



**PM v Republic (Criminal Appeal 012 of 2022)  
[2023] KEHC 3692 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3692 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 012 OF 2022**

**PM MULWA, J**

**MAY 2, 2023**

**BETWEEN**

**PM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon.  
Onsarigo, RM in Kikuyu Criminal Case No.11 of 2017)*

**JUDGMENT**

**Background**

1. The Appellant herein PM was charged in Kikuyu Criminal case no 11 of 2017 with the offence of Defilement contrary to Section 8 (1)(2) of the Sexual Offence Act, No. 3 of 2006.
2. The particulars of the offence are that on 26<sup>th</sup> February 2017 at Kikuyu in Kiambu County the appellant intentionally caused his penis to penetrate the anus of DNW a child aged 1 year 4 months old.
3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
4. The appellant pleaded not guilty and after the full trial, the trial court found the appellant guilty and he was sentenced to life imprisonment.
5. Aggrieved by the sentence and conviction the appellant filed a petition of appeal dated 31<sup>st</sup> March 2017 citing 18 grounds of the appeal, which the appellant condensed into 4 grounds as follows:
  - a. That the evidence adduced was contradictory and inconsistent



- b. That the prosecution did not provide enough evidence to prove that the appellant committed the crime.
  - c. That the prosecution at much deeper level failed to investigate the cause or rather address the root cause of the matter as regards to the offense imposed.
  - d. That it is against the background that the complainants anchored the alleged offence.
6. The appeal was canvassed by way of written submissions. Only the appellants filed submissions despite the state counsel Ms. Ngesa indicating she would ensure the submissions are placed in the court file.

### **Appellant Submissions**

7. The appellant filed submissions on 13<sup>th</sup> March 2023 in which he submitted that the prosecution failed to prove the essential ingredients of defilement as stated in the case of *George Opondo Olunga vs Republic (2016) eKLR* where the court stated the ingredients as identification or recognition of the offender, penetration and age of victim.
8. The appellant submits that the trial court failed to consider the clinical officer's testimony that the bruises could be as a result of vigorous wiping. The trial court relied on contradictory evidence by the two clinical officers. The trial court faced by the contradictory evidence of the clinical officers ought to be guided by the P3 form.
9. Counsel submits that the trial court failed to adhere to the rules under section 124 of the *Evidence Act*, in relying on the evidence of the complainant. The appellant was not adequately identified as the person who committed the offence, he was charged on mere suspicion of being the last person with the minor.
10. According to the appellant the charge against him is a set up by the appellant's mother who has an interest in his land, which she intends to defraud him.
11. The appellant submits that the prosecution failed to prove the case beyond reasonable doubt. The trial court erred in sentencing him to life imprisonment contrary to the findings in the *Francis Muruatetu* case. He urged the court to allow the appeal and quash both the conviction and sentence.

### **Analysis and determination**

12. Having perused the record of appeal and the submissions, the only issue for determination is whether the appeal is merited.
13. This appeal being a first appeal, it is the duty of the court to re-consider and re-evaluate the evidence adduced before the trial court and come up with an independent conclusion - See *Okeno -vs- Republic (1972) EA 32*].
14. Pw1 Teresia Wanja testified that she was employed at the accused person's home taking care of the accused mother. On 26<sup>th</sup> February 2017, at 3.00 pm while attending to the accused mother she had left the child at the accused house, she heard the child crying and asked the accused what was happening and the accused handed her the child and told her to wash the child. She stated that when she put the child in water he stopped crying. Then she noted the baby's anus had blood and was enlarged. She took the child to Lusigiti Health Centre on 28<sup>th</sup> February and later Nairobi Women Hospital. The pair of trouser had blood stains. To prove the age of the minor she adduced a copy of the immunization card and the P3 form.



15. Pw2 Gerald Mutiso a Clinical Officer at Wangige Sub-county produced the P3 form filled by Doctor Kinoti on 2<sup>nd</sup> March 2017. He said the child was brought to the facility with a history of defilement. The doctor did indicate there was anal penetration evidenced by redness on the anus.
16. Pw3 Corporal Beatrice testified she is attached to Kikuyu Police Station, Gender Office. She was tasked to investigate the claim of sodomy as reported on 1<sup>st</sup> March 2017 by Pw1. She said she issued the complainant with the P3 form. She said the victim's clothes had been washed. She did not visit the scene.
17. Pw4 John Njuguna an outpatient clinician at Nairobi Women Hospital. He adduced a Post Rape Care MOH form filled by Faith Mutisya on 28<sup>th</sup> February 2017. According to the form on examination of the baby there was no body injuries but the anal region had bruises with reddening. HIV, Syphilis and Hepatitis tests were conducted but were negative. He adduced the MOH and the PRC forms as his evidence. He testified that the injuries were consistency with the history given by the patient.
18. This marked the close of the prosecution case, and the trial court established a prima facie case against the accused and he was placed on his defence.
19. Dw1 Paul Muite testified that charges against him are framed, he denied defiling the child. He denied being with the minor on the particular day. He said he was at work and returned home at midday showered and left and returned at 7.00 pm. he told the court the minor was born at their home and thus was fond of him as they lived together.
20. Dw2 John Mbugua Muite testified that accused was his nephew. He told the court he was not present on the day of the incident and only learned of the matter after a year.
21. This marked the close of the defence case.
22. Considering the circumstances of the case, the trial magistrate found the prosecution had established the ingredients of defilement that is age of the victim, identification/recognition of the offender and penetration.
23. On the age of the victim, Pw1 the mother to the victim adduced an immunization card to prove the victim was born of 24<sup>th</sup> September 2015. The minor was aged 1 year 4 months at the time of the incident. The appellant did not dispute the age of the minor; it therefore follows that the age of the minor was proved beyond reasonable doubt. At the time of the incident the victim was a minor as defined under the Children's Act.
24. On the issue penetration, Pw1 testified that the minor was with the appellant in his house when she heard the minor crying for some time he called out the appellant's name and he came out and placed the minor on the seat and told Pw1 to wash the minor. Pw1 noticed the minor could not sit comfortably and when she placed him in water he stopped crying. Upon examining the child, she noticed some redness in his anus and informed the accused mother. According to Pw1 she could not leave the house as the accused mother was in a wheelchair and couldn't not leave her without any care. According to Pw1, only four people were in the compound that is the appellant, complainant, the appellant's mother and the minor. Pw1 testified she took the child to hospital the following day.
25. When the minor was examined by the doctor there were bruises and reddening on the anal part. The history of Pw1 is corroborated by the P3 form, GVRC form which both indicate the baby on presentation had bruises with reddening and there was presence of peno-anal penetration which exhibited a case of gender violence (sodomy).



26. On identification, Pw1 testified they lived in the same compound with the appellant. The appellant handed the baby when he was crying. The appellant also confirmed they lived with Pw1 and the baby who was fond of him as he was born in the homestead. I thus find the appellant was positively identified and well known to the complainant.
27. The appellant in his defence denied being at home on the day of the incident and according to him the charge is a frame up by Pw1 in order for his mother to sell his land. He called Dw2 who only described the character of accused he told the court he learned of the incident a year later. In my view Dw2 was not a proper alibi.
28. The appellant has urged the court to consider the inconsistency and contradictions of the evidence adduced by the clinical officers in their testimony and find that the bruises on the minor could have been caused by any other factor. I have analysed the evidence of the two clinical officers who testified, their evidence is corroborated by the P3 form and the GVRC form and the testimony of Pw1.
29. In my view the evidence of the clinical officers is not inconsistent, in the mind of this court the clinical officer was conveying his opinion on the various causes that would lead to bruises on the anus. I place reliance in the case of Alex Kapunga & 3 others v R CR Appeal No. 252 of 2005 where the Court of Appeal Tanzania stated that;

“The fact that there are discrepancies in a witness testimony does not straight away make him or her unreliable witness and make the whole of his or her evidence unacceptable.”

30. In my view I find the conviction by the trial court was safe. The prosecution did prove its case beyond reasonable doubt. The next issue is whether the sentence was proper/lawful. The offence is created under Section 8(1) of the [Sexual Offences Act](#) 2006 while 8(2) creates the punishment;

#### Section 8

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.

31. The above provision prescribes the punishment for defilement with a child aged eleven years and less as life imprisonment. The trial court imposed the maximum sentence as per the law. I do not find the trial court erred in sentencing the appellant.
32. The Court of Appeal sitting at Nyeri in the case of Francis Nkunja Tharamba v Republic [2012] eKLR held as follows;

“...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court’s exercise of discretionary power such as that of sentencing. The next principle that



the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.”

33. From the foregoing I find the trial court followed the law in imposing the maximum sentence of life imprisonment. This court notes the appellant committed a heinous crime to a young soul aged 1 year 4 months. I thus find that this court should not interfere with the sentence meted by the trial court.

34. **Final Orders**

I find the appeal lacks merit, and the same is dismissed.

Orders accordingly.

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 2ND DAY OF MAY, 2023**

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**P.M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua/Duale – Court Assistants

Ms Ann Ngigi - for Appellant

Mr. Muriuki - for State/Respondent

