

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO EO97 OF 2023

DOUGLAS

MUGENDI.....

.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

***(From original Conviction and Sentence in Nanyuki CM Sexual Offences
Case No E022 of 2022 - L. Nyaga RM)***

J U D G M E N T

1. The Appellant, **DOUGLAS MUGENDI** was convicted after trial of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No 3 of 2006**. The particulars of the offence were that on 07/04/2022 and 9/04/2022 in Endana village in Segera location in Laikipia County intentionally caused his penis to penetrate the vagina of R.P a child aged 15 years. On 27/04/2023, he was sentenced to ten (10) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he filed a petition of appeal on 05/09/2023 challenging the conviction and the sentence on the following grounds;

- i.** The learned magistrate erred convicting and sentencing him without considering that the prosecution did not prove the case beyond reasonable doubt.
- ii.** The learned magistrate erred by failing to note that the age of the minor was not conclusively proved as the birth certificate was not availed.
- iii.** The learned magistrate erred by failing to note that the sentence was harsh and exorbitant.
- iv.** The learned magistrate erred by failing to note that he was not taken for medical examination to ascertain that he was the culprit.
- v.** The learned magistrate failed to note that the hymen was old broken.

3. The appeal was canvassed by way of written submissions. He argued that the prosecution failed to provide

compelling evidence as the evidence of the mother, the Sunday school teacher and the school teacher was absent. That the evidence of PW1 and PW2 is treated as evidence of single witness as a child will report what she has been directed to say by a guardian and in this case, the father. PW3 testified that there were no spermatozoa raising question on how the defilement occurred. No birth certificate was produced to ascertain the complainant's name and age which was an injustice to him.

4. In rejoinder, the Respondent's counsel submitted that PW1 testified that she was 16 years at the time of testifying which was nearly a year after commission of the offence therefore possible to have turned 16 years though at the time of the offence she was 15 years. Her father's testimony as to her age was material and that PW3, the clinical officer stated that she was 15 years at the time of the commission of the offence. Further, the trial court observation was reliable as the trial court conducted voir dire examination which was a testament that at a glance, PW1 seemed like a minor. The court also noted in the judgment that PW1 impression upon the

court was that she was a minor. The element of age was also not controverted during trial.

5. On penetration, he submitted that it was proved through the unchallenged evidence of PW1 as the Appellant did not lead evidence to dispute that penetration had occurred. Her evidence was also corroborated by PW3 who testified that the hymen was broken and concluded that defilement had occurred. Further, there was no possibility of error in identification as PW1 had spent two evenings with him and PW2 testified that he was their neighbour. Additionally, PW1 was found in his house in the middle of the night by PW2. He submitted that there was nothing probative in his defence for he only gave an account of his arrest hence his evidence did not shake the prosecution's case.

6. As to sentence, he submitted that sentencing is a discretion and none of the factors were alluded to interfere with that discretion. That he was sentenced to 10 years imprisonment contrary to **Section 8(3)** of the **Sexual Offences Act** which provides for a sentence of 20 years. He therefore urged the court to

enhance the sentence in line with **Section 354(b)** of the **Criminal Procedure Code**.

7. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. This duty was set out in **Okeno vs. Republic [1972] EA** by the Court of Appeal 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 vs. 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 vs. 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 conclusion; it must make its own findings and draw its own 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 vs. Sunday Post [1958] E.A 424.”

8. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

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 findings 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.”

9. To this end a summary of the evidence at trial would be a suitable point of departure.

10. The complainant in her unsworn testimony testified that on 05/04/2022, the Appellant tricked her and asked her to go to his house and stay there. He asked her to accompany him to where he was working and he then took her to his home. They prepared food, ate and slept and the appellant did ‘*mambo mbaya*’ to her. He had sex with her. In the morning, he asked her to leave and come back in the evening which she did. He was not home yet so she waited for him. They had sex again. Her father reported the matter and the Appellant was arrested. She was taken to hospital where she was treated.

11. On cross examination, she testified that there were people who saw them on the road and her brother saw her when she was in his house. She did not tell anyone in the plot of what he had done. That she was found in his house and not Joshua's house. That it is true he gave her Kshs.200/- which he gave her because they had sex.

12. PW2, complainant's father testified that the complainant was in primary school and she was 16 years old. He testified that on 11/04/2022 in the evening, he could not find the complainant. He searched for her and he was informed that she was at Indian's place where the Appellant was working. He went there and brought her back but after a few days, she went back there. He went looking for her and late in the night, he found her with the Appellant and he reported to the police. He reported that the Appellant had defiled his daughter on two occasion. The Appellant had taken the complainant and spent the night with her. He found her in the Appellant's house at midnight.

13. On cross examination, he testified that his son did not tell him that the complainant was in his house. He found the

complainant at the Appellant's house on the bed while the Appellant was seated on the seat. He was told that she was at his place. That he knew the Appellant well as he was a neighbour.

14. PW3, the clinician testified that the complainant was taken to hospital with history of being defiled by two people. She was 15 years old. On examination, she had a whitish smelling discharge, no injury to genitalia and the hymen was old broken. Other tests were negative but on high vaginal swab, epithelial cells were seen. There were no spermatozoa. He concluded that there was evidence of penetration. He produced the P3 and PRC forms as Pexhibit1 and 2 respectively.

15. PW4, the investigating officer testified that they were informed of a defilement case and they proceeded to Endana police post where they found the complainant and PW2. She escorted the complainant to hospital. The complainant informed her that two men had defiled her being Joshua Mwiti and Mugendi. They arrested the two men. Complainant stated that she was 15 years old.

16. On cross examination, she testified that she never asked for Kshs.20,000/- from the Appellant.

17. In his unsworn defence, the Appellant testified that on 17/04/2022 at his miraa business, he was asked by police to follow them to the station and when he enquired why he was to follow them, he was told he would know while at the station. He was taken to Endana police post and they accused him of selling bhang which he denied and he told them that he was selling miraa. They asked for Kshs.20,000/- which he told them he did not have. He was taken to Ngarengiro police station where he was asked to give Kshs.20,000/- but he told them he did not have the money. He was later charged in court and he was surprised that the charges were strange to him. He denied the charge.

18. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To

answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

19. It is trite that for the charge of defilement to stand, the Prosecution must prove the **age** of the victim (must be a minor), that there must be **penetration** and a clear **identification** of the perpetrator.

20. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

21. Proof of age is important in a sexual offense. In ***Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR)***, the Court of Appeal stated that:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

22. In the present appeal, the Appellant’s contention is that age was not proved since the birth certificate was not produced to ascertain the complainant’s age.

23. Indeed, there was no documentary evidence that was produced to prove the age of the complainant. The charge sheet indicated that she was 15 years old. The complainant during *voir dire* examination stated that she was 16 years old and at class six at (particulars withheld) primary school. Her father confirmed that she was in primary school and she was 16 years old. PW3, the clinician testified that she was 15 years which was also indicated on the P3 form. PW4 testified that the complainant stated that she was 15 years old.

24. The trial court while finding that age was proved stated that there was credible evidence that PW1 was a minor at the material time. A *voir dire* examination was conducted on PW1 due to the impression that the witness was a minor. That even though the charge sheet indicated that she was 15 years, it is possible to have celebrated her birthday in between before her testimony.

25. It is trite law that, where the actual age of the victim is not proved, apparent age of the victim shall suffice. The Court of Appeal in ***Jackson Mwanzia Musembi v Republic [2017] eKLR*** held that:-

“Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act.”

26. The Court of Appeal in ***Ali v Republic [2025] KECA 1004 (KLR)*** stated that;

“The appellant's main ground is that the ingredients of the offence of defilement were not proved, i.e., the complainant's age, penetration and identification of the perpetrator. He based his grievances on the fact that the evidence placed before the court was contradictory and inconsistent. The two courts below were satisfied that the complainant's age had been proven. Although the trial court noted that no documentary proof of age was presented to the court, it was of the view that, having interacted with the victim, it was obvious that she was four (4) years old. We do not fault the trial court for its observation. The prosecution cited cases that were on point regarding this issue. The cases of Mwolongochichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No.24 of 2015 (UR) (cited in Edwin Nyambaso Onsongo vs. Republic [2016] eKLR) where concerning age, this Court stated:“...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, baptismcard or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, amongst 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.”Also, Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, the

court held: "In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

27. And in ***Moses Nato Raphael v R {2015} eKLR*** the Court stated as follows:

"On the challenge posed by the uncertainty in the complainants age, this Court had occasion to deal with similar issue in Tumaini Maasai Mwanja v R Mombasa CRA No. 364 of 2010 where the Court held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually, the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability."

28. In the instant case, there was sufficient evidence to prove that the complainant was a minor as even the trial court during voir dire examination stated that '*I note that the witness is a minor and hence I shall conduct a voir dire examination.*' There was also

evidence that she was in class 6 in primary school. It is therefore my view that she was a minor for the purposes of sexual offences.

29. As to whether penetration was proved, the trial court found that the same was proved by the evidence of PW1, PW3 and PW4. She stated that she conducted voir dire and she was satisfied that the complainant possessed the requisite intelligence and understood the meaning and nature of an oath. She gave sworn evidence and viewed her as a truthful witness. She relied on the case of ***J.W.A V Republic (2014) eKLR*** where the court stated that in accordance with **section 124** of the **Evidence Act**, corroboration is not mandatory.

30. The complainant testified that she accompanied the Appellant to his house upon his request and they did 'mambo mbaya' which she clarified to mean sex. They did this on two occasions at his house. That she was found in his house and that he had given her Kshs.200/- for having sex with her. PW2 her father testified that he could not find the complainant and he was informed that he was at Indian's place where the accused was working. He went there and brought her back home but after a few days, she

went back there. He went looking for her and at midnight, he found her at the Appellant's place. That he found the complainant on the bed while the Appellant was seated on the seat.

31. PW3, the clinician testified that hymen was old broke, there was whitish smelly discharge and that there was presence of epithelial cells. He concluded that there was evidence of penetration.

32. It has been held that a broken hymen is not conclusive proof of penetration. But it is also trite law that **the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence (see *Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa) (unreported)*)** thus;

“the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

33. This is in line with the proviso to **section 124 of the Evidence Act** which provides that a trial court can convict on the evidence of the victim of a sexual offence alone provided that the

trial court believed or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. The said section provides;

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

34. To my mind, **Section 124** can only be complied with if the reasons are recorded in the proceeding indicating that the court is satisfied that the alleged victim is telling the truth. The court in ***Robert Wekesa Simiyu v Republic [2019] eKLR*** held that;

“There are no strait-jacketed reasons that must be recorded. What matters most is the impression made on the trial magistrate by the overall evidence of the witness. Those are the reasons he must record.”

35. I have perused the judgment of the learned magistrate and as noted earlier, she was satisfied that the complainant was truthful.

36. On the question whether the Appellant was the perpetrator, he denied committing the offence but he did not state whether he was familiar to the complainant. In his defence, he only gave an account leading to his arrest. There was no doubt as to whether he was the perpetrator as the complainant was categorical that the Appellant defiled her on two occasions in his house where she was found. He also gave her Kshs.200/-. Her father found her at midnight on the Appellant's bed while the Appellant was seated on the seat. Her father testified that he was their neighbour.

37. The Appellant bore no duty to prove his innocence as the burden of proof lay on the prosecution. However, when a cogent case is established through sufficient evidence like in this case, the Appellant's defence ought to raise a reasonable doubt for the prosecution's case to fail. As it were, the appellants case remains a mere denial that leaves the prosecution's case intact.

38. With regard to sentence, the Appellant was sentenced to ten years imprisonment which was below the minimum sentence provided under **section 8(3)** of the **Sexual Offences Act**. While sentencing him, the trial court stated that it was alive to the court of appeal decision in **Nyeri CR. Appeal No. 84 of 2015** where the court stated that the mandatory minimum sentences under the **Sexual Offences Act** were unconstitutional. This position has since been overtaken by the Supreme court decision in the Manyeso case. Thus the sentence passed on the Appellant was illegal.

39. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (see **Ogolla S/o Owuor v R {1954} EACA 270**).

40. The sentence imposed was in fact an illegal sentence as the Supreme Court laid to rest the controversy on the legality of the

mandatory minimum sentences provided in the **Sexual Offences Act**. I do not, however, that the state has not sought enhancement of the sentence and indeed no notice of enhancement was served to give the Appellant the chance to address the issue. In the circumstances, I would let the matter lie.

41. With the result that the appeal herein fails in its entirety and is dismissed.

**Dated signed and delivered virtually this 10th day of
February 2026.**

**A.K. NDUNG’U
JUDGE**