



**Ngoseywi v Republic (Criminal Appeal 384 of 2019)
[2024] KECA 147 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KECA 147 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 384 OF 2019
F SICHALE, FA OCHIENG & WK KORIR, JJA
FEBRUARY 16, 2024**

BETWEEN

CHARLES AMBUTSI NGOSEYWI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Eldoret (H. K. Chemitei, J.) delivered on 12th October, 2018 in HC.CR.A. No. 40 of 2015)

JUDGMENT

1. The appellant, Charles Ambutsi Ngoseywi was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.
2. The particulars of the charge against the appellant were that on 25th May 2012 in Eldoret East District within the then Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of B. A. A., a child aged 10 years.
3. At the trial the prosecution called 5 witnesses, in an endeavour to prove the ingredients of the offence.
4. Thereafter, when he was put to his defence, the appellant gave a sworn testimony. The learned trial Magistrate was persuaded that the prosecution had proved that the appellant committed the offence. He was therefore convicted.
5. Following the conviction, the trial court sentenced the appellant to life imprisonment. The appellant was dissatisfied with both the conviction and the sentence, and he lodged an appeal at the High Court.
6. By a judgment delivered on 12th October 2018, H. K. Chemitei J. dismissed the appeal. It is from that judgment that this appeal arises.



7. In order to appreciate the submissions made by the parties, it is necessary to lay down a summary of the evidence tendered during the trial.
8. B.A.A. was the complainant. She testified that she was 10 years old when the incident took place. B.A.A. told the court that she knew the appellant, as he used to be a casual labourer at a construction site near her home. She had known him for about one month.
9. On the material day, the appellant accosted her at their home, during his fourth visit to the house. During each of the said visits, the appellant asked for drinking water. It was the complainant's evidence that the appellant threatened to kill her if she told anybody about what he had done to her. When the complainant's mother came back home, she told her mother about the incident.
10. MMA is the mother of the complainant. She testified as PW2.
11. PW2 testified that she used to take food to the construction site where the appellant worked. PW2 had been given a tender by the foreman.
12. On the material day, PW2 went to work at her salon and business, which was at [particulars withheld]. Upon her return to the house, the complainant informed PW2 that the appellant had raped her.
13. PW3, BO, is a neighbour to PW2. He testified that the appellant was well known to him, as the appellant worked for him, as a casual labourer at a construction site. When he returned home, from his place of work, he heard people discussing about defilement of PW1.
14. On the next day, when the appellant reported to work at the site, people wanted to lynch him: that prompted PW3 to phone the Chief, who re-arrested the appellant from the hands of the people.
15. PW4, Dr. Joseph Embenzi, was a Senior Medical Officer at the Moi Teaching and Referral Hospital. He produced the P3 Form which had been signed by his colleague, Dr. Kibet. At the time when PW4 testified, Dr. Kibet was away, undertaking further studies. PW4 testified that the complainant had given a history of being defiled by somebody who was known to her.
16. When the complainant was physically examined, the doctor found that she had hymenal tears. The labia minora had an injury. There was vaginal discharge. The lab tests for H.I.V and Syphilis were negative. Spermatozoa was detected.
17. In conclusion, the doctor said that the complainant had been defiled.
18. PW5, PC Ndiema was the Investigating Officer. He said that the appellant was locked up at the Kapsoya Police Post, when he was accused of defiling PW1. He then issued the P3 Form which the complainant presented at the Moi Teaching and referral Hospital, at the time when she was being examined medically. PW5 produced the complainant's Birth Certificate No. 08xxxxx, in which it was indicated that the complainant was born on 13th October 2003. According to the calculations of PW5, the complainant was 10 years old at the time when she was defiled.
19. PW5 also testified that the medical evidence established that there was penetration. His said conclusion was based upon the P3 Form.
20. After PW5 testified, the prosecution closed its case.
21. When the appellant put forward his defence, he told the court about what transpired on the day when he was arrested. He said that when he got to his place of work, in the morning, a certain lady emerged from behind and she called him a thief.



22. Following the said allegation, the appellant was beaten and was then taken to the police station. The appellant testified that the lady who had complained against him never appeared in court during the trial.
23. During cross-examination the appellant said that he did not know PW2. He also did not know her place. However, the appellant stated that he was working near the home of PW2.
24. After the appellant put forward his defence, that marked the close of his case.
25. The appeal before us is a second appeal. In the circumstances, the mandate of this Court is restricted to addressing itself to matters of law only.
26. In the case of *Kaingo v Republic* [1982] KLR 213, at page 219, this Court held as follows;-

“A second appeal must be confined to points of law, and this Court will not interfere with concurrent findings of fact arrived at by the two courts below, unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did.”
27. The appellant had raised the following grounds of appeal;
 - “(a) The age of the complainant was not proved.
 - b. Penetration was not proved.
 - c. The sentence was handed down because it was of a mandatory nature: the trial court did not consider the mitigation.”
28. When the hearing came up on 7th November 2023, the appellant prosecuted his own appeal, whilst Miss Anguria, learned State counsel represented the respondent.
29. Both parties relied on their respective written submissions, which they highlighted.
30. It is common ground that age and penetration are essential ingredients in a case in which an accused has been charged with an offence of defilement.

Age of the Complainant

31. The appellant pointed out that the P3 Form indicated that the complainant was 9 years old. Meanwhile, the charge sheet indicated that the complainant was 10 years old. And in the understanding of the appellant, the complainant put her age at 11 years.
32. In the circumstances, it was submitted that there was no credible evidence to conclusively prove the age of the complainant.
33. We have re-evaluated the evidence and note that whilst the complainant told the trial court that she was 11 years old, she made it clear that that was her age as at the date when she testified in court, which was on 7th December 2012.
34. The complainant made it clear that;

“when this incident happened I was 10 years old.”



35. The Birth Certificate of the complainant was adduced in evidence. It showed that the date of birth was 13th October 2003, which is the very same date which the complainant’s mother testified as having been the date of birth.
36. We find absolutely no room for any doubt as regards the age of the complainant.

Penetration

37. According to the appellant, the evidence tendered by the prosecution did not prove that there had been penetration. The appellant submitted that if the complainant was between 10 and 12 years old, it was not possible for her to fail to state that she felt pain after a grown up man had penetrated her. He noted that the complainant went about her normal duties after the alleged incident.
38. The appellant said that the;
- “... failure by PW1 to vividly explain how she felt, what exactly transpired, leaves gaps to the prosecution case. Did it really happen. I submit this uncertainty should be resolved in favour of the appellant.”
39. In response to the appellant, the respondent submitted that there was sufficient evidence which proved penetration. The said evidence was tendered by the complainant, and was corroborated by the medical evidence.
40. In his reply to the respondent’s submissions, the appellant discounted the alleged evidence about penetration by pointing out that the doctor made reference to injuries which were already healing.
41. We note that the complainant was examined on the day after the incident. Therefore, if the injuries were already healing, it might have been necessary for the doctor to explain how the complainant’s injuries were healing so fast.
42. However, a perusal of the record of the proceedings reveals that the doctor did not make any reference to injuries which were healing.
43. The tears to the hymen, the lacerations and the erythema to the complainant’s left labia minora are testament to the penetration. We therefore find no reason to fault the finding by the trial court, (and which was re-affirmed by the first appellate court) that the prosecution proved penetration.

The Sentence

44. The appellant found fault with the trial court and the High Court because the sentence handed down was of a mandatory nature. He stated that the trial court had failed to take into account the mitigation.
45. In answer to the case of *Edwin Otieno Odhiambo v Republic* [2009] eKLR, which was relied upon by the appellant, the respondent submitted that the said case was distinguishable from this case.
46. In that case, the Court expressed itself in the following terms;

“On the issue of the sentence, it is clear to us that the trial court did not offer the appellant an opportunity to mitigate, and on this we are in agreement with the appellant counsel’s submission. Although we appreciate that Section 216 of the *Criminal Procedure Code* is worded in permissive terms, we are certain that on matters of sentencing, if a court disregards the provision and therefore fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence are enhanced.”



- 47. Whilst that case was determined on the grounds that the appellant had not been afforded an opportunity for mitigation, we find that in this case, the learned trial Magistrate provided the appellant with an opportunity for mitigation.
- 48. Nonetheless, it is evident that notwithstanding the appellant’s mitigation, the trial court felt compelled to hand down the Life Imprisonment on the grounds that it is mandatory.
- 49. In the case of *Francis Karioko Muruatetu v Republic* [2017] eKLR, the Supreme Court held that the mandatory nature of the death sentence, in respect to persons convicted for the offence of murder, was unconstitutional.
- 50. Subsequent to the said decision of the Supreme Court, the emerging jurisprudence which has gained currency in Kenya is that sentences of a mandatory nature were unconstitutional.
- 51. We have no doubt that it is only when the trial court takes into account the mitigation proffered by the accused, that the court can mete out a sentence that was proportionate to the offence in question.
- 52. Consideration of the circumstances in which the offence was committed enables the court to take into account the gravity or otherwise of the offence. Matters that either aggravate or mitigate the gravity of the offence would help the court to determine an appropriate sentence.
- 53. In this case, the respondent invited us to uphold the life sentence, whilst the appellant implored us to set it aside.
- 54. Having given due consideration to the circumstances in which the offence was committed, we did not find any aggravating factors which would justify the imposition of the sentence of life imprisonment. Accordingly, we allow the appeal against sentence, and set aside the same. In the lieu therefore, we now impose a sentence of 30 years’ imprisonment. The said sentence will run from 13th March 2015, when the trial court first sentenced the appellant.
- 55. For the avoidance of any doubt, the appeal against the conviction is dismissed.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

