



REPUBLIC OF KENYA



KENYA LAW
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**WAA v Republic (Criminal Appeal 34 of 2017)
[2023] KECA 200 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 200 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 34 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 17, 2023**

BETWEEN

WAA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kakamega
(Sitati, J.) dated 19th January, 2017 in HCCRA NO. 163 of 2014)*

JUDGMENT

1. The appellant, WAA, was arraigned before the Resident Magistrate’s Court at Kakamega on February 13, 2014 and charged with defilement contrary to Section 8(1) as read together with Section (2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on 31st January 2014 at Masaba sub-location in Butere District within Kakamega County, the appellant intentionally caused his penis to penetrate the vagina of MA (minor) a child aged 3 years.
2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 of the *Sexual Offences Act*.
3. Comprised as part of the prosecution case was evidence adduced through the nursery minor who due to her tender age of 3 gave unsworn testimony. She testified as PW1, and with much difficulty, that the appellant, whom she positively identified, did “tabia mbaya” to her and she specifically pointed to her genitalia. She tearfully narrated how the appellant injured her in the process. Overwhelmed with emotion, the minor broke down in court and the trial magistrate was forced to adjourn the matter. On a later date, she proceeded with her testimony. Again, she identified the appellant by name and narrated that on the material day, he called her when she had come from the toilet. The appellant then took her to his house, gave her some ‘githeri’ and some bread before proceeding to do “tabia mbaya” to her. At



this juncture, the minor broke down again. She further stated that her sister NN, PW5 barged into the house to collect her for her bath and she noticed that she was bleeding.

4. PW5, the 7-year-old elder sister to the minor testified on oath and corroborated her testimony. She positively identified the appellant by name and stated that they were neighbours. PW5 explained that when she entered the appellant's house unannounced, she saw him lying on top of the minor in bed and that he had lifted her dress to her chest while his trouser had been pulled down. Once her presence was noted, both the minor and the appellant quickly sat upright. The minor later in confided in her on what the appellant had done. Four days later, PW5 was upset that the minor had reported her to their mother that she had not wiped the table. In retaliation, she informed their mother that the appellant had done "tabia mbaya" with the minor.
5. Prior to this shocking revelation, SN, PW2, the mother to the minor and PW5 testified that while she was washing her daughters' clothes on the material day, she noticed blood stains on the minor's inner wear. When she enquired from both the minor and PW5, none of them gave out any information concerning the incident. A few days later, PW5 who was angered by the minor said she was going to reveal a secret. The secret turned out to be the sordid revelation of the defilement of the minor by the appellant, who was her brother-law. It took place while PW2 was away from the homestead. PW2, thereupon reported the matter to the police then took the minor to the hospital for examination.
6. Thadeus Toili, PW3, the clinical officer who attended to the minor established, upon examination, that she had indeed been defiled as the hymen was partially broken. There was a foul smell emanating from the minor's vagina and there were injuries therein that were approximately four days old. Police Constable Habiba Mohammed, PW4 conducted the investigations and charged the appellant with the offence. At this juncture, the prosecution closed its case.
7. The trial Magistrate found that the appellant had a case to answer and placed him on his defence. The appellant gave an unsworn statement and waived his right to call any witnesses. He claimed that PW2, who is married to his brother, framed him due to an ongoing disagreement between them. It was his testimony that PW2 accused him of telling his brother that his step-son was ailing and failed to be taken to hospital. The said step-son whom PW2 had sired with another man prior to her marriage to his brother was allegedly a sore point in the marriage as his brother did not want him to live with them and insisted that he be taken to live with other relatives instead. He further stated that since his brother worked away from the home, he was the one handling the succession cause for the family land and was in the process of sub-dividing the same. He accused PW2 of plotting to get rid of him because she feared that he might dispose her and her family of the land on which their matrimonial home was erected.
8. S Olwande, the learned Senior Resident Magistrate, evaluated the evidence before the court and found the prosecution had proved its case beyond a reasonable doubt. He sentenced the appellant to life imprisonment, having noted that it was the only available sentence.
9. Distressed by the judgment and sentence, the appellant appealed to the High Court at Kakamega on 9 grounds. In a nutshell, he complained that; the evidence tendered by the prosecution was not beyond reasonable doubt; his defence was not considered; and the sentence was too harsh.
10. Upon re-evaluating the evidence, Sitati, J and was satisfied that; both the minor and PW5 positively identified the appellant as the perpetrator; PW5 corroborated the minor's testimony; the testimony of the minor and PW5 were believable and therefore true; penetration was proved by the evidence of the partially broken hymen; and that the appellant's defence was not worthy of belief. She also held that the sentence was neither illegal nor excessive.



Consequently, the learned Judge upheld the conviction and sentence as meted out by the trial court and dismissed the appeal.

11. Still dissatisfied, the appellant has preferred this second appeal, based on 5 grounds which, condensed, are that the learned judge erred in law by;
 - a. Failing to find that the prosecution case was not proved beyond reasonable doubt.
 - b. Failing to consider the appellant's defence.
 - c. Upholding the sentence imposed on him by the trial court.
12. During the hearing of the appeal, the appellant appeared in person while the respondent was represented by Mr Okango the learned Principal Prosecution Counsel. Both had filed written submissions.
13. The appellant reiterated the allegations made during his defence hearing that PW2 had framed him due to the bad blood between them. He expressed the opinion that the fact that the minor cried during her testimony was a clear indication that she was forced to give testimony. It was his persuasion that the entire charge was a fabrication and the trial court ought to have given due consideration to his defence. Finally, the appellant submitted that the High Court erred by upholding the sentence that went against the pronouncement of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (Muruatetu 1).
14. In opposition, the prosecution submitted that the ingredients of the offence of defilement were proved beyond reasonable doubt. It was pointed out that; the appellant was positively identified by recognition by the minor and PW5; penetration was demonstrated by the testimony of the minor, the corroboration of PW5 and was confirmed by the evidence of the clinical examination conducted by PW3; and the age of the minor was established by the production of the minor's birth certificate.
15. The prosecution pointed out the guidelines issued by the Supreme Court in *Muruatetu 2* which restrict *Muruatetu 1*'s application to murder sentences under Section 203 and 204 of the *Penal Code*. Therefore, the same is not applicable in this instance, and this Court was urged to uphold the sentence and conviction as pronounced by the trial court and upheld by the High Court.
16. We have considered the record of appeal as well as submissions made by the appellant and the respondent. We appreciate our role as the second appellate court. Our jurisdiction is limited to matters of law only as defined in Section 361 of the *Criminal Procedure Code*. This Court in *David Njoroge Macharia vs. Republic* [2011] eKLR stated as follows;

“That being so only matters of law fall for consideration – see section 361 of the *Criminal Procedure Code*. As this Court has 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 v R* [1984] KLR 611.”
17. The legal issues for consideration herein can be further condensed as whether the prosecution proved its case beyond reasonable doubt and whether the sentence imposed on the appellant is unconstitutional.
18. The Supreme Court in *Gatirau Peter Munya Vs Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR expounded “matters of law” to include the evidentiary element which involves itself with the evaluation



of the conclusions of a trial court on the basis of the evidence on record. Thus, the question to answer is whether the prosecution proved the ingredients necessary to support a lawful conviction in a defilement case. The ingredients to be satisfied are; the identification or recognition of the offender; penetration; and the age of the victim. See *George Opondo Olunga Vs Republic*[2016] eKLR.

19. From the record, it is clear that the appellant was identified by recognition. Not only was he a relative of the minor, they lived within the same homestead. Therefore, the minor and PW5 both unequivocally identified the appellant by pointing at him as the offender to the satisfaction of the trial court and the same was upheld by the High Court. We are also convinced that there was no possibility of mistaken identity.
20. Penetration was proved from the testimony of the minor who stated that the appellant did “tabia mbaya” to her. As both the trial magistrate and learned judge correctly put it, this is a common euphemism used by young children to mean sexual intercourse. We also note the corroborative testimony of PW5 who saw the appellant lying on top of the minor when she walked into the room unannounced. Additionally, the clinical test established that the minor had indeed been defiled. The age of the minor was evidenced by her birth certificate that was produced in court as Prosecution exhibit 1. It indicated that she was born on May 25, 2010 therefore proving that she was 3 years of age when the defilement took place.
21. On the allegation that the minor was coached, we concur with the finding of the trial Magistrate who had occasion to observe that the minor was of such tender age and did not have the mental capacity to create such a story in order to frame the appellant. The Magistrate further noted that the minor had difficulty narrating the events of the material day. Her testimony was not free flowing as one would expect from a child who has been coached on what to say. Further, PW5 only mentioned the incident to her mother, four days later, out of spite as she was angry at the minor. This roundabout way that the crime reached the authorities caused the magistrate to doubt, and reasonably so, whether PW2 framed the appellant. In the end, we find that the conviction of the trial court as upheld by the High Court was safe.
22. On the issue of the sentence, we reiterate the holding of this Court in *Joshua Gichuki Mwangi Vs Republic*, Criminal Appeal No 84 of 2015 (Unreported);

“It is our conviction that the foregoing recapitulates the ratio decidendi of Muruatetu 1 and we believe that the same, as applies to the unconstitutionality of mandatory sentences, can be applied mutatis mutandis to the mandatory nature of the sentences provided for in the SOA.

{{We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed}}.” (Our emphasis)
23. In light of the foregoing and due to the prevailing circumstances considering that the minor was only 3 years old when she was defiled, and by the appellant who was a relative who should have been protective of her, we are convinced that the appellant is deserving of the life sentence meted out by the trial court and upheld by the High Court. See *Juma Said Wanje Vs Republic* [2020]eKLR.
24. In the end, we dismiss this appeal in its entirety. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

P.O KIAGE



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JUDGE OF APPEAL
MUMBI NGUGI

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JUDGE OF APPEAL
F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

