



**Mustafa v Republic (Criminal Appeal E026 of 2021)
[2023] KEHC 1648 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E026 OF 2021**

**A. ONG'INJO, J
MARCH 2, 2023**

BETWEEN

ISMAEL MUSTAFA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of Hon. E.A. Nyaloti, Chief Magistrate delivered on 28th day of January 2021 at Mombasa Law Courts Sexual Offence Case 13 of 2019)

JUDGMENT

1. Ismael Mustafa was convicted for the offence of defilement contrary to Section 8(1) & (2) of the [Sexual Offences Act](#) No. 3. of 2006 - on 28/01/2021. The particulars were that on the 18th day of February 2019 in Jomvu Sub-County within Mombasa County the Appellant intentionally and unlawfully caused his penis to penetrate the anus of EHO a child aged 3 ½ years old.
2. The appellant was sentenced to serve life imprisonment on 2nd February 2021 after his mitigation was considered against the gravity of the offence as well as fact that he was discharged under Section 87(a) [Criminal Procedure Code](#) in a case where the High Court ordered for re-trial where appellant was alleged to have defiled 7 years old child.
3. The Appellant was aggrieved by conviction and sentence lodged the appeal herein on the following grounds:-
 - i. That the learned trial court Magistrate erred in law and fact by convicting the appellant without considering that identification was not proved beyond reasonable doubt.
 - ii. That the learned trial court Magistrate erred in law & fact by sentence the appellant to serve Life Imprisonment without considering that he was denied the right to fair trial pursuant to Article 50(20(p) of the [Constitution](#).



- iii. That the learned trial court Magistrate erred in law and fact by sentencing the appellant to life imprisonment which was harsh and excessive.
 - iv. That the learned trial court Magistrate erred in law & fact by convicting the appellant without considering that the period spent in custody prior to conviction was not put into consideration.
 - v. That the learned trial court Magistrate erred in law & fact by convicting the appellant without considering.
4. The Prosecutions case was that PW 1 the Cousin to the Complainant wanted to bath her uncles children and when she went to look for them she saw the Complainant come from the appellants house. That while bathing the Complainant the appellant passed by and the child told her “huyu amenidinya” meaning that he had sodomised him.
 5. PW 1 called the Uncle PW 2 herein and reported and when PW 2 came the child explained what happened. That the child was taken to hospital. That when appellant was asked what he did to the child he said the complainant had broken his eggs. PW 1 said that the appellant wiped the child after defiling him.
 6. PW 2 said the Complainant was born on 7th May 2015. PW 2 said that MA PW 1 called and told him to go home and hear what the complainant was saying as he had been defiled. That when he went home the Complainant told him that the accused had done bad manners and that after defiling him he wiped his behind with a lessa.
 7. PW 2 reported the matter to Changamwe Police Station and the child was taken to Coast General Hospital where PRC & P3 forms were duly filled after the child was examined and given drugs to take for 3 months. PW 2 said that he had not known the appellant and it's the child who identified him and he was arrested. He said the appellant was with another person in the house but the child was woken up and he identified the appellant as the perpetrator.
 8. That when the child identified the appellant he drew a knife and members of the public assisted to restrain him until police arrived and arrested him. PW 2 said he used to see the appellant in Bangladesh but he had not differed with him. The child PW 3 managed to give an unsworn statement and said that appellant called him to his house and inserted his penis in the child anus and he told M. He said the appellant urinated in his anus and then wiped him with a lessa.
 9. PW 4 - Dr. Irene Atieno produced PRC form filled by the Nurse Saida Mwinyi in respect sexual injuries inflicted on the child EH on his anus. She said the Complainant had a tear on the anal opening at 12 O'clock as per EX. 2. PW 4 also produced P3 form – Ex. P3 – filled by Dr. Nafisa on 7th March 2019. It was assessed that the laceration at the anal opening was inflicted by a blunt object probably a human penis.
 10. PW 5 – Nyumba kumi elder - Carlyne Atieno testified that on 18/02/2019 at 4.00pm. She was eating when a child was taken to her by his Sister and they reported that the appellant had committed an unnatural sexual act on the child. That she took the child to where the father works and also went to Gender Office in Bangladesh. That the child's father was referred to Changamwe Police. That the child took PW 5 to the appellant's house and the appellant came out with a knife. She said the appellants house is close to Complainants house. That the appellant wanted to attack the complainants father with a knife and members of public started beating him.



11. PW 6 P.C. Edna Kemboi investigated case of defilement of the complainant and issued P3 form which was duly filled after the child was examined and treated at Port Reitz Hospital. PW 6 said the appellant was a neighbor to the child and the child knew him and identified him as the one who defiled him. That the child knew the appellant as “yule uncle wa kuuza mayai”. She said that appellant used a lessa to wipe the child after defiling him but the lessa was not recovered when the prosecution closed its case and the appellant became very unruly hurling abuses to the trial Magistrate and in more than one occasion became violent wanting to attack the Magistrate and had to be restrained by Court orderlies and had to be handcuffed as ruling for a case to answer was being delivered.
12. The appellant attacked prison warders who were trying to restrain him from attacking the trial Magistrate. It was ordered that due to his violent behavior he should not be brought to court. The appellant made it impossible for the case to proceed and his defence was closed without him testifying.
13. This appeal was canvassed by way of written submissions. The Appellants submissions filed on 6th February 2023. The Appellant raised 2 totally different grounds which he submitted on and steered clear of the grounds in the petition of appeal. He submitted that the request to have the case transferred was not considered by the trial Magistrate as he was not in good terms with the court and it ought to have recused itself from this case and therefore failure to recuse rendered the trial unfair.
14. The appellant also argued that the trial court failed to observe that the conviction was obtained by means of perjured testimonies knowingly used by the prosecution witnesses to secure his imprisonment. The appellant also submitted that the sentence imposed by the trial court was excessive and thereby contravening Article 28 and 29 of the Constitution of Kenya 2010.
15. The Respondent filed submissions on 13th January 2023. The Respondent argued that the unsworn statement of the Complainant who of tender age was well corroborated by evidence of other prosecution witnesses. The Respondent further submitted that the appellant was accorded fair hearing under Article 50 and that the age of the Complainant was proved, the identity of the perpetrator and fact of penetration was also proved.

Analysis and Determination

16. Having considered the grounds of appeal, the Record of Appeal and Submissions filed by the appellant and the Respondent, the issues for determination are:-
 - i. Whether the Appellant was accorded fair hearing
 - ii. Whether the offence of defilement was proved beyond all reasonable doubt.
17. This being 1st Appellate Court the duties of this Court are well spelt out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze 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 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.”



18. For the prosecutions to prove the offences defilement the identity of the perpetrator the age of the complainant & the age of the Complainant must be proved.
19. PW 1 testified that the uncle's child came from appellants house and when the child saw the appellant passing he told PW 1, "huyu uncle amenidinya," meaning the appellant had sodomized him. PW 1 called and reported what the child had told her about the appellant and also went and reported to PW 5 the village elder. The child took PW 5 to the appellants house and the Appellant came out while armed with a knife wanting to attack the father of the complainant and he was restrained by members of public who disarmed him and beat him up.
20. PW 1 & PW 5 said the appellant's & the complainants house are close to each other. The incident happened at 4.00pm and there was sufficient light to enable the child recognize the appellant who was their neighbor. The Appellant was therefore properly identified as the perpetrator of the offence.

Whether the Complainant was defiled?

21. PW 4 Dr. Irene Atieno produced PRC & P3 forms confirming that the Complainant had a tear on the anal opening. The PRC form was filled by Saida Mwinyi – a nurse at Coast General Hospital & the P3 form was filled by Dr. Nafisa. It was assessed that a human penis penetrated the child's anal orifice. The child told PW 1, PW 2 & PW 5 that the appellant had defiled/sodomised him. The fact of penetration was therefore proved beyond all reasonable doubt.
22. The Age of the Complainant was also proved by production of EXP1-Certificate of Birth showing that the Complainant was born on 7/05/2015 and was therefore 3 ½ years by the time the offence was committed.
23. On sentencing section 8(2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment of life.
24. The Appellant was lawfully sentenced to serve life imprisonment. The trial court considered the appellants mitigation as well as the prevalence seriousness of the offence & sentenced him to life imprisonment.
25. The appellants 2nd ground of appeal is that the trial court did not consider the he was denied fair trial pursuant to Article 50(2)(p) of the Constitution of Kenya 2010 which provides:

“Every accused person has the right to a fair trial which includes the right to the benefit of the least severe of the prescribed punishments for the offence if the prescribed punishment for the offence has been charge between the time that the offence was committed and the time of sentencing”.
26. The Appellant has not explained in his submissions how Article 50(2) (P) of the Constitution was infringed as the penalty for defilement of a child below the age of eleven was enacted in Act No. 3 in 2006 and there have been no changes.
27. As to whether sentence is harsh & excessive the only reprieve is that the current trend and jurisprudence tend to move away from undefined unquantified jail terms in preference for determined the sentences. In that regard this court is of the view that the appellants sentence should be substituted and is hereby substituted with 35 years jail term which should take effect from 20th February 2019 when he was arraigned in court.
28. Whether there was a grudge or in difference between the Appellant and the complainants family, the PW 1 said she had not differed with the appellant and PW 2 said he did not know the appellants and



it is the complainant who identified him where he was in a room with another person. The village elder PW 5 did not say if she has ever received any complaint between the complainant's family and appellant. The 5th ground of the appeal cannot therefore stand.

29. In the course of perusal of the trial courts records, this court noticed that the Appellant made it nearly impossible for the trial to go on and as a result the trial had to proceed pursuant to Article 50(2) (J) of the Constitution of Kenya, 2010 when the Appellant became violent. The Appellant did not give any testimony in his defence because of his conduct in court, he declines to be heard by the trial Magistrate and he declined to testify and he was merely hurling abuses and even attempted to attack the trial Magistrate as a result he case was closed without him testifying.
30. Having re-analyzed and reevaluated the evidence in trial court as well as the judgment of the trial Magistrate, and having considered the grounds of appeal and respective submissions this court finds that the Appeal of conviction lacks merit and the same is dismissed. Appeal on sentence succeeds partially to the effect that life sentence is substituted with 35 years jail term to take effect from 20th February 2019. The Appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF MARCH 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Appellant – Present in person in Kamiti

Mr. Ngiri for State

Hon. Lady Justice A. Ong'injo

Judge

