



REPUBLIC OF KENYA



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**Lekimenchu v Republic (Criminal Appeal 84 of 2017)
[2024] KECA 805 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KECA 805 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 84 OF 2017
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JULY 5, 2024**

BETWEEN

JULIUS LEKIMENCHU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment and conviction of the High Court
of Kenya at Meru (Kiarie W. Kiarie, J.) dated 28th April, 2017)*

JUDGMENT

1. The appellant, Julius Lekimenchu, was arraigned before the Resident Magistrate’s Court at Isiolo on 17th February 2014, and charged with the offence of defilement contrary to section 8(2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 14th February 2014 at [Particulars withheld], Samburu County within Rift Valley Region, the appellant intentionally caused his penis to penetrate the vagina of J.K, (the child) a child aged 5 years.
2. The appellant denied the charge prompting the trial in which the prosecution called a total of six (6) witnesses. It was the child’s testimony that on the material day her mother had sent her with one Makena to fetch water at a plot in town. That she left with Makena and K and that K who is her brother was in front of them. She testified that her shoe got torn and as she was struggling with it the appellant came and took her to his house “akanifanyia tabia mbaya”. She stated that as Lengwe was defiling her in his house, K and Makena came and saw them and that was when Lengwe stopped.
3. She stated that they returned to the shop and their mother gave them food and they went home, that she did not tell her mother what had happened to her until the following day. On receiving the report, the child’s mother reported the matter to the police station and later to the hospital for examination. J.K identified the appellant in court as the person who defiled her.



4. J.K.'s brother E.K (PW2), aged eleven years, testified in similar vein and narrated what happened on the material date and time. He corroborated JK's evidence in every material detail. He stated that when they told their mother what had happened to J.K. they went to the police station at Archers Post? and reported the matter and the police arrested the appellant who lived next to their shop.
5. E.J.M., (PW3) the 8 year old girl who was in J.K and E.K's company when the despicable incident happened repeated the same story. She told the trial court that she saw the appellant take J.K. and she screamed asking the appellant to leave J.K. alone but he did not listen to her. She stated that they followed the appellant and J.K. to his house and that she stood in front of his house but could not see inside the house. She stated that J.K. was screaming and that when she came out she put on her panties. She stated that the door was open and that there was a carton on the floor where the appellant lay with J.K. She pointed to the appellant and stated that she knew him as Lengwe.
6. PW4, Zipporah Gitabi Nyaga stated that she was a businesswoman and a resident of Archers Post. She stated that on 14th February 2014 at around 1900hrs she sent J.K., E.J.M. and E.K. to go to her neighbor to look for water and that they said there was no water and she sent them home. She stated that in the morning of Saturday E.J.M. told her that when they went to fetch water the appellant took J.K. to his house and removed her panties. She stated that she went and reported at Archers Post and that at the station she was given a P3 form and she took J.K. to Isiolo General Hospital. She identified the appellant and stated that he lives near her shop.
7. PW5, Mohamed Duba, a clinical officer at Isiolo Hospital, told the court that he examined the child who alleged to have been defiled. He said that the child's hymen was broken, and that there was presence of pus cells in her vagina. He formed the opinion that the child had been possibly defiled. After investigations, the appellant was arrested and charged with the defilement of the child.
8. On his part, the appellant gave an unsworn statement. He asserted that he is a casual laborer and a tout and that on the material day of 15th February 2014 he was in the vehicle having dropped passengers at the stage and that he was arrested at 13:30hrs. He stated that he was taken to court on 17th February 2014 having spent the night of 16th February 2014 at Archers Post Police Station. He stated that there existed a grudge between him and the child's mother and that he was being framed.
9. The learned trial magistrate upon assessing and analyzing the evidence tendered before the court found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. The appellant, aggrieved by the decision, filed an appeal before the High Court at Meru.
10. In his petition of appeal, the appellant complained that he was convicted on the evidence of a single witness and the sentence meted by the trial court was harsh in the circumstances. In a judgment dated 28th April, 2017, the learned Judge (Kiarie Waweru Kiarie, J.), after re-evaluating the record of the trial court and the submissions made before him, saw no reason to disturb the conviction and sentence by the trial court and dismissed the appeal in its entirety.
11. The appellant is now before this Court, seeking to overturn the decision of the first appellate court, and has proffered five (5) grounds of appeal. In summary, the appellant states that: the trial Judge erred in matters of law and fact by failing to note that the appellant was denied a fair hearing contrary to Article 50(j) of *the Constitution* when the prosecution failed to supply him with all relevant evidence (P3 form); by passing a harsh sentence against the appellant; by failing to note that the prosecution did not prove its case beyond reasonable doubt and by relying on contradictory, inconsistent and uncollaborated evidence.



12. The appeal was canvassed by way of written submissions of both the appellant and the respondent. When the matter came up for plenary hearing, the appellant appeared in person, while learned counsel Ms. Njeru appeared for the State. Both parties informed the Court that they were relying on their written submissions and did not make any oral highlights.
13. It was the appellant's submission that the trial court failed to grant him a fair trial. He asserted that the evidence adduced by the witnesses in the trial was inconsistent and that there was no evidence pointing out that they were warned by the appellant not to tell anyone. The appellant's submissions revolve around factual matters, which fall outside our remit as a second appellate Court.
14. Finally, the appellant submitted that the trial court did not consider the persisting grudge between him and the child's mother, who he said he had been living with as man and wife for three months prior to the alleged incident but had parted due to domestic conflicts. He claimed that the child's mother had framed him using her children, PW1, PW2 and PW3. He contended that he had raised all this during his defence in vain. In other words, the appellant was saying that both courts below failed to consider his defence.
15. He urged us to allow the appeal and to quash both the conviction and sentence.
16. In rebuttal, learned State Counsel, Ms. Njeru, on the appellant's complaint that he was denied a fair hearing contrary to Article 50(j) of *the Constitution* and in particular that he was not supplied with the P3 form, submitted that the trial court conclusively dealt with the matter as evidenced by the judgment delivered on 28th April 2017. She hence contended that the allegation was baseless and lacks merit and as such the appellant's right to a fair hearing under Article 50(j) was never violated through the trial process as all the documentary evidence was provided.
17. Further it was submitted that the prosecution proved its case beyond reasonable doubt and the witnesses were consistent and that the evidence was collaborated. Reliance was placed in the case of Charles Wamukoya Karani -vs- Republic, Criminal Appeal No. 72 of 2013(Unreported) on the critical ingredients forming the offence of defilement being the age of the child, proof of penetration and positive identification of the assailant.
18. Learned counsel submitted that all the children knew the appellant before the date in question, and there was no possibility of mistaken identity and the appellant was accordingly properly identified as the perpetrator.
19. On the issue of defilement, the clinical officer testified that defilement occurred as evidenced by the swollen external genitalia, broken hymen and presence of pus cells all indicative of penetration. It was also submitted that the age of the child was properly dealt with by the testimony of PW6 who produced the child's birth certificate that indicated that the child was born on 19th October 2018 and was, therefore, 5 years old.
20. Finally, on the sentence counsel submitted that the trial court did not err on the sentence and that the same was legally sound. Reliance was placed in Bernard Kimani Gacheru -vs- R. [2002] eKLR. We were urged to dismiss the appeal and uphold both the conviction and sentence.
21. The mandate of this Court on a second appeal is confined to matters of law only by dint of section 361(1) of the Criminal Procedure Code. See Kaingo -vs- Republic [1982] KLR 213 at page 219 where this Court stated:

“ A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 found as it did (Reuben Karoti s/o Karanja versus Republic [1956 17EACA 146]).”

22. We have carefully considered the record, the grounds of appeal, and the rival submissions set out above, in light of this Court’s mandate. We decipher the following issues of law arise for our determination:
 - i. whether the prosecution established the elements of the offence of defilement, to the required standard of proof;
 - ii. whether the first appellate court addressed itself to the grounds of appeal advanced by the appellant; and
 - iii. whether the life sentence imposed on the appellant was harsh and excessive.
23. With respect to the first issue, the prosecution was required to establish three elements forming the offence of defilement namely; the age of the complainant, proof of penetration and positive identification of the perpetrator. On the age of the victim, there was ample evidence adduced before the trial court to prove that she was 5 years old. Her mother’s evidence coupled with the birth certificate produced as evidence laid that issue to rest.
24. The second element is penetration. The appellant submitted that penetration was proved and that as per the complainant’s P3 Form which noted that her hymen was broken, that alone was not sufficient to prove penetration as a broken hymen, according to him, could be due to other factors other than through sexual intercourse. The act of penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence.
25. In the instant case, evidence of penetration emanated from the complainant’s sworn evidence, and was corroborated by the medical evidence of PW5. The child was categorical that the appellant inserted his penis into her vagina. She told the court that the appellant took her to his house, placed her on a carton on the floor and did “tabia mbaya” to her and that she felt pain and screamed, a scream that was heard by PW2 and PW3 who had followed the child and the appellant to his house. PW3 was categorical that she heard the scream and saw PW1 leaving the appellant’s house as she wore her panties. This Court, in the case of Muganga Chilejo Saha -vs- Republic [2017] eKLR observed that courts in this country have generally accepted the use of euphemism, “akanifanyia tabia mbaya” as an apt description of acts of defilement.
26. The complainant was examined a day after the incident occurred. PW5 told the court that the complainant’s hymen was broken, and that there was presence of pus cells in her vagina. After examining the complainant, PW5 concluded that the complainant had been penetrated. The complainant’s P3 form produced by PW5 made similar observations. We find no cause to impeach the concurrent findings of the two courts below which found that the medical evidence, analyzed together with the evidence of the complainant, and the eye witness account of PW3, established beyond any reasonable doubt that the child was defiled.
27. In regard to the issue of identification of the perpetrator, we find that the appellant was properly identified as the perpetrator by the two other children who were in her company when the appellant grabbed her and took her to his house where he defiled her as the two waited outside. Further, the appellant was well known to the victim, PW2 and PW3 as he was a neighbor of their’s at the place where their mother had a shop and that they used to play with him.
28. Contrary to the appellant’s submission, the first appellate court did re-appraise the evidence adduced before the trial court, and came to the same conclusion as the trial court, that the appellant was guilty as



charged. We are also satisfied that the High Court considered the appellant’s defence and gave reasons as to why the same was not convincing. We are, therefore, unable to disagree with the concurrent findings of fact by the two courts below as a consequence of which we find the appeal on conviction devoid of merit and dismiss the same accordingly.

29. The last issue relates to the life sentence imposed upon the appellant by the trial court, and affirmed by the first appellate court. The appellant urged that the same was harsh and excessive. The appellant was sentenced to life imprisonment, which is the minimum mandatory sentence prescribed for the offence of defilement of a minor aged eleven (11) years or less, under Section 8(2) of the *Sexual Offences Act*.
30. It has recently been held by this Court that the mandatory nature of the minimum sentences prescribed by the *Sexual Offences Act* interferes with judicial discretion, when it comes to sentencing. This was the holding of this Court in Joshua Gichuki Mwangi -vs- Republic. Criminal Appeal No. 84 of 2015 (unreported). The Court stated as follows with respect to imposition of mandatory sentences:

“This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Rule 159(2)(a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice be done to all and to protect the purpose and principles of *the Constitution*. This includes the provisions of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited.”

31. There appears to be no mitigation from the appellant who does not appear to be remorseful at all. It is our considered view absent the appellant’s mitigation, his conduct of taking advantage of a young child, who was only five years old at the time, was reprehensible. It is our finding that the life sentence imposed by the trial court, and affirmed by the first appellate court, was commensurate with the offence committed, in the circumstances of this case.
32. Be that as it may, this Court has declared the indeterminate nature of “Life Imprisonment” unconstitutional and interpreted life sentence to amount to 30 years imprisonment. See Julius Kitsao Manyeso -vs- Republic. Criminal Appeal No 12 of In view of this recent jurisprudence, we set aside the life imprisonment imposed on the appellant and substitute therefore a term of 30 years imprisonment. The appeal on sentence only succeeds to that extent.

DATED AND DELIVERED AT NYERI, THIS 5TH DAY OF JULY 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

