



REPUBLIC OF KENYA



**Nduta v Republic (Criminal Appeal 86 of 2016)
[2023] KEHC 2768 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 86 OF 2016
SC CHIRCHIR, J
MARCH 21, 2023**

BETWEEN

AUGUSTINE MARERI NDUATA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The of appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual Offences Act* No 3 of 2006. (The Act).The particulars of the charge are that on the 19th day of February 2016 in Kangema sub- county within muranga county, intentionally caused his penis to penetrate the Vagina of NWM, a child aged 12 years
2. He faced an alternative charge of committing an indecent Act with the child. He was convicted of the 1st charge and sentenced to 40 years imprisonment. He was dissatisfied with the judgment and consequently filed this appeal.

Grounds of Appeal

3. In his amended grounds of appeal, the appellant sets out the following summarized grounds.
 1. That the prosecution’s witnesses contradicted each other and their evidence was doubtful.
 2. That there was no positive identification.
 3. That, the investigations were incomplete and the prosecution did not prove its case beyond reasonable doubt.



Appellant's Submissions

4. It is the Appellant's submissions that the P3 form produced didn't indicate the date of treatment of the complainant, and did not indicate the hospital in which the claimant was treated. That such discrepancies raise doubt on the evidence of the Clinical Officer who produced them. That though the Appellant was said to have had a knife, such a weapon was not recovered from the accident scene.
5. That the complainant's testimony that there were houses near the crime scene contradicted that of her father (PW3) who told the court that there were no houses there. That another contradiction is when the complainant told the court that she ran away on seeing her father which testimony, he submits, contradict that of PW3 evidence which was to the effect that they both ran away.
6. On identification, it is submitted that the fact that the complainant had not seen the accused before, and the alleged sudden attack could not have given a chance to the complainant to identify the assailant. He dismisses the identification by the complainant's father as being doubtful.
7. On whether the prosecution's case was proved beyond reasonable doubt, the appellant cites the prosecution's failure to call the person who allegedly took the child to the hospital, failure to recover the knife which the appellant allegedly had and the clothes worn by the appellant on the time of the attack as some of the facts which ought to have been investigated further.
8. The appellant finally submits that he was never taken through a medical examination to establish if there was any interaction between him and the complainant.

Respondent's Submissions.

9. It is the respondent's submissions that there was consistency in the evidence of the complainant and her father PW3; that even if the hospital which treated the complainant is not indicated, the treatment chits submitted proved that the complainant was treated. The Respondents asserts that any contradictions if any, did not affect the substance of the prosecution's case. The case of *Erick Onyango v Republic* (2014) eKLR was relied on, in this regard.
10. On identification it is the respondent's submission that the offence was committed at 6PM, when there was still enough light to allow for identification; that the complainant testified that she saw the face of the attacker. It is further submitted that PW3 also identified the appellant as he had walked onto the two, and even though both ran away, he caught up with the appellant and arrested him.
11. On whether the respondent's case was proved beyond reasonable doubt it is the respondent's submission that all the ingredients of the offence of defilement were proved.

Analysis and Determination

12. The Mandate of this court as the first appellate court is to re-evaluate the evidence, and come up with its own findings. (see *Okeno v Republic* (1972) EA 32, while bearing in mind the fact that the trial court had the benefit of seeing and hearing the witnesses firsthand. I will address the grounds as set out in the petition of Appeal

Whether the prosecution evidence were contradictory and doubtful

13. The Appellant takes issue particularly with the evidence of PW1, PW2 and PW3 On the clinical officer's evidence(PW1), it is his contention that the document produced did not show the name of the patient, and does not indicate the date of treatment.



I have perused the P3 form (PEHX2) it has the name of the complainant and it was filled at Kangema Sub-district hospital. The treatment notes also has the name of NW, aged 12 years. The appellant's assertion in this regard is therefore untrue.

14. The other contradictions, the appellant submits is where the child victim referred to her father as "a person passing by", instead of identifying her as his father; That at one point the complainant stated that she did not run away but in some instances she stated that she ran away when the father arrived. That the knife that was allegedly used was never recovered.

In my view the above contradictions do not go into the substance of the case. In the case of *Tehangane Alfred v Uganda Cr. Appeal No 139 of 2001* cited with approval in the case of *Erick Onyango v Republic* (2014) eKLR referred to by the respondent, the court can ignore minor contradictions unless the court thinks that they point to a deliberate untruthfulness or if they do not affect the substance of the prosecution case.

Having looked at the evidence of PW1 and PW2, I do not find any attempts at untruthfulness, and the contradictions are so minor as to materially affect the prosecution's case.

Ground 2 whether the appellant was positively identified.

15. The appellant has submitted that the complainant was dragged to the bush and defiled and the fact that she had not met the perpetrator before, raises doubt on proper identification. The appellant urges the court to ignore description given by PW3 on identification, terming the same doubtful.

The complainant told the court "I do not know the accused, I had not met him before.... (line 8 Paragraph 1, page 7) later on the last paragraph on the same page, she stated. "I was able to see the face of the accused person, I have seen that person today here at the chambers sited (line 23-24.).

16. On the other hand PW3 the father told the court "..... I came across the people who were naked in the push along a pathway when I approached them they ran away. I decided to run after the man....." Then later: "I explained to the officer, the whole story and that the person I had arrested was handed over to the AP post. At cross examination, he reiterated that he walked on the appellant defiling the complainant and that he is the one who effected the arrest.

Although both witnesses told the court that they did not know the appellant, I find that the circumstance gave room for positive identification. The time was 6 pm, there was enough light. The appellant removed his clothes and those of the complainant at some point; the appellant covered the complainant's mouth with a handkerchief. All these actions must have given the victim ample time to see the perpetrator's face. The appellant was caught in the act by PW3, he ran after, and arrested him.

There could have been no room for arresting a wrong person as alleged by the appellant. The sequence of events could not have allowed for such a mistake. I am satisfied that they appellant was positively identified as the perpetrator.

Ground 3 – Was the investigation incomplete and was the case proved beyond reasonable doubt

17. The appellant cites what he calls the prosecution's failure to call essential witnesses, failure to avail the knife which the accused allegedly as some of the gaps that materially affected the prosecution's case. The appellant also complains that since he was not subjected to medical examination, no link was established between him and the crime.
18. It is my finding that failure to produce the alleged knife, and failure to subject the appellant to medical examination, did not water down the prosecution's case. In a charge of defilement what the



prosecution is required to prove beyond reasonable doubt is: the age of the child, identification of the perpetrator and penetration.

The victim, was 12 years and this was never an issue in the trial court or in this appeal. The fact of penetration was not also contested. In any event, the medical evidence as well as the evidence of PW2 proved penetration.

I have already addressed myself to the question of identification and I need not go back to it.

19. The upshot of a foregoing is that appeal on conviction has no merit, and the same is hereby dismissed.

Sentencing

20. The appellant was sentenced to 40 years in prison against the prescribed minimum sentence of 20 years. Am aware that following the decision of *Philip Mainigi Mueke & 5 others v Republic*- Machakos High Court petition No E017 of 2021, among other recent decisions, the mandatory or minimum sentences are no longer binding on the courts, such sentences having been declared unconstitutional.
21. However, sentencing is a matter of discretion and this court will only interfere with the trial court's discretion if irrelevant factors were taken into consideration or if material considerations were ignored. I have noticed that the court considered the appellant's failure to mitigate, lack of remorsefulness and the effect of the crime on the victim. I have not found any reason to interfere with the trial court's discretion in court in respect to the sentence.
22. Section 333(2) of the *Criminal Procedure Code*, obligates the court to take into consideration the period spent in custody by an accused person when handing down the sentence. The sentencing policy guidelines also places a lot of emphasis on this aspect of sentencing. The appellant was in custody during trial and there is no indication that the trial court took into account the period spent in custody. I will take failure to indicate to mean that the said period was not factored in.
23. The appellant was charged in February 22, 2016 and sentenced on October 25, 2016. Consequently, the appellant will serve 40 years from the date of sentencing save the 7 months he spent in custody.

Orders;-

1. The appeal on conviction is hereby dismissed.
2. The sentence of 40 years is reduced by 7 months from the date of sentencing.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 21ST DAY OF MARCH 2023

S. CHIRCHIR

JUDGE

In the presence of:-

