



**Micheni v Republic (Criminal Appeal 44 of 2018)  
[2023] KEHC 24056 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL 44 OF 2018  
FN MUCHEMI, J  
OCTOBER 24, 2023**

**BETWEEN**

**SIMON MUCHIRA MICHENI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment of the Resident Magistrate Court Gichugu G. K. Odhiambo (RM), in Criminal Case (S.O.) No. 3 of 2017 delivered on 13th July 2018)*

**JUDGMENT**

**Brief Facts**

1. The appellant lodged this appeal against the entire judgment of the Resident Magistrate Gichugu. He was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to life imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 4 grounds of appeal summarised as follows:-
  - a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case to the standards required in criminal cases;
  - b. The learned trial magistrate erred in law and in fact in failing to take into account the appellant's defence.
3. Parties disposed of the appeal by written submissions.



## The Appellant's Submissions

4. The appellant submitted that PW4, the investigating officer gave contradictory evidence as to when he recorded the witness statements. On learning that the offence was committed on 14/4/2017, the investigating officer recorded the statements approximately 9 months after the incident occurred. As such, the appellant argues that failure to record the witness statements on time prejudiced him at the trial. Moreover, the appellant submits that the investigating officer failed to consider his defence that on the material day he went to work. On the following day, he went to see PW2 and demanded his salary for working on the farm so that he could go to check on his mother and the employer said that she did not have any money and proceeded to frame the appellant in this case. The appellant states that PW4 never visited the scene of the crime thus he did not carry out the investigations as required by law which has occasioned him a miscarriage of justice.
5. The appellant submits that the prosecution did not prove its case beyond reasonable doubt. The prosecution case was based on circumstantial evidence and pursuant to the decision in *Abang A. alias Onyango v Republic* Criminal Appeal No. 32 of 1999 UR and *Omar Mzungu Chimera v Republic* (no citation given) the chain of events did not place the appellant at the scene of the crime as he was not at the scene for he had gone to his mother's home.
6. The appellant argues that the prosecution did not prove the element of penetration against him as he was not taken to hospital for tests and examinations to prove the allegations. He further argues that upon PW1 being examined, the medical officer did not disclose what caused the penetration thus failing to prove the ingredients of the offence. The appellant cites the decision in *Matianyi v Republic* (1986) eKLR and submits that the learned magistrate failed to test the testimony of PW1 as a single witness. The appellant argues that PW1 was coached to lie because PW2 owed him money for working for her.
7. The appellant relies on Section 169 of the *Criminal Procedure Code* and submits that the trial court failed to consider his sworn evidence as he testified that he was at his mother's house on the fateful day. He further states that he went to PW2's home to ask for his salary but she told him she had no money. It was when the appellant returned after seeing his mother that he was arrested.
8. Relying on the decision in Machakos Constitutional Petition No. E017 of 2021 *Philip Mueke Maingi & Others v DPP & Attorney General* (no citation given), the appellant submits that the sentence imposed on him is harsh and excessive and that life sentence has been found unconstitutional.

## The Respondent's Submissions

9. The respondent submitted that the prosecution proved its case beyond reasonable doubt. The respondent argued that the appellant has not demonstrated what aspect of the investigations was shoddy or how it offended him at the trial. The respondent thus submits that the court properly handled the trial, analysed the evidence and applied the law coming to the conclusion that the appellant was the perpetrator of the crime.
10. The respondent relies on the case of *Twehangane Alfred v Uganda* Criminal Appeal No. 139/2001 {2003} UGCA and submits that the chain of evidence by the prosecution was consistent, unequivocal and unshaken by the appellant even during cross-examination. Furthermore, the respondent argues that the appellant failed to demonstrate the inconsistencies and contradictions in the prosecution's case.
11. The respondent further relies on the cases of *Bakare v State* {1987} 1 NWLR and *Stephen Mulili v Republic* (no citation given) and submits that the prosecution proved its case against the appellant by



calling six prosecution witnesses who all proved that the appellant was the perpetrator of the heinous act visited upon the mentally challenged 13 year old minor.

12. The respondent states that the appellant was well represented by counsel during the trial and was given a chance to call witnesses but he did not do so. Further, the appellant chose to give a sworn testimony and was cross examined on the same. The appellant did not rebut the prosecution's evidence that placed him at the scene of the crime.

### **Issues for determination**

13. The two main issues for determination are:-
  - a. Whether the prosecution proved its case beyond any reasonable doubt;
  - b. Whether the trial court considered the defence evidence;

### **The Law**

14. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse 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 that 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.”

15. Similarly in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958]EA 424.”

This was also set out in the case of *Kiilu & Another v Republic* [2005] KLR 174.

### **Whether there was conclusive evidence of all the ingredients of defilement.**

16. Before examining the ingredients of the offence of defilement, two issues raised by the appellant will be addressed. Firstly, the appellant took issue with the manner in which the *voire dire* test was conducted. Secondly, the evidence of the investigating officer concerning discrepancies in dates of recording the witness statements.



17. The appellant argued that the trial court did not conduct a proper *voire dire* test on the complainant. The record shows that the trial magistrate conducted the *voire dire* test and noted that the minor did not understand the nature of an oath and directed that she gives an unsworn statement. Accordingly, the trial court stood guided by Section 124 of the *Evidence Act* and was satisfied that the minor was telling the truth as borne by the record.
18. The appellant raised the issue that investigations were shoddily done and that the investigating officer gave contradictory statements about when he took down the witness statements. It was the evidence of PW4, that the offence was committed on 14/4/2017 and that he recorded his statement on 20/6/2016. He said that he changed the date to read 20/11/2016 but backdated the statements to 20/4/2016. The witness said he started working at the station in October 2016 he admitted to recording the witness statements on 20/11/2016 and back dated them to 20/4/2016. The appellant was arrested on 17/1/2017 and took plea on 18/1/2017. The trial court considered the evidence in totality and came to the conclusion that the omission was on the part of the witness and hence could not be resolved in the appellant's favour. The rest of the evidence was to the effect that the offence was committed on 14/4/2016 and the PRC Form and treatment notes were dated 14/4/2016 whereas the P3 Form was dated 15/4/2016. In my view, the documentation was correctly filled in before the appellant was arrested and before the witnesses testified in court. Furthermore, the appellant was given ample opportunity to cross examine the witnesses which he did during trial. Thus, the omission by the investigating officer did not occasion him any injustice.
19. Relying on the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was stated that:-

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

20. On the age of the victim, the court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

“.... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

21. PW1 testified that she was 12 years old at the time of giving the testimony. She further testified that she was born on 30/5/2005. PW2, the mother of the minor testified that the minor was 10 years and 11 months old at the time of the commission of the offence. The birth certificate was produced that confirmed that the minor was born on 30/5/2005. The minor was therefore ten (10) years and 11 months at the time of the commission of the offence. I have perused the birth certificate and the court record and find that the prosecution proved the age of the minor as being under the age of 12 years at the time of the offence.

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.”



22. On the element of penetration, PW1 testified that she was at her parent's home alone when the appellant went there and told her to follow him so that he could show her something good. The minor complied and was led to a coffee farm. The appellant pushed her to the ground, removed his trousers and underwear and inserted his penis in her vagina as he slept on top of her. The appellant thereafter got up and ran away.
23. PW4, the clinical officer testified that he examined the minor on 14<sup>th</sup> April 2016 and filled the P3 Form. He testified that he did a high vaginal swab and found moderate pus and epithelial cells and that the presence of pus cells indicate bacterial infection and epithelial cells indicate friction between two parts of the body. He further stated that the hymen was freshly broken and the labia majora and minora was hyperemic and red in colour. The witness explained that the freshly broken hymen hyperemic labia and tender labia majora indicated penetration of the penis. PW4 produced the Post Rape Care Form and the P3 Form as exhibits.
24. The appellant argues that the absence of spermatozoa indicates that he did not defile the minor and that the prosecution did not prove what caused penetration. It was argued that the element of penetration was not proved. The absence of spermatozoa was explained in the Court of Appeal in the case of *Mark Muiruri Mose v Republic* [2013] eKLR stated as follows:-

Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed.

Thus it is evident that the evidence of spermatozoa is not necessary so long as the prosecution proved that there was penetration.

25. The evidence of PW1 was corroborated by the medical evidence of PW4 to the effect that the freshly broken hymen, the hyperemic labia and tender labia majora indicated penetration of the penis. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to establish that penetration occurred during the act of sexual assault.
26. On identification, PW1 testified that she was at home alone when the appellant came to their house and told her to follow him. PW1 referred to the appellant as Baba Ann and said that his name is Simon Muchira and that he is their neighbour. On cross examination PW1 stated that she had known the appellant for a long time as he had been pruning their tea as a casual labourer. PW2 testified that PW1 informed her that the appellant had defiled her and that she knows the appellant as Simon Muchira, also known as Baba Ann. The witness further testified that the appellant had been working for her in her coffee plantation. PW3, the Assistant Chief testified that he knew the appellant and arrested him on 17/1/2017 as he had been informed by PW2 that the appellant had defiled her daughter. The appellant had gone missing for some time. PW3 was later informed by members of public that the appellant had resurfaced. The testimony of PW1 and PW2, in my view positively identifies the appellant as the perpetrator. Furthermore PW3, the assistant chief testified that he knew the appellant and arrested him on 17/1/2017 after he resurfaced from hiding. It is thus my considered view that the appellant was positively identified through recognition which is more reliable than identification.
27. The appellant took issue with that the medical evidence did not implicate him and no tests were carried out which were necessary. As the Court of Appeal noted in *Geoffrey Kioji v Republic Nyeri Criminal Appeal No. 270 of 2010 (UR)*:-

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence



is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

It is therefore not in doubt that the evidence of the complainant was well corroborated as required by the law.

28. The appellant submitted that the trial court did not consider his defence. He states that there was an existing debt by PW2 and therefore she fabricated the charges against him. He denies being present at the scene. On 15/4/2016, he states that he went to PW2 and asked her to pay his salary to enable him go home to check on his ailing mother. He further testified that when he returned home he was arrested by the assistant chief. The court noted that PW1 remained steadfast during cross examination and further linked the appellant to the commission of the offence. Thus the trial court believed the evidence of the prosecution witnesses as opposed to the appellant's defence. It is therefore my considered view that the trial court considered the defence in its judgement but found that it did not displace the evidence of the prosecution witnesses. As such, it is my considered view that the defence albeit being considered was not sufficient to displace the prosecution evidence.
29. After analysing the entire evidence and the defence, I am of the considered view that the prosecution proved its case beyond reasonable doubt.

#### **Whether the sentence was harsh and excessive**

30. The appellant has cited the decision in *Maingi & 5 Others v Director of Public Prosecutions & Another* [2022] eKLR and submitted that the life sentence is unconstitutional. This court takes cognizance of the fact that on 7<sup>th</sup> July 2023, the Court of Appeal in *Manyeso v Republic* (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR), held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. In that regard, taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant's actions on the child's future.
31. The appellant in mitigation told the court that he was an old man of poor health and was remorseful. He pleaded for a non-custodial sentence. The trial court did not consider the mitigation of the appellant and proceeded to impose the minimum sentence as provided by Section 8(2) of the Sexual Offences Act. The sentence was imposed in July 2018 before jurisprudence on the unconstitutionality of the minimum sentence was developed by superior courts. In the Court of Appeal case of *Manyeso v Republic* (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR), the Court of Appeal sitting at Mombasa held that minimum sentences under the *Sexual Offences Act* are unconstitutional due to the fact that they deprive judges and magistrates from exercising their discretion in sentencing. In this case, I am guided by the emerging jurisprudence and find that the appellant deserves an appropriate sentence with his mitigation and all the relevant factors being taken into consideration. The aggravating circumstances are that the victim was of tender age of less than twelve (12) years and must have been severely traumatised by the act of defilement.
32. It is my finding that this appeal is partly successful regarding sentence. I hereby make the following orders:-
  - a. That conviction is hereby upheld.



- b. That the sentence of life imprisonment is hereby set aside and substituted with twenty five (25) years imprisonment.

33. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023**

