



REPUBLIC OF KENYA



**Amani v Republic (Criminal Appeal E003 of 2023)
[2023] KEHC 22470 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E003 OF 2023
RE ABURILI, J
SEPTEMBER 19, 2023**

BETWEEN

MOSES OMBIMA AMANI APPELLANT

AND

REPUBLIC RESPONDENT

*((An appeal against the conviction and sentence by the Hon. F.M. Rashid on the 14.9.2022
in the Principal Magistrate's Court in Winam in Sexual Offence Case No.42 of 2019))*

JUDGMENT

Introduction

1. The appellant herein Moses Ombima Amani was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the [sexual Offences Act](#) No.3 of 2006.
2. The particulars of the charge were that on the 6th day of September 2019 in Kisumu East sub county within Kisumu County intentionally and unlawfully caused his penis to penetrate the vagina of VA, a child aged 7 years old.
3. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called four (4) witnesses. At the close of the prosecution's case, the accused was placed on his defence and he gave a sworn testimony denying the charges brought against him.
4. In his judgement, the trial magistrate found that the appellant's alibi failed and that the prosecution had proved its case beyond reasonable and proceeded to sentence the appellant to serve 20 years' imprisonment.
5. The appellant being dissatisfied by the trial court's conviction and sentence, he lodged his Petition of Appeal dated 26th January 2023 and filed on the 27th January 2023 raising the following grounds of appeal:



- i. The learned magistrate erred in law and in fact by convicting the appellant based on the insufficient and unattributed evidence by the prosecution.
 - ii. The learned magistrate erred in law and in fact by failing to note and appreciate the contradictions and speculation in the prosecution evidence.
 - iii. The learned magistrate erred in fact and in law by failing to appreciate the appellant's alibi defense was not displaced by the prosecution case.
 - iv. The learned magistrate erred in law and in fact by not calling necessary witnesses i.e. the clinical officer to produce the Post Rape Care Form.
 - v. The learned magistrate erred in law and in fact by issuing the appellant/accused with a sentence manifestly excessive and harsh in the circumstances.
 - vi. The learned trial magistrate failed to appreciate the law and facts to the case thus arriving at an erroneous decision in the circumstances.
6. The parties agreed to dispose of the appeal by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that there were glaring inconsistencies as to the identification of the appellant by PW1 so much so that she ought not to have been taken as a truthful witness by the trial court.
8. It was submitted that there were contradictions and inconsistencies in the evidence adduced by PW1 and PW2 that cast doubts on the prosecution's case as to the failure of PW1 to identify the perpetrator of the incident. Reliance was placed on the case of John Mutua Munyoki v Republic [2017] eKLR where the court held inter alia that in cases of inconsistencies, contradictions and where the court has to prefer the evidence of one person against the other, it should do so with a degree of circumspection.
9. On penetration, it was submitted that the absence of hymen was not automatic proof of penetration as was held by the Court of Appeal in the case of PKW v Republic [2021] eKLR and that the hymen could have been lost in other ways.
10. The appellant submitted that the defense of alibi was proven. It was submitted further that in accordance with the holding in the case of Erick Otieno Meda v Republic [2019] eKLR where the court held that an alibi defence needs to be introduced early so as to allow it to be tested by the prosecution, in this case the appellant's alibi was introduced early on during the cross-examination of PW2 but the prosecution failed to displace the same.
11. Regarding the sentence imposed on the appellant, it was submitted that the court should consider the appellant's mitigation before the trial court and issue the appellant a lower sentence.

The Respondent's Submissions

12. The respondent submitted that there were no inconsistencies in the prosecution's case and that all the ingredients of the offence of defilement were proved. On the complainant's age, it was submitted that her age was proven to be 7 years old as per the Birth Certificate that indicated she was born on the 29.12.2012.
13. It was submitted that penetration was proven by medical evidence that was corroborated by the evidence of the complainant as was stated in the case of Charles Wamukoya v Republic Criminal Appeal No. 72 of 2013.



14. On the identity of the perpetrator, it was submitted that the complainant's testimony was that her mother found the appellant defiling her and further that the appellant was well known to the complainant as he was her neighbour and lived 100 metres away.
15. Regarding the appellant's alibi defence, it was submitted that the appellant failed to call any other witness to support his alibi and equally failed to produce a register from his workplace confirming that he was indeed at his workplace and thus his alibi defence was a mere afterthought.
16. The respondent submitted that the sentence meted out was too lenient considering the seriousness of the offence and moved court to enhance the appellant's sentence to life imprisonment. Reliance was placed on the case of Athanus Lijodi v Republic [2021] eKLR.
17. The respondent submitted that minor contradictions should not disturb the findings of the trial court as the same was not fatal to the findings, conviction and sentencing of the appellant herein as was held in the case of Joseph Maina Mwangi v Republic Criminal Appeal No. 73 of 1993 as well as the Court of Appeal decision in the case of Erick Onyango Odeng' v Republic [2014] eKLR.

The Role of this Court

18. As a first appellate court; my role is to re-evaluate the evidence afresh and arrive at my own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses as they testified and give due regard for that. See Okeno v R. [1972] E.A. 32.

Evidence adduced before the trial Court

19. PW1 the complainant testified after being taken through a voire dire examination that she was in Class 2 at Kosawo Primary. It was her testimony that on the 6.9.2019 at 4pm she went to her friend Seline and on the way, she passed by the appellant's house, entered his house where the appellant raped her.
20. It was her testimony that after entering the appellant's house, he asked her to remove her clothes then he inserted his penis into her private parts. The complainant testified that the appellant had defiled her severally and asked her to keep quiet.
21. The complainant testified that her mum had found her sleeping in the appellant's bed and that she later told her mum. It was her testimony that the appellant's house was not far from hers and that she knew the appellant as Moses.
22. In cross-examination, PW1 admitted that despite finding her in the appellant's home, her mom did not know that she went there and that when her mum found her there, she woke her up and they went to their house.
23. PW2 Syprine Awuor, the complainant's mother testified that on the 10.9.2019 at 7pm, she was bathing the complainant who did not want to have her private parts cleaned. It was her testimony that she became harsh to the complainant who informed her that she had been defiled by someone who had covered her mouth and who lived near the borehole.
24. PW2 testified that the complainant informed her that it was the appellant who had defiled her. She further testified that she reported the matter at Kondele Police Station and later took the minor to Jootrh. It was her testimony that the minor was born on the 29.12.2012 and was 8 years old in 2019. She produced the complainant's birth certificate as PEx4. She testified that she had never had sexual relations or a quarrel with the appellant



25. In cross-examination, PW2 stated that she never found the complainant sleeping in the appellant's house but that the minor was the one who told her that Moses defiled her. She stated that she was the one who told the complainant that the appellant was called Moses.
26. PW2 further stated that she could not recall the date on which the incident took place. She further stated that she was not aware that the appellant was at work when the incident happened.
27. In re-examination, PW2 stated that she found out on the 15.10.2019 that the minor had been defiled but when pressed further stated that she had forgotten the exact date when the incident occurred.
28. PW3 Dr. Lucy Ombok examined the complainant when she was taken to the hospital and filled and signed her P3 form. It was her testimony that on general physical exam, the complainant was withdrawn and afraid and that upon examining her external genitalia, it was normal and the hymen broken. She produced the P3 form dated 5.11.2019 as PEx2.
29. In cross-examination, PW3 stated that the minor stated that it was not the first time she was being defiled. She further stated that there was penetration though she could not tell at what time the hymen was broken. She further stated that she saw the minor 2 months after the incident.
30. When referred to the PRC form that indicated a whitish discharge, it was her testimony that the same could be from a sexual act, STI or infection.
31. PW4 No. 90975 Corporal George Oduor testified that on the 11.9.2019 while at Kondele Police Station at around 1545hrs, the complainant and her mother arrived at the station and that the mother stated that she was washing the minor's clothes when she saw a whitish discharge on her pants and on asking the minor, she stated that on the 6.9.2019 the appellant lured her into his house and raped her. It was his testimony that the minor was 7 ½ years old at the time the offence was committed.
32. Placed on his defence, the appellant took oath and denied committing the offence and stated that on that day, he was at work at an Indian's Shop where he worked as a storekeeper and that he had arrive at work at 8am and left at 6pm. He testified that there was an attendance sheet that he signed when reporting for work in the morning. It was his testimony that he had colleagues at work who could testify that he was with them. The appellant testified that he was arrested on the 12.9.2019. The appellant testified that he knew both the complainant and her mother.
33. In cross-examination, the appellant reiterated his testimony.

Analysis and Determination

34. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.
 - i. Whether the prosecution proved their case beyond reasonable doubt; and
 - ii. Whether the sentence was manifestly harsh and excessive

Whether the charge was proved beyond reasonable doubt//**

35. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
 - 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- 8(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.”
36. The specific elements of the offence defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:
- i. Age of the complainant;
 - ii. Proof of penetration in accordance with section 2(1) of the [Sexual Offences Act](#); and
 - iii. Positive identification of the assailant.
37. On these elements; “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.” (Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013).
38. Regarding the age of the complainant, In a charge of defilement, the age of the victim is important for two reasons:
- i. defilement is a sexual offence against a child; and
 - ii. age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
39. A child is defined as a person under the age of eighteen years. Is the victim herein a child? PW1 testified that she was 7 years old and in class 2. This was corroborated by the testimony of PW2, the complainant’s mother who produced PEx4, her birth certificate that showed that the complainant was born on the 29.12.2012
40. On the basis of the evidence adduced, I find that the age of the victim was proved to be 7 years as at the time of the incidence.
41. As for penetration, Section 2(1) of the [Sexual Offences Act](#) defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
42. The complainant was firm in her testimony that she was defiled. She told the court how the appellant “inserted his penis into her private parts”. Her testimony was corroborated by the P3 form produced PEx1 and PRC produced as PEx2 that show that the complainant’s hymen was broken though she could not establish when penetration occurred as the examination was carried out 2 months after the incident occurred.
43. In his defence, the appellant stated that the fact that the hymen was broken did not amount to evidence of penetration and that in light of the inconsistencies and contradictions in the testimonies of PW1 and PW2, the court ought not to have convicted him and sentenced him.
44. On the issue of contradictions and inconsistencies, I do acknowledge that there are contradictions in the testimonies of PW1 and PW2 regarding the dates when the defilement was said to have occurred.
45. A careful review of the proceedings and especially the testimony of the complainant clearly show that the complainant was firm that she was defiled on the 6.9.2019. PW2 testified that she came to know of her daughter’s defilement on the 10.9.2019 as she was bathing the minor. It was clear that PW2 was not aware of the date when the incident occurred, she only received information from the minor that she had been defiled.



46. These contradictions and inconsistencies were not material in my view. The testimony of the complainant was firm and remained unchanged even on cross-examination. The Medical evidence corroborated her testimony that she was penetrated
47. The Court of Appeal addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR where it stated inter alia that only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
48. Accordingly, In this appeal, I find that the inconsistencies were minor and were not sufficient to create doubt in the trial court's mind as to the penetration of the minor and by the appellant herein whom she knew as a neighbour.
49. Furthermore, under Section 124 of the *evidence Act*, a court can convict based on the evidence of the victim alone in sexual offences. In this regard, am guided by the Court of Appeal decision in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR where the court held that:
- “With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth.”
50. The question is whether the complainant was indeed truthful. It is my view that the complainant was truthful in her testimony. Further, from the court record, I find that the evidence adduced by the prosecution proved beyond reasonable doubt that penetration occurred.
51. As to whether the appellant was the perpetrator, it bears repeating that the Appellant was a person known to the complainant. The appellant himself testified that he knew both the complainant and her mother.
52. However, the appellant asserted that he raised his alibi earlier during the cross-examination of PW2 and that the prosecution failed to displace it. It was his case that on the material day he was at work at an Indian's Shop. The appellant further testified that he raised his alibi at the earliest instance, specifically when he cross-examined PW2.
53. I have reviewed the cross-examination referred to by the appellant and note that the appellant asked PW2 whether she was aware that he was at work when the incident was alleged to have happened.
54. The question is whether this query by the appellant amounts to a well laid out alibi established by the appellant and raised at the earliest instance.
55. In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden



of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie v Republic* [1984] KLR, the Court of Appeal stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....”

56. In the case of *Victor Mwendwa Mulinge v R*, [2014] eKLR, the Court of Appeal rendered itself thus on the issue of alibi:

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution....”

57. Comparatively, in the South African case of *R v Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

“If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”

58. In *S v Sithole* 1999 (1) SACR 585 (W) at 590g-I, it was stated:

“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”

59. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. The Court of Appeal in the case of *Erick Otieno Meda v Republic* [2019] eKLR observed that:

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu - v - S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).



60. In the instant appeal, the trial court noted that the appellant failed to avail a register or attendance sheet to prove that he was at work on that material day and further that he did not call any of his coworkers to testify that he was at work on the material date.
61. The question is whether the defence of alibi adduced by the appellant can stand. The law prior to the repeal of Section 235 of the Criminal Procedure Code required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. (Emphasis supplied - See Republic – v - John Kimita Mwaniki [2011] eKLR).
62. In my view, the appellant’s alibi was not corroborated by other witnesses whom he himself had brought to the attention of the court. His alibi remained a mere regurgitation of the events of the date of the incident from his own view. The alibi in my view was an afterthought and the same was rightly dismissed by the trial court.
63. Accordingly, I do not find any element of mistaken identity of the Appellant as the person who penetrated the complainant minor’s genitalia.
64. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.
65. In sum, I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 7 years. I find and hold that this appeal against conviction lacks merit and is hereby dismissed.

Whether the sentence imposed on the appellant was manifestly harsh and excessive

66. Under the *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.
67. In this case, the complainant was of the age of 7 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

“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.”
68. The appellant was sentenced to serve 20 years’ imprisonment. The respondent herein prayed for an enhancement of the appellant’s sentence taking into consideration the circumstances of this particular case and the serious nature of the offence. I however note that the prayer for enhancement of the sentence came in the submissions after the appellant had filed his submissions and therefore he was not given the opportunity to be heard on the enhancement of sentence.
69. The Court of Appeal in the case of *J.J.W. v Republic* [2013] eKLR held as follows on enhancement of a sentence by the High Court:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section



354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

70. In this appeal, the prosecution did not file any Notice of Enhancement of Sentence. Accordingly, the prosecution’s prayer for enhancement of sentence fails.
71. Sentencing is nonetheless an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R. and Wilson Waitegei v Republic [2021] eKLR).
72. Was there any mitigation vitiating exercise of discretion by the trial court in imposing a sentence of life imprisonment? The appellant mitigated that he had a family to cater for and thus prayed for a lenient sentence.
73. It should also be noted that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only 7 years. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the *Sexual Offences Act* reflect a deliberate intention by the legislature (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.
74. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. Generally, it is worth noting that, the assault leaves the innocent victim with eternal and time-explosive dent on the integrity of the person as a human being. The aggravating factors weigh heavy; against the mitigating factors of the appellant.
75. In the circumstances I find no reason to interfere with the sentence imposed by the trial court, which sentence was too lenient considering the mandatory life imprisonment provided for under section 8(2) of the *Sexual Offences Act*.
76. I therefore find no merit in this appeal both on conviction and sentence which I hereby dismiss. However, in line with section 333(2) of the Criminal Procedure Code, as the appellant was in custody from the date of arrest on 13/9/2019 to 7/10/2019 when he was released on bond, the sentence imposed shall take into account the number of days that he was in custody before he was released on bond.
77. This file is now closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2023

R.E. ABURILI

JUDGE

