



**M'Mitea v Republic (Criminal Appeal 48 of 2019)
[2024] KECA 1094 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1094 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 48 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
AUGUST 21, 2024**

BETWEEN

TONY KIAMBI M'MUTEA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgement of the High Court of Kenya at Meru (R.V.P.
Wendoh, J.) dated 6th March, 2015 in HC Cr. A. No. 42 of 2011)*

JUDGMENT

Background

1. The appellant, Tony Kiambu M'Mutea, was convicted and sentenced to 25 years' imprisonment by the Chief Magistrate's court at Meru for the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*.
2. The particulars of the main charge were that on 20th August, 2010 at around 9.00p.m at [Particulars withheld] village in Meru Central the appellant intentionally caused his penis to penetrate the vagina of BND, a child aged 13 years.
3. In count II the appellant was charged with the offence of indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 20th August, 2010 at around 9:00p.m at [Particulars withheld] village in Meru Central the appellant intentionally touched the vagina of BND (name withheld) with his penis against her will.
4. The appellant pleaded not guilty to the charges and the prosecution called six (6) witnesses in support of its case.
5. BND (PW1) testified that she was 13 years old and was born on 12th December 1997. It was her evidence that on 20th August 2010 at around 9:00p.m she was at the appellant's homestead where she had been



- for three days. That the appellant's mother was away and had requested her to stay in her house with the children of the appellant's sister. PW1 testified that one child named M went to the appellant's house to borrow a matchbox and after use, the appellant, well known to PW1 as Tony, while at his house, called PW1 and asked her to return the matchbox to him. PW1 testified that she returned the matchbox to the appellant who was standing at the door to his house. It was her further evidence that the appellant held her neck and covered her mouth and took her inside his house.
6. PW1 testified further that the appellant laid her on the floor, tore her clothes while holding both her hands together and covered her mouth with a piece of cloth. It was her testimony that he defiled her from 9:00pm until 11:00pm when Lucy Kagwira (PW2) called the appellant whereupon he released her. It was her further evidence that JK gave her a trouser to wear as she had left the appellant's house without her clothes. It was PW1's further testimony that PW2 called PW1's aunt, AK (PW3) who took her to Meru Police Station and later to Meru General Hospital for examination and treatment as she was in pain.
 7. Lucy Kagwira (PW2) testified that she was the appellant's sister in law and was PW1's neighbour. It was her evidence that on the material night at about 11:00pm JK (PW4) went to her house and informed her that the appellant had locked PW1 in his house. PW2 testified that she went to the appellant's house and called the appellant who did not respond. It was her further evidence that she then called PW1's name and PW1 came out of the appellant's house. It was her evidence that PW1 was crying and when she asked her if anything wrong was done to her PW1 initially hesitated and subsequently informed her that something bad had been done to her. PW2 further testified that PW1 narrated to her and other family members who had arrived at the scene that the appellant had lured her into his house and defiled her.
 8. AK (PW3), who was an aunt and guardian to PW1 testified that on the material night, she was sleeping in her house at about 1.00a.m when she was called by PW2 who informed her that JK (PW4) had called and informed her the appellant had locked PW1 in his house. PW3 testified that she woke up and went to the house where PW1 and JK ordinarily slept where she found PW1 crying. It was her testimony that PW1 tearfully narrated to her that the appellant had defiled her. PW3 testified further that she took PW1 to Meru Police Station and later to Meru General Hospital where she was examined and treated.
 9. JK (PW4) was a minor aged 12 years and the appellant's niece who testified that on the material night, while she was sleeping, she noted that PW1 was not in her bed where she ordinarily slept. It was her testimony that she called PW2 and informed her that PW1 was not in their house whereupon PW2 went to the appellant's house and called PW1 who responded from the appellant's house.
 10. No. 60169 SDA Catherine Nyaga (PW5) was the Investigating Officer who testified that she was attached to Meru Police Station and that on 2^{0th} August, 2010 at around 11:00p.m she was at the police station as the duty officer when PW1 was taken by members of the public and her guardian (PW3) complaining that she had been defiled by the appellant. PW5 testified that she interrogated PW1 and later carried out her investigations. It was her further testimony that she went to the scene where she recovered PW1's jeans trouser under the appellant's mattress. It was here further evidence that she then led the arrest of the appellant who had disappeared on the material night. She produced PW1's birth certificate which indicated that she was born on 11th December, 1995.
 11. Dr. Issac Macharia (PW6) testified that his colleague examined and treated PW1 on 20th August, 2011. PW6 testified that the doctor who examined PW1 found that her hymen was freshly perforated and that there was evidence of sexual intercourse. PW6 produced the P3 form.
 12. The appellant was found to have a case to answer and was put on his defence. He gave sworn evidence and chose not to call any witness. The appellant denied committing the offence for which he was



- charged. He testified that on the day that he was arrested he went to Thimangiri to work. His evidence was that the case of defilement was fabricated against him by PW3 as he had a disagreement with her at home. In cross-examination he testified that he had not reported any complaints relating to the alleged disagreement against PW3 and that there was no pending case between them.
13. After conclusion of the case, the trial court convicted the appellant and sentenced him to twenty-five (25) years' imprisonment for count I and ten (10) years imprisonment for count II. The two sentences were to run concurrently.
14. The appellant was aggrieved by the conviction and sentence and appealed to the High Court at Meru (R.P.V. Wendoh, J.). In a judgment delivered on 6th March, 2015, the learned Judge held as follows:
- “I find no reason to fault the trial court’s judgment. Upon conviction, the trial court went ahead and convicted the appellant on both the 1st charge of defilement and the second charge of indecent act thus falling into serious error. The two offences arise from the same transaction. The second charge should have been an alternative of the main charge and once a finding was made on the main charge, no finding should have been made on the alternative charge. For that reason, I quash the conviction on the second charge and set aside the sentence of 10 years imprisonment. A person who defiles a girl aged 12 to 15 years is liable to imprisonment for not less than 20 years imprisonment upon conviction. The appellant was sentenced to 25 years imprisonment. The sentence is not excessive, it is lawful and I confirm it. In the end, the appeal partially succeeds in respect of count 11 and the appellant will serve 25 years imprisonment on count 1. It is so ordered.”
15. Dissatisfied by the judgment, the appellant lodged a second appeal to this Court appealing against both conviction and sentence. The appellant who was unrepresented submitted that he relies on the grounds of appeal stated in the submissions and abandoned the grounds in the memorandum of appeal. The grounds of appeal as stated in the submissions are that:
- i. The learned Judge erred in law by failing to note that the sentence meted by the lower court is manifestly harsh and excessive.
 - ii. The learned appellate judge erred in matters of law by failing to note that there was possibility of mistaken identity since the evidence of the clinical officer proved that the complainant was defiled.
 - iii. Error of law and fact by not invoking the time spent in custody while sentencing the appellant as stipulated under section 333(2) of the Criminal Procedure Code Chapter 75 Laws of Kenya.
16. The memorandum of appeal had the following grounds of appeal:
- i. That both the High Court Judge and the learned trial magistrate erred in both law and facts in failing to observe that the prosecution tendered unreliable, inconsistent and contradictory evidence and lacked the material to prove the ingredients of the offence;
 - ii. Error in law in failing to make a finding that there was an existing grudge between the appellant and the child who tailored all that against him;
 - iii. Error in failing to make a finding that investigations, the court proceedings and the charges suffered procedural irregularities;
 - iv. Failure to see the whole case was not proved beyond reasonable doubt to justify conviction;



- v. Error in convicting the appellant without considering that the overt act which amounts to commit the offence was not in existence in the evidence of witnesses;
 - vi. Failing to consider that there was insufficiency of evidence connecting the appellant to the offence of which the evidence was not only reliable but inadmissible;
 - vii. Error in convicting appellant without considering that from the whole evidence given in court there was no eye witnesses; and
 - viii. Sentence meted was manifestly excessive.
17. At the hearing of the appeal, the appellant was unrepresented while Ms. Nandwa, learned Prosecution Counsel was on record for the respondent. Both parties had filed their written submissions, which they both relied on.
18. The appellant submitted that identification was not free from error as it was dark as per the evidence of PW1 and further that PW1 testified that the assailant did not talk to her. The appellant submitted that the evidence tendered by PW4 showed that the scene of crime was a house shared by three brothers (PW4's uncles) including the appellant and it was difficult to know who the assailant was from among the three brothers. The appellant relied on the case of John Waitbaka Chege vs Republic [1979] eKLR for the proposition that great care should be exercised where the conditions for favourable identification are poor.
19. The appellant further submitted that his defence was faulted without any cogent reasons. He submitted that he had made a sworn statement and raised a defence of alibi, however, no enquiry was made regarding the said defence. The appellant further testified that he had a grudge with PW3 who was the aunt and guardian of PW1 and that the charge of defilement against him was therefore a frame up. The appellant further submitted that neither the trial court nor the 1st appellate Court considered the issue of the existence of the grudge that he raised.
20. Regarding sentencing, the appellant submitted that the provision that a convict for the offence of defilement with a child between the age of 12 and 15 years is liable for a term of not less than twenty years (20) curtail the sentencing discretion and offends the constitutional dictates of fair trial. The appellant further submitted that he ought to have been sentenced to 20 years and not 25 years' imprisonment. Further, that on reliance of the sentencing guidelines, the maximum sentence should not be imposed on first offenders unless there are aggravating circumstances. The appellant relied upon the case of Republic vs Jagani & another [2001] KLR 590 for the proposition that this Court has jurisdiction to interfere with a sentence imposed where, among other reasons, the sentence is manifestly excessive in the circumstances of the case.
21. The appellant further submitted that the period he was in custody was not taken into account during sentencing. The appellant relied on the case of Ahamad Abolfathi Mohamed & Another vs Republic [2018] eKLR. The appellant urged us to allow the appeal, quash the conviction and set aside the sentence.
22. Ms. Nandwa, learned counsel for the State opposed the appeal. Counsel asserted that the trial court and the 1st appellate court found the evidence of the prosecution to be truthful and credible. Counsel



relied on the case of MTG vs Republic (Criminal Appeal E067 of 2021) [2022] KEHC189 (KLR) where the High Court (Mativo, J. – as he then was) held that:

“... Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically...”.

23. Counsel submitted further that the alleged grudge alluded to by the appellant was between him and PW3 and not PW1 who was the complainant. Counsel asserted that if at all there was a grudge between the appellant and PW3 then PW3 would not have let PW1 keep the company of the appellant’s nieces when the appellant’s mother was away. Counsel further submitted that all ingredients of the offence of defilement were proved, that is, the age of the complainant was proved by production of a birth certificate to be 15 years at the time of the commission of the offence; PW1 testified that the appellant defiled her; the medical examination conducted on PW1 and the P3 form produced showed evidence of penetration; and the appellant was positively identified. Counsel maintained that identification was by recognition, as the appellant was well known to PW1, as they were neighbours. Counsel further submitted that the appellant did not deny the fact that he knew PW1. Further, PW3 confirmed that the appellant was their neighbour.
24. Counsel asserted that on the material night, PW2 called out to PW1 who came out from the appellant’s house. Counsel relied upon the case of Francis Muchiri Joseph vs Republic [2014] eKLR on the issue of identification by recognition where this Court stated as follows:
- “In Lesaru vs 1988 KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is not better mode of identification than by name. In R Vs Turnbull (1976) 3 All ER 551, Lord Widgry CJ observed that the quality of identification evidence is critical: if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger...Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
25. On the sentence, counsel submitted that the sentence imposed on the appellant was appropriate noting the gravity of the offence and its effect on the victim, PW1. Counsel submitted that under the Judiciary Sentencing Policy Guidelines, courts are bound by the minimum mandatory sentences and cannot impose a sentence below what is prescribed. In conclusion counsel submitted that the respondent proved its case beyond reasonable doubt for the offence of defilement. Counsel urged us to dismiss the appeal for lack of merit and uphold both the conviction and sentence.

Determination

26. 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.”

27. 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* [1950] 17 EACA146).”
See also *Karingo v R.* [1982] KLR 213.

28. With the above in mind, we have considered the appeal, the submissions, the authorities cited and the law.

29. We discern four (4) main issues for determination in this appeal to be whether the prosecution proved its case beyond reasonable doubt; whether the defence was properly rejected; whether sentence meted by the trial court and upheld by the 1st appellate court was manifestly harsh and excessive; and whether the time spent in custody by the appellant was taken into account in sentencing by the trial court and the 1st appellate court in compliance by Section 333(2) of the Criminal Procedure Code.

30. Section 8(1) of the *Sexual Offences Act*, provide that:

“8

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

31. On the question whether the prosecution proved its case beyond reasonable doubt, this Court in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 it was stated as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

32. On the age of PW1, a birth certificate was produced by PW5 which indicated that she was born on 11th December, 1995 and that she was therefore 15 years at the time of the commission of the offence. On penetration, PW3 testified that the appellant defiled her. Further, medical evidence adduced by PW6 confirmed that there was penetration and that PW1 was defiled.

33. On the identity of the perpetrator, we note that identification of the appellant was based on the evidence of PW1 and PW2. From the record, PW1 was categorical that it was the appellant who took her into his house and defiled her and that she had known him all her life as they were neighbours. Identification of the appellant was therefore through recognition. The complainant knew the appellant well as they were neighbours and on several occasions, the appellant’s mother while away would request PW1 to go and stay in her house with the children of the appellant’s sister. It is notable that the appellant did not dispute that he knew PW1 and that PW2 who was PW1’s aunt and guardian confirmed that the appellant was her neighbour.

34. PW2 further testified that on being informed by PW2 that PW1 was locked by the appellant in the house, PW2 called out the name of the appellant but he did not respond. It was her testimony that she then called PW1 who responded and came out from the appellant’s house.



There was nothing in evidence to suggest that the house had more than one occupant at the material time. It is also notable that the Investigating Officer, PW5, testified that she found a jean trouser under the appellant's mattress which PW1 testified she had worn on the material night and which she had left in the appellant's house when she was called by PW2.

35. This Court in *Reuben Taabu Anjononi & 2 Others vs. R* [1980] KLR stated that:

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”

We therefore find that all the ingredients of the offence of defilement were present.

36. On the ground that the appellant's defence was not considered, from the record, the appellant testified that on the material day he left his home in the morning and returned in the evening at 9.00pm when he was arrested. It is notable that the appellant testified regarding the day that he was arrested and not the day of the commission of the offence. The appellant claimed that there was a grudge between him and PW3. He did not give details of the alleged grudge. The prosecution cast doubt whether PW3 who was PW1's aunt and guardian would have allowed PW1 to take care of PW4 when the appellant's mother was away. We agree – from the evidence of PW1 and PW2, the appellant's mother on a number of occasions requested PW1 to take care of the appellant's sisters' children (including PW4) when she was away. We therefore find that the 1st appellate court did not err in rejecting the appellant's defence. The appellant's appeal against conviction therefore fails and is dismissed.

37. On the ground that the sentence was harsh and excessive, the appellant was sentenced to 25 years' imprisonment for the offence of defilement by the trial court which was upheld by the 1st appellate court. Section 8(3) of the *Sexual Offences Act* provides as follows:

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

38. In *Shadrack Kipkoech Koogo v R Eldoret Criminal Appeal No. 253 of 2023* this Court reiterated that:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be inferred (see also *Sayeka vs. R* (1989 KLR 306).”

39. From the record, the appellant preyed on a 13-year-old girl who was taking care of his sister's children. Section 8(3) of the *Sexual Offences Act* provides for an imprisonment for a term of not less than twenty years where the victim is aged between the ages of 12 and 15 years.

Accordingly, we see no reason to interfere with the sentence of 25 years imprisonment imposed by the trial court and upheld by the High Court.

40. The appellant has urged us to take into account the period that he was in custody as that was not considered during sentencing. This Court in *Ahamad Abolfathi Mohamed & Another vs Republic* (supra) held as follows:

“Taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It



is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.”

41. By parity of reasoning and in accordance with Section 333(2) of the Criminal Procedure Code, the sentence will be effective from 1st September, 2010 which was the date on which the appellant was first arraigned in court. Those shall be the orders of the Court.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF AUGUST, 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

