



REPUBLIC OF KENYA



KENYA LAW
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**Muogo v Republic (Criminal Appeal E033 of 2022)
[2023] KEHC 20644 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E033 OF 2022**

**A. ONG'INJO, J
JULY 20, 2023**

BETWEEN

BAKARI HAMISI MUOGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment delivered by Hon. Sandra Ogot, Senior Resident Magistrate at Msambweni Senior Resident Magistrate's Court Sexual Offence No. 20 of 2020 on 19th January 2022, Republic v Bakari Hamisi Muogo)

JUDGMENT

Background

1. Bakari Hamisi Muogo 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.
2. The particulars are that Bakari Hamisi Muogo on the 20th day of December 2019 at around 0005hrs in Msambweni sub-county within Kwale County, intentionally and unlawfully caused his penis to penetrate the vagina of MOG a girl aged 13 years.
3. In the alternative count, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The trial magistrate considered the evidence of six prosecution witnesses and the sworn statement of the appellant and convicted the appellant who was sentenced to serve 18 - years imprisonment.
5. The appellant was aggrieved by the conviction and sentence, he preferred the appeal herein filed on March 8, 2022 on the following grounds: -



1. That the learned trial magistrate erred in law and facts for not appreciating that the prosecution case was not proved beyond reasonable doubt.
 2. That the learned trial magistrate erred in law and facts by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
 3. That the learned trial magistrate erred in law and facts for not noticing that the medical evidence was not established to corroborate the complainant's evidence.
 4. That the learned trial magistrate erred in law and facts for not considering that crucial witness was not summoned in court.
 5. That the learned trial magistrate erred in law and facts for dismissing my defence without any legal basis.
6. The appellant prayed that his appeal be allowed, conviction quashed and sentence set aside.
7. PW1, MOG the complainant herein, said that she is 14 years old. That on 20.12.2019, Fatuma the wife of the appellant convinced her that they go to a disco in Makongeni which she did and that they were in the company of the appellant. That they got to the disco at 10.00 pm and returned home at midnight aboard a pikipiki and that the appellant told the rider to drop them at some point saying they would walk. That it was a path leading home with bushes on the side and that Fatuma told the appellant that "Bakari mshike M tumfanyie tabia mbaya" and then the appellant held her, undressed her and defiled her. That Fatuma was seated there and that the appellant told PW1 that if she told, he would stab her. That she slept at the appellant's place and went back home the next morning. PW1 informed court that two days later, she got a really bad cold/flu and that her mum went and told her that she heard the appellant was talking about how he had sex with her. That PW1's mother went and told Babu who called the appellant and that the appellant insulted Babu who then reported to the chief and to Msambweni Police. That PW1 was taken to the hospital and treated.
8. PW2, OMG, the father of the complainant stated that on 20.12.2019, he had come from work at 6.00 pm and that when he got home, PW1 was not at home. That she went back home the next day but she could not say where she had been. That they went to the chief and the appellant was called and questioned but the appellant got annoyed and left. That the chief gave PW2 a letter to take to the OCS Msambweni. PW2 said that the complainant was taken to hospital for treatment and that examination confirmed that she was negative for disease and pregnancy but positive for defilement. When PW2 reported the matter to the police, the appellant took off and when he resurfaced, PW2 informed the police who went there undercover pretending to buy fruits and arrested him. PW2 identified the treatment form dated 17.1.2020 – MFI 1, PRC Form – MFI 2 and P3 Form – MFI 3.
9. PW3, ML informed court that the complainant is her child and that 7.1.2020, she saw her child was missing and that in the morning, the complainant went back home and that she was holding her stomach coming from the neighbour's. That PW3 asked her where she had been and she said she was from a bar in Makongeni but her neck was swollen. That the complainant said when they came from Makongeni, he took her to the forest and defiled her. That PW3 went and reported to the chairman who referred them to the chief and from there to Msambweni Police Station, and then the hospital.
10. PW4, No. 92074, Corporal Dickson Kiros, at Msambweni Police Station stated that he was not the investigating officer and that the file was handed to him by Corporal Joshua Mureithi. He stated that on 20.1.2020, he was with his colleague Mureithi at the Crime Office when he got alerted by the report office that a case of defilement had been reported and that he took the parents and the



complainant to the crime office. PW4 testified that they interrogated the complainant and she said that on 20.12.2019, the appellant and his girlfriend met the complainant and told her about a wedding ceremony in Makongeni area and that they wanted her to join them. That they left at 8.00 pm and that they stayed at the wedding ceremony until midnight. That they all boarded one motorcycle and headed back home. That the appellant escorted the complainant and that he started to touch her breasts and buttocks but she did not want his advances. That the appellant removed her panties and lowered his trousers and defiled her.

11. PW4 stated that they booked the report and issued her with a P3 Form which was filled at Msambweni County Hospital. PW4 marked the treatment notes of 17.1.2020 as MFI – 1, the PRC Form of 21.1.2020 as MFI – 2, and the P3 Form of 21.1.2020 as MFI – 3. PW4 further stated that the complainant had an age assessment done on 22.1.2020 where her age was established to be 13 years old. The age assessment report was produced as PExh – 4.
12. PW5, Dr. Ibrahim Hassan Muasya from Msambweni County Hospital stated that he filled the P3 and PRC Forms but the treatment book was filled by Dr. Mwanaidi from Msambweni Hospital but was on maternity leave. He testified that the treatment notes for the complainant aged 13 years was seen on 17.1.2020 at 3.40 pm and that she was taken in by parents on history of defilement by someone known to her, who lured her to attend a wedding and forced to have sex with threats of being killed should she report. PW5 testified that no condom was used, there was no chronic illness and that vaginal examination showed whitish discharge, the external genitalia was normal, there was no bruising or laceration, there was no hymen, and all other systems were normal. PW5 informed court that HIV, pregnancy, syphilis, Hep- B & C were negative, and that urinalysis was normal. That the P3 Form was filled on 21.1.2020 and that the date of birth for the victim was 20.5.2007, the incident date was 20.12.2019 at midnight. PW5 produced the treatment book as PExh – 1, the PRC Form as PExh – 2, and the P3 Form as PExh – 3.
13. DW1, Bakari Hamisi Muogo, said that he still denies the charges and that all he knew was that he had differences with the father of the complainant who seduced his wife and bought her an outfit. That when he caught him, he admitted to it and that they spoke locally and that he said he had to pay him for the errors of his ways. That on the day of payment, he saw police officers instead and that he was arrested and taken to Msambweni Police Station. That when he was taken to court, he learnt that he had been charged with defiling his daughter.
14. The appeal was canvassed by way of written submissions.

Appellant's Submissions

15. The appellant submitted that PW2, the father of the complainant, was not in good terms with him and that the said PW2 conceded as much. He also said that he gave his evidence on oath and explained how he was not in good terms with PW2. He also submitted that the complainant did not say the appellant defiled her and the medical evidence as narrated by PW5 did not establish that the complainant was defiled.
16. The appellant also argued that PW5 was not the author of the P3 Form which he produced and there was no express opinion as to whether the complainant had been defiled and when she was defiled. He argued that the criminal proceeding against him were designed to achieve an ulterior motive by PW3 and PW3 following PW2 seducing his wife and later refusing to pay for his errors. He said the complainant was used as a pawn. The appellant also argued that he was arrested and charged on evidence that is hearsay which is inadmissible.



17. In regard to sentence, the appellant urged the court to take into consideration the decision High Court Petition No. E017 of 2021, Machakos, *Philip Mueke Maingi & 5 Others v Republic* as the sentence passed against him was harsh and excessive given the circumstances of this where the complainant behaved like an adult. He urged the same to be reduced.

Respondent's Submissions

18. The prosecution submitted that all the ingredients of the offence of defilement had been proved beyond reasonable doubt and that the sentence was commensurate of the aggravating circumstances of the case where the appellant defiled the complainant while his wife was watching.
19. On the issue of timely supply of evidence, he submitted that on 3rd March 2020, statements of all witnesses, charge sheet, covering report, investigation diary, P3 Form and treatment notes were supplied to the appellant and he was therefore given sufficient time to prepare for the trial.
20. On the issue of insufficient medical evidence, the prosecution submitted that the complainant was examined and a report submitted to court showing that there was penetration. It was further submitted that even without medical report, the court would still make a finding that the case had been proved beyond reasonable doubt if it finds that the complainant's evidence is truthful.
21. The prosecution further argued that the appellant did not identify the crucial witness that he claimed was not called and in any case, the appellant's wife who was the only eye witness was at large and she was also not a competent and compellable witness. It was also argued that the prosecution was at liberty to call the number of witnesses sufficient to establish its case as provided under section 144 of the [Evidence Act](#).
22. The respondent submitted that the appellant's defence was considered in the trial court judgment on page 43 lines 5-10 and said that the same was weak and uncorroborated and did not in any way shake the evidence of the prosecution.

Analysis and Determination

23. This being the first appellate court, this court is guided by the principles in [David Njuguna Wairimu v Republic](#) [2010] eKLR where the court of appeal held: -
- “The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
24. After considering the grounds of appeal Records of trial court and submissions, issues for determination are: -
- i. Whether the prosecution's case was proved beyond reasonable doubt
 - ii. Whether sufficient evidence was brought within reasonable time frame
 - iii. Whether the medical evidence corroborated the complainant's evidence



- iv. Whether the prosecution failed to avail evidence of a crucial witness
- v. Whether the trial magistrate dismissed the appellant's defence without any legal basis

Whether the prosecution's case was proved beyond reasonable doubt

25. The ingredients of the offence of defilement were settled in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

26. The complainant's age was assessed at 13 years and the age assessment report was produced as an exhibit. There was also proof of penetration and PW5 produced the P3 and PRC Forms as well as the treatment notes to prove that the complainant was defiled.
27. There was no doubt that the appellant was working at the home of PW2's neighbor and PW2 said that the neighbour could even send the appellant's wages through his phone and he could give the appellant his phone together with the PIN to go and withdraw his wages. It is the appellant's wife who lured the complainant and accompanied the appellant to a disco and on return at midnight aboard a motorbike, they were dropped along the path where he defiled the complainant in full view of the wife.
28. All the ingredients of the offence of defilement were proved beyond reasonable doubt.

Whether sufficient evidence was brought within reasonable time frame

29. The appellant did not submit on what he meant by failure to bring sufficient evidence within reasonable timeframe but a perusal of the proceedings in the lower court confirms that he was supplied with the evidence that the prosecution intended to rely on and even when he complained that he did not have the statement of PW4 who was testifying on behalf of the initial investigating officer, PW4 was stood down to enable him prepare to cross examine him at a later date.

Whether the medical evidence corroborated the complainant's evidence

30. Dr. Ibrahim Hassan Muasya, PW5, examined the complainant and filled P3 and PRC Forms whereas Dr. Mwanaidi filled the treatment booklet. P5 said that upon examination of the complainant, that the complainant's hymen was missing and that the genitalia was normal and there were no bruised or laceration as the offence was committed on December 20, 2019 and the complainant was seen on January 17, 2020. He said that the presence of pus cells in urinalysis was a confirmation of STI.
31. The complainant's evidence that the appellant defiled her on 20th December 2019 was confirmed by PW5. PW2 and PW3 confirmed also that their daughter went missing at night and on return, they learnt that she had gone to a disco together with the appellant and his wife and on the way back the appellant defiled her. The appellant's allegations that the complainant's father had a grudge with him and that he framed him to settle a score was denied by PW2 categorically in cross examination.
32. The evidence of the complainant was corroborated by the parents PW2, PW3 and the doctor PW5.

Whether the prosecution failed to avail evidence of a crucial witness

33. The appellant did not identify the witness whose evidence he claimed to be crucial and who was not called by the prosecution. He did not also say which evidence the said witness was supposed to tender in court. Section 143 of the *Evidence Act* provides that the prosecution is not obliged to call a superfluity



of witnesses but only such witnesses as are sufficient to establish the case beyond reasonable doubt. See *Keter v Republic* (2007)1 EA 135.

Whether the trial magistrate dismissed the appellant's defence without any legal basis

34. The trial magistrate weighed the defence of the appellant as against the prosecution's evidence and concluded that it stood as weak and uncorroborated. Furthermore, PW2 said he had no grudge with the accused and that it was not true he had a relationship with the appellant's wife. It is therefore not true that the trial magistrate dismissed the defence without any legal basis.
35. In concluding his submissions, the appellant urged the court to have consideration of the holding in High Court Petition No. E017 of 2021, *Philip Mueke Maingi & 5 others v Republic*, as the mandatory minimum sentence was harsh and excessive. The trial magistrate said that the spirit of the law in the *Sexual Offences Act* was meant to punish the assailants who sexually prey on children. She said that the appellant did not deserve mercy of the court considering that he was 10 years older than the complainant and he knew what he was doing. He was therefore sentenced to serve 20 years imprisonment which was to take effect from February 2020. The trial magistrate exercised discretion and explained why she came to the conclusion that the appellant deserved the minimum provided sentence. That discretion having been properly exercised, this court has no reason to interfere with it considering the appellant's degrading and reckless actions against the complainant.
36. In conclusion, this appeal lacks merit and is hereby dismissed.

Right of appeal within 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 20TH DAY OF JULY 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

