



**Abungana v Republic (Criminal Appeal E010 of 2022)  
[2023] KEHC 20610 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL APPEAL E010 OF 2022**

**JR KARANJA, J**

**JULY 21, 2023**

**BETWEEN**

**JOSEPH IKALA ABUNGANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, Joseph Ikala Abungana, appeared before the Principal Magistrate at Kapasabet facing a charge of defilement, contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) or Alternatively, a charge of committing an indecent act with a child Contrary to Section 11(1) of the [Sexual Offences Act](#).
2. It is alleged that on the 20<sup>th</sup> May 2018 within Nandi County, the Appellant defiled MA, a girl aged eight (8) years.  
  
After a full trial, the Appellant was convicted on the Main Count and sentenced to life imprisonment. Being dissatisfied with the Conviction and sentence, the Appellant preferred this appeal on grounds set out in his petition of appeal filed herein in March, 2022.
3. The general complaint as may be deciphered from the grounds of appeal is that the Appellant was convicted on the basis of evidence which was insufficient in establishing the ingredients of the charge and that his defence was disregarded by the trial court.  
  
At the hearing of the appeal, the Appellant referred himself and reiterated his grounds of appeal by oral submissions.
4. The State/ respondent, represented by the Learned Senior Principal Prosecution Counsel (SPPC), Ms. Oduor, opposed the appeal and relied entirely on its written submissions in that regard.



The Learned Prosecution Counsel contended that the Appellant was found in the act and that he was placed at the scene of the offence and linked to the offence beyond reasonable doubt.

5. The cardinal role of this court was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was briefly that RA (PW1), a worker in [Particulars Withheld] Hills arrived home from work at 6:00am on the material date and was called out of her house by people who were strangers to her. They had with them her daughter, MA (PW2), and the Appellant and was informed that the daughter was found with the Appellant.

6. After examining her daughter, R (PW1) took her to the local police station and thereafter to the Nandi Hills District Hospital where she was medically examined by a Clinical Officer, Tom Kipkosgei Kilele (PW4) who thereafter compiled the necessary P3 form (P. Exhibit 2) confirming that the girl had been defiled.
7. Indeed, the child Complainant, (PW2) indicated that she was forcefully taken to a forest by the Appellant and defiled before a villager found them out.

The Villager, Charles Kipketer Ruto (PW3), was in the forest collecting firewood at about 6:00pm when he heard a child screaming and on checking found the Appellant on top of the child Complainant. They were on the ground and were both strangers to him (PW3). He suspected that the Appellant had defiled the girl child and with the help of a guard he took both of them to the girl's mother (PW1).

8. A Security Officer at Nandi Hills, Christopher Kipchirchir Cherwon (PW5), after being informed of the incident took both the Appellant and the child complainant (PW2) to the Nandi Hills Police station where CPL. Nicholas Agure (PW6), took over the investigations of the matter from a transferred colleague and later preferred the present charge against the Appellant.
9. In his defence, the Appellant denied the charge and indicated that he was arrested after having engaged in an altercation and quarrel with a person who worked in a tea factory where he also worked as a tea plucker. The person called a security guard from the factory and he was arrested and taken to Nandi Hill Police Station before being arraigned in court for the present offence which he knew nothing about.

10. The evidence was considered in its totality by the trial court which then concluded that the prosecution had proved its case beyond all reasonable doubt. In so concluding, the trial court rendered itself thus: -

“The victim was able to identify Accused Person as the person who pulled her into a bush and defiled her there. Her evidence was consistent with what PW3 said. I believe the young girl. From the time she said the Accused Person pulled her to the bush to the time that PW3 heard her screams there was no occasion to have permitted any other person other than Accused Person to be suspected to have been the perpetrator. I find that there is evidence beyond all reasonable doubt that Accused Person pulled the victim herein into a forest removed her clothes and penetrated her vagina and broke her hymen.

The Victim was born on 27.10.2001 as evidenced by her birth certificate serial No. xxxx which was issued on 1<sup>st</sup> August 2013 and produced as prosecution exhibit 1. She was therefore aged 9 years as at 20<sup>th</sup> May 2018 when Accused Person defiled her.”

11. Having reconsidered the evidence, this court was satisfied that the finding above mentioned I was correct in as much as it was informed by the very credible and sufficient evidence adduced against the



Appellant by specifically the child Complainant (PW2), the Clinical Officer (PW5) and the Villager Ruto (PW3).

12. It was thus established beyond reasonable doubt that the child Complainant (PW2) was less than eleven (11) years old when she was sexually assaulted by the Appellant an adult male person.

The medical evidence confirmed and established the fact of defilement while the birth certificate (P. Exhibit 1) established the child Complainant's age as at the material time of the offence.

With such strong and credible evidence, the prosecution clearly shattered and disproved the Appellant's defence which was thus reduced to nothing less than a pack of lies thereby ventering his conviction safe and sound and is hereby sustained and upheld.

13. The "killer punch" which effectively and efficiently landed the conviction was the credible evidence that the Appellant was caught by the Villager (PW3) with his pants down and in "fragrante delicto" ("caught in the act").

After conviction, the Appellant was handed a sentence of life imprisonment pursuant to Section 8(2) of the Sexual Offences Act which is framed in mandatory terms.

14. The Sentence was lawful and ought not be interfered with at this juncture however, in a very recent decision of the Court of Appeal delivered on 7<sup>th</sup> July, 2023 at Mombasa i.e. Julius Kitsao Manyeso v Republic Criminal Appeal No. 12 of 2021, the sentence of mandatory life imprisonment was effectively declared unconstitutional and somehow abolished altogether.

The court found that mandatory life sentences are an unjustifiable discrimination, unfair and repugnant to the principle of equality before the Law under Article 27 of the Constitution.

15. In international Law, it is now a Principle that all prisoners including those serving life sentences be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

The European Court of Human Rights (ECHR) reasoned in Vinter & Others v U.K. (2016) 111 ECHR 317, that an indeterminate life sentence with no hope of parole was degrading and inhuman.

It would therefore be just and fair for this court, on the basis of the Principals set out in the decisions cited herein above to set aside the life imprisonment sentence imposed upon the Appellant by the trial court and substitute it for imprisonment for a term of thirty (30) years.

16. Other than the Alteration in the sentence, the appeal fails for want of merit

Ordered accordingly.

**DELIVERED AND DATED THIS 21<sup>ST</sup> DAY OF JULY, 2023**

**J. R. KARANJAH,**

**JUDGE**

