



REPUBLIC OF KENYA



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**Mbithi v Republic (Criminal Appeal E113 of 2023)
[2024] KECA 424 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 424 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E113 OF 2023
MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA
APRIL 26, 2024**

BETWEEN

MORRIS NZIOKI MBITHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court at Machakos
(D.K. Kemei J.) dated 31st July, 2017. in Machakos CRA No. 91 of 2015)*

JUDGMENT

1. The appellant, Morris Nzioki Mbithi, has preferred this second appeal against the decision of the High Court upholding his conviction and sentence for 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 were that on the 27th of May, 2014, in Athi River District, Machakos County, he intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of FO, a child aged 5½ years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place as in the main count, he caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of FO, a child aged 5½ years. He was tried before the Principal Magistrate’s Court at Mavoko, convicted and sentenced to life imprisonment. His appeal to the High Court in Machakos was unsuccessful, with the High Court upholding both his conviction and sentence in the judgment the subject of this appeal.
2. In his grounds of appeal, the appellant impugns the decision of the first appellate court on five grounds, namely that it failed: to re-evaluate the prosecution evidence as incumbent on it as the first appellate court; to find that the medical evidence was ‘benign’ (sic) and unable to prove penetration as a key element of defilement; to observe that the prosecution’s case was ‘open to ambivalent’ (sic)



since the trial was unfair in contravention of article 25 of *the Constitution*; to give the appellant's defence adequate consideration; and to 'enact' (sic) section 169(1) of the Criminal Procedure Code (CPC) while 'disowning' the appellant's defence. He further alleges that the first appellate court erred in upholding his conviction and sentence without observing that the entire prosecution case was 'impeachable' under section 163(1) of the *Evidence Act*.

3. This being a second appeal, the remit of this Court is confined to consideration of matters of law only. Before embarking on a consideration of such matters of law as can be gleaned from the applicant's grounds of appeal, it is important to set out briefly the evidence that was before the trial court.
4. The complainant, FO, testified that on the material day, she was outside playing with the appellant's daughter, one G. The appellant called them both and they went to the railway line. The appellant told them to remove their clothes, which they did, and he defiled them in turn. The incident was reported to FO's mother, SM (PW3) by FO's brother, CM. FO admitted what had happened upon further questioning by SM when she was being bathed. FO was taken to the hospital and later to the police station, where she recorded a statement. FO further testified that this was not the first time that she had been defiled by the appellant.
5. The evidence of PW2, Pauline Mwendu, a clinical officer who examined FO at the Athi River Health Centre, was that FO had bruises on her labia minora and her vaginal orifice and that her hymen was torn; that there was no spermatozoa, and HIV and syphilis tests were negative. PW2 concluded that FO had been defiled.
6. PW3, SM, the complainant's mother, testified that FO was 6 years old, having been born on 2nd July 2008. That on the material day, while she was bathing FO, she noticed sperm around her vagina. She asked FO what had happened and FO laughed. When SM threatened to beat her up, FO told SM that the appellant had defiled her twice and warned her against telling anyone what had happened. SM then reported the matter to the police and was issued with a P3 form, after which she took FO to hospital. She produced an immunization card as proof of the complainant's age.
7. The complainant's brother, PW4, CM, a child aged 7 years, testified that he knew the appellant as 'Baba G' or Morris. On the material day, after school, when they were playing outside, the appellant called FO and his daughter, G, and they went to the appellant's house. CM followed them slowly and peeped through a hole in the door frame of the appellant's house. He saw the appellant remove FO's pants and pull her dress up; that the appellant then defiled FO and FO told him that it was enough; that the appellant then defiled his own daughter, G., who also told him that it was enough. CM testified that he then ran away and pretended to play. He further testified that he saw the appellant, FO and G go off towards the railway line. CM further testified about two other incidents in which he had observed the appellant defile his daughter, G, and the complainant. He identified the appellant in court as the perpetrator, stating also that the appellant had assaulted him for having informed FO's mother about the defilement.
8. PW5, PC Pauline Katunge, the Investigating officer, testified that she had received a complaint that the appellant had defiled FO, a child aged 5 and a half years at the time of the offence. That upon interrogating the appellant's neighbours, it was confirmed that the appellant had a habit of playing with children.
9. When placed on his defence, the appellant gave sworn testimony and called one witness, his wife, Monica Kavivi Nzioka. The appellant denied committing the offence. He testified that on the material day, he was in his wife's shop behind their house from 8.00 a.m. until 9.00 p.m. when they closed the shop. That he was the caretaker of the plot where FO and her family had rented a house; that FO's mother used to come home late and that he treated her children as his own. It was his testimony



that his relationship with FO's mother soured when she started defaulting in paying rent, coming home late at night and making noise for other tenants; that FO's brother, CM, had started engaging in sexual activities with his sister, the complainant, the appellant's daughter, G and other children in the neighborhood; that the appellant had once punished him for defiling his daughter, one J, following which a disagreement between him and FO's mother arose.

10. In her evidence, DW2 testified that her husband, the appellant, did not commit the offence he was accused of; that he was at their shop until about 5p.m. when she relieved him for a lunch break; that they remained in the shop until 7.00 p.m. when they closed the shop together. DW1 echoed the appellant's allegation that FO's brother used to defile FO and their daughter, G, and that she had once punished FO's brother for it; that FO's mother used to get home late and drunk, leaving her children unattended, and that other tenants had complained; that FO's mother had demanded Kshs. 500,000 to withdraw the case against the appellant; and that G had never reported to her that the appellant used to defile her.
11. The trial court found that both the immunization card and age assessment report produced in evidence put FO at 6 years of age at the time of the trial; it further found that the evidence of FO's brother, a child of tender years, was admissible as he was categorical that he had witnessed the appellant defile FO and his own daughter; and that whether or not CM had also had sex with the two children, FO and G, was not material as he might have been trying to experiment what he had seen; and that his evidence corroborated that of FO. The trial court further found that the fact of defilement had been established by the medical evidence adduced by the clinical officer, PW2. The court further held that pursuant to section 124 of the *Evidence Act*, the evidence of FO required no corroboration, and was quite explicit on the issue of defilement.
12. It was also the trial court's finding that, contrary to the appellant's contention backed by his wife's testimony that the charges were fabricated because of a grudge against him, no evidence was called in support of the allegation, nor was the issue brought up in cross-examination of the prosecution witnesses. Further, the claim that FO's mother had demanded a sum of Kshs.500,000 to withdraw the suit was not brought up in cross examination during her testimony. As for the identity of the perpetrator, the trial court found that he was well-known to FO and CM as he was the caretaker of the plot where they lived.
13. In his appeal in the High Court, the appellant challenged the decision of the trial court on the grounds that the offence of defilement had not been proved; that the trial court had convicted him on the basis of uncorroborated evidence of a minor; that his defence and submissions had not been considered; that his mitigation had not been considered, and that the sentence meted out was excessive. We observe that the arguments being raised before us with respect to section 163 of the *Evidence Act* on impeachment of the credibility of witnesses, section 169(1) of the CPC on the contents of judgments and Article 25 on the rights that cannot be derogated from are being raised for the first time before this Court.
14. The first appellate court considered the appeal and, upon an evaluation of the evidence against the grounds of appeal before it, found that the prosecution had proved its case against the appellant; and that the trial magistrate properly analysed the evidence correctly in arriving at a guilty verdict against the appellant on the main count of defilement. The first appellate court further found that the sentence meted out on the appellant was prescribed under section 8(1) and 8(2) of the *Sexual Offences Act*. It therefore upheld both the appellant's conviction and sentence.
15. At the hearing of the appeal before us, the appellant appeared in person while the state was represented by learned prosecution counsel, Mr. Omondi. The appellant indicated that he was relying on his written submissions and was challenging both his conviction and sentence. Whilst highlighting his



- written submissions, he urged this Court to consider his sentence, which he submitted was harsh and excessive. He also prayed that the Court should consider the fact that while in prison, he had undertaken a course in wood carving, and that he had reached grade 2 in the said course.
16. In his written submissions, the appellant submitted at length with regard to the findings of fact by the trial and first appellate court, contending that the first appellate court failed to re-evaluate the evidence as a whole before arriving at its decision; that had it done so, it would have reached a different conclusion. Further, that it failed to re-evaluate the evidence and find that the elements of defilement- the fact of penetration, the age of the complainant and the identity of the perpetrator- had not been established. The appellant noted the comments of the trial court, while considering the evidence of FO's brother, CM, that the conditions in which FO and her brother lived, were not good. He submitted that because of such comments, the trial court had introduced into the arena matters which were not raised at the trial or in counsel's submissions. Further, that contrary to the first appellate court's findings, the prosecution witnesses were not (sufficiently) credible to satisfy the requirements of section 124 of the *Evidence Act*. The appellant further rehashed the evidence before the trial court with regard to penetration to submit that there was no evidence to show that he had taken FO and his daughter G away and defiled them. His submission was that the prosecution evidence was questionable, and his conviction was therefore not safe.
 17. With respect to his sentence, the appellant submitted that it was harsh and excessive; that the first appellate court had noted that the trial court's hands were tied by the statutory provisions and while it had received a pre-sentence report, it had to mete out the appropriate sentence, life imprisonment. The appellant submitted that the views taken by the two courts below were in contravention of the sentencing purpose which emphasizes rehabilitation and safe return of the convicted person to society.
 18. In opposing the appeal, the respondent submitted that this being a second appeal, only matters of law fall for consideration, and this Court will not normally interfere with concurrent findings of facts by the two courts below unless it is shown that such findings are based on no evidence or are based on misapprehension of the evidence, or the courts below are shown to have acted on wrong principles in making the findings.
 19. Noting that the facts of the case were fairly straight forward, the respondent submitted that from the prosecution's five witnesses, it had been able to establish the three ingredients it was required to establish in order to prove the charge of defilement: penetration, the age of the victim and the identity of the perpetrator. That the trial court had found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. That in accordance with its obligation as the first appellate court as stated in *Okeno vs Republic* [1972] EA 32, the first appellate court had re-evaluated the evidence, concurred with the findings of the trial court and upheld both the appellant's conviction and sentence.
 20. Citing the decisions in *David Njoroge Macharia vs R.* 2011) eKLR and *Chemagong vs. Republic* [1984] KLR 213 with respect to the mandate of this Court to consider only matters of law in a second appeal, the respondent urged this Court not to interfere with the concurrent findings by the courts below as they were based on the evidence tendered, and there was no misapprehension of the evidence. The respondent submitted that the particulars of the offence were straight forward and free from ambiguity; the witnesses tendered testimonies which were truthful and reliable; and that all the elements of the charge and the ingredients of the offence were all proved by cogent evidence. The respondent therefore urged the court to dismiss the appeal and uphold both the conviction and sentence.
 21. We have considered the record of appeal, the appellant's grounds of appeal and the submissions of the parties, which we have summarised above. While we appreciate that the appellant is acting in person



and has no legal knowledge, we note that his appeal is essentially questioning the evidence on the basis of which he was convicted and sentenced to life imprisonment. This being a second appeal, our remit is confined to a consideration of matters of law by dint of section 361 of the CPC- see also *Karingo vs. Republic* [1982] KLR 213. This Court will interfere with concurrent findings of fact by the two courts below only if they are not supported by the evidence, or unless based on misdirection or errors of law- see *Omolo & 2 others v Republic* [1991] KLR 328.

22. A perusal of the appellant's grounds of appeal reveals that the appellant's main contentions are that the first appellate court did not re-evaluate the prosecution evidence or consider his defence; and that the sentence that it upheld was excessive. A consideration of the judgment of the first appellate court, however, reveals that it duly considered the evidence presented before the trial court, as well as the appellant's defence. The appellant's defence before the trial court was a denial of having committed the offence charged, coupled with an allegation that his prosecution was as a result of a grudge held by FO's mother towards him.
23. The first appellate court identified two issues for determination: whether the prosecution had proved its case to the required standard of proof, though it, incorrectly, phrased the issue as 'proved its case beyond' the required standard of proof, and whether the sentence imposed by the trial court was appropriate. The first appellate court identified the essential ingredients in a charge of defilement, and considered the evidence presented before the trial court by the prosecution evidence, which it analysed in detail and concluded: that FO was aged 5½ years at the time of the offence; that she knew the appellant, who was her neighbour; that she and the appellant's daughter, G, had been defiled by the appellant; and that the fact of defilement had been confirmed by the medical evidence. The first appellate court further noted that the appellant and his witness had confirmed that they were neighbours with the FO and her family. We therefore find that the contention that the first appellate court did not re-evaluate the evidence has no basis, and this ground is therefore unsustainable.
24. The appellant has complained that the first appellate court did not consider his defence. This calls for an evaluation of the evidence before the trial court, which is outside the remit of this Court. However, even if we were to consider the argument, we find that the first appellate court fully considered the evidence before the trial court, including the appellant's defence. The learned judge of the High Court noted that while the appellant alleged that he was in the grocery run by his wife all day until 9.00 p.m., he later admitted that he took a lunch break around 4.30 p.m.; that his wife testified that he took a break around 5.00 p.m.; that FO and her brother testified that the offence took place at about 5.00 p.m., around the time the appellant took his lunch break. We agree with the two courts below that the appellant's defence did not shake the prosecution evidence. His complaint that his prosecution was as a result of a grudge held by the complainant's mother was also dismissed, in our view, rightly so, by the trial court and the first appellate court upon a consideration of the evidence before the trial court. We agree fully with the findings of the first appellate court, find no basis for interfering with its decision, and dismiss the appellant's appeal on conviction.
25. The appellant has challenged the sentence of life imprisonment imposed upon him on the basis that it is harsh and excessive. He submits that the sentencing policy must promote restorative justice and values of rehabilitation. Section 361 of the Criminal Procedure Code provides that severity of sentence is a matter of fact, not law, and is therefore outside the remit of this Court. The question, however, is whether, even if it were not a matter of fact, we would be moved, on the facts of this case, to interfere with the sentence imposed on the appellant. The appellant was convicted of the offence of defilement of a child of five years. The evidence before the trial court showed that he liked playing with children and was popular with children. The investigating officer, PW5, testified that "I visited the plot where



I interviewed some people and some children who were playing outside there and I was told it was accused's habit to play with children and that is why complainant easily gave in.”

26. Not only was the appellant found guilty of defiling his neighbour's child, FO, but the evidence strongly suggests that he was defiling his own daughter, G, an agemate and playmate of FO.
27. In his mitigation, the appellant stated that he was a first offender and the sole breadwinner, and that he should not be sentenced to a custodial sentence. We are aware of the emerging jurisprudence, following the Supreme Court decision Republic [2017] eKLR, that provisions of the law which exclude or fetter the discretion of a court in sentencing are inconsistent with *the Constitution*. In line with that reasoning, several benches of this Court have held that the sentences prescribed in section 8(2), (3) and (4) of the *Sexual Offences Act*, which are mandatory minimums, should also be considered unconstitutional as they deprive courts of discretion in sentencing. Other benches have held a contrary view. Thus, the issue is yet to be settled. In our view, the minimum sentences under the *Sexual Offences Act* are indicative of the seriousness with which society takes sexual offences, especially when such offences are perpetrated against the most vulnerable, as in this case. The appellant exhorts us, in his written submissions, to reconsider his sentence as “there is no sinner without a future and there is no saint without a past”, thus the applicant being reformed and remorseful of the past proves to be a saint in the present.”
28. However, using the most charitable terms we can find, we can only describe the appellant as an irredeemable paedophile, preying not only on his neighbour's child, five years of age, but also on his own daughter, of the same age. His ‘example’ was so insidious and poisonous to a child's morals that FO's brother, a little boy of seven years, seems to have been moved to follow the appellant's example, an allegation made by the appellant in an attempt to blame his prosecution on an alleged ‘grudge’ by the child and his mother and sister, the complainant. In our view, the appellant is the kind of offender whom Mativo J. (as he then was) described in *Petition No. 97 of 2021-Edwin Wachira & Others v Republic* when he stated:

““26. The core value is to ensure that courts impose a ‘just and appropriate’ sentence. This requires a judge sentencing an offender to ensure that the ‘aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.’ The “just and appropriate sentence” arrived at considering the peculiar circumstances of the case can only be arrived if the sentence is fixed and pre-determined regardless of the peculiar circumstances. Some defilement cases are preceded or accompanied by extreme violence and sometimes leave life threatening impairments or even death. Offenders in such cases deserve no mercy. Stiffer or even maximum sentences must be deployed in such cases. Other cases involve very young and innocent girls or boys, mentally or physically challenged victims or extremely aged and helpless persons. Offenders in such cases deserve no mercy. Others cases involve persons who have been entrusted with young children, and they abuse the trust. Such persons deserve no mercy.”
29. The appellant in this case, in our view, was particularly depraved. It takes a particularly twisted mind to befriend children, earn their trust, and then prey on them sexually. That one of the victims was his daughter, though no charges were lodged against him with regard to her, makes it one of the cases where the mandatory minimum is well deserved.
30. Accordingly, we find no merit in the appellant's appeal against sentence either. His appeal is accordingly dismissed on both conviction and sentence.



DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

M. GACHOKA FCI Arb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

