



REPUBLIC OF KENYA



KENYA LAW
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**Murei v Republic (Criminal Appeal 151 of 2019)
[2023] KEHC 962 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 151 OF 2019
JWW MONG'ARE, J
FEBRUARY 15, 2023**

BETWEEN

DANIEL KIPKORIR MUREI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and sentence of Hon. N. Wairimu in Eldoret
Chief Magistrate's Court Case No. 190 of 2018 delivered on 18th September 2019)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences act*. The particulars of the offence were that on the 9th day of September 2018 in Eldoret West District, within Uasin Gishu County, he unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of MJ a girl aged 14 years old.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 of the *Sexual offences Act*. The particulars of the offence were that on the 9th day of September 2018 in Eldoret West District, within Uasin Gishu County, he unlawfully and intentionally caused his genital organ namely penis to come into contact with the genital organ namely vagina of MJ a girl aged 14 years old.
3. The appellant pleaded not guilty and proceeded to full hearing. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate was satisfied that the prosecution proved its case to the required standard. The appellant was convicted of the main count and sentenced to 20 years imprisonment.
4. Being aggrieved by the sentence and conviction of the trial court, the appellant instituted the present appeal vide a petition of appeal filed on September 27, 2019. The appeal is premised on the following grounds;



1. That the trial magistrate erred in law and in fact while convicting (me) while not looking that the prosecution case was marred with a lot of contradictions.
2. That the trial magistrate erred both in law and in fact when relying on the evidence which was not purposed materially.
3. That the learned trial magistrate erred in both law and fact on convicting (me) when there was no crucial link established to connect (me) to the offence.
4. That, (I) pray to be served with the initial court proceedings to enable raise more reasonable grounds during the hearing of the appeal.

The parties filed submissions on the appeal.

Appellant's Case

5. In his submissions the appellant has challenged the evidence used to convict him with the offence of defilement. He states that the three key elements of the offence of defilement were not proved to the required standards.
6. He submitted that the evidence on the age of the complainant was not proved and that the birth certificate produced in court did not bear an official rubber stamp and seal of the director of civil registration and as such could not be relied on.
7. On identification the appellant submitted that the evidence on identification was not proper as the trial court failed to consider the nature of light available at the time of the incident, since it was alleged that the offence took place at night. He asked the court to disregard it.
8. The appellant also had issues on the evidence adduced to prove the element of penetration. He contended that there was inconclusive evidence of penetration and that the medical report was unreliable as the doctor mentioned hymeneal tears without proving penetration of other parts of the vagina. He urged the court to allow his appeal and set aside the conviction and sentence.

Respondent's Case

9. Learned Prosecution Counsel opposed the Appeal. He submitted that the prosecution produced evidence to prove its case against the appellant to the required standard of proof. On the elements required to determine that an offence of defilement had been committed he submitted that there was sufficient evidence adduced to sustain the conviction.
10. On age the prosecution relied on the oral evidence of the complainant who testified that she knew her date of birth as being the August 8, 2004 and that she testified on oath and was a truthful witness. The evidence was then corroborated by the evidence of her mother who also produced the birth certificate as evidence to prove the age of the complainant/victim.
11. The respondent contended that on second element of penetration that there was sufficient evidence to prove the same. The complainant testified that she was raped and described in detail how the appellant entered the kitchen where she was sleeping with her cousin and upon overpowering, removed her clothes and raped her. This was corroborated by the evidence of PW1 the medical officer who produced the P3 form to support her testimony and the same shown that there was a hymeneal tear on the genital area of the complainant upon examination. She further submitted that this evidence was sufficient that the complainant had been defiled.



12. The respondent further submitted that despite the fact the incident took place in the middle of the night and that witnesses placed the time as to between 2.00am and 4.00am, there was enough proof to link the appellant to the offence. The appellant is the neighbour to the complainant and well known to the complainant and her family who also testified. Evidence of the complainant was to the effect that because the appellant had a torch she identified him as he was using a torch when he entered into the kitchen where they were sleeping.
13. Her cousin, PW6 also testified that she found the appellant lying on the spot where the complainant had been sleeping and on shining her torch on him he fled the scene. There was also evidence to the fact that the appellant returned to the home of the complainant the next morning and retrieved a hat that had been lying in the compound linking him further to the happenings of the night before, a fact that was not controverted by the Appellant either during cross-examination or in his testimony.
14. The respondent urged the court to uphold the conviction and sentence and dismiss the appeal for lack of merit.

Analysis And Determination

15. The duty of an appellate court was set out in *Okeno v Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* (1975) EA 57). 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.”

16. Upon consideration of the petition of appeal and submissions of the parties, the following issues arise for determination;
 1. Whether the prosecution proved its case to the required standard

Whether the prosecution proved its case to the required standard

17. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.
18. The age of the complainant was proved by production of her birth certificate indicating she was born on August 8, 2004. This proved she was 14 years old at the time of the incident. PW1, the doctor who produced the P3 form on behalf of Dr. Sharon Mutai who examined the witness and filled the same testified that the injuries were reflective of penetration having occurred on the material date.
19. On identification, despite the incident having occurred at night, the identification of the appellant was by recognition. Further, PW6 was able to identify the appellant with a torch, and as the appellant had carried a torch there was sufficient light for his identification. In the premises, the ingredient of identification was satisfied.



- 20. In the premises, I find that the elements of the offence of defilement were proved beyond reasonable doubt. Consequently, the trial magistrate did not err in convicting the appellant.
- 21. The grounds of appeal do not disclose any of the grounds against the sentence despite the appeal being against the conviction and the sentence. That notwithstanding, I shall consider the appeal against the sentence. Under section 8(3) of the *Sexual Offences Act* the appellant was liable to a minimum of 20 years imprisonment. I am alive to the emerging jurisprudence in *Mainji & 5 others v Director of Public Prosecutions & another Petition* E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G V Odunga J stated as follows;

To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

- 22. I have considered the grounds of appeal, the submissions of the parties, the mitigation of the Appellant and the record of appeal and I find that the sentence was commensurate with the offence. The conviction and sentence are hereby upheld. The sentence shall be calculated to run from 11th September, 2018 in compliance with the provisions of section 333(2) of the *Criminal Procedure Code*.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF FEBRUARY 2023

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J.W.W.MONGARE
JUDGE

Judgment delivered virtually in the presence of;

- 1. Appellant is Present
- 2. Ms. Sakari holding brief for Ms okok- Prosecution Counsel
- 3. Loyanae- Court Assistant.

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J.W.W.MONGARE
JUDGE

