



**Mulusu v Republic (Criminal Appeal 50 of 2020)
[2021] KEHC 311 (KLR) (11 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 50 OF 2020
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

FRANCIS KISALI MULUSU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon.V. Kachuodho, SRM dated 15th October 2020 in Sexual Offence Case No. 53 of 2019 at the Magistrates Court at Thika)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*. The particulars were that on 8th May 2019, at Sewage area, Juja sub county within Kiambu County, he intentionally and unlawfully caused his penis to penetrate into the vagina of CNW, a girl aged 4 ½ years old.
2. The Appellant now appeals against the conviction and sentence as set out in the amended Petition of Appeal dated 25th March 2021. The Appellant also relies on his written and oral submissions. The Prosecution opposed the appeal through the oral submissions of its counsel.
3. This is the first appellate court and in *Okeno v. Republic [1972] EA. 32*, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It 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 and there is nothing objectionable in doing so, provided 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 decision (see *David Njuguna Wairimu v Republic KSM CA CRA No. 28 of 2009 [2010] eKLR*)



4. With the above in hindsight, I now proceed to determine the Appellant's appeal which is premised on five grounds. First, the Appellant states that one Dr. Murimi, who examined the complainant, CNW did not testify at all and that the person who testified as PW 3 was not the examining doctor. The Appellant claims that the Prosecution did not lay down any basis on why she was introduced as a replacement witness and that the whereabouts of the said Dr. Murimi were not indicated to the court by the Prosecution's counsel and that this failure contravenes the express provisions of section 33 as read with section 77 of the [Evidence Act](#).
5. Section 77 of the [Evidence Act](#) provides for production of documents by persons such as medical practitioners as follows:
 77. Reports by Government analysts and geologists
 - (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
 - (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
 - (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.
6. A plain reading of the above provision in the context of this appeal is that the court may presume the authenticity and genuineness of the doctor's signature, office and qualifications. The court may also summon the doctor if it thinks fit, for purposes of examining them. Going through the record, I do not think it can be disputed that PW 3 testified on behalf of Dr. Murimi Paul. She stated that she was familiar with his signature and went on to produce the medical P3 and PRC form on behalf of the hospital that he worked in. I find and hold that the reports were produced in line with sections 77 of the [Evidence Act](#). The Appellant, also had the opportunity to cross-examine PW 3 on the reports hence there was no prejudice or injustice occasioned. Therefore, this ground of appeal by the Appellant lacks merit and fails.
7. Second, the Appellant contends that the learned trial magistrate failed to gauge the credibility of PW 1 as a witness in that her testimony was contradictory and at best, hearsay. The Appellant states that the contradiction in her testimony in-chief was that she was informed of the defilement by her daughter CNW but during cross-examination, she was informed of the defilement by the Appellant's sister. Further, the Appellant states that contradictions can be found in PW4's examination in-chief.
8. Whether PW 1 was informed of the defilement by her daughter CNW or the Appellant's sister is immaterial and does not necessarily negate the fact that the defilement happened. The Court of Appeal, in [Erick Onyango Ondeng' v Republic NRB CA CRA No. 5 of 2013 \[2014\] eKLR](#) cited with approval the Ugandan Court of Appeal decision in [Twehangane Alfred Vs Uganda, CRA No 139 Of 2001, \[2003\] UGCA 6](#) that it is not very contradiction that warrants rejection of evidence. As the court put it:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

9. I find that PW 1's testimony did not affect the main substance of the Prosecution's case and if anything, was buttressing the point that CNW had been subjected to an act of penetration. I further find that whether she was informed of the defilement by CNW herself or the Appellant'
10. Third, the Appellant claims that there were different scenes of crimes captured in the evidence of PW 3, PW 2 and PW 4. However, having reviewed the testimony I do not find any inconsistencies as to the scenes of crime. CNW stated that she was defiled where the dust bins were kept, which testimony was consistent with that of PW 4. In any case, and as the Court of Appeal held in *Erick Onyango Ondeng v Republic (supra)*, the alleged contradictions on whether the defilement took place outside of the Appellant's house did not amount to much and neither did it negate the fact of defilement.
11. Fourth, the Appellant also states that PW 4's testimony was false and sensationalist and that her claim of the scene of crime being near dustbins and/or the victim screaming is unsupported. I have already found that PW4's testimony was consistent with that of CNW as to the scene of crime. PW 4 further testified that she arrested the Appellant at his house which is "near the dust bin". The record does not have any testimony of PW 4 stating that CNW screamed as has been claimed by the Appellant.
12. Fifth, the Appellant states that when CNW was being cross-examined, she stated that one "Mburu", who bathed her, was obviously not the house girl's sister and could not be a woman. In his submissions, the Appellant seems to suggest that it could have been the said Mburu who defiled CNW and that the said house girl ought to have been called as a prosecution witness.
13. The evidence on record unerringly points at the Appellant as the perpetrator of the crime. The Appellant was a neighbor of CNW who was well known to her and her mother PW 1. CNW identified the Appellant as the perpetrator to both her mother PW 1 and PW 4, the police officer. CNW's evidence was consistent and was corroborated by the evidence of PW 3 that she was defiled. Let me add by stating that the proviso to section 124 of the *Evidence Act* allows the trial court to convict the Appellant on the evidence of PW2 alone, as the victim of a sexual offence, if for reasons to be recorded, the trial court was satisfied that she was telling the truth.
14. The trial court conducted a *voire dire* examination of CNW and found that she was of tender years and incapable of understanding the meaning of giving evidence on oath. The learned trial magistrate, in the judgment, found that CNW's testimony, together with that of the other prosecution witnesses was reliable and truthful, with no reason to lie against the Appellant. In the foregoing, I reject the Appellant's claim that someone else called "Mburu" defiled CNW and that the testimony of the house girl was not necessary as the testimony of CNW alone was enough to convict the Appellant.
15. In sum, I am in agreement with the trial court that all the ingredients necessary to satisfy a charge of defilement were proved by the Prosecution against the Appellant; CNW's age was proven to be 4 ½ years as per the birth certificate produced. The testimony of CNW and that of PW3 proved that CNW was subjected to an act of penetration and CNW positively identified the Appellant as the person who defiled her.
16. Although the charge sheet referred to section 8(3) of the *Sexual Offences Act*, the proper section prescribing the penalty or sentence upon conviction of the offence of defilement defined under section 8(1) is section 8(2) as the child is below age of 11 years. This error did not affect the substance of the charge nor cause injustice as it is curable under section 382 of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya) (see also *Samuel Kilonzo Musau v Republic [2014] eKLR*). Section 8(2) of the *Sexual Offences Act* provides that 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. The trial court meted out the same sentence upon the Appellant and I find no reason for the court to interfere with the same.

17. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the respondent.

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