



**Busie v Reupblic (Criminal Appeal 100 of 2023)
[2024] KEHC 13134 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 100 OF 2023
FN MUCHEMI, J
OCTOBER 24, 2024**

BETWEEN

JUSTUS WANYONYI BUSIE APPELLANT

AND

REBUPLIC RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable E. Riany (SRM), in Criminal Sexual Offence Case No. E054 of 2021 on 19th October 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Chief Magistrate Thika whereas he was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. He was convicted of the principal charge and sentenced to serve life imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 5 grounds of appeal which can be summarised as follows:-
 - a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof by failing to prove penile penetration;
 - b. The learned trial magistrate erred in law and in fact in finding that the appellant was positively identified as the perpetrator of the crime;



- c. The learned trial magistrate erred in law and in fact by failing to find that the medical examination report was tainted with inconsistencies and incapable of supporting a conviction.
 - d. The learned trial magistrate erred in law and in fact for failing to consider that the entire prosecution case was filled with contradictions.
3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the medical evidence of PW6 contradicts the testimony PW2. PW2 testified that the minor was defiled and taken to hospital on the same date whereas the Post Care Rape Form dated 8th June 2021 indicated that there were no physical injuries on the minor's genitals, classified the minor's state as normal, no discharge and no lacerations and marks. The appellant argues that the defilement took place before the alleged incident of 8th June 2021.
5. The appellant further submits that the DNA report produced by the investigating officer indicated that his sperm was found on the minor's pant and stockings. However that contradicted the Post Care Rape Form which outlined that there was no blood or stains on the minor's panties. The appellant further argues that the expert witnesses failed to indicate the age of the alleged injuries from the produced medical documents and the testimony by PW6 on the presence of pus cells.
6. The appellant argues that the sentence of life imprisonment is harsh and excessive. Relying on the cases of *S vs Mchunu & Another (AR24/11) [2012] ZAKZPHC 6*; *S vs Mofokeng 1999(1) SACR 502 (W) at 506(d)*; *S vs Jansen 1999 (2) SACR 368 (C) at 373*; *Jared Koita Injiri vs Republic [2019] eKLR*; *Charo Ngumbao Gugudu vs Republic [2011] eKLR* and *R vs Scott (2005) NSWCCA 152*, the appellant submits that mandatory sentences take away a court's discretion to mete out a sentence. The appellant further submits that he is a first offender and the trial court ought not have sentenced him to the maximum prescribed sentence on the account that he was not remorseful.

The Respondent's Submissions.

7. The respondent relies on the case of *Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013* and submits that the prosecution proved its case beyond reasonable doubt by proving all the elements of the offence of defilement. On the element of age, the respondent relies on the case of *Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR* and submits that the prosecution produced the birth certificate of the minor which indicated that the minor was born in the year 2015 and therefore at the time of defilement, the complainant was 6 years and in the bracket defined by Section 8(2) of the *Sexual Offences Act*.
8. The respondent further relies on Section 2 of the *Sexual Offences Act* and the case of *Mark Oiruri Mose vs Republic (2013) eKLR* and submits that PW1 testified that the appellant did bad manners to her using his penis into her vagina. The respondent further submits that PW6 produced the P3 Form which indicated that there was redness and inflammation on the labia majora and minora. Further, PW2 and PW3 corroborated the evidence of PW1 and PW6 and confirmed that there was penetration as they had observed the victim. The respondent argues that the allegation that the medical examination report was tainted by inconsistencies does not hold any water.
9. On the identity of the perpetrator, the respondent submits that PW1 was well known to the appellant. PW1 identified the appellant in court as the one who took her from school and defiled her. PW2, the mother of the minor, positively identified the appellant and the appellant confirmed to have picked up the victim from school. Thus, from the evidence adduced during the trial, it is clear that the appellant



is the person who defiled the minor and there was no possibility of mistaken identity as the appellant was well known to the victim.

10. The respondent submits that all the prosecution witnesses were consistent and corroborated each other.

Issue for determination

11. The appellant has cited 6 grounds of appeal which all form one issue, that is, whether the prosecution proved its case beyond any reasonable doubt.

The Law

11. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

12. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“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 vs Republic (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding and 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 vs Sunday Post [1958]EA 424.” This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt.

13. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:
 - a. Whether there was conclusive evidence of all the ingredients of the offence of defilement;
 - b. Whether the prosecution case was marred with contradictions and inconsistencies.

Whether there was conclusive evidence of all the ingredients of defilement.

14. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”



15. The appellant argues that the prosecution did not prove the elements of penetration and positive identification of the assailant.
16. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
17. On the element of penetration, PW1 testified that the appellant went and picked her up from school at around 3pm on 8th June 2021 using his motor bike. PW1 further testified that the appellant took her far, removed her clothes, her stocking and panty and did bad manners to her with his thing for urinating into her thing for urinating. The minor further testified that the appellant then dressed her up and took her home using his motor bike. The minor stated that when she got home she started crying and told PW4 what had transpired.
18. PW6, a doctor at Thika Level 5 Hospital, testified that she examined the minor on 10th June 2021 and filled the P3 Form. She testified that the minor was in pain in the vagina and experienced a lot of pain while peeing. The doctor further testified that there was blood present in the minor’s urine. The witness classified the degree of injury as grievous harm and concluded that the minor had been defiled. PW6 produced the Post Rape Care Form and P3 Form as exhibits. On cross examination, the witness confirmed that the minor had been defiled and further testified that upon examination of the minor, she had bruises on her vagina and she was bleeding. She further testified that the urinalysis test confirmed that there were pus cells present.
19. To prove penetration, the key evidence relied on in the offence of defilement, is the complainant’s testimony usually corroborated by medical evidence. The medical evidence showed that the minor had bruises on the vagina and that she was bleeding at the time of examination. The P3 Form confirmed that there was discharge, redness and inflammation on the labia mayora and minora. Furthermore, the Post Rape Care Form revealed that the hymen was broken. The complainant maintained that the appellant defiled her and on cross examination she remained consistent in her testimony and was not shaken even on cross-examination. The complainant maintained that the appellant defiled her the defence of the appellant was a mere denial of the offence. Thus, it is my considered view that the prosecution proved the element of penetration.
20. On the issue of identification, PW1 testified that the appellant picked her up from school on the fateful day using his motor cycle. PW2, the minor’s mother testified that her colleague gave her the appellant’s number for he carried out bodaboda business after working hours. The witness testified that PW1 was normally taken to school by a rider she knows but on that day he called her stating that he would not be available. PW2 further testified that her colleague pointed to her the appellant to help ferry the complainant home. PW2 showed the appellant where to drop PW1 from school. PW 1 and the appellant exchanged contacts. The witness stated that she thereafter informed the teacher of the complainant that the appellant was to pick her daughter from school on the material day. On the fateful day, PW2 testified that the appellant caller her at 3.31 pm and stated that he had dropped the minor. Further PW7, the investigating officer testified that the DNA samples, she took from the appellant matched the sperm fraction on the victim’s pant and stocking which sperm belonged to the appellant. It is thus my considered view that the appellant was positively identified as the perpetrator. As such, I accordingly find that the prosecution did prove the element of identification.
21. The appellant further argues that the prosecution’s case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence as there are inconsistencies in the medical evidence produced by PW6. Relying on the case in the Court of Appeal Tanzania of Dickson Elia



Nsamba Shapwata & Another vs The Republic Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

22. PW6 testified that she examined the minor on 10th June 2021 and the minor had pain in her vagina. The victim also experienced a lot of pain while peeing. The doctor further testified that there was blood in her urine and she classified the degree of injury as grievous harm and concluded that the minor had been defiled. PW6 further testified that the minor had bruises on her vagina and that she was bleeding. Further that the P3 Form confirmed that there was discharge and the urinalysis results confirmed that there were pus cells. The Post Care Rape Form indicates that there was vaginal penetration and that the hymen was broken. After undergoing a vaginal swab, the doctor indicated in his report that he found epithelial cells which are all indicative of defilement. The medical evidence was corroborated by the minor’s evidence on how the appellant defiled her on 8th June 2021. Thus, it is my considered view that the medical evidence does not contradict the evidence of PW1 in any way. Furthermore, the investigating officer testified that the DNA samples taken from the appellant matched the sperm fraction found on the victim’s pants and stockings. It is evident that the appellant defiled the minor as all the evidence points towards him and the allegations by the appellant that the prosecution case is filled with contradictions does not hold water.
23. It is my finding that the prosecution proved the case beyond any reasonable doubt as required by the law.

Whether the sentence is harsh and excessive

24. The Court of Appeal, on its part in Bernard Kimani Gacheru vs Republic [2002] eKLR restated that:-

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

25. Recently the High Court dealt with the constitutionality of the mandatory minimum sentences under the *Sexual Offences Act* in the case of Maingi & 5 Others vs Director of Public Prosecutions & Another [2022] eKLR. The petitioners in the said case were convicts serving sentences for offences under the *Sexual Offences Act* and they argued that the mandatory minimum sentences imposed in the Act took away the discretion of the courts in imposing alternative sentences. The court held that the strict application of the mandatory minimum sentences under the *Sexual Offences Act* with no discretion at the trial court to determine the appropriate sentence to impose, such sentences were contrary to Article 28 of *the Constitution*.
26. Similarly, in the Court of Appeal case of *Manyeso vs Republic (Criminal Appeal No. 12 of 2021)* [2023] KECA 827 (KLR), the accused was convicted of the charge of defiling a girl aged 4½ years and



sentenced to life imprisonment, held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. The Court of Appeal further held that notwithstanding the direction issued in Francis Karioko [2021] eKLR which applied to only murder cases, the reasoning in Francis Karioko [2017] eKLR equally applied to the imposition of a mandatory indeterminate life sentence namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard on mitigation when facing lesser sentences are allowed to be heard on mitigation.

27. The aggravating factors in this case are that, the minor was a child of 6 years and the impact of the offence must have hit her hard. I have weighed this against the fact that the appellant was a first time offender. However, this court cannot lose sight of the seriousness of the offence. The trauma that goes with the offence of defilement is detrimental to the child's mental and physical health and may adversely affect the future of the child on performance in life generally and finally define who the said child will be. The offence is indeed of serious nature and the appellant deserves a deterrent sentence. However, following the jurisprudence in the foregoing decisions of superior courts, I am of the considered view that the appellant ought to benefit from a lesser sentence, other than the maximum sentence imposed under Section 8(2) of the *Sexual Offences Act*.
28. Consequently, I hereby set aside the sentence of life imprisonment and substitute it with twenty (20) years imprisonment.
29. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024.

F. MUCHEMI

JUDGE

