



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Maingi v Republic (Criminal Appeal 23 of 2017)
[2024] KECA 1065 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1065 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 23 OF 2017
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

GEORGE KANYUITHI MAINGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Meru
(Kiarie W. Kiarie, J.) dated 20th December, 2016 in HCCRA NO. 21 of 2016)*

JUDGMENT

1. The appellant, George Kanyuithi Maingi, was charged with two counts of defilement contrary to Section 8(1)(2) (sic) of the Sexual Offences Act. The particulars of the charges were that on 13th December, 2014 in Tigania West District of Meru County, he intentionally caused his penis to penetrate the vagina of AM, a girl child aged 9 years and that of EK, a girl child aged 7 years.
2. The alternative charges were two (2) counts of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charges were that on the material date in Tigania West District within Meru County, the appellant intentionally caused his penis to touch the vagina of AM, a girl child aged 9 years and that of EK, a girl child aged 7 years.
3. The evidence upon which the appellant was convicted was that on 13th December, 2014, the mother of AM & EK (PW3) had gone to fetch water leaving AM (PW1) and EK (PW2) in the house with their stepfather, the appellant herein. It was PW1's testimony that the appellant while holding a knife ordered her to remove her clothes. She obliged and the appellant defiled her. PW3 returned home having forgotten the jerrycan top. She found the appellant in the act of defiling PW1. When she confronted him, he slapped her, chased her with a panga and locked her outside the house. He proceeded to defile PW2. PW3 reported the matter to the police leading to the appellant's arrest. PW1 and PW2 were taken to hospital for treatment. Medical evidence adduced by the Clinical Officer,



Geoffrey Muthomi Muriithi confirmed that PW1 had been defiled and that there was an attempt to defile PW2.

4. The appellant was charged at the Principal Magistrate's Court at Tigania. The trial court found that the prosecution had proved its case beyond reasonable doubt in count 1 and 2, convicted the appellant and sentenced him to life imprisonment. The trial court ordered that sentences were to run concurrently.
5. The appellant was aggrieved by his conviction and sentence and appealed to the High Court (Kiarie W. Kiarie, J.).
6. The learned Judge dismissed the appellant's appeal on conviction and sentence and found in part as follows:

“The medical evidence by Geoffrey Muthomi Murithi (PW4) was that medical evidence in respect of EK (PW2) showed that there was an attempted defilement. The learned trial Magistrate ought to have convicted him on the alternative charge. I therefore quash the conviction on the second count and set aside the sentence therein. I substitute the same with conviction on the alternative charge.

When the learned trial Magistrate convicted on the substantive charges, the correct position is to indicate that he made no findings on the alternative charges, but not to indicate that they were spent.

Where there is more than one life sentences, (sic) or where there is a life sentence and another lesser one, an accused ought to be sentenced to only one life sentence while the other one or others are held in abeyance.”

Section 8(2) of the *Sexual Offences Act* provides:

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.

“It is clear that the sentence under this section is mandatory. The sentence meted out by the trial Magistrate was therefore legal and the only one for that matter.

Having made the foregoing observations, the appellant's appeal partly succeeds on sentence. His appeal on conviction is dismissed. He will serve the sentence in count one while that one in count two is held in abeyance.”

7. Undeterred, the appellant filed a second appeal to this Court against conviction and sentence. At the hearing of the appeal, the appellant who was unrepresented confirmed to the Court that his appeal is only against sentence. He submitted that the sentence of life imprisonment imposed on him was excessive and prayed for a reduction of sentence to 18 years or 20 years imprisonment or in the alternative that he be set at liberty.
8. Ms. Nandwa, learned counsel for the State opposed the appeal and relied on her written submissions. Counsel submitted that the sentence meted out on the appellant was not excessive taking into account the fact that the appellant took advantage of two minors and defiled them.
9. Counsel further submitted that the life sentence meted out by the trial court was upheld by the High Court which carefully analyzed the evidence on record from both the prosecution and the appellant.
10. In conclusion, counsel submitted that the prosecution proved its case against the appellant to the required standard of proof beyond all reasonable doubt. Counsel urged this Court to uphold the High



Court's decision and find that the sentence was well within the law. Counsel urged the Court to dismiss the appeal for lack of merit.

Determination

11. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only. Section 361 of the Criminal Procedure Code provides that:-

“ 361.

(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

- a. on a matter of fact, and severity of sentence is a matter of fact; or
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

12. This Court in the case of *Chemagong v Republic* (1984) KLR 213 on page 219 stated as follows:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (*Reuben Karari s/o Karanja vs. Republic* 17 EACA146)” See also *Karingo v R.* (1982) KLR 213.

13. We have considered the appeal, the submissions, the authorities cited and the law. This is an appeal against sentence. It is the appellant's contention that the sentence meted out on him was excessive. Counsel for the respondent has urged us to uphold the sentence meted out on the appellant.

14. The trial court sentenced the appellant to life imprisonment for the charge of 2 counts of defilement which were to run concurrently. The 1st appellate court found that the medical evidence by PW4 showed that PW1 was defiled while there was attempted defilement in respect of PW2. The first appellate court further held that the trial court should have convicted and sentenced the appellant on the alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The 1st appellate court therefore quashed the conviction on the second count and set aside the sentence and substituted the same with conviction on the alternative charge.

15. Section 8(1) and (2) of the *Sexual Offences Act* provides as follows:

Defilement

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. 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.



16. The appellant was sentenced to life imprisonment which was a lawful sentence for the offence committed. It is notable that the appellant was PW1's and PW2's stepfather and PW3's husband.

17. As stated by this Court in the case of JMM Vs R [2020] eKLR:

“...sexual relations between an adult and a child is perverted and wrong, no matter the circumstance. And if the child is a family member, the psychological consequences are even more damaging. There are some lines that should never be crossed.”

18. The appellant has urged us to reduce the life imprisonment imposed by the trial court and upheld by the 1st appellate court. This Court in the recent decision of Evans Nyamari Ayako v R CRA No. 22 of 2018 in part held as follows:

“On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to 30 years imprisonment.”

19. By parity of reasoning, we allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed on the appellant shall translate to 30 years imprisonment from 7th June, 2016 when the appellant was convicted. The sentence in respect of the alternative charge will be held in abeyance.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

