



**Mugendi v Republic (Criminal Appeal E127 of 2023)
[2024] KEHC 13931 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E127 OF 2023
CJ KENDAGOR, J
NOVEMBER 4, 2024**

BETWEEN

JAMES MUGENDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in Meru Chief Magistrate's Court Criminal Case no. E042 of 2021, delivered by Hon. L.W Maina, Magistrate, on the 07th September, 2023)

JUDGMENT

1. 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](#). The particulars of the offence are that on diverse dates between 28th September, 2021 and 4th October, 2021, at [Particulars Withheld], Meru County, he intentionally caused his penis to penetrate the anus of MM, a child of seven (7) years.
2. The Appellant faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#), the particulars being that on diverse dates between 28th September, 2021 and 4th October, 2021, at [particulars withheld] Meru County, he intentionally touched the anus of MM, a child of seven (7) years.
3. He pleaded not guilty, and the case proceeded to trial. He was subsequently convicted of the main charge of defilement and sentenced to life imprisonment.
4. Dissatisfied with the conviction and sentence, he filed a petition of appeal on 25th September, 2023, listing seven (7) grounds of appeal:
 - i. That the trial magistrate erred in both matters of law and facts by failing to note that the clinical report was questionable.



- ii. That the learned trial magistrate failed to note that the prosecution case was not properly investigated by investigation officer.
 - iii. That the learned trial magistrate erred in law by failing to consider that the legal provision for mandatory life sentence under Section 8 (2) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the Appellant is unlawful.
 - iv. That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to the required standards of proof as required by the law.
 - v. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.
 - vi. That the learned trial magistrate erred in law and facts by failing to note that the evidence adduced by the prosecution witnesses was contradictory and paradoxical.
 - vii. That the learned trial magistrate erred in law and fact by rejecting the appellant's defence without giving any cogent reason.
5. The appeal was canvassed through written submissions. The Appellant contends that the prosecution witnesses gave conflicting testimonies and failed to meet the standard of proof beyond reasonable doubt. He further submitted that the issue of penetration as a necessary element of the offence had not been established and urged the Court to find that his defence was credible.
 6. The Respondent submitted that the prosecution's evidence was corroborative and credible, effectively proving all the essential elements of the defilement charge. According to the Respondent, the imposed sentence should be upheld as the trial Court considered the aggravating circumstances of the case.
 7. As an appellate Court, I must reconsider and evaluate the evidence before the trial Court and arrive at an independent conclusion, bearing in mind that I did not hear or see the witnesses. I am guided by the decisions in *Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32 And Kiilu & another v Republic (2005)1 KLR 174*.
 8. The complainant stated in Court that the Appellant, a farmhand at their home, had sexually assaulted him on three occasions after threatening to harm him if he reported the incidents. He said that the Appellant would call him and take him to the granary, where he removed his clothes and put his penis into his anus. He detailed the specific dates of three incidents and expressed his fears of telling his family what had occurred. He reported the incident to his school principal on 4th October, 2021.
 9. PW2 was the complainant's uncle. He told the Court that on 25th October, 2021 he attended the school where the child was enrolled after the headteacher requested the guardian's attendance due to an alleged case of indiscipline involving the minor. He testified that while in the headteacher's office with the minor, the minor stated that he had been sexually abused by the Appellant, who was employed at their home. PW2 told the Court that the minor stated that the Appellant had inserted his penis inside his anus on several occasions. He stated that, based on the information, he took the minor to the hospital and then filed a report at the police station.
 10. The investigating officer testified as PW3, he told the Court that the report was made on 26th October, 2021 and the Appellant was arrested on 28th October, 2021. PW3 stated that he interrogated



- the complainant, who revealed multiple instances of sexual molestation by the Appellant at their homestead. He produced the birth certificate for the minor.
11. PW4 was the complainant's grandmother and guardian. During her testimony, she outlined the events that led her to learn of the complaint. She highlighted that the Appellant had been employed as a farmhand in her home for many years, during which he earned her trust. She stated that the minor would assist the Appellant with farm work. She also testified that she was present alongside PW2 when the minor was examined at the hospital. She denied owing any money to the Appellant.
 12. PW5 was a medical doctor. He produced the P3 medical report, which was filled out on 26th October, 2021 and he gave the findings of the medical examination. During the medical examination, no physical injuries were found on the male genitalia, and there were no lacerations on the hand, indicating no fresh tears, which would typically heal within 72 hours. Additionally, no bleeding or discharge was noted, and the minor tested negative for sexually transmitted infections.
 13. The Appellant, in his defence, stated that he was assaulted and compelled to admit the offences upon his arrest. He denied the charges and stated that PW4 owed him salary for the period 2020 – 2021. The Appellant stated that the minor was manipulated by the grandmother (PW4) to file false charges against him.
 14. I have considered and analyzed the evidence that was tendered before the trial Court by the Appellant and the prosecution, the grounds of appeal, and the written submissions by the parties herein
 15. The issues for determination are;
 - i. Whether or not the Prosecution proved its case beyond reasonable doubt;
 - ii. Whether or not the sentence meted out by the Trial Court was manifestly excessive.
 16. The complainant was a child of tender years who gave unsworn evidence. The record shows that the trial court conducted a *voire dire* examination and recorded it in terms. I am satisfied that the trial Court employed the correct procedure in ascertaining the child's competence to give evidence.
 17. In *C.W.K v Republic* [2015] eKLR, the Court highlighted the ingredients forming the offence of defilement;

“The critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant.”
 18. The burden of proof rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In *Stephen Nguli Mulili vs Republic* [2014] eKLR, it was held that: -

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa vs. R*, [2013] eKLR.”
 19. The complainant and his grandmother testified about his age, which can be ascertained further from the evidence produced before the trial Court (P.Exh. 2—Birth Certificate). I am satisfied that the complainant's minority age was proven to the required standard. He was 6 years old when the incidents complained of occurred.
 20. Section 8 of the *Sexual Offences Act* defines defilement as;



8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.

Penetration is defined as;

‘means the partial or complete insertion of the genital organs of a person into the genital organs of another person.’

21. Section 2 defines genital organs as;

‘the whole part of a male or female genital organs and for purposes of this act includes the anus.’

Thus the insertion of the genital organs of a person into the anus of another person is defilement if the other person is a child.

22. The Appellant and the complainant were well-known to each other as they resided in the same home. It was established that the appellant worked as a farmhand at the home, which he confirmed. The evidence highlighted their shared living situation, which contributed to their familiarity as they regularly interacted in their daily lives on the farm. PW4 confirmed that the Appellant was a trusted farmhand and, as such, was left alone with the minor on several occasions. PW2 testified about how the issue became known after he was called to the school. In my view, the absence of the headteacher in this case does not create a gap in the prosecution's case.

23. The Appellant contends that there was insufficient evidence of penetration and that the conviction was based solely on the testimony of one witness. The complainant gave a detailed account of how the Appellant would remove his clothes and insert his penis into his anus. There was certainty about the nature of the act. He was also clear that the Appellant had threatened him, and that was why he had not reported it to his family.

24. The medical examination took place 24 days after the reported assault. The doctor clearly stated that, because of the time-lapse, no visible injuries were anticipated during the examination.

25. It is well established that a single witness's oral evidence is sufficient to warrant a conviction. See *George Kioji Vs R Nyeri Criminal Appeal No. 270 of 2012* (unreported). The Court held as follows:

“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 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.”

26. The trial Court assessed the credibility of the complainant and made the following observation:

“Without a shadow of doubt, the Court does believe that the minor testified without being prompted and gave evidence with such freshness of mind as if the facts took place yesterday. The Court does find him to be a credible witness and indeed is of the opinion that he was telling the truth.”



27. I have reviewed the evidence presented before the trial Court and have no reason to question the Court's evaluation of the complainant's credibility. The Appellant's claim that this case was fabricated in order to settle a debt is unconvincing and lacks credibility. The case came to the fore from the complainant's behaviour at school, and the report to the police was made the following day after the incident was reported to PW2. There is no credible basis to suggest that PW4 would fabricate accusations against the Appellant, especially considering their longstanding trusted employee-employer relationship.
28. In the end, I concur fully with the learned trial magistrate that all the ingredients of the offence were proved beyond a reasonable doubt. The Appellant was afforded a fair trial, and the conviction was safe. The appeal against conviction is accordingly dismissed.
29. I will now turn to the sentence. Under Section 8 (2) of the *Sexual Offences Act*, 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.
30. The learned trial magistrate exercised discretion on sentencing and, in doing so, meted a lawful sentence.
31. Jurisprudence has developed to establish that life imprisonment should not be left to an indeterminate period.
32. In *Manyeso v Republic* [2023] KECA 827 (KLR), the Court of Appeal held that life imprisonment was unconstitutional and substituted the same with 40 years. They stated as follows: -

“We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in *Jackson Wangui*, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature..... We are therefore of the view that while the Appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the Appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the Appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”
33. The trial Court called for pre-sentence and victim impact assessment reports. The victim was reported to have suffered psychological and emotional distress as a result of the incidents. The Appellant told the Court that he was an orphan with no family of his own.
34. After careful consideration of the gravity of the offence committed, the mitigation and the reports filed, I exercise discretion and translate the sentence of life imprisonment to a definitive term of 40 years. In compliance with Section 333 (2) of the Criminal Procedure Code, the period the Appellant spent in custody before his sentence shall be taken into account, from 28th October, 2021 to 21st September, 2023.
35. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined in paragraph 33 of this judgment.

It is so ordered.



**DATED, DELIVERED AND SIGNED AT NAIROBI VIA THE MICROSOFT TEAMS PLATFORM
ON THIS 04TH NOVEMBER, 2024.**

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C. KENDAGOR

In the presence of:

Court Assistant: Beryl

Appellant: James Mugendi

Respondent: Mr. Musila, ODPP

