



**Kamonje v Republic (Criminal Appeal 38 of 2020)
[2023] KEHC 21009 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 38 OF 2020
WM MUSYOKA, J
AUGUST 1, 2023**

BETWEEN

GEORGE GITAU KAMONJE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. CN Njalale, Senior Resident Magistrate, SRM, in Butali RMCSO No. 30 of 2019, of 27th May 2020)

JUDGMENT

1. The appellant, George Gitau Kamonje, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on August 31, 2019, in Matete Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of SL, a child aged 8 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.
2. PW1, SA, was the complainant. She described how the appellant took her on a motorcycle, and stopped at some place, where he defiled her. He then took her home. She informed her parents, and she was taken to the hospital and to the police station. PW2, ZAA, was the father of PW1. He stated that PW1 was defiled on August 31, 2019, and did not disclose the motorcyclist who had defiled her. She was taken to a private chemist on September 1, 2019, where she was given drugs. She was taken to a public health institution on October 10, 2019. He said that PW1 was born on November 22, 2011. PW3, AMA, was the mother of PW1. She testified that PW1 informed her, after about a week, that she had been defiled. She took her to a medical centre for medical attention, and later to the police. The appellant was subsequently arrested. She said that PW1 was 8 years old then, having been born on November 22, 2011. She said that she took a week before realizing that PW1 had been defiled. She said that she took PW1 to hospital on September 10, 2019. PW4, Stanley Kokonya, was the clinician



who attended to PW1. She noted a yellowish discharge from her vagina, but there were no tears or lacerations. There were pus cells. He concluded that there was evidence of defilement. The appellant was also tested, and was found with similar pus cells. He found PW1 to have been unstable, and her genitalia was painful. PW1 told him the person who had done that to her. PW5, Miller Rapando, investigated the matter.

3. The appellant was put on his defence, vide a ruling that was delivered on April 28, 2020. He made a sworn statement. He denied the charges. He testified on the events of the day when he was arrested. He said he could not recall where he was on August 31, 2019.
4. In its judgment, the trial court found the appellant guilty.
5. The appellant was aggrieved, and brought the instant appeal, revolving around the sentence being harsh and excessive; the time taken before the incident was reported; urinary tract infections could be caused by means other than defilement; and the case was a frame-up.
6. Directions were given on July 22, 2021, for canvassing of the appeal by way of written submissions. Both sides filed written submissions, which I have read through, and taken note of the arguments made.
7. On the sentence of 30 years imprisonment, being harsh, I will start by stating that section 8(2) of the *Sexual Offences Act* prescribes a penalty of life imprisonment, for victims of up to 12 years old. The trial court only awarded a sentence of 30 years imprisonment because *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), *Philip Mueke Maingi & others vs Director of Public Prosecutions & another Machakos* HCPet No E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No 97 of 2021 (Mativo, J), had declared mandatory sentences unconstitutional, and had stated that the trial courts had discretion to consider other sentences, otherwise the trial court would have imposed the mandatory life imprisonment sentence prescribed under section 8(2). The victim of the defilement was just 8 years old, a child of tender years, who would require the sort of protection implicit in that sentence. The sentence imposed by the trial court was proper given the age of the victim.
8. On the time taken prior to the report being made of the defilement, PW3 gave the explanations. PW1 did not disclose to PW3 about her ordeal. PW3 only got to know about it when PW1 began walking with difficulty, and upon checking her she saw that she had a swelling in her genital area, and that was when she took her to hospital. At hospital, PW4 noted that there was evidence of defilement.
9. On the urinary tract infections, being caused by means other than defilement, there is corroboration from PW1, that hers were caused by defilement by the appellant. She informed PW3 and PW4 about being defiled by the appellant, and the infections corroborated her narrative.
10. On the allegation that the case was a frame-up, because PW3 was his former friend, who was bitter because he had not acceded to her request for assistance, I have found no basis for that. When he confronted PW3 with the allegation that they were previously friends, she had vehemently denied the same.
11. Overall, the appeal herein is without merit and I hereby dismiss it. The file herein to be closed. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
1ST DAY OF AUGUST 2023**

W MUSYOKA

JUDGE



Mr. Erick Zalo, Court Assistant.

Appearances

George Gitau Kamonje, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

