



**Muinde v Republic (Criminal Appeal E101 of 2022)
[2024] KEHC 8156 (KLR) (Crim) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E101 OF 2022
LN MUTENDE, J
JULY 4, 2024**

BETWEEN

JACKSON MUINDE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal arising from the original conviction and sentence in S.O Case.
No. 297 of 2019 at the Chief Magistrate’s Court Makadara, by Hon. Kivuti (SRM))*

JUDGMENT

1. Jackson Muinde, the Appellant, was charged with the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* (S O Act). The particulars of the offence were that on 23/11/2019 at [particulars withheld] within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of TW, a child aged 12 years.
2. In the alternative, the appellant faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *SOAct*. Particulars being that the appellant touched the child’s vagina on the said date at the stated place.
3. Having denied the charge, the appellant was taken through full trial, convicted on the main charge and sentenced to serve 20 years imprisonment.
4. Briefly, facts of the case were that PW1 lived at [particulars withheld] where the appellant also lived. That on 23/11/2019 she visited the communal toilet on the plot. As she stepped out she encountered the appellant who pulled her to the bathroom forcefully, removed her clothes, namely skirt and shorts. He unzipped his trouser, removed his penis and inserted it into her vagina. He committed the act while holding her neck at the throat area and they faced each other.



5. To violate her sexually, he lifted her right leg and placed it on a piece of wood then pressed her against the wall. She banged the bathroom wall made of iron sheet and neighbors responded by going to her rescue an act that made him open the door and run out. PW2 NWM, the victim's mother upon hearing screams also went to the scene and confirmed that the appellant was a person well known to her.
6. The victim was taken to Kwa Reuben Police Station and later to hospital while the appellant was brought to the station by his mother and other neighbours. At the hospital the complainant was subjected to medical examination and a report thereof made. PW4 No. 81xxx Corporal Caroline Nentaya conducted investigations and caused the appellant to be charged.
7. Upon being placed on his defence the appellant gave sworn evidence and called one witness in support of his case. He stated that although he lived at [particulars withheld] on 22/11/2019 he had visited his mother at Ruiru. That his mother was sick hence he spent the night at her house and left Ruiru on 23/11/2019 at 2:00 pm and arrived at his house at 5:00pm. While at the house people knocked his door informing him that he was required to record a statement with the police.
8. That he had fallen out with a neighbour after she had washed clothes and poured dirty water at his doorstep. He denied knowing or speaking to the complainant and that it was good to have peace as per Bible principles.
9. DW2 Edda Ndetei his mother testified that she was sick on 22/11/2019 and that the appellant went to her house then left on 24/11/2019 at around 2:00pm He later informed her at 8:00pm that he that he had been arrested.
10. The court considered evidence adduced and dismissed the alibi defence put up as an afterthought hence found the case against the appellant having been proved beyond doubt, convicted and sentenced the appellant.
11. Aggrieved by the conviction and sentence meted out the appellant preferred this appeal on grounds that:It was a misdirection in not finding that the prosecution's evidence was grossly contradicted.Finding that the appellant was guilty was a misdirection.The court failed to appreciate that the evidence was not corroborated and was insufficient to convict him.The court disregarded the defence and dismissed it as an afterthought.The court misdirected itself in law in sentencingThat the sentence was not commensurate with the offence
12. The appeal was canvassed through written submissions. It is urged by the appellant that the defence put up was not considered and that it was not shaken during cross examination hence was firm and cogent. Reliance was placed on the case of *Republic -vs- Sithole* 1999 (1) SACR. He also argues that the burden of proof was not attained.
13. That Section 235 of the *Criminal Procedure Code* was repealed as stated in the case of *R -vs- John Kimita Mwaniki* (2011) eKLR; the appellant was a layman and could not understand the importance of bringing the defence of alibi at an early stage. Reference is made to the case of *Republic -vs- Gachanja* (2001), *Republic -vs- Philemon* (2014) eKLR .
14. Further, that the standard of proof being beyond doubt the prosecution failed to meet it. That there were inconsistencies on the place of the incident, some stated that it was at the bathroom and others in the toilet. The time of the offence and the events of the day is also contradictory and there were no eye witnesses.
15. Lastly that the discharge was not taken for DNA analysis to tie the appellant to the offence and that the evidence on penetration was contradicted. That the hymen ought to have been broken and not a notch at 8'oclock as explained by the medical witness.



16. The State did not file submissions.
17. This being a first appellate court it has the power to reassess and evaluate the evidence adduced at the trial and to come up with independent conclusions bearing in mind that it did not see or hear the witnesses who testified. (*See Okeno -vs- Republic* (1972 EA 32).
18. The offence of defilement is proved when the prosecution evidence establishes that the victim was a child, the perpetrator committed an act of penetration within the meaning of Section 8 as read with Section 2 of the *Sexual Offences Act* (SOAct); and, that the perpetrator was positively identified.
19. It was proved that the victim was born on 8/4/2007 per the evidence supported by the birth certificate. This was proof beyond reasonable doubt that the victim was 12 years old at the time.
20. Section 2 of the *SOAct* defines penetration to be either partial or complete penetration of the genitalia. It can be proved through medical evidence, oral testimony or circumstantial evidence. In *Kassim Ali -vs- Republic* Cr. App. No. 84 of 2005 the Court of Appeal at Mombasa held that:

“... The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
21. In *Mkendeshwo -vs- Republic* (2002) 1 KLR 46 the Court of Appeal held that:

“In criminal cases the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt and generally, the accused assumes no legal burden of establishing his innocence.”
22. Section 124 of the *Evidence Act* provides that the victim’s oral testimony in sexual offences is sufficient to prove the case where the court finds that the witness was truthful and recorded reasons for this finding. There would be no need of corroboration in such cases. With or without corroboration the charge would be proved.
23. PW1 testified to circumstances in which she encountered the appellant. He pulled her to the bathroom and forcefully removed her skirt and shorts. He then unzipped his trouser and removed his penis and inserted it into her vagina. She also told court that the appellant had severally warned her that one day he would have intercourse with her. Medical evidence adduced proved partial penetration evidenced by discharge and laceration on the vagina of the 12-year-old child. The evidence proves that the offence occurred at day time and that the perpetrator was known to the victim as a neighbour.
24. On the question of contradictions, PW2 and PW4 contradicted PW1’s evidence by indicating that there was an attempt to defile the child. PW4 and PW2 also testified that there was an eye witness who caught the appellant in the act, PW2 testified that she found the appellant and the complainant. PW4 was the Investigating Officer while PW2 was her mother who went to the scene after the act. Whatever their opinion as to what amounted to defilement could not be stated to be the material fact of the act that happened in their absence. The noted inconsistencies were hence minor that did not go to the root of the case since PW1’s evidence proved defilement and was also corroborated.
25. The testimony of the neighbor was not adversely withheld, it could not be voluntarily obtained and no conclusion can be drawn to cast doubt on the strength of the prosecution’s case already proved in court.
26. On the question of the alibi defence put up, such a defence may be raised at any stage of the trial and is within the accused constitutional right. The prosecution must be given a chance to rebut any new



evidence that shakes its case. The alibi should as a matter of course introduce doubt in the mind of the court.

27. In *Kimotho Kiarie -vs- Republic* (1984) eKLR the Court of Appeal held that:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; *Said -vs- Republic* [1963] EA 6.”

28. If brought late in the day, the court may find it an afterthought, however, courts still have the duty to analyze the case as a whole.

29. In *Karanja -vs- Republic* [1983] eKLR, the Court of Appeal cited its decision in *R vs Ahmed Bin Abdul Hafid* (1934) 1 EACA 76 and held that:

“..Nevertheless we agree with the observations of the Court of Appeal for Eastern Africa in *R v Ahmed Bin Abdul Hafid* (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in *R v Little boy*, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought. This, indeed, is the object of the statutory amendments in 1982.”

30. In the instant case, the State having not put in a repartee there may not have been any prejudice having suffered. Evidence of PW1 and PW2 proved that the appellant was at [particulars withheld] area within the plot on the 23/11/2019. The medical evidence also proved that the complainant was defiled was on the 23/11/2019.

31. The appellant and DW2 alleged that the appellant was at Ruiru on 22/11/2019, the appellant stated that he left on 23/11/2019 at 2:00pm, his mother contradicted him stating that he left on 24/11/2019.

32. The appellant stated that neighbours came to him requiring him to record a statement with the police, he did not explain the reason he was told to do this but the finding is that this could not be by chance .

33. PW1 had no reason to misrepresent facts. The appellant was also examined on 25/11/2019 but due to delay no spermatozoa was noted. That notwithstanding evidence of the victim which was believable proved that the appellant was the assailant.

34. On the question of sentence, Section 8(3) of the *Sexual Offences Act* provides that:

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

35. The court sentenced him as per statute and was not keen on exercising its discretion and adhering to the objectives of sentencing. The court has power to intervene where the sentence is harsh and excessive which is the nature of minimum sentence as they do not reflect the circumstances of the case. Further the appellant mitigation on record was not considered and therefore he was denied the right to benefit from crucial provisions of fair trial.



36. The appellant stated that he was a bread winner and that he had studied biblical courses meaning that he had taken steps to reform. He prayed for leniency.
37. The appellant was also in remand custody but the court erred in failing to consider the period spent in remand pursuant to Section 333 (2) of the *Criminal Procedure Code*. He was arrested on 23/11/2019 and sentenced on 10/5/2022.
38. In the result, I hereby confirm the conviction but interfere with the sentence, meted which I set aside and substitute with fifteen (15) years imprisonment to be effective from 23/11/2019.
39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 4TH DAY OF JULY, 2024.

L. N. MUTENDE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

