



**Munywoki v Republic (Criminal Appeal E017 of 2024)  
[2024] KEHC 16880 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E017 OF 2024  
LM NJUGUNA, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**CHARLES KYALO MUNYWOKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. Endoo RM in Embu Chief Magistrate's Court Sexual Offence case No. E003 of 2023 delivered on 31st January 2024)*

**JUDGMENT**

1. The appellant, being dissatisfied with the decision of the trial court, filed an grounds of appeal dated 26<sup>th</sup> February 2024, seeking that the appeal be allowed, conviction quashed and the sentence be set aside. The appeal is premised on the grounds that:
  - a. The learned trial magistrate erred in both law and fact by convicting and sentencing the appellant when the prosecution did not prove its case beyond reasonable doubt;
  - b. The learned trial magistrate erred in law in failing to give the appellant the benefit of doubt which he was entitled to;
  - c. Part of the proceedings were conducted in a language not understood by the appellant;
  - d. The language used was not recorded in the proceedings; and
  - e. The trial magistrate erred in law in convicting and sentencing the appellant when there was completely no evidence in support of the charges.
2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on 08<sup>th</sup> January 2023 at Embu West sub-county, within Embu County, the appellant, intentionally and unlawfully



- caused his penis to penetrate the vagina of J.K, a child aged 12 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 08<sup>th</sup> January 2023 at in Embu West subcounty within Embu County, the appellant, intentionally and unlawfully touched the vagina of J.K. a child aged 12 years with his penis.
3. When he was arraigned in Court, the appellant pleaded guilty and the plea was duly entered. The facts were read out to him later and when he was asked to plead, he pleaded not guilty and the plea was duly entered. The matter proceeded to hearing and the proceedings were interpreted from English to Kiswahili.
  4. PW1 was Dr. Geoffrey Njuki NJiru of Embu Level 5 Hospital who stated that upon examining the victim, he noted that the hymen was perforated, an indication that she had been involved in sexual activity before the incident. That there was a white discharge but no fresh trauma but penetration had occurred and she tested negative for pregnancy. That he filled out the PRC form which indicated that the victim had been missing for a while and that she was found at the appellant's house. That he sent the minor for counselling. He produced the P3 and PRC forms and lab requests and results forms.
  5. PW2 was M.M., the minor's mother, who stated that the minor disappeared on 06<sup>th</sup> January 2023 at 4PM and she reported the disappearance to the police who told her to inform them if she finds the child. That with the help of her brother, she started looking for the child and she found her at the appellant's place. That she locked them both inside the house and she called the police who went and took the minor. That they took the child to Embu Level 5 Hospital. On cross-examination, she stated that when she found the minor, she was with the appellant alone in the house and that she knows the appellant's wife. That his house is less than 10 minutes' walk from her house.
  6. PW3 was Cpl. Rose Musyoka of Njukiri Police Post. She stated that on 08<sup>th</sup> January 2023, PW2 reported at the police post that her daughter was missing and after about 2 hours, she informed the police that she had located the minor. That they accompanied her to the appellant's house which is near [particulars withheld] Primary School and a crowd had gathered. That they found 3 men in the house including the appellant and the minor. That they were all rounded up and taken to the police station and the minor was taken to Embu Level 5 Hospital. She stated that the house was a one-roomed unit and when they entered, there were 2 men on the bed and the appellant and the minor were seated on the chair. The other 2 men said that they were in the house to ensure that the appellant does not escape. On cross-examination, she stated that the minor was escorted to the police station before being taken to Embu Level 5 Hospital. That the other 2 men are the ones who explained why they were in that house.
  7. PW4 was P.C. Sarah Ndumba of Njukiri Police Post who stated that PW2 reported the disappearance of her daughter on 08<sup>th</sup> January 2023 at around 11AM. That at 1PM, she returned to the station and told the officers that she had located the minor. That she and PW3 escorted PW2 to the appellant's house where they found 3 men and the minor in the house. The minor told her that the appellant had defiled her and so they arrested him and they took the minor to the hospital through the police station. She stated that the age of the minor was ascertained through her birth certificate which proved that she was 12 years at the time of the incident. On cross-examination, she stated that she founded her investigations on what she was told and that it is the minor who said that she had been defiled by the appellant after he spent the night with her.
  8. PW5 was Cpl. Stephen Arika of Njukiri Police Post who stated that he accompanied PW3 and PW4 to the house of the appellant where the minor was found. That he recorded the statements of the appellant, the minor and PW2 and the appellant was arrested. On cross-examination, he stated that a person who is arrested should be arraigned within 24 hours excluding weekends in which case they



- have to wait until the next working day. That the appellant was arrested after he was identified by the minor. That his role ended after arresting the appellant and that it is the duty of the investigating officer to ensure that the arrested person is arraigned.
9. PW6 was JK, the victim. She stated that on 07<sup>th</sup> January 2023, she was in the company of her 2 cousins when they met one Nancy's male friend who gave them Kshs.50/=. That her aunt found them and enquired the source of the money and she told PW2 who threatened to beat her if she did not tell her who had given her the money. That she ran away from home in the evening so that her mother could not beat her. That she went to her aunt's place where she stayed for 20 minutes then she left for Embu town and at around 8.00p.m, she went to Njukiri at Elizabeth's home where she used her phone to call the appellant to go and pick her. That the appellant went for her at around 1.00 a.m and took her to his house where they slept together and they had sex 3 times.
  10. She stated that the following day, they were eating when they heard a knock on the door and when they answered, it was PW2 in the company of her brother and some neighbours who locked them in the house. That PW2 went and called the police who took them to the police station and she was taken to Embu Level 5 Hospital. On cross-examination, she stated that PW2 wanted her to give her the money she had earned from babysitting but she refused. That the appellant had sex with her three times that night. That it was just the 2 of them in the house but 2 other people entered the house when her mother arrived. That she feared to go back home because her mother would beat her up.
  11. At the close of the prosecution's case, the appellant was placed on his defense, having been found with a case to answer.
  12. DW1, the appellant, stated that he was in his house with his 2 colleagues when PW2 came holding PW6's hand. That she locked them in his house and called the police and he was arrested. That when he was arrested, PW6 told PW2 to stop making money using her name. That the police couldn't be sure that he committed the offence. He urged the court to acquit him of any offence. On cross-examination, he stated that he could not recall the names of the 2 men that were in his house and that PW6 was not a stranger to him although he had not seen her for 3 days before the incident.
  13. The trial court convicted the appellant and sentenced him to 10 years imprisonment.
  14. This appeal was canvassed by way of written submissions.
  15. In his submissions, the appellant attacked the P3 form terming it as inadmissible given that some information required on it was not filled out or was incomplete. That the PRC form also does not provide proof that the appellant committed the offence. He submitted that the testimony of PW2 is inaccurate since the dates she spoke of fall on different days from the dates she stated, specifically the date of disappearance of the minor. That the testimony is inconsistent since PW3 said that she locked the appellant's house with PW6 and that the appellant was inside but PW4 stated that they found 4 people inside the house.
  16. That it is suspect that PW6 did not account for her whereabouts between 8PM and 1AM on the day of the incident and whomever she was with. That PW6 could have had sex with another person because there was insufficient evidence pointing towards him. He argued that there are contradictions as to the number of people that were found in the appellants house since PW6 said that there were only 2 people and that the other 2, a male and a female, entered when PW2 arrived. He urged the court to allow the appeal.
  17. The respondent submitted that the elements of the offence were proved beyond reasonable doubt. It relied on sections 2 and 8 of the *Sexual Offences Act* and stated that the victim's birth certificate showed that she was 12 years old at the time of the incident. It relied on the cases of *EE v. Republic*



(2015) eKLR, Hadson Ali Mwachongo v. Republic (2016) eKLR, Aloyo Ewoi v. Republic (2017) eKLR and MTG v. Republic (2022) eKLR. On the issue of language barrier, it noted that the appellant was addressed in a language that he confirmed he understood and he understood the charge he was facing. That he participated in the proceedings and where necessary, the court provided interpretation of the proceedings. It urged the court to dismiss the appeal given that the evidence adduced proves that the appellant committed the offence.

18. The issues for determination are as follows:

- a. Whether the prosecution has proved the case beyond reasonable doubt; and
- b. Whether the sentence should be set aside.

19. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 I agree with the court when it held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

20. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

- a. The age of the complainant- that the complainant was a child;
- b. Penetration occurred; and
- c. The perpetrator was positively identified.

21. According to the minor’s birth certificate, she was born on 05<sup>th</sup> May 2010 meaning that at the time of the incident, she was 12 years old. PW1 testified that upon examination of the victim, the hymen was perforated prior to the incident. That there was a whitish discharge but there was no fresh trauma. He noted that the pregnancy test returned negative results. He produced the P3 and PRC forms as evidence. In the case of E E v Republic [2015] eKLR the court expressed itself on the question of penetration as follows;

Penetration is defined in section 2 of the *Sexual Offences Act* as:

“‘Penetration’ means the partial or complete insertion of the genital organ of a person in the genital organ of another person.

The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In Bassita Hussein – VS – Uganda, Supreme Court criminal appeal No. 35 of 1995, the court stated,

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”



In my view, there is sufficient evidence to prove that there was penetration.

22. Next, it is necessary to prove that the appellant is connected to the offence. PW2 testified that she found PW6 in the appellant's house and that it was just the 2 of them in the house at the time. That she locked them inside the house and went to call the police who found the minor in the house and arrested the appellant. PW3, PW4 and PW5 stated that when they entered the house, they found 3 men, including the appellant and the minor inside the house. That the other 2 men explained to the police that they were there to ensure that the appellant does not escape.
23. PW6 stated that she ran away from home since her mother wanted to beat her. That at 8.00 p.m on that evening, she was at the home of one Elizabeth, whose phone she used to call the appellant. That the appellant offered to pick her and take her home, but she refused. That eventually, she met the appellant at 1AM and they went to his house where he had sex with her 3 times that night. She stated that when her mother found them the following day, she was in the company of her female cousin and her brother, who entered the appellant's house. That the appellant's mother returned with the police later.
24. From these testimonies, it is evident that the appellant was at the scene at the same time as the victim. According to section 124 of the *Evidence Act*, the testimony of the victim regarding identification of the assailant, needs not be corroborated in sexual offences. In this case, the evidence is sufficient to place the appellant at the scene. In his submissions, the appellant stated that the medical evidence did not point to him as the perpetrator. It is my view that the circumstances of the case point to the appellant as the perpetrator and medical evidence was not necessary in this case for him to be connected to the offence.
25. In his defense, the appellant stated that he had arrived home late the previous night and he was in the company of his 2 friends from work. He could not recall their names but he stated that the following day, PW2 went to his house holding the hand of PW6 and she called the police. This testimony does not unsettle the prosecution's evidence in any way.
26. The appellant stated that the trial magistrate conducted the trial in a language that he could not understand. Upon perusal of the trial court's proceedings, I have noted that the court had the proceedings interpreted when necessary. For the most part, the proceedings were conducted in Kiswahili and the appellant even testified in Kiswahili. He had an opportunity to cross-examine the prosecution witnesses and he took plea having understood the charges. It is too late in the day for the appellant to bring up this issue having failed to raise it during the hearing of the case.
27. The appellant also challenged the sentence and asked this court to set it aside. Having reaffirmed the findings of the trial court on conviction, I do note that the trial magistrate sentenced the appellant to 10 years imprisonment, being a departure from the statutory prescribed sentence of 20 years imprisonment for this offence. The trial magistrate noted the mitigating factors and the pre-sentence report before passing the sentence. In my view, the sentence need not be disturbed.
28. Therefore, I find that the appeal lacks merit and the same is hereby dismissed.
29. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant

..... for the Respondent

