



**Nyangau v Republic (Criminal Appeal E011 of 2020)
[2024] KECA 901 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 901 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E011 OF 2020
MA WARSAME, LA ACHODE & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

KEFA MARIITA NYANGAU APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Eldoret
(Omondi, J.) dated 18th September, 2018 in H.C.C.R.A No. 1616 of 2012)*

JUDGMENT

1. This is a second appeal filed by the appellant against his conviction and sentence. The appellant was originally convicted and sentenced to life imprisonment by the Chief Magistrate’s Court at Eldoret, 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 offence were that on April 30, 2011 at [particulars withheld] within Western Province, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of RM, a girl aged 9 years. In the alternative, he was charged with indecent act contrary to section 11(1) of the [Sexual Offences Act](#).
3. To briefly place the appeal into context, on April 30, 2011, RW, a 9-year-old girl was sent by her mother to collect milk from one Mulei’s home around 6:00 pm . She then encountered the appellant, who was employed by Mulei. The appellant pulled RW into his house and defiled her. Upon release around 7:00 pm, RW went home and informed her mother (PW2) about the defilement. The minor was then taken to hospital and the matter reported to the police, who arrested and charged the appellant.
4. In his defence the appellant stated that he was on his way to church on May 3, 2011, when the police arrested him and charged him with the offence stated before the Court.



5. The trial magistrate rejected the appellant's defence and found the evidence of the complainant believable and consistent with what she had narrated to her mother as corroborated by medical evidence. In addition, the court found that the age of the complainant had been proved by the health card produced before court.
6. The appellant was dissatisfied with the decision of the trial court and appealed to the High Court on the grounds that there was a discrepancy between the name of the complainant in the charge sheet, that the charge sheet did not use the word 'unlawful' in the particulars of the offence making the charge sheet defective, the document produced to prove the age of the complainant was not authentic and that the evidence of the prosecution witnesses was tainted with discrepancies.
7. The appeal was dismissed by the High Court (Omondi, J as she was then) which determined that the conviction was safe and the sentence was as provided under the law.
8. The appellant has now come before us faulting the judgment of the first appellate court alleging that the court made an error of law in dismissing his appeal and upholding the conviction and sentence. In particular, he contends that the identification was not proved correctly, that the evidence before the court was inconsistent, that the charge against him was not proved to the required standard and that the mandatory sentence imposed was unconstitutional.
9. When the appeal came up for hearing on June 25, 2024, the appellant appeared in person while Miss Anguria Advocate appeared for the State. The appellant relied on his filed submissions, and Miss Anguria also relied on submissions filed on behalf of the respondent dated November 20, 2023.
10. In his written submissions, the appellant submitted that his identification was not founded on credible evidence and that an identification parade was not conducted for the alleged victim to identify him. He further contended that the penetration was not proved and that the prosecution was duty bound through evidence of expert witnesses to point out the anomalies that the mother found in the genitalia of the complainant after the alleged defilement and that no eye witness confirmed that he had defiled the minor.
11. Elaborating on the inconsistencies in the prosecution's case, the appellant submitted that the identity of the complainant was unclear. The charge sheet indicated RW while the mother indicated her daughter was RW. In addition, there was a discrepancy of when the complainant was taken to hospital. The complainant's mother contended that the date was April 30, 2011 while the Investigating Officer alleged it was May 1, 2011. Lastly the appellant submitted that he was subjected to an illegal mandatory sentence which was contrary to the law.
12. For the prosecution, it was submitted that medical evidence proved that the complainant had been defiled and that identification was by recognition, as the complainant stated that the appellant worked for Mulei and she had seen him before. Further, the testimony of Mulei was not necessary as he did not witness the incident and that the witnesses called were sufficient to prove the case against the appellant.
13. Citing the case of *Shadrack Kipkoeb Kogo - vs - R.*, Eldoret Criminal Appeal No.253 of 2003 it was submitted that the court exercised its discretion correctly and that in passing the sentence, the court did not take into account irrelevant factors or wrong principles. Moreover the sentence was not excessive because the appellant committed a savage act of sexual debauchery and traumatised a young girl of only 9 years.
14. This Court's jurisdiction as the second appellate court is limited to matters of law only. As has been 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 vs R* [1984] KLR 611.

15. While appreciating the scope of our mandate as expounded above, and having given due consideration to the record of appeal, the memorandum of appeal and submissions, three issues arise for our determination, namely, whether the contradictions in the prosecution evidence were material to warrant an acquittal, whether the ingredients of the offence of defilement were proved beyond reasonable doubt and whether the sentence imposed on the appellant is legal.
16. Section 8 (1) of the *Sexual Offences Act* defines the offence of defilement in the following manner:-

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

Therefore, penetration is an essential ingredient and ought to be established in respect of any charge of defilement. Section 2 of the *Sexual Offences Act* defines penetration thus,

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;...”

Contrary to the appellant’s allegations, the evidence is clear that there was penetration on RW. The P3 form which was produced by the clinical officer of Turbo Health Centre, Dickson Kebut (PW5) confirmed upon examination that her hymen was broken, there was a white discharge on her genitals and blood in her urine.

17. As to the identity of the perpetrator, the only available evidence was that of RW. It is trite that under the proviso to Section 124 of the *Evidence Act*, a trial court can convict on the sole evidence of the victim of a sexual offence. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. See *Arthur Mshila Manga vs. Republic* [2016] eKLR. The trial court upon observing the demeanour of RW, found that she was a truthful and reliable witness and we see no reason to interfere with the same. The complainant gave a detailed description of the events and was able to recognize and describe the appellant as the perpetrator. She was also able to restate the ordeal to her mother and the Clinical Officer. In our view the fact that there was no other eye witness did not negate the recognition of the appellant and did not shake the complainant’s evidence.
18. As for the discrepancies in the name of the Victim, the complainant categorically stated that her name was RW and her health card as well as the P3 form submitted similarly state that her name is RW. The fact that her mother called her RW was immaterial because she also refers to her as RW in her testimony and says that “I send RW to the home of Mr. Mulei to collect milk.” As for the difference in dates of when the complainant was taken to hospital both the complainant’s mother, the Health Officer and the Investigating Officer confirm that in their examination in chief that it was April 30, 2011. We are not convinced by the appellant’s allegation that it was a case of mistaken identity and that there were two different complainants.
19. This Court in *Joseph Maina Mwangi vs. R-* Criminal Appeal No. 73 of 1993(unreported) aptly expressed itself on the issue of discrepancies as follows:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of *Criminal Procedure Code*



viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

20. Looking at the evidence, we are satisfied that the prosecution’s case was clear, cogent and solid. And that any discrepancies were immaterial to the conviction of the appellant. We found no discrepancy to warrant an interference with the sound conviction.

We are satisfied that the conviction of the appellant was based on overwhelming evidence, that the High Court correctly and clearly upheld the sound conviction entered by the trial court. There is nothing to warrant our intervention and interference.

21. In the end, the prosecution’s evidence dislodged the appellant’s defence of alibi and placed him at the scene. In *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR this Court held,

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution”; see *Karanja vs. R.*

22. On the issue of the appellant’s sentence, we reiterate that the life sentence imposed by the trial court and upheld by the High Court is not illegal and can still be meted out in deserving cases (see *Athanus Lijodi vs. Republic* [2021] eKLR).

23. In this case the trial court considered the fact that the appellant was a first offender and took into account his mitigation. Nonetheless, the court found the crime committed was serious and heinous and therefore sentenced the appellant to life as provided by Section 8(1) as read with 8(2) of the *Sexual Offences Act*. The High Court saw no reason to interfere in that regard, and neither do we.

24. The upshot of the foregoing is that we find that the conviction and sentence of the appellant is well founded in law. We hereby dismiss the appeal.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2024.

M. WARSAME

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W.K KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

