



REPUBLIC OF KENYA



KENYA LAW
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**Kimutai v Republic (Criminal Appeal 22 of 2023)
[2024] KEHC 7184 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE**

CRIMINAL APPEAL 22 OF 2023

RB NGETICH, J

JUNE 13, 2024

BETWEEN

MOSES KIMUTAI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (J. Mativo J) dated 13th January 2020 and delivered on 23rd January 2020 in Malindi High Court Criminal Appeal No. 17 of 2019 arising from the original trial in Kilifi Criminal Case No. 217 of 2015)

JUDGMENT

1. The appellant herein, Moses Kimutai, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that the accused on the 13th day of September, 2020 at Mogotio Sub-County within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of M.J. a child aged 7 years.
2. The Appellant faced an alternative charge of committing indecent an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the appellant on the 13th day of September, 2020 at Mogotio Sub-County within Baringo County, intentionally and unlawfully caused his penis to come into contact with the vagina of M.J a child aged 7 years.
3. When the charge was read out to him on the 8th May, 2017, he pleaded not guilty to both the charges and a plea of not guilty was entered. The case proceeded for hearing and upon hearing, the accused was found guilty, convicted and sentenced to serve life imprisonment.
4. Dissatisfied with the decision of the trial court the Appellant has filed an appeal to this court on the following grounds: -



- i. That the Learned trial Magistrate erred in law by convicting the appellant on the basis of insufficient and incredible evidence.
 - ii. That the Learned trial Magistrate erred in law and facts by convicting the appellant on incredible identification evidence tendered by the complainant
 - iii. The learned magistrate erred in law and fact in convicting the appellant when there was no evidence to show that the appellant defiled the complainant.
 - iv. The learned trial magistrate erred in law and fact when almost the whole proceedings were un-procedural.
 - v. The learned trial magistrate erred in law and fact in ignoring the defence of the accused.
 - vi. The learned trial magistrate erred in law and fact in relying on circumstantial evidence to convict the accused.
 - vii. That the learned trial magistrate erred in law and in fact by failing to give the appellant's adequate consideration as required by law.
 - viii. The sentence meted to the accused by the trial magistrate was harsh and excessive.
5. The Appellant prays for the total success of this appeal, conviction be quashed, sentence be set aside and he be set at liberty.

Appellant's Submissions

6. The Appeal proceeded by way of both written and oral submissions. He submitted that upon PW3 being cross examined after being recalled, as shown at page 23 of the court proceedings, PW3 stated that she found the accused person at the scene defiling the victim while in her statement at page 9 of the court proceedings, she told the court that she found the accused person in the scene with his trouser unzipped.
7. He submits that PW6 stated in court that she visited the scene while PW3 after being recalled and cross-examined stated that the police officers did not visit the scene. He submits that PW6 who is the investigating officer lied to the court and he did not visit the scene.
8. He submits that PW1 is a juvenile child of tender age and in her statement, the trial magistrate did not quote any word or statement PW1 may have used to explain the act of defilement and the body parts might have been used. Further that pw1 said she felt pain while the doctor pw4 said there were no tenderness and no discharge seen. Further that Pw4 said she examined the complainant but she did not examine the accused and therefore failed to prove whether the accused person has any relation with the offence.
9. That further, PW4 the doctor testified that he examined PW1 and gave her prep and filled the P3 form. That a look at the P3 form section at section B it indicates that there was no treatment received prior to examination which is clear that PW4 lied to the court in her statement. He submits that PW4 testified that the victim had an old broke hymen meaning the victim had been defiled before.
10. That the learned trial magistrate erred in law and fact by wrongly convicting the accused person on evidence which did not prove the ingredients of the offence charged in each count beyond any reasonable doubt.



11. He submits that the learned trial magistrate erred in law and fact by failing to appreciate and disregarding his defence and by imposing a manifestly excessive sentence considering the circumstances of the case.
12. That it is clear that for the offence to be proved to the legal standard, the prosecution must prove the following ingredients being identification, penetration and age of the victim as held in *Anne Njambi Kiragu v the Republic* (2021) eKLR.
13. He submits that the learned trial magistrate erred in laws and fact by relying on circumstantial evidence and failing to thoroughly interrogate the evidence adduced by the prosecution vis- a- vis the essential elements of the offence defilement and consequently arrived at the erroneous conclusion that the offence facing the accused person had been proved beyond reasonable doubt which was not the case.
14. He prayed to be placed on probation as per the recommendation of the probation officer. That the reason why he prays for probation sentence is that the grandmother of the victim went several times to the parents of the accused asking for forgiveness telling them that the accused did not defile her grandchild who is the victim since she confessed to her that she was forced by her aunt to say so.
15. That it is ironical that the trial magistrate said when delivering her judgement at page 53 of the court proceedings that the victim is an orphan and she lives with her siblings therein discrediting the mitigation of the accused person. He submits that the victim is a single parent not an orphan as said by the court.
16. That on the basis of this submissions that they urge this court to quash the conviction and sentence set aside.
17. The prosecution counsel Ms. Ratemo submitted orally that the appellant was charged with the offence of defilement of a girl aged 7 years and was found guilty by the trial court and sentenced to life imprisonment.
18. The appellant submits that the prosecution was required to prove the ingredients of the offence of defilement being age of the victim, penetration and whether the perpetrator was identified.
19. She submits that the prosecution produced a birth certificate as exhibit 1 which indicated the date of birth as 13th September, 2020 which confirmed that at the time of defilement, the child was 7 years old. That the 2nd element is penetration which she submits that the victim was treated at Soin Sub-County Hospital on 14th September, 2020 where laboratory tests were done and according to the medical treatments notes produced as exhibits in court, the doctor found old broken hymen which proved the child had been defiled. That the prosecution also produced the P3 Form as exhibit 2 which confirmed that there was grievous harm identified as defilement and also a post-rape care form which was produced and which confirmed defilement.
20. She submits that the victim also testified and gave description of how she was defiled. That she indicated that the perpetrator pushed her to the ground, removed her inner pant, removed his long trouser and inserted his private parts in her private part. That her evidence was consistent with the evidence of the doctor.
21. The appellant submit that the prosecution proved there was penetration and on the issue of identification, she submits that the victim identified the perpetrator to be the appellant herein. She stated that she knew the appellant before the offence and described him as a neighbor who dug their pit latrine. She submits that the victim properly identified the Appellant.



22. She submitted that an eye witness PW2 also testified and stated that he found the appellant defiling the minor PW.1; that he found the appellant on top of the minor and that the minor was scared and when she screamed, members of the public came and arrested the Appellant.
23. That in his defence, the appellant indicated that the charges were fabricated against him on the ground that the complainant's aunt owed him Kshs.2,100/= but he did not provide proof of the debt owed and his allegation did not negate the fact that the complainant was defiled and he was found at the scene by members of the public.
24. She submits that the defence was an afterthought and did not shake the prosecution's case; she submits that the appellant was properly convicted and sentenced; that he was sentenced to life imprisonment owing to the fact that under *Sexual Offences Act*, defilement of a girl below 11 years attract sentence of life imprisonment. She submitted that she is aware of the recent court of appeal decision on life sentence and therefore she prays that should the court set aside the life sentence, it be substituted with 30 years' imprisonment to serve as deterrence to would be offenders.

Analysis and Determination

25. This being the first appellate court, I am required to re-analyze and re-evaluate evidence adduced before the lower court while bearing in mind the fact that unlike the trial court, I did not have the opportunity to hear evidence first hand and observe demeanor of witnesses. For this I give due allowance. This position was stated in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.”

26. Further, the Court of Appeal in *Kiilu & Another v Republic* [2005]1 KLR 174, stated as follows: -

- “ 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

27. In view of the above I have perused and considered evidence adduced before the trial court and wish to consider the following: -



- i. whether ingredients of the offence of defilement were proved beyond reasonable doubt.
- ii. Whether the sentence imposed was harsh and excessive

i. whether ingredients of the offence of defilement were proved beyond reasonable doubt.

28. 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).

(a) Penetration

29. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

30. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

31. The complainant stated that someone approached her and pulled her into the forest, pushed her on the ground and placed her to lie on her back and removed her inner pants. She stated that the accused had worn a long trouser which he removed and she saw his private parts. She testified that he placed his private parts which he uses to urinate in her private parts and she felt pain. She stated that she screamed and her sister EJ came to her rescue and when E came, the accused was still at the scene. She stated that E screamed attracting her aunt MC who went and arrested the accused. She stated that she knew the accused before the offence who she referred to as their neighbor and whom she positively identified in court.

32. The minor herein narrated how the Appellants accosted her and defiled her, PW4 the clinical officer produced the P3 Form which indicated that the minor had tears on her labia minora. The victim was candid on how the appellant defiled her and which evidence was corroborated by the evidence of PW 2 who found the appellant on the act and the evidence of PW 3 who rushed to the scene upon hearing screams and found the accused at the scene and eventually arrested him. Based on the evidence of the victim, the evidence of PW 2, PW 3 and PW 4 that there is no doubt was proved beyond reasonable doubt.

(b) Proof of age

33. The second ingredient of the offence of defilement is proof of age of the victim. The Court of Appeal in [Edwin Nyambogo Onsongo v Republic](#) (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”



34. The investigations officer produced a birth certificate for the victim which indicated that the victim was born on 17th April, 2014 meaning she was 7 years at the time of the offence. In my view, the birth certificate was sufficient proof of the age of the victim that she was 7 years at the time of the offence.

(c) Identification of assailant

35. PW1's testimony is that she was defiled by the Appellant. The complainant stated that she knew the accused person before the incident whom she termed as their neighbor. She was able to identify the accused person in dock as the assailant. PW2 who was a sister to the complainant visited the scene immediately when she heard her sister scream and found the accused defiling the complainant. PW2 screamed attracting PW 3 who rushed to the scene and found the accused still at the scene and arrested the accused/appellant immediately. The complainant, PW 2 and PW 3 were able to recognize the accused as the offence occurred in broad daylight and there was therefore no possibility of mistaken identity. I do hereby find that the accused was positively recognized by the complainant, pw2 and pw3.

36. On whether the appellants defence was considered, record show that the trial court considered the appellant's defence but it did not cast any doubts on the prosecution case. Reasonable doubt is not mere possible doubt.

(ii) whether sentence imposed was harsh and excessive

37. The Appellant's other ground of appeal is that the sentence meted on him was harsh and excessive. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

38. Further in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR the court of appeal stated as follows: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

39. The appellant herein was sentenced to life imprisonment. However, in the case of Malindi Court of Appeal Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso Versus Republic* where the court of appeal declared life imprisonment unconstitutional.

40. Guided by the above decision, the appellant deserves determinate sentence. I have considered circumstances surrounding the offence. I take note of the victim's age being 7 years old at the time of the offence and find that 30 years imprisonment is appropriate sentence for the appellant.

41. Final Orders: -

1. Appeal on conviction is hereby dismissed.



2. Life sentence is set aside.
3. Appellant sentenced to 30 years imprisonment.
4. Period served in remand from the date of arrest and period served in prison after conviction to be computed in the sentence above.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 13TH DAY OF JUNE, 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Court Assistant: Karanja.

Ms.Omari for State.

Appellant: present.

