



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Appeal E071 of 2023)
[2024] KEHC 9292 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E071 OF 2023
JM NANG'EA, J
AUGUST 1, 2024**

BETWEEN

STEPHEN MAINA MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Principal Magistrate's
Court at Kangema (Hon. I. Gichobi) delivered on 25/04/2023)*

JUDGMENT

1. The appellant is dissatisfied with the said judgement of the above stated lower court before which he was charged with a main offence of defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the same *Act*.
2. The particulars of the main charge are that on diverse dates between January 2021 and 3rd January 2022 within Murang'a County the appellant caused his penis to penetrate the vagina of VGK , a child aged 15. It is alleged in relation to the alternative charge that during the same period and at the same place the appellant intentionally and unlawfully touched VGK's vagina using his penis.
3. The appellant refuted the charges.
4. After a full hearing, the trial court convicted the appellant of the main charge of defilement pursuant to Section 215 of the *Criminal Procedure Code* and sentenced him to 20 years imprisonment. No order was made regarding the alternative charge.
5. The grounds of appeal as per Amended Grounds of Appeal filed on 27/05/2024 may be condensed as follows:



- a. That the learned trial magistrate erred in law and fact by convicting the appellant against the weight of the evidence.
 - b. That the learned trial magistrate erred in law and fact by failing to properly consider his alibi defence.
And
 - c. That the learned trial magistrate erred in law and fact by meting out a minimum mandatory sentence yet sections 216 and 329 of the *Criminal Procedure Code* gives the court discretion to impose a lesser sentence.
6. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {see the case of *Okeno V. Republic* (1972) EA 32}.
 7. The prosecution evidence is that sometime in January 2021 VGK (hereinafter referred to as ‘the complainant’) met with the appellant as she went to work at the home of an elderly woman. She didn’t know the appellant before that meeting during which he invited her to be visiting him at his home. Later on a Tuesday while on her way home from school she detoured to the appellant’s home which the latter had shown to her. She found the appellant at home who allegedly led her to his bedroom and had sexual intercourse with her. Afterwards she was given Ksh. 10 and warned not to disclose the incident to anyone. Thereafter the complainant continued visiting the appellant at his home during which visits they engaged in sexual intercourse. In particular, the complainant narrated that on 3/01/2022 she had sexual intercourse with appellant again when she visited him. According to her, they used “condoms” during each of the sexual acts.
 8. As she left the homestead that day, however, the complainant’s grandfather (PW3) saw her and gave the information to her grandmother (PW2). The complainant stated that she disclosed the sexual acts she had had with the appellant to PW2 who warned her not to go to his home again. Both grandparents of the complainant confirmed her evidence. The complainant admitted taking the appellant’s watch and Ksh.20 while he was away without his consent. This was at a time they had begun their sexual liaisons.
 9. The complainant was subjected to medical examination at Othaya Sub County Hospital on 5/1/2022. A pregnancy test conducted showed negative results. When the girl was again examined at Nyakianga Health Centre on 7/1/2022, she complained of missing her monthly periods. The complainant told the court that she later conceived in March 2022 but did not know the man responsible for the pregnancy since she had continued to engage in sexual intercourse with many other people after the acts with the appellant.
 10. No spermatozoa or blood was seen in the complainant’s vagina. Her hymen was broken but the breaking had healed. A whitish discharge as well as numerous epithelial and pus cells were observed in her genitalia. This was opined to be evidence of urinary tract infection and necessary medication was prescribed. PW4 (Clinical Officer) who examined her concluded that she had been defiled based on his observations of the state of the complainant’s genitalia.
 11. The case Investigating Officer (PW5) confirmed lodgement of the complaint at the Directorate of Criminal Investigations (Mathioya) on 7/1/2022. Later the appellant also went to the police station and complained of theft of his cow and trees. According to PW5 she learnt that the parties were trying to reach an amicable settlement but the appellant changed his mind and reported loss of his said property. The appellant was arrested at the police station on 5/1/2022 when he came to make



- his report and he was charged after the complainant recognized him as her assailant. His complaint of stolen property was investigated separately and according to PW5 about 21 persons were arrested over the theft.
12. The appellant gave a sworn defence and continued to deny the charges. He stated that on 4/1/2022 some people confronted him and accused him of defiling the complainant. The mob declared that they were going to seize his cow and trees as compensation for the alleged defilement. Under duress they made him sign an agreement written in the Agikuyu language to this effect. An English translation of the agreement was also tendered in evidence. The complainant was summoned to the scene and forced to implicate him failure to which she would also be taken to the police and beaten up. Despite pressure from the crowd the complainant declined to implicate him. The appellant lamented that the mob thereafter confiscated his cow and two trees worth Ksh.30,000 and Ksh.40,000 respectively. Aggrieved, he reported the matter to the police but he was only able to retain his trees and never recovered his cow. Although suspects of the theft were arrested they were never charged.
 13. The appellant therefore dismisses his prosecution as malicious. He contends that the complainant's grandfather (PW3) who allegedly saw the complainant leaving his home had poisoned his cow to death sometime in September 2021. The appellant further charged that the complainant would also steal from him and cited one incident when she found her wearing his watch. PW3 was said to be angry with the appellant for refusing to sell land to him. Since then PW3 allegedly vowed to do everything to destroy the appellant.
 14. Having reviewed the prosecution and defence evidence, there is no doubt that the complainant's vagina had been penetrated in light of the medical evidence that her hymen was broken. The complainant has also admitted that she had had sexual intercourse with many other men. The issue for determination is whether the prosecution showed beyond reasonable doubt that the appellant defiled the complainant on the material on record.
 15. It is clear that there was an unlawful attempt to use extrajudicial means of compromising the matter through the purported agreement alluded to herein in which the appellant is said to have undertaken to compensate the complainant's family. This is not, however, a proper confession by the appellant as it is neither made before a magistrate nor a proper police officer as required in law. The said agreement is not therefore credible evidence of the appellant's guilt also considering that the latter disowned it and complained to the police about confiscation of his property.
 16. Regarding the appellant's claim of malice on the part of PW3, I agree with the trial court that this is clearly an afterthought as he had not sought legal redress before this case arose. Determination of this appeal turns on whether the complainant spoke the truth implicating the appellant (see the proviso to section 124 of the *Evidence Act*). Judicial precedents including in *JWA V. Republic* (2014) have restated this legal position.
 17. The complainant's evidence implicating the appellant has not been discredited either through the appellant's cross-examination or his evidence. She has given a detailed account of the occasions at which she met with the appellant. The appellant claims in his grounds of appeal that his alibi defence was not considered yet he didn't raise any such defence in his evidence.
 18. Grounds a) and b) of the appeal therefore fail and the conviction stands.
 19. Regarding the complaint as to the sentence meted out against the appellant, I find that the 20 years imprisonment is lawful as section 8 (3) of the *Sexual Offences Act* prescribes that minimum sentence if the victim is 15 as in this case. Ground (c) of the appeal also fails.
 20. The upshot is that the appeal is dismissed.



**JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT
NAIROBI THIS 1ST DAY OF AUGUST, 2024 IN THE PRESENCE OF:**

The Prosecution Counsel, Ms Gakumu

The Appellant

The Court Assistant (Ruth)

J. M. NANG'EA

JUDGE

