



REPUBLIC OF KENYA



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**Muthembwa v Republic (Criminal Appeal 028 of 2021)
[2023] KEHC 2090 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 028 OF 2021
F WANGARI, J
FEBRUARY 6, 2023**

BETWEEN

PETER KITHEKA MUTHEMBWA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. R.
Ombata (S.R.M) in Kitui SOA case No. 091 of 2014)*

JUDGMENT

Background

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*¹. Particulars of offence that on 10th day of October 2014 at about 1.30pm at (withheld) within Kitui County, intentionally and unlawfully committed an act which caused penetration with FL alias FM a child aged 5 years by inserting his penis to her genital organ namely vagina.
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 10th day of October 2014 at about 1.30pm at (withheld) within Kitui County, intentionally and unlawfully committed an act of indecency with FL alias FM a child aged 5 years by touching her private parts namely vagina using his hands. The appellant was convicted in the main charge and was sentenced to life imprisonment.
3. Having been dissatisfied with the judgment, conviction and the sentence imposed, the appellant lodged this appeal.

¹ Act No. 3 of 2006



4. This being the first appellate court, I am guided by the principles as set in the case of Ganpat v State of Haryana², as cited by Mativo J in *Makau v Republic*³ 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.
5. Also in *Okeno v Republic*⁴ and *Kiilu & ano. V Republic*⁵, 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

6. The complainant (PW 1) managed to tender her evidence after the 3rd attempt as she was not psychologically ready to testify, and she had to undergo counselling sessions. When she finally testified on 16/3/16, she was indicated as PW 4. She gave evidence that on October 10, 2014, she had gone to fetch firewood and she was alone. The accused who was known to her, and whom she described as the person who makes and sells brooms made from grass, ambushed her. She said he attacked her, covered her mouth, removed her underwear and forced himself on her. She said the accused removed his penis and inserted it into her vagina. She said the experience was painful.
7. After he was through with her, the accused left her. She went home and informed her grandmother and one M. what the accused had done to her. She was later taken to the police station and the hospital. The accused was later arrested. The trial magistrate did not give the accused an opportunity to cross examine the witness.
8. HK (PW 2), the complainant's teacher in her nursery school, gave evidence that on 13/10/14 at 8am, she noticed that the complainant was missing during the school assembly. She went to the complainant's class and found her. She asked her why she was not at the assembly but she did not say anything. She was told to go for the assembly. As she was walking, the teacher noticed that the

² Ganpat v State of Haryana (2010) 12 SCC 59

³ Makau v Republic (Criminal Appeal E015 of 2021) [2022] KEHC 179 (KLR) (14 March 2022) (Judgment)

⁴ Okeno v Republic (1972) EA 32

⁵ Kiilu & ano v Republic (2005) 1KLR 174



complainant was walking in difficulties and appeared as if she was in pain. Her uniform had a wet stain at the back.

9. PW 2 called her fellow teachers and told them her suspicions. They called the complainant and examined her private parts. They saw that her genitalia was swollen, reddish and torn. They asked her what had happened and she told them that one Peter had defiled her when she had gone to fetch firewood. She said the said Peter used to sell brooms in their area.
10. The teachers reported the matter to the head teacher, who then called an elder and they were advised to go report to the police. The mater was reported and the witness recorded her statement. The teachers also accompanied the complainant to hospital. On cross examination, she said she did not witness the commission of the alleged offence.
11. Dr. Cosmas Mutisya (PW 3) though recorded as PW 4, a doctor at Kitui District Hospital, examined the complainant after presenting herself with a history of defilement. Her hymen was broken and the genitalia had some redness.
12. The lab results showed that she had a urinary tract infection as pus cells were noted. HIV test was reactive meaning she tested positive. An age assessment was done and she was found to be about 6 years old. The P3 form, PRC and age assessment report were produced as exhibits. On cross examination, he said only the complainant was presented to the hospital and not the accused.
13. Habiba Ali (PW 4), indicated as PW 5 in the proceedings, gave evidence that she was the investigating officer. On 15/10/14 the complainant was brought to the police station by the teachers. PW 2 reported that the complainant had been defiled. The witness testified that the complainant told her that she had been defiled by one Peter who sells brooms. She was escorted to hospital for medical examination. A P3 form, PRC form and age assessment report were subsequently issued.
14. The witness said that with the help of the teachers and the complainant, the accused person was arrested from his house. On cross examination, she said the complainant identified the accused as the person who defiled her.
15. In his defence, the accused gave evidence that on 10/10/14 he spent his day at his place of work. He never met the complainant and did he did not defile her. He admitted that he sold brooms for a living. He was however stood down after the trial magistrate observed that he was incoherent and it was ordered that he undergo a mental assessment.
16. He was found to have mental illness features and was put under treatment. He was later found mentally fit to plead. He continued to testify that he was framed by those who arrested him.
17. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the main count and sentenced him to serve life imprisonment term.

Grounds of appeal

18. 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 unfairly denying the appellant the opportunity to cross examine his accuser.
 - b. The trial magistrate erred in matters of law and facts by relying on the victim's wobbling narrative contrary to the doctrines of section 124 of the *Evidence Act*.



- c. The trial magistrate erred in matters of law and facts by not ordering the prosecution to disclose the evidence it intended to rely on to support its case from the onset as constitutionally demanded.
 - d. That the state violated the fiat of Articles 35 (2) and 244 of *the Constitution* as read with Section 50 (1) of the *National Police Service Act* for dishonesty
19. The parties were directed to put in their written submissions by 27/1/2023. As at the time of writing this judgment, the submissions by the appellant were on record, but the respondents submissions had not been filed.

Appellant's submissions

20. The appellant submissions were in support of the grounds of appeal. In a nutshell, he stated that the right to a fair trial under Art. 50 of *the Constitution* had been violated. He said that the complainant was put on the witness box severally but stood down because the prosecution was 'frustrated that the victim was not acting right'.
21. He submitted that it was not the complainant who testified because she was initially PW 1, but the 'complainant' who testified on 16/3/16 was indicated 'PW 4'. He said PW 4 was a 'proxy, surrogate or a protégé of the complainant that testified, but not the complainant.
22. He also submitted that the denial by the court to allow him cross examine the complainant violated his constitutional right under Art. 50 (2)(k) of *the Constitution* and Section 146 of the *Evidence Act*.

Issues for determination

23. The issues arising from this appeal are;
- a. Whether the prosecution proved the elements of the offence of defilement.
 - b. Whether the right to fair trial was denied
 - c. Whether the defence raises reasonable doubts against the evidence of the prosecution.

Whether the elements of the offence of defilement have been proved

24. The appellant was charged with the offence under section 8 (1) as read with section 8 (2) of the *SOA*. The elements arising from the above are;

Age of the complainant

25. The essence of proof of age in a defilement matters is in determination of the sentence to be given upon conviction, as the *SOA* have different sentences based on the age of the victim.
26. In *Musyoki Mwakavi v Republic*⁶, 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. The medical doctor (PW 1) produced an age assessment report indicating that the complainant was aged about 6 years at the time of the defilement. The age element was therefore proved.

⁶ Musyoki Makavi v Republic (2014) eKLR



Proof of penetration

27. 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.”

28. The doctor gave evidence that after the examination of the complainant, he found that her hymen was broken. With the history of defilement, the missing hymen, the infection noted, all these are indications of penetration. Despite the HIV test having been found reactive, it was not stated if the virus was contracted during the defilement incidence or not. The appellant did not undergo medical test as that would have shed some light as to whether or not he is the one who infected the complainant with the HIV virus. I find that the element of penetration was proved.

Identification of the assailant

29. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The complainant’s evidence is that it was the appellant who defiled her. The appellant was known to the complainant as the person who make brooms from grass and then sells them. The accused in his defence said he also made brooms for a living. I find the element of identification was proved.

Violation of the right to fair trial

30. The appellant submitted that the trial was a sham. He stated that the complainant was coached on what testify. When the prosecution could not get their way, they availed another witness other than the complainant to testify. The issue that the complainant was a different person was raised only during the submissions.

31. Further, the appellant said that he was denied the opportunity to cross examine the complainant. On one hand he states that it was not the complainant who testified in court, and on the other hand, he says he was denied an opportunity to cross examine the complainant. I find that the allegations that the prosecution availed a different witness other than the complainant was an afterthought and is hereby dismissed.

32. The appellant also submitted that the provisions of section 124 of [Evidence Act](#) were violated.

Section 124 of the [Evidence Act](#)⁷ states;

‘Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth’.

⁷ [Evidence Act](#), Chapter 80 Laws of Kenya



33. I have carefully evaluated the evidence of the complainant. She was consistent in her evidence in-chief. Her evidence was corroborated by that of her teacher and the doctor. I concur with the findings of the trial court that the complainant's evidence passed the test in section 124 of the Evidence Act.

Sentence imposed

34. Section 8 (2) of the Sexual Offences Act provides;

‘A person who commits an offence of defilement with a child aged eleven years or less shall be upon conviction be sentenced to imprisonment for life’

35. The above provision prescribes a mandatory minimum sentence of 20 years' imprisonment. In Maingi & 5 others v DPP & ano⁸, 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’.

36. The court is therefore bound to re-examine the sentence in the light of the above, the superior courts have made pronouncements on the unconstitutionality of the mandatory sentences in the SOA. the court is therefore not bound to give the mandatory life sentence in this matter. The trial court gave a life imprisonment. After considering the impact caused to the complainant as the victim of the sexual offence, the mitigation by the accused, I find no reason to interfere with the decision on sentencing.

37. In the end, I uphold the conviction and the sentence imposed by the trial court.

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 for State

Appellant present

Court Assistant - Guyo

⁸ Maingi & 5 others v Director of Public Prosecutions & ano (Petition E017 of 2021) KEHC 13118 (KLR) (17 May 2022)

