



**Musa v Republic (Criminal Appeal 015 of 2022)
[2023] KEHC 1796 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 015 OF 2022
F WANGARI, J
FEBRUARY 6, 2023**

BETWEEN

ISAAC KIMANZI MUSA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. M. Onkoba (P.M) in Mwingi SO Case No. 9 of 2019)

JUDGMENT

Background

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*. Particulars of offence that on March 3, 2019 between 9pm and midnight, at (withheld) within Mwingi Central Subcounty within Kitui County, intentionally caused his penis to penetrate the vagina of MMM a child aged 15 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. Particulars of offence are that on March 3, 2019, at (withheld) within Mwingi Central Subcounty within Kitui County, intentionally touched the vagina of MMM a child aged 15 years with his penis.
3. The appellant was convicted in the main charge and was sentenced to serve imprisonment period of 20 years. Having been dissatisfied with the judgment, conviction and the sentence imposed the appellant lodged this appeal. This being the first appellate court, I am guided by the principles as set in the case of Ganpat v State of Haryana, as cited by Mativo J in *Makau v Republic* as hereunder;
 - a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.



- b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
 - c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial Court has breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
4. Also in *Okeno v Republic* and *Kiilu & ano V Republic* , the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.

Summary of evidence

5. The complainant (PW 1), said she had gone to the market to have her shoe repaired and to buy some food stuff. She entered one of the butcheries to buy meat. She found the accused seated at the counter. She asked him if he had meat and the accused told her it was over. On her way home, she saw the accused followed her. He asked for her name but she told him she cannot give her name to a stranger. The accused asked her to go visit him. There was a house that was nearby and it was open, and the accused pushed her into the said house. She screamed but the accused covered her mouth. He pushed her to the bed and he locked the door. The complainant said she had seen her pastor, Pastor Daniel pass by. The accused forcefully removed her clothes and he defiled her. She said the accused inserted his erect penis into her vagina.
6. After the accused was done with her, they heard a knock on the door. The accused refused to open. The complainant opened the door. That is when she saw Pastor Daniel and 2 other men who introduced themselves as police officers. They were both led to the chief's office. Her parents came to the chief's office. Both the complainant and the accused were held till the following morning when they were taken to Mwingi police station. She told the police what had transpired. She was taken to hospital for examination and treatment. On cross examination, she reiterated her evidence in chief. She however denied that she had any sexual relationship with the pastor.
7. OMM (PW 2), the father to the complainant gave evidence that he received a call from Pastor Daniel, who informed him that he had seen his daughter (PW 1) being dragged into a room by a man. He went home and confirmed from his wife that PW 1 was not at home. The wife went to meet the pastor before him. When he joined them, he found the accused, PW 1, the pastor, the father to the accused and his uncle. They wanted to negotiate the matter out of court but PW 2 refused. The matter was reported to the police. He confirmed that PW 1 was 16 years old as per the birth certificate. On cross examination, he said he did not have a grudge with the accused.
8. CKM (PW 3), the mother to the complainant gave evidence that on the material day, she had sent her daughter to the market. Upon returning home at around 9pm, she did not find her daughter. Her husband (PW 2) informed her that her daughter had been seen being dragged into a lodging by a man. She went and reported the matter to APs and got 2 officers and went to the scene. She witnessed the accused and her daughter get out of the lodging room after they were forced to open the door by the police. The rest of the evidence was similar to that of her husband (PW 2).



9. DMM (PW 4) a pastor gave evidence that on the material date he was coming from their local market. That is when he saw the accused and the complainant walk into a lodging. The accused was holding complainant's hands. He went home and called the complainant's father and informed him what he had witnessed. The complainant's mother joined him and they went and reported the matter to the AP post. Together with the police, they went to the lodging and flushed out the accused and the complainant from the lodging.
10. PC Cosmas Mwasi (PW 5) and APC Isaac Mose (PW 6) both gave similar evidence as the arresting officers. They received a complaint from the mother to the complainant who was in the company of their pastor reporting that her daughter had been seen entering a lodging with a man. They went to the lodging where they found the accused and the complainant in the room together. They arrested the accused and subsequently handed him over to the police at Mwingi.
11. Dr Kennedy Munyoki (PW 7) though indicated as PW 5, a medical doctor produced the P3 form as an exhibit. He stated the complainant had no noted injuries in her genitalia, the hymen was missing and pus cells were noted. He however stated that the complainant had a history of previous penetration. He could not tell when the penetration occurred.
12. PC Saf Barre (PW 8) indicated as PW 6, is the investigating officer. She gave evidence on how she interrogated the complainant, caused her to go for medical examination, recorded statements from witnesses and charged the accused who was already in custody, with these offences.
13. In his defence, the accused said he was arrested from his butchery after Pastor Daniel (PW4) brought in police claiming that the accused had threatened to kill him. The complainant was in the company of the police and she was instructed to frame the accused. He denied committing the offence as charged.
14. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the main count and he sentenced him to serve a 20-year imprisonment term.

Grounds of appeal

15. Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on grounds as hereunder;
 - a. The trial magistrate erred in matters of law and fact by convicting and sentencing the accused on uncorroborated evidence
 - b. The trial magistrate erred in matters of law and facts in relying on inconclusive doctor's evidence
 - c. The trial magistrate erred in matters of law and facts in failing to consider the grudge between the accused and PW 4
 - d. The trial magistrate erred in law and facts in failing to give reasons of dismissing the defence of alibi.

The state was directed to put in its written submissions by January 27, 2023. At the time of writing the judgment, the submissions had not been filed.

Appellant's submissions

16. In his submissions, the appellant stated that the evidence by the prosecution was full of contradictions. The clothes allegedly torn by the accused during defilement were not produced as exhibits. The doctor



stated that the complainant had a history of previous penetration. He also stated that his sperms were not found in the complainant's genitalia.

17. Further, he submitted that the court denied him the opportunity to challenge the evidence of the complainant.

Issues for determination

18. The issues arising from this appeal are;
- a. Whether the elements of the offence of defilement were proved
 - b. Whether the defence of alibi was proved

Whether the elements of the offence of defilement have been proved

19. The appellant was charged with the offence under section 8 (1) as read with section 8 (3) of the SOA. The elements arising from the above are;

Age of the complainant

20. The essence of proof of age in a defilement matter is in determination of the sentence to be given upon conviction, as the SOA have different sentences based on the age of the victim. In *Musyoki Mwakavi v Republic*, it was held that medical evidence through a doctor, birth certificate, victim's parents or guardians' evidence can be used to determine the age of the victim. In this case, a birth certificate was produced and indicated that the complainant was born on May 20, 2003. At the time of the alleged offence, the complainant was 15 years old. I find that the prosecution did prove the age element.

Proof of penetration

21. 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.'
22. The doctor gave evidence that the complainant's hymen was missing. There were no injuries noted, hence the conclusion that there was previous penetration. The complainant gave evidence that the accused had sex with her before the police came for them. The prosecution witnesses all gave evidence that the accused and the complainant were found in the lodging room. The fact that there was no presence of semen does not mean there was no penetration. I find that the element of penetration was proved.

Identification of the assailant

23. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The complainant's evidence that she first met the accused in the butchery. He later followed her and took her to the room where she was defiled. PW4 gave evidence how he saw the accused pull the complainant to a lodging. The mother to the complainant and the arresting officers found the complainant and the accused together at the lodging. The identity of the accused was therefore not in doubt. I find the element of identification was proved.



Whether the defence of alibi was proved

24. The appellant first raised the defence of alibi during the defence hearing. The burden of proof does not shift to the appellant to prove his alibi defence. The prosecution had the burden of disproving the alibi and proving its case against the accused person. However, the evidence by the prosecution witnesses placing the accused at the scene of crime is overwhelming. I find that the evidence adduced against the appellant on the offence of defilement was proved beyond reasonable doubt.

On sentencing

25. Section 8 (3) of the SOA provides;

‘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’.

26. The above provision prescribes a mandatory minimum sentence of 20 years’ imprisonment. In *Maingi & 5 others v DPP & ano*, Odunga J in holding that the mandatory minimum sentences in SOA are unconstitutional stated as hereunder;

‘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*’.

27. The court is therefore bound to re-examine the sentence in the light of the above.

Conclusion

28. I have re-evaluated the evidence on record and I am satisfied that the prosecution proved the elements of the offence of defilement. The appellant was therefore properly convicted and sentenced. The appeal on conviction therefore fails, and proceed to uphold the conviction by the trial court. In respect to the sentence imposed, the trial magistrate was tied by the minimum sentence imposed in the SOA. The same having been held to be unconstitutional, the application for revision of the sentence must succeed.

29. I am guided by the Sentencing Guidelines. The evidence on record shows that the complainant had previous penetration. That does not warrant the accused to defile the complainant. The complainant had not attained the age of majority to give consent to a sexual encounter. She was still a minor and is under the protection of the law. The time spent in custody by the appellant must have been a lesson learnt.

30. The sentence of 20 years’ imprisonment is therefore substituted with an imprisonment term of 10 years. The time spent in custody shall be deemed to form part of the sentence, that is with effect from March 6, 2019. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF FEBRUARY, 2023.

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F. WANGARI

JUDGE

In the presence of;



Pauline Mwaniki State
Appellant present
Court Assistant - Guyo

