



**Masiyo v Republic (Criminal Appeal E071 of 2023)
[2024] KECA 672 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KECA 672 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E071 OF 2023
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
JUNE 14, 2024**

BETWEEN

FRANCIS WEKESA MASIYO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (G. W. Ngenye-Macharia, J.) dated 18th April, 2018 in HCCRA No. 96 of 2017)

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act (SOA). The particulars of the offence were that on 7th June 2015, at Mowlem in Njiru District within Nairobi County, he committed an act which caused penetration into the female genital organ namely, vagina, of N. W (minor), a girl aged 1 year.
2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the SOA. The particulars were that on the same day and place, he intentionally and unlawfully committed an indecent act with N. W (minor), a girl aged 1 year, by touching her private parts, namely, vagina.
3. The appellant denied the charges leading to a trial in which the prosecution called 6 witnesses. The prosecution case was that on 7th June 2015 at 3.00 pm, the minor's mother, AAA, PW1, was working in her salon while also attending to the minor when the appellant, who was her neighbour visited. The appellant would occasionally mind the minor and on the material day he offered to do so. He took the child and went to PW1's house where he found her husband. PW1's husband left for work at about 4.00 pm. At around 8.00 pm, PW1 went back to her house and found the minor on the sofa set. The appellant was seated next to her. Normally, when the appellant visited, he would wait for PW1 to cook but that day he left in a hurry. PW1 decided to change the minor's diapers and was shocked when



she saw blood on the front side of the minor. She also noticed that the minor was bleeding from her vagina. She called her co-wife, SK, PW4, and told her what she had seen. PW4 went and examined the minor and they resolved to take her to Lucy Kibaki Hospital. They, however, found a long queue at the hospital and PW1 decided to call her mother who advised her to take the minor to Ofafa Jericho Dispensary. At the dispensary, it was established that the minor had been defiled. PW1 reported the matter to the police who referred her to MSF Mathare for further treatment. The police doctor also examined the minor. Later the appellant was arrested and charged. PW1 produced the minor's clinical card indicating that she was born on 22nd June 2014. The court also observed that the victim was a toddler of an apparent age of 1½ years.

4. Dr. Joseph Maundu, PW2, testified that he was the Police doctor who examined the minor on 9th June 2015. He observed the following upon examining the minor, there were no physical injuries; the external genitalia were tender and swollen at the vulvas; there were fresh bruises which were bleeding on touch; the hymen was torn and the tears were fresh. There was also blood on the genital opening. PW2 filled the child's P3 form which he produced in court.
5. Irene Nyangwachi, PW3, a clinical officer at MSF testified on behalf of her colleague, Purity Kajuju who had examined the minor. She stated that she knew the handwriting and signature of her colleague. PW3 gave testimony that the minor was taken to their clinic on 8th June 2015 and upon being examined it was observed that she had stains of blood and stool on her outer genitalia; the outer vulval walls were swollen and painful to touch and there were fresh vulval bruises which were easily bleeding on touch. The minor also had fresh hymeneal tears, bleeding and clots of blood on the hymen margins. PW3 produced the medical certificate that had been filled by her colleague and post rape care forms. PW4 corroborated PW1's testimony that the appellant was known to her and on the material day he picked the minor from the saloon and offered to take care of her.
6. No. 101809 PC Brian Musyoka, PW5, of Mowlem Police Post recalled that on 8th June 2015, he was on duty at night when members of the public took the appellant to the police station. A report had earlier been lodged at the station to the effect that the appellant had allegedly defiled a one-year-old child. PW5 rearrested the appellant. No. 65887 PC Sudi Hilali, PW6, was the investigating officer in the matter. He gave evidence that when he was assigned this case, he took both the victim and, the appellant who was already in custody, to a police doctor for examination.
7. At the close of the prosecution case, the learned Chief Magistrate (H. M. Nyaga), as he then was, found that the prosecution had established a prima facie case against the appellant and he placed him on his defence.
8. The appellant gave an unsworn statement and called one witness. He admitted that PW1 was known to him and that he had previously taken care of her child. The appellant explained that on the material day PW1 called him and asked him to take the minor to her house. On arriving at PW1's house, he found the minor's father there. Together with the minor, they accompanied the minor's father to fetch water and wash his bicycle at their plot. The minor's father then requested him to stay with the child as he was getting ready to go to work. The appellant testified that he did stay with the child and at 6.00 pm, he went back to PW1's house. When PW1 arrived, he handed over the child to her. She offered him tea but he declined. After two days the police went to his house, beat him and arrested him. The appellant denied committing the offence. He claimed that PW1 had been seducing him but he had refused her advances since her husband was his good friend. Nancy Nanjala Wekesa, DW2, a sister to the appellant, corroborated the appellant's evidence. She confirmed that PW1 had called the appellant and when he went back home, he was in the company of the minor and the minor's father. They later left with the bicycle of the minor's father. DW2 testified that the appellant went back to his house with



- the child and they stayed with her till 6.00 pm when he took her back to PW1's house. DW2 denied the allegation that the appellant defiled the minor.
9. The trial Magistrate evaluated the evidence tendered and found the appellant guilty of the offence of defilement. He convicted him and proceeded to impose a life imprisonment sentence.
 10. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Ngenye-Macharia, J (as she then was) who re-evaluated the evidence on record and delivered judgment on 18th April, 2018 upholding the conviction and sentence meted on the appellant.
 11. Dissatisfied with the decision of the High Court, the appellant preferred the instant appeal raising 5 complaints in a self-crafted 'Grounds of Appeal'. In his undated written submissions, the appellant further proffered 2 'amended grounds of appeal'. In summary, the grounds are that the learned Judge erred by failing to;
 - a. Find that the trial court erred by not finding that the appellant was not properly identified as the perpetrator of the offence.
 - b. Find that the trial court failed to observe that penetration was not proved.
 - c. Find that the trial court failed to observe that the complainant was not a credible witness.
 - d. Find that the trial court never established the age of the complainant.
 - e. Find that the trial court believed the complainant's evidence without giving reason.
 - f. Appreciate the doctrine of fair trial under Article 25 (c) of the Constitution and Section 216 of the Criminal Procedure Code
 - g. Find that the sentence to life is harsh, cruel and violates article 28 of the Constitution.
 12. During the hearing of the appeal, the appellant appeared in person while Mr. Kimanthi, the learned prosecution counsel, appeared for the state. Both parties had lodged written submissions which they relied on with Mr. Kimathi highlighting his.
 13. The appellant faulted the learned Judge for finding that since the minor never left his custody, no other person other than him would have defiled her. He argued that the prosecution never established that the child was in no other person's possible reach on the material day. The appellant contended that the presence of the minor's father at the scene of crime on the date in issue was a fundamental factor which weakened his culpability. He submitted that the sentence of imprisonment for life was unlawful and an affront to his right to dignity considering that he was in his youthful age when he was arrested. Citing the Sentencing Policy Guidelines, the appellant stated that sentencing must promote restorative justice and the values of rehabilitation. He urged us to find that in view of his mitigation, the sentence that was meted out was harsh.
 14. While asserting that he had undergone tremendous reforms and acquired skills to enable him to reintegrate into the society, the appellant beseeched us to impose an alternative sentence. To buttress this assertion, he quoted this Court's decision in Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) where the Court concurred with the Supreme Court's finding in Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) to the effect that, 'We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.'



15. For the respondent, Mr. Kimanthi opposed the appeal, submitting that the age of the victim was proved to be about one year, one month, based on the minor’s clinical card which was produced in court and which showed that she was born on 22nd June 2014. The minor’s mother, PW1, also confirmed that she was of that age. Further, penetration was established through the evidence of PW1 and that of PW2 and PW3, the doctors who examined the minor. Counsel continued that the identity of the perpetrator, the appellant herein, was founded on very strong circumstantial evidence in view of the fact that the appellant took the toddler from her mother and stayed with her till evening when he handed her back to her mother. To counsel, the circumstances surrounding the case irresistibly pointed to the appellant as the one who defiled the child. In support of this argument, Mr. Kimanthi set out the test to be applied in considering circumstantial evidence as cited in this Court’s decision in *Musili Tulo v Republic* [2014] eKLR;

[...]

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

...

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of *Musoke v R* [1958] EA 715 citing with approval *Teper v R* [1952] AL 480, thus:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co- existing circumstances which would weaken or destroy the inference.”

16. On sentence, counsel asserted that the circumstances surrounding the commission of the offence were very aggravating bearing in mind that the child was only one-year-old and therefore helpless. Mr. Kimanthi urged that despite recent jurisprudence encouraging the exercise of judicial discretion in sentencing, the sentence of life as imposed by the trial court and upheld by the High Court was appropriate and this Court should not interfere. In the end counsel implored us to dismiss the appeal in its entirety.

17. This being a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This was affirmed by the holding of this Court in *David Njoroge Macharia v Republic*[2011] eKLR;

“That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below



are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v R* [1984] KLR 611.”

18. Upon our review of the evidence on record and the submissions by the parties, we think the substantive question of law that arises for our consideration is whether the prosecution proved its case against the appellant beyond reasonable doubt and whether the sentence meted out was harsh and unlawful.
19. The appellant contends that he was not properly identified as the perpetrator of the offence. He asserts that the minor’s father was also present at the scene of crime on the material day. The appellant further argues that penetration was not proven and neither was the age of the minor established. He asserts that the sentence to life was harsh and unlawful.
20. We note that in considering this matter, the trial court itself observed the child in court and estimated her age to be one and a half years. PW1, the child’s mother also gave testimony to the effect that the minor was about one-year-old when she was defiled and she produced the child’s clinical card to confirm that age. Further, the trial court found that penetration was satisfactorily proved by the testimony of PW2 and PW3 who gave evidence on the nature of injuries that the toddler suffered and confirmed that she had been defiled. In her decision, the learned Judge was in agreement with the trial court that the age of the minor was sufficiently proved. The court was also of the view that the medical evidence that was adduced by PW2 and PW3 on the presence of injuries on the child’s genitalia, was consistent with penetration. The two courts below having made concurrent findings of fact on the elements of age and penetration, we are not persuaded that we should interfere with those findings given the evidence tendered. The record bears out that in addition to the evidence that was adduced to prove the child’s age, the court independently noted the child was about one and a half years. Moreover, the evidence by the medics, PW2 and PW3, detailing that the child’s hymen was torn and the tears were fresh, she had blood on the genitalia opening and that the genitals were tender and swollen at the vulva, is explicit evidence that the minor was defiled. We accordingly are of a similar mind as the two courts below that the age of the minor and penetration were adequately established.
21. As to the identity of the perpetrator of the offence, both courts below found that the circumstantial evidence pointed irresistibly to the accused to the exclusion of any other person as the person who defiled the toddler. In a bid to, presumably, shift blame to the minor’s father, the appellant contends that the minor’s father was also present at the scene of crime. However, besides the evidence of PW1, PW4, and DW2, the appellant himself admitted that he was known to the mother of the minor and he would at times mind the minor. He further confirmed that on the material day, he was given the child to take care of her and he was with her all through the day till evening when he returned her to her mother. It is therefore apparent that he should know who took advantage of the vulnerable one-year-old and defiled her.
22. We think that a consideration of the circumstances that surrounded the events of the material day, against the test to be applied in assessing circumstantial evidence as outlined in the decision in *Musili Tulo*(supra), leads to the inevitable conclusion that the appellant was the perpetrator of the offence. Evidence was adduced by PW1, PW4, DW2, and the appellant himself that the appellant went to the salon where PW1 works and he was given the minor to attend to as previously happened from time to time. The appellant went to PW1’s house where he claims he found her husband. They then left with the minor and PW1’s husband to go wash his bicycle after which they went back to PW1’s house. PW1’s husband apparently requested the appellant to stay with the child as he was leaving for work. The appellant testified that he went with the child to his house and stayed with her till evening when he returned her to her mother’s house. In our considered view, the circumstances that transpired on the date in question, taken cumulatively, form a chain so complete that there is no escape from the



conclusion that within all human probability the crime was committed by the appellant and no one else.

23. On sentence, the appellant argues that the sentence he was given is harsh and unlawful. He submits that he has since reformed and we should consider imposing an alternative sentence in view of this Court's decision in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR). In that decision, the Court was of the view that a life sentence could also mean a certain minimum or maximum time that is set by a judicial officer along established parameters of criminal responsibility, retribution, rehabilitation, and recidivism. It is noteworthy that the sentence that was meted out is not unlawful. Section 8(2) of the *SOA* prescribes the punishment for defilement of a child of 11 years or less to be life imprisonment. Concerning the appellant's plea that he has since reformed and thus should be given an alternative sentence in line with the decision in *Manyeso* (*supra*), we note that the appellant did not offer any mitigation. Significantly, we are mindful of the circumstances under which he committed the offence. The appellant was entrusted with the care of a one-year-old helpless toddler and he ended up doing a bestial act to her, defiling her and leaving her with horrendous injuries. We are of the view that while he should be given an opportunity for rehabilitation, this is one case that does not deserve any mercy or leniency from the Court. We consequently decline to interfere with the sentence meted out.

24. As a result, we find that this appeal is without merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

