



**KKM v Republic (Criminal Appeal 9 of 2019)
[2023] KECA 8 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KECA 8 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 9 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 20, 2023**

BETWEEN

KKM APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Malindi
(Chitembwe, J.) delivered on 6th February 2017 in High Court)*

JUDGMENT

1. This a second appeal by the appellant, KKM. He is aggrieved by the judgement of the High Court (S Chitembwe, J) delivered on February 6, 2017, dismissing his appeal against a judgment of the Chief Magistrate’s Court at Malindi delivered on March 17, 2015, in which he was found guilty and convicted for the offence of defilement contrary to section 8(1) as read with section 8 (2) of the [Sexual Offences Act](#) and sentenced to life imprisonment. The particulars of the offence were that on August 11, 2012, at [Particulars Withheld] village, [particulars Withheld] Location in Malindi District within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MN, a girl aged 3 years 7months.
2. His complaints in the present appeal as set out in his memorandum of appeal and amended supplementary grounds of appeal are that the Judge failed to consider that the prosecution did not prove its case; that the Judge did not consider that the medical evidence was incomplete, unreliable and insufficient; the victim of the alleged offence was subjected to cross examination resulting in a miscarriage of justice; that the age of the victim was not proved; and that the sentence imposed was not within the law requirement and that.
3. During the hearing of the appeal before us on September 29, 2022, the appellant appeared virtually from Malindi Prison. He relied entirely on his written submissions filed on September 20, 2022 in



which he expounded on the grounds of appeal. Learned Senior Principal Prosecution Counsel Ms Mutua held brief for Miss Ombele learned Principal Prosecution Counsel for the respondent also relied entirely on written submissions filed on January 28, 2022.

4. The facts as established by both the trial court and the High Court are that the appellant and MN are not only relatives but are also neighbours. MN's mother, PW1, described the appellant as her uncle. On August 11, 2012 at about 6.30 pm, MN was playing with her friend outside when the appellant appeared with his children. MN followed them. PW1 saw the appellant holding MN's hand. PW1 engaged the appellant in conversation enquiring about a property she had bought from the appellant's brother. PW1 narrated that the appellant:

“...was still holding [MN's] hand. He told me that he was going with MN home and he would return her to me as he brings to me the report on the land so I should not be worried. I respected my uncle and I allowed him to go with M. I continued washing clothes.”

5. Concerned that her daughter MN had not returned after about 20 minutes, PW 1 decided to look for her. She found her (MN) walking with two other children (PW3 and PW6) along the road. MN was walking with difficulty, with her legs apart. MN showed her mother Kshs. 10 she had in her hand. On enquiring from her where her grandfather (appellant) was, MN stated that “he had left her by the roadside and given her Sh 10 to buy potatoes.” Intrigued by the manner in which MN was walking, PW1 asked her to walk towards her. MN tried to walk. She informed her mother (PW1) that she was in pain. On closer examination, PW1 saw that MN “had semen on her legs dripping down her legs” and “her panty was on her thighs.” PW1 called her neighbours. MN was taken to Gede Dispensary and a report made at Watamu Police Station.
6. PK (PW4) was one such neighbour. She was at home on 11th August 2012 at about 6.00 pm when she heard PW1 talking in an alarming tone. She went outside. She saw that MN “had semen trickling down her legs”. She advised PW1 to take MN to hospital and accompanied them to Gede Dispensary and onto Watamu Police Station.
7. NK (PW3) a student in class six at [particulars Withheld] Primary School and her brother JV (PW6) a student in class 7 at [particulars Withheld] Primary School, both neighbours of MN, recalled that they were on the road on August 11, 2012 at about 6.30 pm when they saw MN with the appellant; the appellant was holding MN's hand and smoking a cigarette; they saw the appellant give MN Kshs 10 “and told her to go home”; they decided to escort MN home. She was “walking funnily”, she said. They informed PW1 what they had seen.
8. MN had difficulties testifying. All she said in her testimony was that she goes to school; that she knows the appellant, KK; and that “he did bad manners” to her and hurt her in her private parts. The court made a note of her demeanor and recorded that “she is scared.”
9. The investigating officer Police Constable Faith Mukiri (PW7) was attached to Watamu Police Station. On August 12, 2012, she found a report made the previous day by PW1 that her daughter MN had been defiled by the appellant and taken to hospital. She recorded witness statements including that of MN who said that “babu” had defiled her by inserting his “mdudu” in her private parts; she gave PW1 a P3 Form which was filled at the hospital. She obtained MN's clinic card from PW1 which she produced indicating MN's date of birth to be February 23, 2009.
10. Ibrahim Abdullahi (PW5) a Senior Clinician at Malindi Hospital examined MN at Malindi Hospital on August 17, 2012 where she presented with a history of defilement. He noted that MN had tenderness and pain while walking. Upon examining her, he concluded that MN, aged about 3 years 7 months, had been defiled. There was a tear on the vagina and her hymen was perforated. He noted



- that a lab examination showed spermatozoa. DNA specimen was taken. He assisted in the collection of the DNA samples from MN and the appellant. He produced the P3 Form and treatment notes.
11. George Lawrence Oguda (PW8), a government analyst with the Government Chemist Mombasa performed DNA analysis from samples received from MN and the appellant in terms of exhibit memo prepared by Chief Inspector of Police Michael Donga (PW9) the OCS, Watamu. He found that MN's dress and panty had semen on them which tested positive for human semen. He concluded that the appellant's samples and that found in the MN's underpants belonged to the same person.
 12. In his defence, the appellant stated that he is a mason in Gede; that he understood the charges facing him but was shocked that he was put on his defence. He stated that "I leave it to the court" and made submissions.
 13. Having found that the prosecution had proved its case to the required standard, the trial court, as already stated, convicted the appellant, and sentenced him to life imprisonment. As indicated, the conviction and sentence were upheld by the High Court.
 14. In his submissions before this Court, the appellant urged that the medical evidence adduced was "erroneous, incomplete and unreliable"; that contrary to Section 36(2) of the *Sexual Offences Act*, the entire process of DNA analysis, collection and storage was totally erroneous, full of errors and mistakes due to incompetence from unprofessionalism of unqualified doctor. It was submitted that the age of the injuries was incorrectly indicated in the P3 form; that the P3 form did not explain the meaning of perforated hymen therefore the findings on the P3 form ought not to be given weight. Cited in support was the High Court case of *Ben Maina Mwangi v Republic*, HCCA No 471 of 2001 (reported as *Ben Maina Mwangi v Republic* [2006] eKLR) for the proposition that it was critical to relate the age of the injuries with the date of the alleged offence.
 15. As regards the sentence, the appellant cited the case of *Eliud Waweru v R*, Criminal Appeal 102 of 2016 [2019] eKLR in support of the argument that the mandatory minimum sentences limit judicial officers from exercising discretion. It submitted that the trial court declared the appellant a dangerous sexual offender without any aggravating circumstances.
 16. In opposition to the appeal, it was submitted; that the complaint that MN should not have been subjected to cross examination has no basis; that having regard to section 19 of the *Oaths and Statutory Declarations Act* and article 50(2)(k) of the *Constitution*, there was no miscarriage of justice when the victim was cross-examined. It was submitted that the appeal is wholly lacking merit; that all the ingredients of the offence were proved; that the age of the victim was established through the health card that was produced; that there was medical evidence to prove of penetration; and the appellant was positively identified.
 17. As regards the sentence, it was submitted that the same is legal in accordance with Section 8(2) of the *Sexual Offences Act* and as clarified in the Directions of the Supreme Court on July 6, 2021 in the Muruatetu case.
 18. We have considered the appeal and the submissions. As stated in *Karani v R* [2010] 1 KLR 73:

“...By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”



19. The first complaint by the appellant is that there was a miscarriage of justice on account of the failure by the High Court to consider that the victim of the offence, MN, was subjected to cross examination. That complaint is not borne out of the record. The trial court record of proceedings shows that on April 30, 2013, after the trial court conducted a voir dire, MN gave an unsworn statement, the court having noted that “she does not understand the nature of an oath”. The record then shows that after MN’s brief statement that she knows the appellant and that he did bad manners to her, counsel for the appellant Mr. Gekanana, when apparently given an opportunity to cross examine MN stated, “I have no questions.”
20. Apart from the fact that MN was not in fact cross examined, we do not think there is a bar, in appropriate cases, to cross examining a child even though the evidence of such child is not given on oath. As this Court state in *Maripett Loonkomok v Republic* [2016] eKLR:
- “It is equally settled that by dint of sections 208 and 302 of the *Criminal Procedure Code*, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No 373 of 2006.”
21. There is, therefore, no merit in the complaint that there was a miscarriage of justice on account of MN having allegedly been cross examined.
22. As regards the age of the victim MN, her mother, PW1 stated that she was born on February 23, 2009. The investigating officer, PW7, produced her Child Health Card which indicated the same date of birth. Accordingly, the finding by the learned Judge that “the complainant’s age was proved as her immunization card was produced as the first exhibit” is well founded. We endorse the holding by the High Court (JM Ngugi, J, (as he then was)) in *Fappyton Mutuku Ngui v Republic* [2012] eKLR that conclusive proof of age in cases under *Sexual Offences Act* does not necessarily mean there has to be a formal age assessment report or the production of a birth certificate and that other modes of proof of age are available. See also decision of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000 where the Uganda Court of Appeal expressed that apart from medical evidence, age may also be proved by birth certificate, the victim’s parents, or guardian and by observation and common sense.
23. Next is the complaint that medical evidence adduced was incomplete, unreliable and insufficient. Specifically, the appellant complains about the DNA evidence. In that regard the Judge stated:
- “From the evidence on record, it is clear to me that the prosecution evidence is grounded on two main grounds. Firstly, the evidence of the three witnesses, PW1, PW3, and PW6. That evidence is corroborated by that of PW5, the clinical officer. He noted that PW2’s hymen was perforated. That (sic) was a tear on PW’s vagina. Apart from the above evidence, there is the DNA evidence.”
24. The Judge stated further that even if the DNA evidence is ignored, there is still sufficient evidence that proved the prosecution case. We respectfully agree with the learned Judge. Moreover, even though initially there were challenges with the samples taken and the process took long, there was the evidence of PW9, the OCS, Watamu who executed the court order and took the appellant to Malindi District Hospital where samples were taken; he then prepared an exhibit memo to forward the samples which were received by the government chemist, PW8, who analyzed them and concluded that the appellant’s samples and that found on MN’s underpants belonged to the same person. The DNA evidence corroborated the evidence of PW1, PW2, PW3, PW4, PW5 and PW6, which on its own was sufficient to sustain the charge.



25. As regards the sentence, it has not been demonstrated that the same is illegal or unlawful. As counsel for the respondent has submitted, on July 6, 2021, the Supreme Court of Kenya in *Francis Karioko Muruatetu & another v Republic and Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR, clarified that the principle in its earlier decision in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR is only applicable to murder cases.

26. In the result, this appeal fails and is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY, 2023.

GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

