



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutua v Republic (Criminal Appeal E053 of 2022)
[2024] KEHC 6848 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E053 OF 2022
FROO OLEL, J
JUNE 7, 2024**

BETWEEN

CHARLES MUMO MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal of the conviction and sentence arising in Mwingi CMCR(SO) No 01 of 2020 delivered on 29.06.2022 by Hon I.G. RUHU, Senior Resident Magistrate)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 3rd day of January 2020 at Waita location, Mwingi central sub county of Kitui county intentionally and unlawfully caused his penis to penetrate the vagina of H.M.M a child aged 13 years and 10 months.
2. In the alternative he was charged with an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on 3rd day of January 2020 in Waita location of Mwingi central sub county of Kitui county intentionally and unlawfully touched the vagina of H.M.M a child aged 13 years and 10 months.
3. The Appellant took plea, and denied the charges. The prosecution called four witnesses and on being placed on his defence, the Appellant gave sworn evidence. The trial magistrate did consider the evidence tendered/proffered, and found the Appellant culpable of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual offences Act* No 3 of 2006. He proceeded to convicted him and sentenced him to serve 20 years imprisonment.



B. Evidence at Trial

4. PW1 KM testified that the complainant (PW2) was her 2nd born daughter, who was born in the year 2006 and was a special needs child, who had difficulty in explaining herself and was a student at Migwani special school. On 04.01.2020, she observed that her daughter was not walking in her normal style and asked her if she had a problem but she did not say anything. The following day she still noticed she had difficulty and again asked her what the problem was and it is when she disclosed that “Mutua alinitoa nguo akakinda mimi”. She explained that “Kukinda” is Kamba for rape.
5. Her daughter further confirmed that the said incident occurred under a tree, where she usually herds their goats but could not recall the exact date when the said incident occurred. She then took PW1 to the scene of the incident, which turned out to be an isolated and bushy place within her parcel of land, but was not within the vicinity of any home. She reported this incident to the appellants father and the police before taking her daughter for treatment at Waita Dispensary for treatment. In cross examination PW1 reiterated that PW2 disclosed to her the he had violated her, but personally did not witness the incident. After she reported this incident to the police the appellant went missing for two weeks and was arrested when he resurfaced. There were many people in the village but PW2 had specifically mentioned the appellant as the person who violated her and was known to her has a close neighbour.
6. PW2 H.M.M, underwent voire dire examination and was adjudged not to possess sufficient knowledge to appreciate the sanctity of an oath, she therefore gave unsworn testimony. She testified that she was a student at grade two, Migwani special school and could not tell her age or why she was in court. She further stated that while herding goats in the bush, the appellant came, removed her innerwear and skirt, proceeded to remove his trouser and had sexual intercourse with her. She pointed to her private parts as the spot violated by the appellant, who according to her “Aliingiza mbinu”- Kamba word for “penis”. The incident had occurred in broad daylight when the sun was up and identified the appellant on the dock as the person who violated her. PW2 stressed that the appellant laid her on the ground, while facing up and proceeded to lay on top of her. This she demonstrated by laying on the court bench facing up. In cross examination PW2 confirmed that it was the appellant who laid on top of her on the material day.
7. PW3 Dr Curtis Alice of Mwingi level 4 Hospital, testified and produced the medical documents on behalf of Dr Katuku, who was away on study leave. The victim was mentally challenged and is alleged to have been defiled by a person known to her. On examination of her private part revealed that her hymen was absent, and she had blood discharge form her vagina. The conclusion drawn was that the patient had been exposed to sexual intercourse. PW3 proceeded and produced the treatment notes and P3 as exhibits.
8. PW4 Constable Scholastica Kyambi confirmed that a report was lodged at Mwingi police station on 06.01.2020 by PW1 complaining that the appellant had defiled her daughter PW2, who was referred to Mwingi level 4 Hospital for medical examination, and it was confirmed that indeed she had been violated. Though PW2 was a girl leaving with disability, she was able to communicate and disclose to PW1 what had transpired to her. She was 13 years old and pw4 produced her birth certificate into evidence. In cross examination PW4 confirmed that she did not witness the incident nor was she present when the appellant was arrested, but PW2 had recorded her statement with the police narrating what transpired.
9. The Trial Court found that the appellant had a case to answer and placed him on his defence. He simply stated that he lived with Waita village and would herd livestock for a living. On 03.01.2020 he



was arrested and brought to Mwingi police station. He denied ever defiling the Minor her. In cross examination he admitted that PW1 and PW2 was his neighbour's and their homes shared a common boundary. Sometimes their livestock would encroach into each other's homestead but as families they had no difference nor had he quarrelled with PW1 nor did she have any reason to falsely accuse him. He was aware that PW2 was child with special needs, and reiterated that the never defiled her.

10. After the hearing, trial court did consider all the evidence adduced and found the Appellant guilty of the defilement and after mitigation, proceeded to sentence him to serve twenty (20) years in prison.

C. The Appeal

11. Dissatisfied by the conviction and sentence, the Appellant filed the following Amended grounds of Appeal that;
 - a. That the learned trial magistrate erred in law and fact while convicting the appellant in reliance with the evidence of the complainant and failed to consider the evidence of PW1, PW4 and PW3 the doctor that the victim was mentally challenged while the trial court failed to appoint an intermediary to communicate with the court
 - b. That the learned trial magistrate lost direction in evidence after concluding the alleged purported identification by recognition was conclusive without considering the first report with description of PW1, the mother of the victim and PW2 the victim was not tendered into record as the same reveals.
 - c. That the learned trial court lost direction in evidence while rejecting the appellants alibi defence which was not displaced by the prosecution side as per section 212 of the criminal procedure code, Cap 75 laws of Kenya.
12. The Appeal was canvassed by way of written submissions.

D. Appellant's Submissions

13. The Appellant submitted that PW1 was a child who was not possessed of sufficient knowledge to know what oath was, her age and/or why she was in court. Further the said witness could not recall what had transpired on 04.01.2020. Considering all the above averments, a plausible question arose if the said complainant was capable to testify without an intermediary to assist her communicate with the court, given her speech/mental disability. Failure to appoint a intermediary lead to miscarriage of justice due to the inconsistent and unreliable nature of her evidence.
14. Further the appellant was taken to hospital on 06.01.2020, while her evidence was that the offence occurred on 03.01.2020. No explanation was given to explain this delay and it was possible that anything could have happened to the complainant during the intervening period. It also created doubt as to whether the sexual assault indeed occurred as alleged. The appellant also faulted the procedure used to admit the P3 form into evidence as Section 77 of the *Evidence Act* was not complied with. But even if the court were to rely on the said P3 form, the same was still did not prove penetration as there are many factors which could break the hymen like bicycle riding, horse riding and/or tampon insertion. The medical examination did not reveal any injury to PW2 genitalia, and raises doubt as to whether the was any blood as noted therein
15. The appellant also challenged his identification by recognition as purported by PW1 and PW2. He faulted the court for failing to go further and consider the first report made to the police, so as to confirm if indeed the said witnesses mentioned him in the said report and/or if they made some sort of effort to describe his features to help aid in investigations. Reliance was placed on Maitanyi Vs Republic



(1986) KLR 198 & Wamunga Vrs Republic (1980) KLR 424, where the issue was raised as to whether the complainant was able to give some description or identity of the assailant and for the need of the court to carefully consider such evidence to ensure it is free from possibility of error before safely making it a basis of conviction

16. The final issue raised was that the trial court erred in rejecting his alibi, yet the prosecution never rebutted the same as required in law. The state had wrongly disregarded his alibi, on the assumption that it was not raise earlier during trial, but their proposition was wrong, as there was no specific provision of law, barring introduction of alibi evidence at any time during trial. The prosecution had therefore failed to prove the falsity of the Alibi evidence presented, and he ought to have been given benefit of doubt. Reliance was placed on Victor Mwenda Mulinge Vs Republic (2014) eKLR to expound on this proposition.
17. The appellant therefore urged this court to find that there was sufficient doubt raised on the prosecution evidence and the same ought to have been resolved in his favour.

Respondent's Submissions

18. The respondent submitted that they did prove the ingredients of the offence and the trial court was right to convict the appellant. PW4 produced the birth certificate of the minor as it was proved that PW2 was 13 years old and was born on 29th March 2006. PW2 also confirmed in her evidence that the appellant did sexually assault her. Her specific evidence was that "Mutua alinitoa nguo aka kindi mimi" she specifically explained that "Kukinda" is Kamba for Rape. She further went ahead and explained that the incident occurred under a tree while she was herding goats and took PW1 to the spot where the incident occurred. PW3 the medical doctor did produce the medical treatment notes and P3 form, which corroborated PW2 evidence and therefore penetration and identification was adequately proved
19. The respondent further submitted that, it was not necessary to appoint an intermediary to help PW2 express herself. Even though she was a child with special needs, she had adequate cognitive traits, and was able to adequately communicate, go to school and be tasked with taking care of their goats. She was able to state her name in court and positively identified the appellant in court. Even during cross examination, PW2 was able to respond to questions put cross to her by the appellant. Under the circumstance of this case it was therefore not necessary to appoint an intermediary to help PW2 communicate.
20. Finally, as regards sentencing, the appellant was charged with a serious offence and it was proved that he defiled a child with special needs and sentenced to serve a period of 20 years imprisonment. While it had been held that the court had discretion in sentencing, such had to be exercised judiciously while considering the prevailing circumstances of each case. The respondent therefore urged this court to find that the appeal against conviction was merited, but could reconsider the sentence melted out as against the Appellant.

E. Analysis & Determination

21. I have considered the trial court record, the grounds of appeal as raised and the submissions of the parties as filed and find that the following issues for determination;
 - a. Whether the ingredients of the offence of defilement were proven and/or Whether failure by the prosecution to use an intermediary, resulted in miscarriage of Justice
 - b. Whether the sentence should be interfered with.



22. This being the first appeal, this court is as a matter of law enjoined to analyse and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno versus Republic* (1072) EA 32 where the court of appeal set out the duties of the first appellant court as follows;
- “An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (*Pandya versus Republic* (1957) EA 336) and the appellant court own decision on the evidence made. The 1st appellant court must itself weigh conflicting evidence and draw its own conclusion (*Shantital M Ruwala versus Republic* (1957) EA 570). It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court and collect finding and conclusion. It must make its own finding and draw its own conclusion. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact the trial court has had the advantages of hearing and seeing witnesses. See *Peters versus Sunday Post* (1958) EA 424.”
23. The appellant did submit that since PW2 was mentally challenged, the court ought to have appointed an intermediary to help her adduce evidence and failure of the trial court to do so lead to miscarriage of justice as PW2 evidence was not coherent. The medical evidence produced was contrary to provisions of Section 77 of the [Evidence Act](#) and also did not prove penetration given that the said examination was carried out three (3) days later. Finally, the Appellant faulted the court for not calling for and considering the first information report made to the police to confirm if the complainant had given his name and description to the police at inception of the investigations process.
24. Section 2 of the [sexual offences Act](#) No 3 of 2006 defines an intermediary as;
- “a person authorized by court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children’s officer or social worker.”
25. Section 31(1) & (2) of the sexual offence Act, No 3 of 2006 provides that a court on its own initiative or on the request of the prosecution declare a witness, other than the accused to be a vulnerable witness if the victim is a child or a person with mental disability and proceed to provide protection to the said witness by appointing an intermediary as stipulated under section 31(4) as read together with section 31(5) of the sexual offence Act, No 3 of 2006. The witness then will be allowed to give his/her evidence through the said intermediary. It should be clarified that the intermediary’s role is to communicate to the witness the questions put across and to communicate to court answers from the victim, so far as necessarily understood by the witness.
26. The record clearly shows that the trial court did conduct *voire dire* examination on PW2 and found that she did not possess sufficient knowledge to appreciate the sanctity of oath but could give unsworn evidence, which she proceeded to do. PW1, her mother had described her child’s disability as “she is a disabled child as she had difficulty explaining herself... She goes to school at Migwani special school and was in vocational class 2.” From the evidence of PW1 and PW2 it is clear that though she had disability, PW2 had sufficient mental intelligence to explain what transpired, and event took PW1 and showed her the exact spot where she was defiled. She had sufficient mental capacity to be given the tasks to herd goats alone, and even during her testimony did mention the appellant by name as the person who sexually assaulted her. She therefore demonstrated sufficient mental capacity to tell her side of the story and further also demonstrated what transpired by laying down on the “witness bench facing



up”. It is obvious that PW2 did not need an intermediary to help her communicate with court and no miscarriage of justice was occasioned.

(i) Whether the ingredients of the offence of defilement were proven.

27. Section 8 (1) and (3) of the sexual offence Act No 3 of 2006 provides that;
1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 3. A person who commits an offence of defilement with a child between the aged of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
28. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.
29. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. 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.” (emphasis added)
30. From the evidence on record the age of the minor in this case is 13 years old. This was confirmed by PW1, PW4 who produced the complainant’s birth certificate (Exhibit 3) that indicates that the minor born on 29.03.2006, and was therefore 13 years old. I have no doubt in my mind that this element has been proven.
31. The second element is penetration which 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.”
32. The same section defines “genital organs” to include;
- “the whole or part of male or female genital organs and for purposes of this Act includes the anus.”
33. Section 124 of the *Evidence Act*, Cap 80 provides as follows:
- “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
- Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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.”

34. The minor in her evidence in chief did testify and confirmed that the Appellant defile her. In her evidence in chief, she did state that;

“I had sex with mumo mutual. I was herding goats at the bush. Mutua came and removed my underwear. I also had a skirt and shirt on. He also removed his trouser. He then had sexual intercourse with me.

..... Mutua inserted his penis in my private part. “aliingiza mbinu” court interpreter informs court “Mbinu” is Kamba word for penis..... He defiled me in broad daylight. I cannot remember the exact time but the sun was up. Mumo Is the one in court. (witness identifies accused on the dock)

He laid me on the ground before he violated me sexually. He laid on top of me. He laid on top of me while I was facing up.

(c0urt- witness demonstrates to court how she laid down during the ordeal. (witness lays on the bench facing up)

In cross examination and Re-examination, PW1 further stressed that;

“ It is you who had sex with me and it is mumo who laid on top of me on that day. He removed my underwear and defiled me

35. Though PW2, was a child with special needs, and was described by PW1 to have difficulty in explaining herself, she possessed enough intelligence to report this incident to her mother and took her to the exact spot where the incident occurred. Her evidence before court was consistent and cogent and she without doubt had no reason to fabricate evidence as against the Appellant.
36. The medical evidence on record was presented by PW3, Dr Curtis Alice who produced the treatment notes and P3 form capturing PW2 examination. The medical evidence confirmed that indeed PW2 hymen had been broken and there was also blood discharge from her vagina and the medical doctor who had examined her concluded that the patient had been exposed to sexual intercourse. The medical examination therefore corroborated PW2 evidence and confirmed that she had been defiled.
37. The Appellant objection to this evidence holds no water, as PW4 explained that Dr Katuku, who examined the minor was away on study leave, and the court was perfectly in order to allow her proceed with her evidence and produce the said document's into evidence. Section 77 of the Evidence Act envisages such a scenario, and permits admissibility of such evidence.
38. The third and last element is identification. In this case there was recognition. This fact was confirmed by PW1, PW2, and PW4. PW1 confirmed that they were related with the Appellant, his father was an uncle to her husband. She reported this incident to them and they also expressed dismay by what had occurred. PW2 specifically reported the appellant by name as the person who defile at daytime when the sun was till up. Further as also captured in the evidence reproduced the above, PW2 clearly knew the appellant by name and was obviously somebody well known to her. Her evidence leave no doubt whatsoever as to who sexually assaulted her and it was the appellant.



39. In *James Murigu Karumba vs. Republic* [2016] eKLR, it was held by the Court of Appeal based, on *Suleiman Juma alias Tom – v- R* (2003) eKLR; (2003) KLR 386 that:

“Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value.”

40. The identification evidence was thus sufficient and squarely placed the appellant as the perpetrator of this heinous crime and if the appellant wanted to rely on the first information report, he ought to have called for the same during trial and asked PW1 and PW2 relevant question relating thereto. The court as a neutral arbiter had no obligation to call for the said first information report and cannot be faulted for not doing so.

(iii) Sentencing

41. As regards the sentence, the Appellant was charge with defilement contrary to section 8(1) and 8(3) of the *sexual offences Act* No 3 of 2006. Further, the said Section 8(3) of the said *sexual offences Act* expressly provides that a person who commits an offence of defilement with a child between the aged of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

42. The appellant upon conviction did mitigate and the trial Magistrate sentenced him to serve a period of twenty (20) years, which sentence was to consider the time already spent in custody. The Court of Appeal in the case of *Benard Kimani Gacheru Vs Republic* (2002) eKLR stated;

“It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

43. In *MMI Vs Republic* (2022) Eklr the court referred to the case of *S Vs Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that;

“A court exercising appellate jurisdiction cannot, in absence of material misdirection by the trial court , approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”



44. The trial court did consider the appellants mitigation and proceeded to sentence him to serve for a period of 20 years imprisonment. The judiciary sentencing provides that in determining sentencing the court should consider the degree of culpability, impact of the crime on the victim, aggravating and mitigating factors such as age of victim and offender, character and record of the offender, remorsefulness of the offender, possibility of reform and re adaptation of the offender amongst other factors provided therein.
45. In this matter, the trial magistrate made an error by failing to conduct sentencing hearing and immediately after convicting the appellant, heard his mitigation and proceeded to convict him on the same day. He did not call for a pre-sentence report nor did he consider the sentencing parameters as provided for under the Judiciary sentencing policy. More particularly I do note from the primary file that an age assessment was conducted on the appellant and he was found to be about 18 years or thereabouts. (see, medical report/ age assessment dated 04.02.2020). Though he committed a heinous crime, a less punitive and balanced sentence would have sufficed depending on if he can be rehabilitated.
46. This constituted an error, which permits this court to intervene as sentencing forms an integral part of trial and failure to adhere to the procedure provide vitiates the sentence handed down. It must be noted fair trial as provided for under Article 50(2) of *the constitution* extends to sentence hearing and the same must be conducted to give the accused person a fair and fighting change to get an appropriate sentence after all relevant factors are considered.

G. Disposition

47. The upshot, having considered and reviewed the evidence adduced at trial and submissions made, I do find that the appeal against conviction is not merited and proceed to dismiss the same.
48. The appeal as against the sentence is hereby allowed. The sentence of Hon L.G.Ruhu (SRM) issued in Mwingi CMCR SOA NO 1 OF 2020 is hereby quashed. The trial file is hereby referred back to the Chief Magistrate Mwingi Law Courts, he/she will conduct fresh sentence hearing, shall call for a probation/sentencing report, and will hear the appellant's mitigation afresh before re sentencing him while considering the sentencing parameters provided for in law.
49. Right of Appeal 14 days.
50. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 7th day of June, 2024.

In the presence of:-

Appellant present from Kamiti Maximum prison

Ms Mwaniki for O.D.P.P

Sam Court Assistant

