



REPUBLIC OF KENYA



**Musyimi v Republic (Criminal Appeal E007 of 2022)
[2023] KEHC 22263 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E007 OF 2022**

RK LIMO, J

SEPTEMBER 18, 2023

BETWEEN

JOHN MUNGU MUSYIMI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. John Mungu Musyimi alias Kala the appellant herein, was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the [Sexual Offence Act](#) vide Mwingi Chief Magistrate’s Court Sexual Offence Case No. 7 of 2019.
2. The particulars of the charge are that on 23rd February, 2019 in Mwingi Central within Kitui County he did an act that caused penetration of his genital organ namely penis into the female genital organ namely vagina of MM (name withheld) a child aged 12 years.
3. The appellant denied the offence but after trial he was found guilty and convicted by the trial court. Below is the summary of the evidence and defence presented at the trial.
4. The complainant/victim aged 12 years upon voire dire examination testified on oath albeit with difficulty and told the trial court that she had gone to the appellant’s house to borrow a donkey which was to be used to fetch water and that he found the appellant at home alone with the children. She recalled that the appellant whom she referred to as “Kala” told her to go and untie the donkey and drive it but as she went, the appellant followed her from behind and tripped before defiling her. The girl stated that she felt pain and that as the ordeal was going on, the wife to the appellant arrived and found the appellant on top of her in the act.
5. She testified that when the appellant saw his wife, he stopped the act and walked away. She added that the appellant’s wife known as Kalisa picked her up and took her to the brother of the appellant known as Kaluku who told her to go home. She added that she walked home and met her mother and told her



- what had happened. She testified that her mother informed the Area/Chief who went with the police and arrested the appellant from his home adding that the appellant had earlier told her never to reveal to anyone what he was doing to her.
6. LM (PW2), the mother to the complainant testified that on 23rd February, 2019 she had gone to attend a women's meeting and returned home at around 6PM. She stated that upon arrival, the appellant went to her home and told her that he had defiled her daughter. She testified that she was stunned and she asked him three times to repeat what he had just told her and that he confirmed that he had had sex with her daughter. She testified that her daughter later arrived and confirmed that she had been defiled by the appellant and that the appellant's wife caught them in the act.
 7. She further testified that the following day, the appellant's wife named Kalisa went to her home and explained to her what she witnessed. She stated that she then called the Area Chief on phone and reported the incident and shortly thereafter, the Area Chief and a Village Elder named Kitondo arrived with the police and they arrested the appellant. She testified that she then took the minor to hospital for treatment adding that her daughter was in class 4 and was born in year 2006 and was 12 years at the time of the incident.
 8. The appellant never challenged the evidence tendered by PW2 by way of any questions in cross-examination.
 9. Mwikali Julius Musili (PW3) the Area Chief testified and corroborated the evidence of PW2. He testified that after receiving a phone call from PW2 and being notified of the incident, he headed to the home of the complainant and interviewed the complainant and her mother (PW2).
After being briefed on what happened, he stated that she called the Officer Commanding Station – Mwingi Police Station who went to the scene from where the appellant was arrested.
 10. Dr. Kennedy Munyoki (PW4) testified he examined the minor 2 days after the incident and found that she was defiled because of the absence of hymen. He opined that penetration was positive and tendered the P3 Form he authored and signed as P Ex 2 and treatment notes as P Ex3.
 11. PC Saffi Bare (PW5) the Investigation Officer in this case testified and told the trial court that a report about the defilement incident was reported on 24/2/2019 in the evening and explained the actions taken by the Police in regard to the treatment of the victim and filing of P3 Form and action taken against the appellant in arraigning him.
 12. When placed on his defence, the appellant gave a brief sworn statement denying committing the offence. He termed the evidence tendered by the prosecution as falsehood arising from a boundary dispute adding that he shares a boundary with the complainant's father.
 13. The trial court evaluated the evidence placed before it and found that the Prosecution's case had been proved against the appellant because all the ingredients of the offence had been proved. The appellant was convicted and sentenced to serve 20 years' imprisonment.
 14. The appellant felt aggrieved and filed this appeal raising the following grounds: -
 - i. That the learned trial magistrate erred in law by not taking cognizance of the fact that the prosecution's case had not been proved beyond doubt.
 - ii. That the trial magistrate erred by not realizing that the charge he was framed because of a boundary dispute.



- iii. That the prosecution's case was marred with contradictions and inconsistencies.
 - iv. That the trial court did not consider his defence.
 - v. That the prosecutions' case was not corroborated by medical/expert evidence.
15. In his written submissions the appellant urges this court to acquit him so that he can go back to his people because he feels time spent in custody is enough. He says that he has reformed and has listed down the number of courses he has done while in prison.
16. He further submits that he was framed up and contends that the complainant mother harboured a grudge against him.
17. He submits that the sentence meted out was too harsh and excessive in view of the fact that he is a bread winner in his family with three children attending school.
18. The State has opposed this appeal pointing out that it was able during trial to prove the following elements in the offence upon which the appellant was charged;
 - a. Age
 - b. Penetration
 - c. Identification of the appellant
19. The State submit that the age of the victim was established by age assessment report tendered as P Ex 3.
20. On penetration, the Respondent points out that the evidence of PW1 and PW2 that she was defiled was corroborated by the Doctor (PW4). In its view the evidence proved beyond doubt that penetration was positive.
21. On identification, the State submits that the appellant is a neighbour to the victim was well known as "Kala". It submits that the evidence of PW1 and PW2 proved beyond doubt that the appellant was the culprit.
22. It further submits that the issue of a boundary dispute only cropped up during the defence and the appellant never cross examined the prosecution's witnesses over the allegation.
23. It supports the sentence imposed pointing out that the trial court was duly guided by law and aggravating circumstances.
24. This court has considered the grounds raised by the appellant in this appeal and the response made by the State.
25. This is a first appellate court and the mandate of this court is to re-evaluate the evidence tendered with a view to reaching own conclusions.
26. The issues arising from this appeal are as follows: -
 - i. Whether the prosecution proved its case to the required standard.
 - ii. Whether the defence was considered.
 - iii. Whether the sentence was harsh.



(i) Whether the Prosecution proved its case beyond doubt

27. As observed above, the appellant was charged and convicted of the offence of defilement Contrary to section 8(1) of *Sexual Offence Act* for such an offence to be sustained, the following elements are crucial and must be proved beyond any reasonable doubt.
- i. Penetration
 - ii. Identification of the perpetrator
 - iii. Age
28. On penetration, this court has considered the evidence of the minor, who narrated the incident quite clearly and though she was a bit shy, initially she gathered courage and narrated what transpired. I do find that her testimony was quite consistent with the testimony her mother gave. The mother (PW2) had gone to a women's function and returned later in the evening to find her daughter defiled. She first learnt about the defilement from the appellant himself who went to her and reported the incident. I do find that the surprise and disbelief expressed by the mother was quite normal because here was someone reporting to her that he had defiled her own daughter. It was unbelievable at first and she only came to terms to what had happened when the daughter (PW1) went home and confirmed that she had been defiled. That in my view was consistent with a normal reaction of a parent in the circumstances.
29. I also concur with the Respondent's submissions that the evidence of the victim in respect to the element of penetration was corroborated by the doctor's (PW4) evidence. The doctor was categorical in his evidence that penetration was positive and tendered both the treatment chit (P Exb 1 and P3 Form (P Exb 2) as evidence. The oral and documentary evidence tendered by the Prosecution proved beyond doubt that the minor was defiled. It is instructive to note that the appellant never challenged the evidence given by PW2 which means that he was satisfied with what she told the court.

(ii) Whether the appellant's defence was considered.

30. This court has gone through the judgement of the trial court and find that the trial court considered the issue of boundary dispute raised by the appellant. The trial court gave due weight to the same.
31. The appellant also during trial, never raised the issue of boundary dispute with PW2 the mother to the minor testified and the appellant had no questions to ask her. If at all he had misgivings about the veracity of her testimony, why didn't he ask questions to test the veracity of the evidence tendered and/or find out if she was only giving evidence with a view to fix him. The issue of boundary dispute in my considered view was simply raised by the appellant as a red herring. There was no iota of evidence tendered to establish the existence of such a dispute. It might as well have been merely an afterthought because even when the Area Chief (PW3) testified, the appellant had no issue with his evidence. He also did not probe the Chief about the existence of it at all, or existence if a dispute. This Court, in light of this finds that the defence raised had no weight to dispute the prosecution's case which I find was simply watertight.
32. On age, this court finds that the medical evidence tendered by the doctor (PW4) proved beyond doubt that the minor was aged 12 years. The mum also told the trial court that her daughter was in class 4 and was 12 years old. The age assessment report. (P Ex3), and the P3 Form (Pexh



2) corroborated that evidence. This court finds that the element of age was well established and proved by the Prosecution's case.

33. On identification, it is quite evident going by the evidence tendered that the appellant was a neighbour to the victim and was well known to her as "Kala". Furthermore, his own wife found the appellant in the act and reported to the victim's mother. The appellant never challenged that fact and in fact, he concedes that he shares a boundary with the victim's parents. He was therefore, positively identified and he did not contest that fact.

(iii) Whether the sentence was harsh

34. The provisions of section 8(3) prescribes a minimum sentence of 20 years for anyone found guilty of defiling a minor between 11 years and 15 years of age. The trial court noted that the appellant an adult man took advantage of a vulnerable young girl to satisfy his sexual drives and was caught quite literally, pants down committing the "*shameful act".
35. The appellant cannot fault the trial court for imposing a minimum sentence of 20 years which in my view is deserved.
36. In the premises, this court finds no merit in this appeal the same it disallowed. The conviction and sentence are upheld. He was out on bond during trial so the provisions of section 333(2) of *Criminal Procedure Code* does not apply to him.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF SEPTEMBER, 2023.

HON. JUSTICE R. LIMO-JUDGE

