



**Simiyu v Republic (Criminal Appeal E040 of 2022)
[2024] KEHC 10718 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E040 OF 2022
REA OUGO, J
AUGUST 1, 2024**

BETWEEN

MOSES SUVERIA SIMIYU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of Hon. A. Odawo (SRM)
dated the 7th of April 2022 in Bungoma CMC SO No E116 of 2020)*

JUDGMENT

1. The appellant was convicted 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 was sentenced to serve 20 years imprisonment. He was dissatisfied with the conviction and sentences and filed this appeal.
2. The grounds are that:
 1. The appellant pleaded not guilty to the charges.
 2. That the trial magistrate erred in law and fact in failing to appreciate that matters of this nature required a DNA test to ascertain the offender as per provisions of the [Sexual Offences Act](#) No 3 of 2006 Laws of Kenya.
 3. That the trial magistrate erred in law and fact in conducting proceedings that violated the right of the appellant as per the provision of the law of Kenya hence null and void.
 4. That the trial magistrate erred in law and fact in arriving at a decision while considering the contradictions between Pw1 and Pw4 and the investigating officer in the judgment-making.
 5. That the trial magistrate erred in law and fact in arriving at a decision while considering extraneous factors.



6. That the trial magistrate erred in law and fact in failing to appreciate the communication data was not availed to clarify the evidence that was raised in court and considered in the decision making.
 7. That the trial magistrate erred in law and fact in failing to appreciate that the first report was made later after his arrest.
 8. That the trial magistrate failed to appreciate that the P3 form in this matter never contained the OB Number and the only OB Number available in the charge sheet is the one for return arrest of the accused which did not cover the first arrest.
 9. That the sentence imposed is manifestly excess and harsh in the circumstances.
3. On 16th February 2024 the appellant filed supplementary grounds of appeal as follows:
1. That the identification of the perpetrator was not conclusive.
 2. That the trial court erred in law and in fact in not making a finding that the age of the victim was in doubt.
 3. That the trial court erred in law and in fact in not making a finding that penetration was not proved beyond reasonable doubt.
 4. That the trial court erred in law and in fact in not putting into consideration the conduct of the complainant and evidence of the surrounding circumstances pursuant to section 33 of the *Sexual Offences Act* No 3 of 2006.
 5. That the trial court erred in law and in fact in not making a finding that the mandatory nature of minimum sentence under section 8 (3) SOA No. 3 of 2006 is unconstitutional and not warranted on plea.
 6. That the trial court erred in law in negating the fact that the appellant's sentence should be deemed to start from the time of his arrest pursuant to section proviso 33(2) CPC, 38(1) P.C.
4. The role of this Court as the first appellate Court is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 that a first appellate Court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze 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 give allowance for that.
5. CNW (Pw1) testified that she was born on 26/6/2005. She knew the appellant and testified that in September 2020 while living with her grandmother the appellant called her and asked her if she could sleep with him. She declined. He then forcefully took her to his brother's house and removed her clothes. He then took his penis and put it in her vagina and told her not to tell anyone. She slept in that house that day and took her back to her grandparents the following day. The appellant gave her Kshs 40/- as pocket money. When her father, DW called her on the phone, Pw1 told him what transpired. After three days the appellant called her again and asked that they go to the market to buy clothes. He then took her to his home before they left for the house of the appellant's brother where they had sex twice. They also met after a week to meet him at his butchery. The appellant proceeded to rent a room where they had sex twice. Pw1's uncle and grandfather who were looking for her found her and she told them what transpired. They took her to the police station and hospital.
6. EW (Pw2) testified that Pw1 is his niece and on 20/10/2020 he received a call from Gilbert that Pw1 had disappeared for 2 days. He was informed that Pw1 would receive phone calls from her stepmother's



- phone. They obtained the appellant's number from her and called it but he was arrogant on the phone. The appellant had taken Pw1 and hidden her but when he realized he was being traced he took the girl back to her father's house. He took her to Bumula Hospital and a P3 was filled. After he was released on bond, the appellant called him several times so that they could reach an agreement but Pw2 declined.
7. PW (Pw3) testified that he knows the appellant. He explained that his home and that of the appellant is separated by a river. On 23/10/2020 she found Pw1 at his home. Pw1 told him that she was brought there by the appellant. He later received a call from one of his uncles who informed him that they were looking for Pw1. He took Pw1 to the police station.
 8. The clinical officer, Peter Wanyanya (Pw4) testified that he examined Pw1 and observed that she had a white discharge on her vulva. The discharge looked like a melted drug used to prevent or procure abortion. He gave her medication to prevent pregnancy and PEP. The hymen wasn't intact. Pw1 girl had no lacerations. He testified that Pw1 had run away from home for a few days. Pw4 also examined the appellant and did not see any signs of bruises on the genitalia. Urinalysis and HIV tests were done and there were no signs of abnormality. On cross-examination, he testified that the girl was 15 years although it was indicated on the treatment notes that she was 13 years old. He explained that initially, she had no birth certificate to prove her age. He testified that the hymen was broken and this can be through sex, accidents, riding bicycles etc.
 9. GWW (Pw5) testified that he is Pw1's uncle and that the complainant used to live with him. She disappeared on 19/10/2020 and they started to look for her physically and were also making calls. They called the number that Pw1 would call severally. The receiver confirmed that he was with Pw1 and told them where they were. They went to the location he had given and discovered they were misled. They called the appellant again and he introduced himself as Pw1's grandfather. He told them where the complainant was but they found she was not in that location. They traced the number and discovered it was registered under the appellant's name. Pw5 reported the matter to the police and the appellant was arrested in Bumula. Pw5 testified on cross-examination that when he reported he was given OB No 19/23/10/20. There was also OB No 12/23/10/20.
 10. MN (Pw6) testified that Pw5 is her husband and that lived with Pw1. On 19/10/2020 she did not find Pw1 so she looked for her among her friends but to no avail. Her phone rang and the caller stated that the complainant had called him and it was through that number that they traced the appellant. The appellant was found on 23/10/2020.
 11. The investigating officer, No. 106795 PC Joshua Mutegi (Pw7) testified that the initial investigation officer in the case, Stella Wamaitha, was transferred to Meru County. Pw1's grandfather, P W made the report and Pw1 was brought to the station and later taken to the hospital.
 12. The appellant was put on his defence, testified as Dw1, and gave sworn testimony. He testified that he was arrested on 23/10/2020. At the time he was with his friends drinking changaa. Everyone gave out Kshs 2,000/- to be released. He did not have the money so he was detained. He was arraigned in court on the current charges.

Analysis And Determination

13. I have considered the evidence before the trial magistrate, the grounds of appeal, the submissions by the parties, and the issues for determination are whether the prosecution proved its case to the required standard; and whether the sentence was excessive. The prosecution was required to prove that penetration occurred, that the perpetrator was positively identified as the appellant, and that the complaint was below the age of 18.



14. The appellant in his submissions argued that the identification of the perpetrator was inconclusive. The report made to the police did not name the appellant nor give his description which was paramount as the prosecution case was that the appellant was known to the witnesses.
15. The respondent in their submissions urged the court to consider the holding in *Ogeto v Republic* [2004] KLR 19 where the court held that a fact can be proved by a single witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. The appellant was well known to Pw1 as they were neighbours and she had known him for 2 months. The prosecution also submitted that the trial court considered the evidence surrounding circumstances as set out under section 33 of the *Sexual Offences Act* as they were captured in the evidence of the victim Pw1. Section 33 of the *Sexual Offences Act* provides as follows:
- “Evidence of surrounding circumstances and impact of sexual offence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—
- (a) whether a sexual offence is likely to have been committed—
- (i) towards or in connection with the person concerned;
- (ii) under coercive circumstances referred to in section 43; and
- (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.”
16. On the issue of identification, I agree with the finding of the trial court that the identification of the appellant was a case of recognition. The appellant was well known to the complainant. In *Anjononi and Others v The Republic* [1980] KLR the court observed that;
- “.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”
17. Pw1 testified that the appellant was known to her as his house was close to theirs. According to her evidence, they met several times between September and October. Initially, the appellant asked to have sex with her but she declined causing him to drag her to his brother’s house. She also met the appellant when they went to the market and later met the appellant at his butchery. On cross-examination, she testified that the appellant was her father’s tenant. The evidence of Pw1 shows that the appellant was not a stranger. The complainant had met the appellant severally and knew him well.
18. Pw6 testified that she lived with Pw1, her niece, and the appellant called her line inquiring about Pw1. Pw5 also testified that they called the appellant and he confirmed that he was with the child and he gave them the wrong information regarding their location. Pw5 and Pw6 confirmed that the number was registered in the appellant’s name and reported the matter at the police station. The testimony of Pw5 and Pw6 further corroborates the testimony of Pw1.
19. The appellant in his submissions also challenged the finding on penetration arguing that the respondent did not prove the same beyond reasonable doubt. He testified that the only evidence to prove penetration was on account of a broken hymen. There was no evidence to show that the complainant had sexual intercourse prior. The melted drug found in her discharge was also not



- explained. The appellant also faulted the trial court for relying on the uncorroborated testimony of Pw1 without noting her demeanor and reasons as expected in section 124 of the *Evidence Act*.
20. The respondent on the other hand argues that the finding on the P3 Form was proof of penetration. Pw4 testified that the minor's hymen was not intact and produced the PRC form as evidence.
 21. The evidence of the clinical officer was that after examining Pw1 he did not see any lacerations on the genitalia. He also noticed a whitish substance on Pw1's vulva which he attributed to have been medication given to her for an abortion/prevention of pregnancy. On cross-examination, he testified that the broken hymen could have been a result of sex, accidents, riding of bicycles, etc. Pw4 in the P3 form concludes that there was defilement however, there was no explanation on how he arrived at this finding.
 22. However, Pw1 was clear in her evidence on penetration. She testified that:

“At the house, he told me to remove my clothes. I was wearing a trouser which he removed. He then did with me bad manners on the bed. He took his penis and put it in my vagina. He did this for 5 minutes. It was the first time. Accused called me again...we...went to his brother's house...and had sex twice that night. After a week again, he called me...rented a room, we slept there and had sex twice again.”
 23. The prosecution's case is therefore premised on the evidence of a single witness. The proviso of section 124 of the *Evidence Act* states as follows:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”
 24. The Court of Appeal in *Arthur Mshila Manga v Republic Criminal Appeal No. 24 of 2014 [2016] eKLR* held that:

“It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic [2008] KLR (G&F), 1175* and *Jacob Odhiambo vs. Republic [supra]*). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.”
 25. Although the appellant has argued that the court failed to provide reasons why it was satisfied that Pw1 was telling the truth, the trial magistrate in her judgment noted that the minor's account on the issue of penetration was sufficient for the court to find that the victim was telling the truth. Pw1 gave a clear account of the instances in which the appellant had sexual intercourse with her. Her evidence was unshaken by cross-examination. I find the reason given by the trial court on Pw1's truthfulness rational.
 26. The trial court considered the evidence of the surrounding circumstances which revealed that the appellant defiled Pw1 severally. His defence that he was arrested while he was with friends while drinking changaa does not displace the prosecution evidence made against him.
 27. The appellant submits that the age of Pw1 was in doubt. Pw1 was born on 6/6/2005 while the incident occurred in September 2020 therefore the victim was 15 years at the time of the offence.



The prosecution in opposing this argument submitted that according to the birth certificate, Pexh1, produced by Pw7, the victim was 15 years old.

28. The fact that Pw1 was 15 years old has not been challenged. The birth certificate shows Pw1 was born on 6/6/2005 and was 15 years at the time of the offence. The prosecution proved beyond reasonable doubt that Pw1 was a child. Section 8(3) of the [Sexual Offences Act](#) provides as follows:

“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.”

29. The appellant also argued that the mandatory nature of the sentence under section 8 (3) of the [Sexual Offences Act](#) was unconstitutional and unwarranted. However, the Supreme Court in Republic v Joshua Gichuki Mwangi, [PETITION NO. E018 OF 2023](#), held that:

“(56) Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the [Sexual Offences Act](#), and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

(58) The amici in that context submitted, and we agree, that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. They cite instances in which the courts have been influenced by myths that; attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and, the alleged relationship between the perpetrator and the victim diminishes the perpetrator’s culpability.”

30. The appellant was sentenced to the 20-year minimum sentence as per section 8(2) of the [Sexual Offences Act](#) which is lawful.



31. For the reasons I have set out, I uphold the conviction and the sentence. I find that the appeal is without merit and is consequently dismissed.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 1ST DAY OF AUGUST 2024

R.E. OUGO

JUDGE

In the presence of:

Moses Suveria Simiyu / Appellant -Present in person

Miss Matere -For the Respondent

Wilkister - C/A

