



**Njuguna v Republic (Criminal Appeal E039 of 2022)
[2023] KEHC 2763 (KLR) (Crim) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E039 OF 2022**

JM BWONWONG'A, J

MARCH 9, 2023

BETWEEN

JACOB MUTUTU NJUGUNA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. A. Mwangi C.M on 15th December 2021 in Kibera Chief Magistrate's Court Sexual Offences Case No. 7 of 2018 Republic vs Jacob Mututu Njuguna)

JUDGMENT

1. This is an appeal pursuant to a conviction and sentence of life imprisonment for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*, No 3 of 2006. In his appeal, the appellant raised 5 grounds.
2. In grounds 1, 2, and 3 the appellant challenged the totality of the prosecution evidence as contradictory, insufficient, and inconclusive to warrant a conviction. In ground 4 the appellant complained about how the trial was conducted arguing that he was never issued with witness statements before the trial began. In ground 5, the appellant complained that the trial magistrate failed to consider his plausible defence.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.



4. VK (name withheld) (PW 1) after voir dire gave unsworn evidence. She told the court that she is nine (9) years old. She narrated that on 13th February 2018, after she arrived home from school. She met the appellant who was their neighbour and he asked her for a matchbox. At the time, no one was at home. She gave him a matchbox. As she was leaving, he grabbed her and forced into the house asking her to apply oil to his penis. He then proceeded to undress her and pushed her to the ground, where he defiled her. A neighbour identified as V who lived in the same house arrived and found him on top of her.
5. She told the court that he quickly rose and pushed her outside the house and locked it. He explained to the neighbour what had transpired. The neighbour reported the incident to her mother. Her mother also reported the incident at Riruta Police Station. She was taken to Coptic Hospital for treatment and counseling.
6. In cross-examination, she told the court that it was not the 1st time that the appellant had attempted to defile her. He had previously asked her to apply oil on his private parts but she did not report the incident because she was afraid. She testified that the appellant gave her money and told her that she loved her.
7. EVK (PW 2) testified that she is the mother of the complainant, aged 9 years. On 13th February 2018, she was informed by V that the appellant had been found defiling the complainant. The appellant and the complainant were both naked and the complainant had oil in her hands. She told the court that she questioned the complainant the allegation, which she first denied but she later admitted it. She testified that complainant had told her that the appellant had been giving her money since November 2017 after defiled her. In addition, she was afraid of reporting him to avoid being punished.
8. She reported the incident at Riruta Police Station. The next day, she took the complainant to Riruta Kawangware clinic, where the PRC was filled. They were also referred to Coptic hospital for further treatment and counseling.
9. On cross-examination, she stated that she examined the complainant and saw sperms and a tear on the vagina. Further, the appellant offered to pay her for her silence.
10. JMB(PW 3) stated that he is related with the appellant and lives in the same plot. He testified that on February 13, 2018, V informed him that he found the appellant defiling the complainant.
11. Dr. Joseph Maundu (PW 4) of Nairobi police surgery testified that he examined the complainant on February 16, 2018. She had been referred to him after a report of defilement was made. The complainant did not have any physical injuries. Her external genitalia were normal. The hymen was broken. No discharge was noted. She was treated at Riruta Health Centre. He filled the P3 form which was produced as an exhibit.
12. Loreen Mwendu Mailu (PW 5) a clinician at Coptic Hospital stated that on February 16, 2018 the complainant was brought to the facility after a reported case of defilement 66 hours after the incident. She was accompanied by her mother. She was examined and tests were carried out. She was treated with hepatitis injection, antibiotics and post-exposure prophylaxis. The complainant had already taken a bath.
13. Delvin Ondari (PW 6) a clinical officer stated that he examined the complainant on 14th February 2018 at Riruta Health Centre. She was escorted by her mother who reported that the child had been defiled. on examination, her hymen was broken, cream-colored vaginal discharge which was smelly, HIV test was negative. He concluded that there was penetration.



14. No 105409 PC Grace Syombua (PW 7) the investigating officer testified that she was assigned investigation duties in the matter. On 13th February 2018, the complainant's mother reported that her child had been defiled. The suspect had been found in the act by a neighbour who informed her mother. The complainant confirmed that indeed she had been defiled and she was escorted to the police station and later to the hospital. The suspect was arrested and charged with the offence of defilement. She produced a copy of the complainant's birth certificate indicating her age as 9 years.
15. After the close of the prosecution case, the trial court found that the appellant had a case to answer and he was put on his defence. In his defence he gave sworn evidence and he did not call any witnesses. In his defence, he denied defiling the complainant. He accused the complainant's mother of trying to extort money and framing him. He testified that the complainant did not incriminate him in the crime. Further, the prosecution witnesses only gave hearsay evidence. That if he would have been guilty, members of the public would have lynched him. He urged the court to acquit him.

Analysis And Determination

16. In grounds 1, 2, and 3 the appellant challenged the totality of the prosecution evidence as hearsay and not sufficient to warrant a conviction. He submitted that the evidence of the complainant was full of material contradictions. He claimed that the complainant testified that he had allegedly put his penis on her vagina raising reasonable doubt as to the occurrence of the sexual assault. That he only attempted to defile her but there was no penetration. Secondly, medical evidence presented by Dr. Maundu (PW 4) and Loreen Mwendu (PW 5) confirms that the complainant was attended to 4 days after the alleged incident. The appellant argues that the delay was never explained raising reasonable doubt if indeed the complainant had been sexually assaulted. Further, the medical evidence confirmed that the hymen was broken. However, it was not recent. As such it was a case where the complainant was having sexual intercourse with other individuals and not the appellant.
17. In rebuttal, Ms. Joy Adhiambo, learned prosecution counsel submitted that the age of the complainant was proved beyond reasonable doubt. Secondly, the appellant was positively identified. The testimony of the victim and the medical evidence also confirmed that indeed there was penetration. She maintained that the prosecution had proved their case beyond reasonable doubt.
18. Section 2 (1) of the *Sexual Offences Act*, No 3 of 2006 defines penetration as follows:

‘Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
19. Further, section 8(1) and (2) of the *Sexual Offences Act*, No 3 of 2006 provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
20. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.



21. The complainant's mother (PW 2) indicated that the complainant was born on 11th November 2008 and was nine (9) years at the time of the alleged incident. Her birth certificate was produced to that effect. The prosecution, therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was allegedly committed.
22. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. PW 1 after a voire dire examination gave an unsworn statement in which she narrated how the appellant forcefully lured her to his house and defiled her. She told the court that the assailant removed his penis and asked her to apply oil on him. Thereafter she undressed her and defiled her. She further told the court that it was not the first time he had attempted to defile her. In cross-examination, she stated that although he attempted to insert his penis, was not successful. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

“Many times, the attacker does not fully complete the 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.”
23. The medical evidence presented confirmed that the complainant's genital area was that her hymen was broken, genitalia was foul smelling, and discharge which was not normal. The conclusion by PW 4 and PW 6 was that the complainant was likely to have been sexually assaulted. There is no other possible explanation of what could have happened to the minor's genitals besides evidence that she was defiled.
24. Regarding the identity of the perpetrator, the complainant knew the appellant and identified as him as the one who sexually assaulted her and he was known to her. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator.
25. After my appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate. The prosecution evidence leaves no doubt in my mind that the appellant defiled the complainant and the elements of the offence have been proven.
26. In ground 4 the appellant complained how the trial was conducted arguing that he was never issued witness statements before the trial began. From the record of the trial court, the appellant was issued with witness statements on March 5, 2018 and he confirmed receipt. That ground of appeal therefore fails.
27. In ground 5, the appellant argued that the trial magistrate failed to consider his defence. He submitted that he intended to raise an alibi defence but was not given an opportunity to do so. He cited the case of *Victor Mwenda Mulinge v Republic* [2014] eKLR where the court held that the falsity of proving an alibi defence of an accused person lies on the prosecution.
28. I have considered the record of appeal. In his defence, the appellant did not raise an alibi defence. In his defence, the appellant gave sworn testimony and did not call any witnesses. He denied committing the offence he was charged with. His defence was considered by the trial court and found to be unbelievable. The ground therefore fails.
29. On the sentence, the appellant was convicted to life imprisonment. In the sentencing proceedings, the trial court noted that he had considered the age of the offender (68) and his mitigation. He stated that his hands were however tied by the law and proceeded to sentence him to life imprisonment because of the victim's age of 9 years.



30. However, in light of the various judicial decisions the mandatory minimum sentence can be vacated in appropriate cases. Further pursuant to the provisions of section 216 and 329 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, mitigation is part of the process under section 329 which provides that the court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
31. Thus, in my view, section 329 of the [Criminal Procedure Code](#), gives to for the judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find life imprisonment for a first offender being somewhat too stiff and shatters all the hopes of the appellant for rehabilitation or having another chance to start afresh. Further, there has been no definition of what life imprisonment means. It would be an injustice to keep certain offenders for an indefinite period of time, when the circumstances of their cases suggest that they should at some point be given a chance to start afresh.
32. Therefore, the appeal on sentence succeeds. The minimum mandatory sentence of life imprisonment is hereby vacated. I hereby resentence the appellant to 30 years imprisonment from the date of his conviction being December 15, 2021.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kinyua court assistant

The appellant in person

Ms. Oduor for the respondent

