



**Mwendwa v Republic (Criminal Appeal 251 of 2019)
[2023] KEHC 547 (KLR) (Crim) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 251 OF 2019
CW GITHUA, J
FEBRUARY 1, 2023**

BETWEEN

KENNEDY MAKAU MWENDWA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Kibera chief Magistrate's
Sexual Offence No.108 of 2016 dated 19th June 2019 (Hon. F. Mutuku))*

JUDGMENT

1. The appellant, Kennedy Makau Mwendwa, was charged in the main count with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* (SOA). In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *SOA*.
2. After a full trial, he was convicted in the main count with the offence of defilement whose particulars were that on December 10, 2016, in Ngumo location within Nairobi County, he intentionally caused his penis to penetrate the vagina of MN (name withheld), a child aged 13 years. He was sentenced to serve 15 years imprisonment.
3. He was dissatisfied with his conviction and sentence. He proffered an appeal to this court vide a petition of appeal dated December 5, 2019 which he subsequently amended with leave of the court.
4. In his amended grounds of appeal, the appellant principally complained that the learned trial magistrate erred in law and in fact by: convicting him on the basis of contradictory evidence which did not prove the essential elements of the offence of defilement beyond any reasonable doubt; basing his conviction on the evidence of the minor complainant under Section 124 of the *Evidence Act* without



- appreciating that she was not a truthful witness; failing to adequately consider his defence; and, failing to take into account the Judiciary Sentencing Policy Guidelines before meting out sentence against him.
5. The appellant prosecuted his appeal in person. He chose to prosecute it by way of written submissions which mode was also adopted by the respondent. He filed his written submissions on March 7, 2022 together with his amended grounds of appeal while those of the respondent were filed on December 17, 2021. In response to the respondent's submissions, the appellant filed further submissions on July 26, 2022.
 6. In his submissions, the appellant expounded on his grievance that he was wrongly convicted, as in his view, the prosecution had not proved the three elements of the offence of defilement beyond reasonable doubt. He relied on several authorities to support his contention that the age of the victim was not conclusively established and that he was not positively identified as the perpetrator of the offence. He further asserted that there were inconsistencies in the prosecution's case which ought to have been resolved in his favour. He urged the court to find merit in the appeal and allow it as prayed.
 7. The appeal is contested by the respondent. Learned prosecution counsel Mr. Kiragu in his written submissions supported the appellant's conviction and sentence. He submitted that through its nine witnesses, the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt. He invited the court to find that the appellant was properly convicted; that the sentence imposed on him was very lenient and if anything, it should be enhanced to the mandatory minimum sentence of 20 years imprisonment prescribed by the law for the offence. He implored the court to dismiss the appeal in its entirety for want of merit.
 8. As the first appellate court, I have a duty to subject the evidence presented before the trial court to a fresh and exhaustive scrutiny to arrive at my independent decision on whether or not to uphold the appellant's conviction. In re-evaluating the evidence, I should remember that I did not see or hear the witnesses as they testified and give due allowance for that disadvantage. See: *Okeno V Republic*, [1972] EA 32; *Kiilu & Another V Republic*, [2005] 1 KLR 174.
 9. I have considered the appellant's grievances in this appeal, the parties' rival written submissions and all the authorities cited. I have also considered the evidence on record and the judgment of the trial court. Having done so, I find that the only issue arising for my determination is whether the prosecution proved the charge subject of the appellant's conviction beyond reasonable doubt.
 10. It is now settled law that in a case of defilement, the onus rests on the prosecution to establish beyond doubt that the victim of the sexual assault was a child; that there was penetration and that the accused person was positively and reliably identified as the culprit.
 11. Regarding the first ingredient, under Section 2 (1) of *SOA*, the meaning assigned to a "child" is that provided under the Children's Act. Under Section 2 of the *Children's Act*, a child is defined "as any human being under the age of 18 years". In this case, the age of the victim as stated in the charge sheet was 13 years. In her evidence, the victim who testified as PW1 stated that she was born in the year 2003. PW2, JM who was the minor's guardian and lived with her testified that PW1 was 13 years old at the time the offence was allegedly committed. PW1 and PW2's evidence was supported by the evidence of PW4, LK, their other sister and the finding of Dr Shako (PW5) who examined PW1 on January 9, 2017. According to the medical evidence in the P3 form completed by PW5 and produced as Pexhibit 2, PW1's age at the time of examination which was about a month after the incident was confirmed to be 13 years.



12. It is important to note that though the prosecution also sought to rely on a birth certificate produced by the investigating officer (PW8) as P exhibit 5 in support of its case regarding the victim's age, the birth certificate did not add value to the prosecution case since it was not issued in the name of the complainant. It bore the name of LN which did not belong to the complainant. This fact does not however adversely affect the prosecution case since as stated by the Court of Appeal in *MW V Republic*, [2020] eKLR, the age of the victim can be established in various ways. It can be proved by medical evidence, a birth certificate or through the testimony of the victim, guardian or parents.
13. In respect of penetration, PW 1 testified that on the material date, that is, December 10, 2016 at around 7pm, she was picking clothes from a drying line when a peg fell into the appellant's house. The appellant upon request refused to pass on the peg to her but instead pushed her into the house and shortly thereafter had sexual intercourse with her.
14. The evidence of PW1 was materially corroborated by the evidence of PW6, Peter Ngatia, a clinical officer at Nairobi Women's Hospital. PW6 produced as Pexhibit 1 the PRC form filled by his colleague who had examined PW1 on the same date the offence was allegedly committed.
15. According to the PRC form, at the time of examination, PW1 had a freshly broken hymen and an abnormal whitish discharge which were evidence of vaginal penetration. PW5 who examined PW1 on January 9, 2017, about a month later found that her hymen had tears at 6 and 4 o'clock which may have been caused by sexual conduct.
16. Although according to the evidence of PW8, a Government Analyst at the Government Chemist, the high vaginal swab obtained from the complainant was not stained with any semen or blood, the mere absence of spermatozoa or blood in a victim's genitalia does not by itself mean that there was no penetration. I am fortified in this finding by the Court of Appeal's decision in *Mark Oiruri Mose V Republic*, [2013] eKLR in which the court discussed the element of penetration in defilement cases and stated as follows:

“In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”

In view of the foregoing, I am satisfied that the prosecution proved beyond reasonable doubt the element of penetration.

17. Regarding identification, the appellant in his sworn statement in his defence admitted that he knew PW1 and PW2 prior to the material date since they were his immediate neighbours. In fact, there is undisputed evidence that the plot in which the appellant, PW1, and PW2 resided had only two houses, the one occupied by PW1 and PW2 and the one in which the appellant and his brother (DW2) resided.
18. It is PW1's evidence that the appellant had been washing clothes outside his house and he pushed her into the house and sexually assaulted her after she approached him to pass on a peg which had fallen into his house. Contrary to the evidence adduced by DW2, PW1 was categorical in her evidence that the appellant was alone in the house at the material time. Her evidence was consistent with the evidence of PW2 and PW4 who stated that on returning home at around 8pm, they found PW1 in the appellant's house and they were the only two people in the compound. PW1 upon enquiry reported to them that the appellant who they knew as Bernard had defiled her. And when she was examined at



the Nairobi Women Hospital the same evening, her hymen was found to be freshly torn and she had an abnormal whitish discharge which the examining doctor concluded was evidence of penetration.

19. I am cognizant of the fact that the appellant denied having committed the offence as alleged and had his brother give evidence in support of his defence but given the above evidence, I am unable to fault the trial court's finding that the appellant was positively recognized by PW1 as her assailant. In this case, there was no possibility of mistaken identity given that the appellant was PW1's immediate neighbour and the fact that PW1 was actually found in the appellant's house by PW2 and PW4 when they returned home on the evening in question.
20. After my independent evaluation of the evidence on record, I agree with the learned trial magistrate that the appellant's claim that the charges were fabricated by PW2 and his brother's evidence were an afterthought aimed at misleading the court to help the appellant escape the course of justice.
21. For the foregoing reasons, I am satisfied that the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt. The appellant's conviction was therefore proper and safe.
22. On the appeal against sentence, the record shows that the appellant was sentenced to serve 15 years imprisonment instead of the 20 years minimum mandatory sentence prescribed by the law for the offence. The learned trial magistrate exercised her discretion and imposed a sentence lesser than the minimum mandatory sentence provided for by the law following the Court of Appeal's decision in *Evans Wanjala Wanyonyi V Republic*, Criminal Appeal No. 312 of 2018 where the court, by analogy of reasoning, extended the Supreme Court's decision in *Francis Karioko Muruatetu & 5 Others V Republic*, [2017] eKLR and applied it to the minimum mandatory sentences prescribed under the SOA. In that case, the Court reduced the appellant's sentence from the mandatory sentence prescribed under the SOA and substituted it with a sentence of ten years.
23. It is noteworthy that the Supreme Court in the 2nd Muruatetu decision has since clarified its holding in the 1st Muruatetu case that it only applied to the death penalty prescribed for the offence of murder and not all mandatory sentences. This guidance was however given about three years after the date the appellant was sentenced and in my considered view, it cannot operate retrospectively.
24. The court record shows that in sentencing the appellant, the learned trial magistrate considered all relevant factors and did not apply any wrong legal principle. There is no indication from the record that the learned trial magistrate abused her discretion in any way. I consequently find no reason to disturb the appellant's sentence.
25. In the end, it is my finding that this appeal is devoid of merit and I accordingly dismiss it in its entirety.
It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 1st day of February 2023.

C W GITHUA

JUDGE

In the presence of

The appellant

Ms Ntabo for the Respondent

Ms Karwitha Court Assistant

