lived in his uncle's homestead as a caretaker. Thus, there was no ground to indicate PW1 was mistaken regarding the person who committed the heinous act on her.

55. I have carefully looked at the evidence on record. There is nothing to suggest even remotely that the complainant and/or her family had any grudge against the Appellant. She and her family had no reason to fabricate a case against the Appellant.
56. There was no motive for that. I am convinced the complainant told the Court the truth. The Appellant was given an opportunity to cross-examine the complainant. However, he said he had no questions during the cross-examination. Thus, he cannot now be heard to say his right to a fair trial was violated.
57. It is worth noting that this is a matter where the High Court ordered a retrial, and the prosecution had to call its witnesses afresh. The trial court could not force the Appellant to cross-examine the complainant. The defense, as given by the Appellant, did not, in my view, shake the prosecution case.
58. The Court finds that the trial court did not err in convicting the Appellant. The prosecution proved its case beyond reasonable doubt. Thus, this Court upholds the conviction of the charge facing the Appellant.
59. On sentence, the Appellant was sentenced to life imprisonment as per the provisions of Section 8(1) (2) of the Sexual Offence Act where the victim of defilement is aged 11 as in the instant matter,11 the perpetrator is sentenced to life imprisonment.
60. However, the Court of Appeal has declared that life imprisonment in Kenya should be 30 years maximum. See the case of *Evansat Kisumu Nyamari Ayako Vs Republic Criminal Appeal no 22 of 2018*.
61. Thus, the Court, taking to the fact that the Appellant was a first offender and had been in custody for five years, the Court makes the orders;
 - i. The appeal on conviction is dismissed, and the conviction is upheld.
 - ii. The appeal on sentence succeeds, and the Court substitutes the life sentence, interpreted as 30 years, and sentences the Appellant to twenty (20) years imprisonment.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 2ND DAY OF MAY 2024.

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C KARIUKI

JUDGE

