



**Mutua v Republic (Criminal Appeal 181 of 2017)
[2024] KECA 1090 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1090 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 181 OF 2017
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
AUGUST 21, 2024**

BETWEEN

ISAAC MUTINDA MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

*((An appeal from the judgment of the High Court of Kenya at Nanyuki
(M. Kasango, J.) delivered on 8th November 2017 in HCCA No 39 of 2017))*

JUDGMENT

1. The appellant, (Isaac Mutinda Mutua), was arraigned before the Chief Magistrate's Court at Nanyuki to answer a charge of defilement contrary to Section 8(1) of the *Sexual Offences Act*, as read with Section 8(3) of the same Act. It was alleged that on the 10th day of August 2015 about 3.00pm at Laikipia Central in Laikipia County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of C.W.M. a girl aged 15 years. He denied the charge and was tried, convicted and sentenced to serve twenty years imprisonment.
2. Being aggrieved, the appellant appealed to the High Court challenging both conviction and sentence on five grounds. The learned Judge of the High Court (M. Kasango, J), after re- evaluating and analysing the evidence on record, found that the prosecution proved the charge beyond reasonable doubt and that the sentence imposed on the appellant was lawful. The appeal was consequently dismissed in its entirety.
3. Further aggrieved, the appellant has come to us on second appeal citing grounds, inter alia, that; the superior court erred in law by upholding the conviction while failing to consider that the charge sheet was fatally defective and could not sustain a conviction; by upholding the conviction, failing to appreciate that the penetration element was not conclusively proved and could not sustain a conviction; by upholding the conviction while failing to appreciate that the prosecution failed to prove



- the identification element; by relying on evidence that had contradictions that went to the root of the case; and by upholding the appellant's sentence and in contrast the sentence failed to consider the time spent in remand as provided under Section 333(2) of the Criminal Procedure Code, which was 1 year and 4 months.
4. At the hearing before the trial court, eight (8) witnesses testified for the prosecution. They included the child, her mother, a village elder, two AP officers and there was also the evidence of the clinical officer who first examined the minor and a doctor who examined the minor subsequently and produced the P3 form and a police officer who investigated the case.
 5. In brief, the evidence was that on the material day, CMW a fifteen- year-old girl was on 10th August 2015 grabbed by the appellant at knife point and dragged to his house as she fetched water and that while in the house and still under threat of a knife the appellant defiled her. Later CMW's mother together with others who were assisting her to look for her missing daughter, demanded the appellant to open his door and when he did CMW was found lying on the bed inside the appellant's house.
 6. The matter was reported to the AP post and subsequently the child was taken to the hospital where she was examined by Dr. Julia Maina from Nanyuki Teaching and Referral Hospital. On examination the doctor found CWM's hymen was perforated but there were no bruises or lacerations. The doctor concluded that CWM had been defiled and she was also pregnant. The witness produced the medical report in court as exhibit.
 7. On his part, the appellant testified on oath and stated that on 10th August 2015 in the evening after eating dinner he slept and at midnight heard people knocking at his gate and because he was not from that area he feared for his life and refused to open the door. He was taken to the police station, but he denied the charge. He maintained that he did not defile the CWM.
 8. At the plenary hearing of the appeal, the appellant appeared in person and informed the Court that he would rely on the written submissions that he had filed.
 9. On the other hand, the respondent was represented by Patrick T. Onjoro, Senior Principal Prosecution Counsel who also relied on his written submissions filed on 25th September 2023.
 10. As regards the charge sheet, the appellant stated that the prosecution case was based on a defective charge as the charge sheet did not give sufficient information to allow him to understand the charges and to defend himself sufficiently. He relied on section 134 of the Criminal Procedure Code. He submitted that the allegations were not supported by medical evidence for the reason that the clinical officer who examined the victim gave evidence in cross-examination that he could not determine whether the victim had been defiled on 10th August 2015 when she was first examined.
 11. He further submitted that the clinical officer opined that there had been earlier sexual activity and on examining the victim that evening she was pregnant and he therefore posed the question as to whether the prosecution case was founded on what happened on 10th August 2015 or before that day. He submitted that the prosecution failed to prove that it was indeed he that had committed the offense with the exclusion of any other based on the fact that the victim was already pregnant before 10th August 2015, a fact that the victim failed to disclose and as such raised an issue of credibility.
 12. The appellant further submitted that the prosecution did not prove penetration as the clinical officer stated that they were only to confirm penetration and that from the physical examination they could not confirm that she was defiled on that date. Further, that the medical doctor from Nanyuki referral hospital gave evidence that the complainant was pregnant but could not tell how old the pregnancy was, from this evidence it was submitted that penetration was not established.



13. According to the appellant that the prosecution failed to positively identify him as the person who penetrated the complainant, and that in sexual offenses especially where the issues of pregnancy arise the question is whether it was the appellant who penetrated the complainant to the exclusion of any other person and as such the prosecution failed in this aspect of identification of the appellant by the complainant.
14. With regards to sentence it was submitted that the trial court failed to consider the time spent in remand while undergoing trial. He relied on section 333(2) of the Criminal Procedure Code. He urged that he was arrested on 10th August 2015 and was sentenced on 24th December 2016 having spent one year and 4 months while undergoing trial and that the court should consider the time spent in remand while undergoing trial.
15. On his part, Mr Onjoro opposed the appeal and maintained that the appellant was properly convicted on the evidence on record, the charge against him having been proved beyond reasonable doubt. Counsel submitted that the evidence of PW1 was consistent and unshaken and that even though there was absence of bruises and lacerations the evidence of PW1 was credible in itself and was sufficient proof of defilement. Reliance was placed on *Kassim Ali -vs- R. [2006]eKLR* for the proposition that the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by way of oral evidence of a victim or by circumstantial evidence.
16. It was submitted that it is now settled law that sexual assault is proven by evidence not by medical examination and that evidence by the victim or even circumstantial evidence is enough to prove rape or defilement as the case may be. It was further submitted that failure to produce a lab test was not fatal as PW7 and PW8 confirmed that the complainant was pregnant and produced medical evidence to that effect as exhibits.
17. According to learned counsel, CWM's evidence was corroborated by the evidence of PW2 and PW3 who found her inside the appellant's house lying on the bed when they forced him to open the door. Further, that the law is settled that in sexual offences where the victim is a minor corroboration is no longer necessary as a matter of law. We were urged to dismiss the appeal in its entirety.
18. This being a second appeal, by dint of section 361 of the Criminal Procedure Code, our jurisdiction is limited to issues of law only. We reiterate what this Court stated in *M'Riungu -vs- Republic [1983] KLR, 455* that:

“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.
19. The issues of law which we discern for our consideration are whether the first appellate court properly re-evaluated the evidence and came to the right conclusion that the charge against the appellant was proved to the required standard and whether the sentence imposed on the appellant was proper.
20. Penetration is defined under section 2 of the *Sexual Offences Act* as “the partial or complete insertion of the genital organs of a person, into the genital organs of another person.” Therefore, the ingredients of the offence that had to be proved in order to establish the charge of defilement against the appellant were; that there was an act of penetration that is, the partial or complete insertion of male genital



organs, into that of the child; that the child was under eighteen years of age; and that the appellant had been positively identified as the person who committed the act of penetration.

21. The judgment of the first appellate court reveals that the court addressed the evidence and analysed the issue of the complainant's age, penetration and whether the appellant was the perpetrator, before rejecting the appellant's defence and arriving at the conclusion that the offence of defilement was established and appellant proved to be the perpetrator.
22. On our part we have similarly examined the evidence and found that CWM testified on how the appellant grabbed her from outside his house took her to his house, and under threat to stab her with a knife he had removed her clothing and proceeded to have sex with her. The evidence of the minor was again consistent with that of her mother who found her lying on the appellant's bed and later with that of a clinical officer who examined her and noted that the minor's hymen was broken and also found out that she was pregnant.
23. The appellant appears to think that since there was no proof that he was responsible for CWM's pregnancy, then penetration on his part was not proved. We hasten to state, however, that it matters not that the victim could have been penetrated by somebody else and impregnated before the date in question. What was in question was whether the appellant defiled the child on the date in question. A DNA test was not necessary as the issue was not the paternity of the baby CWM was carrying.
24. There was concurrence by the two courts below that the child was actually found lying on the appellant's bed on the date and time in question; that the appellant refused to answer when he was called out to open the door, and although there were no fresh bruises in the child's genitalia, there was evidence of recent sexual activity. There was, therefore, sufficient credible evidence that penetration had taken place.
25. The age of the complainant was relevant not only to establish the charge of defilement, but also as a relevant factor in the sentence to be imposed under Section 8(3) of the *Sexual Offences Act*. In *Justin Kubasu -vs- Republic*, this Court cited *Edwin Nyambogo Onsongo -vs- Republic* [2016] eKLR, in which the Court cited with approval *Mwolongo Chichoro Mwanyembe -vs- Republic*, Mombasa Criminal Appeal No. 24 of 2015, that:

“...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as birth certificates, baptism card or by oral evidence of the child, if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among the credible forms of proof ...’ We think that what ought to be stressed, is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable”
26. In regard to the child's age, there was ample evidence to show that she was 15 years old. Other than her mother's testimony, the birth certificate produced in court as exhibit left no doubt that the child was 15 years of age.
27. As regards the identity of the person who defiled the child was concerned, the appellant was identified by the child. She knew him well before the date in question as he was a neighbour and she used to fetch water at his place. The village elder also identified the appellant as having been with the minor in the house when he was forced to open the door and the minor was found lying on his bed. Although the appellant claimed that he is the one who took himself to the station at midnight when he heard people knocking at his gate, he did not deny having been at home on the date and time when the offence was committed. We have no reason to depart from the concurrent findings of the two courts below to the



effect that the child was found inside the appellant’s house lying on his bed after the appellant was forced to open the door.

28. We come to the conclusion that the first appellate court properly reconsidered and re-evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard, against the appellant, and his defence was properly rejected. We, therefore, find no merit on the challenge on conviction.
29. With regards to the sentence, it is noteworthy that the minimum sentence provided for defilement of a child aged between twelve and fifteen years under section 8(3) of the *Sexual Offences Act*, is the 20-years imprisonment. The sentence meted against the appellant is the minimum mandatory sentence provided under the law. The constitutionality of mandatory minimum sentences under the Sexual Offences Act has been the subject of several decisions of the High Court and this Court. The issue has nonetheless been settled by the Supreme Court in its recent decision in Republic vs Joshua Gichuki Mwangi [Supreme Court Petition No. E018 of 2023] where the Supreme Court ruled that the said sentence is not unconstitutional, and further that this Court has no discretion to interfere with the minimum sentences imposed under the *Sexual Offences Act*. We shall, therefore, not interfere with the sentence.
30. We note, however, that the appellant also faults the two courts below for failing to apply section 333 (2) of the Criminal Procedure Code. Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis supplied).

See also Ahmad Abolfathi Mohammed & another -vs- Republic [2018] eKLR).

31. It is clear from the proceedings that the appellant was arrested on 10th August 2015. He appeared in court on 14th August 2015. He was convicted and sentenced on 24th December 2016. That period was not considered when the trial court passed sentence.
32. We, therefore, order that in compliance with section 333 (2) of the Criminal Procedure Code, the sentence shall be effective from 14th August 2015, which was the date the appellant was arraigned in court and remanded in custody where he remained until he was convicted. The appeal against sentence only succeeds to the said extent. We order that the officer in charge prisons re-computes the appellant’s sentence to give him credit for the period spent in remand custody. The appeal against both conviction and sentence is otherwise dismissed.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF AUGUST 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE



.....

JUDGE OF APPEAL

true copy of the original.

Signed

DEPUTY REGISTRAR

