



**Irungu v Republic (Miscellaneous Criminal Application
041 of 2022) [2023] KEHC 20523 (KLR) (20 July 2023) (Directions)**

Neutral citation: [2023] KEHC 20523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CRIMINAL APPLICATION 041 OF 2022**

CM KARIUKI, J

JULY 20, 2023

BETWEEN

SAMUEL MBUGUA IRUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Honourable S N MWANGI
Senior Resident Magistrate delivered on 15th February 2018 in the
Chief Magistrate Court at Nyabururu SO A Case No. 29 of 2017)*

DIRECTIONS

1. The applicant accused was charged with the offense of defilement Contrary to section 8(1) as read with section 8(2) of *Sexual Offences Act* No 3 of 2006.
2. Particulars being that on diverse dates between November 1, 2015 and November 30, 2015 at [Particulars Withheld] intentionally and unlawfully caused his genital organ (penis) to penetrate genital organ (vagina) JW child aged 13 years.
3. Alternative count was of indecent assault on similar facts.
4. He pleaded not guilty, and after trial, the trial court recorded acquittal but thereafter sentenced the applicant to twenty (20) years imprisonment on February 15, 2018.
5. He lodged appeal No 18/2018, which he withdrew on September 24, 2021 and instead lodged Misc Criminal Application No E041/022.
6. However, the application sought the hearing of appeal forthwith. Thus, essentially, he has no matter for hearing.



7. However, when the matter came for directions on July 3, 2023, the applicant and the Prosecutor pointed out that the trial court had acquitted the appellant. Still, the court sentenced the applicant to twenty (20) years, a serious contradiction of law and fact, and a total/ gross breach of the Constitution as the appellant has been in custody since February 15, 2018 without conviction.

8. The court found serious contradictions in the prosecution witness evidence:

“Whereas a court of law is always called upon to make decisions or inferences on some set of circumstances, such a court should endeavour to make such decisions or inferences based on the available evidence as adduced before it, and it ought to be slow in making assumptions not supported by facts as tendered before the court.

From the evidence on record, there was an issue regarding when the matter was reported to the police and why it took more than one year to have the accused person arrested. According to the complainant, she realized she was pregnant two (2) months later, but her mother noticed the changes she was undergoing from December 2015 but didn't do anything about it. However, two months later, she reported to the police, and at five months, she took her to a private hospital, but she later contradicted herself in her examination-in-chief when she said she realized her daughter was pregnant at six months when she took her to hospital. However, all their evidence was contradicted by the investigating officer (PW4), who testified that the complainant's mother reported the matter at their station on February 12, 2017 and said the person who had defiled her daughter and ran away had been seen at Subukia Centre. She told her to investigate where he used to live, which she did and informed her on the night of the place. The accused, who seemed drunk, did not open the door, so they forced it open and found him lying on a mattress on the ground after they identified themselves. He didn't resist at all. He, however, changed and said that the matter had been reported at their station vide 0B No 25/20/11/2015, but the person had gone underground.

More contradictions were by the investigating officer who stated that the complainant reported to them that she was fetching water and the tap when the accused called her into his room, where he pushed her to the mattress, which was on the ground for there was no bed in his room, he removed her clothes, and he did bad manners to her. By the time he recorded her statement, she had already given birth and was 13. According to him, the defilement occurred on November 25, 2015. It was reported on the same day, proved by the PRC form, which indicated that the matter was reported at 8 am, yet the complainant alleged that the defilement occurred at 8 pm. The question then is. Why did the complainant lie to the court that she did not inform anyone of the alleged defilement, for she only noticed she was missing her periods in the 2nd month after? Why did the complainant's mother lie to the court that she learned of her daughter's pregnancy in December 2015 when she started seeing the changes she was undergoing, then change to 5 months when she allegedly took her to a private hospital, and then again change and say it was at six months? Why report a matter on the same day the defilement was committed and not have the accused person arrested immediately, yet they lived in the same plot? Why go to the hospital alleging that the complainant was arrested on February 13, 2017, years after the alleged defilement was committed and when the alleged child born due to the alleged defilement was seven months old? Why allege the accused person had gone underground, yet after he had moved out to another place, he went back to work in the same plot the complainant and her family were living in but didn't have him arrested, according to the complainant's cross-examination?



I take judicial notice that the complainant though a minor at the material time, was not a child of tender age and was capable of understanding the importance of informing her mother or reporting the alleged crime matter to the police, which was done by her mother the same day it's alleged to have been committed. However, the delay in arresting the accused person and charging him in court was not explained, and the above-stated questions leave much to be desired. It cannot be ruled out that sexual intercourse did not occur between the complainant, the accused person, or any other man, resulting in pregnancy. However, the conduct of the complainant and her mother puts their credibility as witnesses in question.

It is not lost to this court that the offence the accused person faced was serious and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty of the prosecution to ensure adequate evidence is adduced against a suspect to uphold a conviction. The standard of proof required in criminal cases is well settled, proof beyond any reasonable doubt; hence this case cannot be an exception. This court believes acquitting ten guilty persons is better than convicting one innocent. The upshot is, therefore, that this court has no option but to acquit the accused person for both the principal count of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006 and the alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006.

Court: I have listened to the accused person's mitigation, but it is unfortunate that despite him having spent one year in custody as this case was being heard to its conclusion, the sentence provided for by sub-Section 8(3) is clear and mandatory. He is, at this moment, sentenced to serve 20 years imprisonment. However, if aggrieved by the decision of this court, he has the right of appeal in fourteen (14) days.”

9. And analysis thereof and conclusion naturally had trajectory and flow towards an acquittal.
10. Under Section 362 of the CPC, this court is vested with revisionary power and can be moved by any party or act-Suo moto once it comes across such proceedings, orders, or judgment as in the instant case.
11. There is no Constitutional or legal justification for the appellant to continue serving an unconstitutional sentence as he has not been convicted.
12. I do not see any reason for a re-trial on the face of the evidence on record and trial court analysis in judgment.
13. The appellant is entitled to be released forthwith without much ado.
14. The trial magistrate seemed to have lost sight of her judgment result the same day she delivered it when she went ahead to entertain mitigation and sentence him thereof.
15. This was a tragedy of a person acting in person, and he may not have understood the judgment to protest his sentence after acquittal.
16. Thus, without much ado, the court quashes and sets aside the trial court's sentence and orders the appellant to be released forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 20TH DAY OF JULY 2023.

CHARLES KARIUKI

JUDGE

