



**Mugendi v Director of Public Prosecutions (Criminal Appeal
E102 of 2023) [2024] KEHC 7185 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E102 OF 2023
TW CHERERE, J
JUNE 13, 2024**

BETWEEN

ZABLON MUGENDI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal from judgment and conviction in Nkubu Criminal
Case S. O No. E001 of 2023 by Hon.E.Ayuka (PM) on 12th July 2023)*

JUDGMENT

1. Zablon Mugendi (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. He was also charged with kidnapping contrary to section 257 of the Penal Code. The offences were allegedly committed on 08th January, 2013 against GM a child aged 9 years.
2. Complainant stated she was born on 06th December, 2013 as shown on certificate of birth PEXH. 5. She stated that Appellant was known to her as he used to ferry her mother on a motor cycle. She recalled that on 08th January, 2023, she was in church with her cousins EM and M. She stated that M went to buy sweet and when he returned told her that Appellant wanted to talk to her. That Appellant gave sweets to EM and M and carried her on a motor cycle and on the way bought her new clothes then took her to some house where he defiled her. Appellant then dropped her off at the home of Mama Munene and later picked her and dropped her near the home of Mama K. She walked home and reported the incident to her aunt J.
3. EM aged 13 years recalled that he was with complainant and M when Appellant gave him and M sweets and went away with the complainant who did not return home until about 11.00 pm in the night.



4. Complainant's mother stated Complainant was born on 06th December, 2013. She stated Appellant was her former lover. When complainant informed her she'd been defiled by Appellant, she reported the matter to police. She accompanied PC Benjamin Kasa to Appellant's house and in the presence of Appellant recovered complainant's clothes therefrom.
5. Accused exercised his constitutional right under Article 50 (1) (i) to remain silent, and not to testify during the proceedings.
6. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on 12th July 2023 convicted and sentenced Appellant to life imprisonment on the 1st count and 3 years on the 2nd count. The trial magistrate directed that the sentence in count 1 be held in abeyance.
7. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and by amended grounds of appeal stated in his submissions raised the following issues:
 - a. That the learned trial magistrate erred in law and fact by failing to note that the evidence of broken hymens is not prove of defilement.
 - b. The Learned Trial Magistrate erred in law by failing to consider that the legal provision for maximum/ minimum sentences under section 8 (4) of the Sexual Offences Act denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27(1) (2)(4) of the Constitutional of Kenya. Hence, the sentence imposed on the appellant is unlawful.
 - c. That learned trial magistrate failed to note that the key witnesses were not called to support the testimony of PW1
 - d. That learned trial magistrate failed to take into consideration the defense of the appellant.
8. This being a first appeal, the court's duty is as was stated by the Court of Appeal in Mark Oiruri Mose v Republic [2013] eKLR that:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”
9. 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).
10. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See Hadson Ali Mwachongo vs Republic Criminal Appeal No. 65 of 2015 [2016] eKLR & Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009[2010] eKLR.
11. Complainant's certificate of birth tendered in evidence reveals she was born on 06th December, 2013 and was therefore 9 years when the offence was allegedly committed.



12. Concerning penetration, 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.”
13. Upon examination a day after the incident, Appellant was found with a freshly broken hymen thereby corroborating complainant’s evidence that she had been defiled the previous day. This case is distinguishable with instances where a complainant would have an old broken scar which cannot be traced to a particular incident.
14. Concerning Appellant’s culpability, I have considered the case of Stephen Nguli Mulili v Republic [2014] eKLR where the Court of Appeal had this to say regarding reliance on Section 124 of the [Evidence Act](#) to convict:
- “as a general rule of evidence embodied in Section 124 of the [Evidence Act](#), an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:
- “Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”
15. Complainant stated she knew Appellant before the material date as he used to carry her mother on his motor cycle. That Appellant had taken complainant on a motor cycle was corroborated by EM who stated he was with complainant when Appellant took her away.
16. Additionally, complainant’s clothes were found in Appellant’s house where she said she left them after she changed into new clothes that Appellant had bought for her.
17. Concerning the Appellant’s contention that Prosecution failed to call crucial witnesses, Section 143 of [Evidence Act](#) (Cap 80) Laws of Kenya provides:
- “143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
18. In Donald Majiwa Achilwa and 2 other v R [2009] eKLR the Court stated:
- “The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.”



19. In *Keter v Republic* [2007] 1 EA 135 the court held inter alia:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”
20. In the instant case, the prosecution called five witnesses whose evidence was corroborated and they had no obligation to call any other.
21. Appellant did not tender any evidence and there was none for the trial magistrate to consider.
22. Section 8(2) of the *Sexual offences Act* under which Appellant was convicted provides that:
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
23. Odunga J (as he then was) in the case of *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR) held that to the extent that the *Sexual Offences Act* prescribes mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* which provides that “Every person has inherent dignity and the right to have that dignity respected and protected”.
24. From the foregoing, I find that the Appellant was not entitled to receive the maximum sentence under the circumstances.
25. The evidence on record demonstrates that Appellant took away complainant in the course of committing the offence of defilement. The offence of kidnapping is a duplex charge and Appellant ought not to have been either charged, convicted nor sentenced of the same.
26. In *Egrone v Republic (Criminal Appeal 86 of 2019)* [2024] KECA 206 (KLR) (29 February 2024) (Judgment), the Court of Appeal resented the Appellant to 15 years for a similar offence as the one petitioner was convicted of.
27. In the end, the conviction and sentence on count 2 are set aside in entirety.
28. The conviction on count 1 is however upheld but the life sentence is substituted with a 15 years’ imprisonment term from the date of arrest on 16th January, 2023.

DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For the DPP - Ms. Rotich (PC-1)

