



**Nyamusoga v Republic (Criminal Appeal E052 of 2023)
[2024] KEHC 11997 (KLR) (2 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E052 OF 2023
RPV WENDOH, J
SEPTEMBER 2, 2024**

BETWEEN

MENGANYI MWITA NYAMUSOGA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. M.O. Obiero – Senior Principal Magistrate in
Kehancha Senior Principal Magistrate’s Court S.O. No. E051 of 2022 delivered on 25/08/2023)*

JUDGMENT

1. Menganyi Mwita Nyamusoga has filed this appeal against the judgment of the Senior Principal Magistrate, Kehancha, in which he was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an incident Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.
2. The particulars of the charge are that on 2nd October, 2022, in Kuria-West Sub County within Migori County, intentionally caused his penis to penetrate the vagina of JNA a child aged 13 years old and in the alternative, intentionally touched the vagina of JNA a girl aged 13 years with his penis.
3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of six witnesses in support of their case namely; PW1, the complainant child JNA, PW2 George Omondi Olocho a clinical officer at Kuria West Sub-County Hospital, PW3, PC Magdaline Kibe, the investigating officer attached to Kehancha Police Station, PW4 Joseph Machuchu of Kehancha Namba Five and lastly PW5 Pius Chacha.
4. When placed on his defence, the appellant gave a sworn statement and did not call any witnesses.



5. Upon conviction, the appellant was sentenced to serve twenty (20) years' imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 28/08/2023 and Supplementary Grounds are that: -
1. The plea as taken herein was not unequivocal.
 2. The trial magistrate misdirected herself when she failed to critically analyse the entire evidence and realize that the inconsistencies could not sustain a conviction.
 3. Based on the foregoing, the sentence meted herein is illegal in its entirety, harsh and excessive.
 4. The learned trial magistrate failed to consider the provisions of section 333(2) of the Criminal Procedure Code and therefore violated the right of the appellant to a fair trial under Article 50 (2) (p) of the Constitution.
 5. The learned trial magistrate erred in law and in fact when he failed to be bound by the provisions of Sexual Offences Act and failed to exercise discretion in sentencing.
6. The appellant consequently prays that the Appeal be allowed, conviction quashed and sentence set aside.
7. The Appeal was canvassed by way of written submissions. The appellant filed his undated written submissions while the Prosecution counsel Ms. Ikol- Esaba opposed the appeal through their submissions dated 21/03/2024.
8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno v Republic* (1972) EA 32 where the Court of Appeal said: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see *Peters v Sunday Post*, [1958] E. A. 424.”

9. PW1, gave her testimony on oath after the court conducted a *voire dire* and the court found that she was competent to be sworn. She told the court that she is 13 years, a student at Wizara Primary School. That on 2/10/2022 she left home at about 6:00am to go to church. She met the appellant who had a motorcycle, who asked her where she was going and asked her to board the motorbike. The appellant then took a different direction from where she was going. They proceeded and got to a place called Namba Five Area and he stopped; that He closed her mouth and strangled her and threatened to kill her if she screamed, He put her on the ground, removed her pant and then removed his pant and had sex with her. He stood up and while he was dressing, she took the motorcycle Key and ran away. She met a man who was passing and asked for help, the appellant ran into the maize plantation and managed to escape but left the motorcycle which was taken to the police station. She was escorted to the police



- station and later taken to the hospital; that even though the appellant was a stranger to her, the incident happened during the day when it was already bright and she was able to identify the mark on his face. The complainants birth certificate, PRC Form and the police abstract were marked as MFI 1 – 3.
10. PW2 stated that he examined the victim aged 13 years old on 2/10/2022 at around 8:42am; she was sick looking, in pain and had difficulty in walking; there was tenderness on mandibles and stomach; when vaginal examination was done, he noted a posterior vaginal tear, the hymen was freshly broken, there was vaginal discharge, blood in the urine, red blood cells and spermatozoa were seen. There were epithelial cells which was an indication of friction, the pregnancy test was negative. The victim also had physical injuries on the head and neck and the probable weapon used was a blunt object, her abdomen was tender. Consequently, he formed the opinion that the victim was defiled and she was placed on treatment. The injuries sustained on the neck and head were classified as harm. He produced the PRC Form, P3 Form and the Treatment Notes as Exhibits 2, 3 and 4 respectively.
 11. The investigating officer (PW3) stated that on 2/10/2022, she received information about a motor cycle registration No KMFU 725J Boxer, red in color that had been taken to the police station by members of the public. It was alleged that the rider had defiled a girl. The victim explained and gave a full account of what had happened on the day of the incident. The motor cycle rider caught her on the mouth and neck and pulled her to the bush, he also threatened to kill her if she screamed, he then wrestled her to the ground and removed her pant and had sex with her; that after the incident, she took the keys of the motor cycle and ran away screaming, members of the public responded and assisted her and took her to the police station.
 12. While conducting investigations; they consulted Watu Credit Ltd who confirmed that the owner of the motor cycle was one David Makore Nyakeraro; when interrogated, the said David stated that he had given the said motor cycle to a rider Pius Chacha Nyamusoga. When summoned to the station, the said Pius explained that he had given the motor cycle to his friend, the appellant, on the day pf the incident. On 7/10/2022 the appellant was arrested by members of the public, the victim was able to positively identify the appellant as her assailant, whom she described as having scars between his eyes. The motor cycle was photographed and thereafter released to Watu credit, the bundle of photographs were produced as MFI 5(a) – (c). She also produced the Birth Certificate as Exhibit 1 and which showed that the victim was born on 6/12/2009 and was 13 years old.
 13. PW4, a village elder at Kehancha Namba Five stated that on 2/10/2022 at about 8:30am, he was at home when he heard screams. He rushed to the bush near the road, where he found PW1 crying and was holding a motor cycle's key. He also found other people at the scene. He took the victim to the police station; that he also saw the motor cycle at the scene which was red in color and of registration No KMFU 723J, the same was also taken to the police station.
 14. PW5 stated that he is the rider of the motor cycle registration number KMFU 723J, Honda red in color which belongs to one David Makore; that on 1/10/2022 at about 3:00pm, the appellant requested him for the motor cycle which he intended to use for mining at night and he gave it to him. However, on the following day, the appellant did not return the motor cycle as agreed. He later learnt that the motor cycle had been detained at Kehancha Police Station for the reason that the rider had defiled a girl. On 7/10/2022 the appellant was arrested by other boda boda riders. He also stated that the appellant was the person he gave the motor cycle to and was also his cousin.
 15. PW6 confirmed that he is the registered owner of the motor cycle of registration number KMFU 723J, make Honda and red in color; that he gave the motor cycle to PW5 who was operating at Kurutyange Stage. On 3/10/2022, he was informed by the chairman of the boda boda that his motor cycle had



- been used to commit an offence. He explained that he had employed somebody to ride the motor cycle but he was arrested and only released after the appellant had been arrested.
16. The appellant denied committing the offence.; He stated that he could not remember where he was on the day of the incident 2/10/2022; that he was arrested on the 8/10/2022 by boda boda riders and charged with the offence in court.
 17. In support of the appeal, the appellant mainly submitted on the sentence. He relied on the decision in *Joshua Gichuki Mwangi v Republic* on the mandatory sentences and submitted that the trial court failed to exercise its discretion when it issued the 20 years imprisonment; which he maintained is illegal and harsh. He further submitted that the period spent in remand was not factored in the sentencing which he maintained was unconstitutional and amounts to degrading treatment; that the same also goes against the principle of equal treatment and protection before the law. He stated that he is a first-time offender and has shown remorse and urged the court to reduce his sentence.
 18. In her submissions, Ms. Ikol- Esaba Counsel, for the Prosecution submitted on the 3 main ingredients of the offence of defilement, whether the same had been proved to the required standard of beyond reasonable doubt by the prosecution and the alleged failure by the trial court in exercising his discretion in sentencing but instead issuing the mandatory sentence of 20 years imprisonment.
 19. On penetration; Counsel submitted that the testimony of the victim was corroborated by PW2, who produced the PRC Form, P3 Form and the Treatment Notes noted that there was posterior vaginal tear, the hymen was freshly broken, presence of spermatozoa in the urine and made a conclusion that there was defilement of the victim. She thus submitted that the testimony of the victim was cogent and the same was corroborated by the testimony of the clinical officer and penetration was therefore proved.
 20. On the age of the victim, it was her submission that PW3 produced the minor's Birth Certificate which indicated that the minor was born on 6/12/2009, she was 13 years old at the time of the incident which age is below 18 years as prescribed in section 2 of the Children's Act.
 21. Lastly, on the identification of the appellant; it was submitted that from the testimony of the victim, it is the appellant who carried her on the motor cycle, that at the time of the incident it was already bright and she could see the mark on the appellant's face. She thus maintained that with regards to identification, the requirements of proof were met. Further, that the victim was able to positively identify the appellant when he was arrested by members of the public and taken to the police station.
 22. On sentence Counsel relied on Court of Appeal decision on sentencing in *Thomas Mwambu Wenyi v Republic* [2017] eKLR where it was held that "..... there is no straight-jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances....". Counsel thus submitted that the trial court correctly exercised its discretion after taking into account all the circumstances surrounding the offence of defilement committed by the appellant. Further, that the sentence was neither harsh nor excessive but that the same was within the provisions of the prescribed law.
 23. On the alleged failure to comply with the provisions of section 333(2) of the *Criminal Procedure Code* and the violation of the appellant's right to fair hearing under Article 50(2) (p) of the *Constitution*, she conceded that even though the sentence was as per the provisions of the law, the same did not consider the time spent in remand.



24. I have carefully read and understood the amended grounds of appeal, record of appeal and the rival submissions. This being an offence of defilement, the prosecution had the duty to prove beyond any reasonable doubt the following: -

1. Proof that the complainant was a minor;
2. Proof of penetration;
3. Proof of identification of the perpetrator.

See the case of [Charles Wamukoya Karani v Republic](#) Criminal Appeal No 72 of 2013

Proof that the Complainant is a minor.

25. Age is a critical aspect in Sexual Offences and must be proved conclusively. I have carefully looked at the Record of Appeal, particularly the testimonies of PW1 and PW3 contained; Both witnesses stated that the victim was 13 years old hence still a minor at the time of the offence. Further, PW3 produced a copy of the Birth Certificate as Exh. 1 and which showed that the victim was born on 6/12/2009, thus below the statutory age limit as provided in the Act.

26. Rule 4 of the [Sexual Offences Rules, 2014](#) provides that:-

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

27. This position was further buttressed by the Court of Appeal in the case of [Mwalango Chichoro Mwanjembe v Republic](#), Mombasa Criminal Appeal No 24 of 2015 [2016] eKLR held as follows: -

"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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense..... "

28. I therefore find that the birth certificate produced as Exh. 1 is a *prima facie* proof of the age of the victim to the required standard. She was 13 years old at the time of the incident and was therefore a minor.

Proof of penetration.

29. Penetration has been defined under section 2 of the [Sexual Offences Act](#) as "partial or complete insertion of the genital organs of a person into the genital organ of another person."

30. PW1 in her testimony gave detailed account of how she met the appellant and what he did to her on the day of the incident; that the appellant took a different route from where she was going and branched into the bush. That he closed her mouth, strangled her and threatened to kill her if she screamed; he put her on the ground, removed her pant then removed his pant and had sex with her; she managed to take the motorbike key, run away and scream for help when the appellant was dressing up.

31. PW2 examined the victim on the same day of the incident at about 8:30am and in his testimony he stated that on vaginal examination; he noted a posterior vaginal tear, the hymen was freshly broken, there was vaginal discharge, blood in the urine, red blood cells and spermatozoa were seen, there were epithelial cells which was an indication of friction, the evidence of the force used. Pw1 also had physical



injuries on the head and neck, her abdomen was tender. He made the impression that PW1 was defiled. Though PW1 had not sufficiently explained whether penetration occurred the testimony by PW2 confirms penetration in terms of Section 2 of SOA.

32. The appellant on his part merely denied committing the offence. The evidence of PW1,2 and three were unshaken.
33. It is the finding of this court that penetration was satisfactorily proved to the required standard.

Proof of Identification of the Perpetrator of the offence.

34. Positive identification of a person is what connects them to an offence and the court must be satisfied that the same is free from any possibility of error; particularly when the only evidence of identification is by a single witness. There is no dispute that the incident was not witnessed by any other person other than pw1 and this court is under a duty establish whether the appellant was indeed the perpetrator of the offence.
35. According to PW1, the perpetrator fled the scene leaving the motor cycle KMFU 225J Boxer at the scene. PW4 the village elder who was one of the first people at the scene confirmed that fact. He is the one who took the motor cycle to the police station. PW3, the Investigating Officer, through her investigations with Watu Credit Limited, the financier of the motor vehicle who revealed the owner to be PW6 David, who had given it to his rider PW5, Pius Chacha who in turn led to accused as the person he had given the motor cycle on 1/10/2023 and did not return it next day to him as agreed. The appellant did not dispute PW5 and 6's testimonies. Although PW1 had only seen the appellant in court, the incident occurred the day time after 6.00a.m.
36. During the ordeal, the appellant was in close contact with the appellant and even noted a mark on his face. The appellant was arrested by members of Public on 7/10/2022 four (4) days after the incident. Although ideally, the police should have conducted an identification parade, I find that the appellant was properly traced through the owner of the motorcycle and identified by PW1 who saw him during the day and was in close contact with him and he was arrested only after four (4) days.
37. Taking the totality of the foregoing into consideration, I am of the considered opinion that the appellant was indeed the perpetrator of the offence of defilement and the same was sufficiently proved to the required threshold. The testimony and evidence by PW1 was firm, consistent and cogent; The same was further corroborated by the evidence and testimony of PW3, 4, 5 and 6.
38. In view of the foregoing, I find that the appeal is not merited. The conviction is safe and sound. The sentence is lawful. Consequently, the conviction and sentence of the trial court is hereby sustained. The sentence should however take into account the time spent in remand in terms of Section 333(2) *CPC*. Plea in this matter was taken on 11/10/2022 and the appellant was sentenced on 25/8/2023. The sentence of twenty (20) years imprisonment should commence on 11/10/2022. It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 2ND DAY OF SEPTEMBER, 2024.

R. WENDOH

JUDGE

In presence of; -

Mr. Majale for the state

Appellant Present

Mr. Juma –Court Assistant

