



**Nyamesa v Republic (Criminal Appeal 81 of 2020)
[2023] KECA 54 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 54 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 81 OF 2020
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
FEBRUARY 3, 2023**

BETWEEN

PETER ONGORO NYAMESA APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the judgment of the High Court at Nairobi (Majanja J.)
delivered on 16th January 2020 in High Court Criminal Case No. 79 of 2019.)*

JUDGMENT

1. The appellant, Peter Ongoro Nyamesa, was charged with 3 counts of the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#).
 - a. In count I, the particulars were that on diverse dates between October 29, 2017 and January 28, 2018 at Wangui shopping Centre, Gatundu South sub-county within Kiambu county, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of MWK, a child of 9 years.
 - b. In count II, the particulars were that on diverse dates between October 29, 2017 and January 28, 2018 at Wangui shopping Centre, Gatundu South sub-county within Kiambu county, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of GWN, a child of 10 years.
 - c. In count III, the particulars were that on diverse dates between October 29, 2017 and January 28, 2018 at Wangui shopping Centre, Gatundu South sub-county within Kiambu county, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of CWK, a child of 14 years.



1. After trial, the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was convicted of the three counts and sentenced to serve life imprisonment on count 1 and count 2, and 20 years imprisonment on count 3. The sentences in count 2 and 3 were however suspended. Aggrieved by the decision of the trial court, he preferred a first appeal to the High Court at Kiambu. Upon hearing the appeal, Majanja J affirmed the conviction but quashed the life imprisonment and substituted it with 30 years' imprisonment.
2. Aggrieved by that decision, the appellant filed this second appeal which is based on the following 5 grounds: -
 - a. That the appellate judge erred in matters of law by failing to find that: the charge was defective for non-conformity with evidence adduced; key ingredients of the offence were not established against the appellant; the threshold and burden of proof was not established owing to the uncanny and duplicated evidence that was relied upon to convict him and which was overlooked by both the trial court and high court; the appellant was greatly prejudiced when the burden of proof was shifted on him to exonerate himself of the charges in question; and failing to give adequate consideration to the appellant's defence.
4. This is a second appeal and by dint of section 361(1) (a) of the *Criminal Procedure Code*, this court's jurisdiction is circumscribed to considering only matters of law. The role of the second appellate court was succinctly set out in *Karani v R* [2010] 1 KLR 73 wherein this Court expressed itself thus: -

“This is a second appeal. 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.”
5. We shall briefly revisit the facts of the case so that we satisfy ourselves that the two courts below arrived at concurrent findings of fact and so carried out their mandate as required by the law. In advancing their case, the prosecution called 10 witnesses. PW1 MWK, PW2 CWK and PW3 GWK, the complainants herein, narrated that the Appellant did bad manners to them on different occasions and used to give them money, cake, 'ngumu' and tea. They used to go to the appellant's home and he would call one of them inside while the others waited outside. He would then ask them not to tell anybody and give them money to share amongst themselves.
6. PW6, CWM the deputy head teacher at PW3's school noted that PW3 would come late to school or would be absent some times and as well came to school with a lot of money in various denominations. The deputy head teacher called PW3's aunt, PW4 and told her about her concerns. They interrogated PW3 who disclosed to them how the appellant had been luring her and her friends to his house and sexually molesting them then giving them money thereafter. The school urgently convened a Board of Management (BOG) meeting and a decision was made to take the children to hospital and report the matter to police. PW1's mother, PW5, received this information after the interrogation. She went and picked her daughter from school.



7. The children were taken to Gatundu police station to report the incidents. The investigating officer PW10, No 105484 PC Phoebe Opiyo interrogated them then took them to Gatundu hospital for examination and treatment. According to the P3 forms and treatment notes produced by PW9, Dr Catherine Kibathi from Gatundu level 5 Hospital, PW1 had lacerations on the labia majora, her external genitalia were swollen and hymen was absent. The high vaginal swab showed the presence of pus cells and red blood cells. PW2 on the other hand had no bruises but the hymen was absent, there was pus cells and she had a whitish discharge. PW3 had lower abdominal tenderness, lacerations on labia majora and the hymen was absent. The doctor concluded that all the children had been defiled.
8. On February 8, 2018, PW7, Julius Kuria Ng'ang'a the secretary of Nyumba Kumi, was asked by the assistant chief to assist with arresting the appellant but the appellant had taken off. He was arrested on February 12, 2018 in Nyanduma by members of the public. PW8, No 201132915 APC George Wamaitha of Gachika Administration police post went to Wangui and found the appellant tied up with a rope while being escorted to the post. He re-arrested him and handed him over to police officers from Gatundu police station. PW10 then charged him with the subject offences. She produced immunization card and birth certificates for the minors in a bid to prove their ages.
9. Upon being placed on his defence, the appellant gave an unsworn testimony and called one witness. He testified as DW1 and denied committing the offence claiming that he was framed. DW2, Ng'ang'a Njuguna, an assistant chief of Gathiru sub-location, testified that he did not have any issues with the appellant save for the instant case which was reported to him and he referred it to the police.

Submissions

10. The appellant who was unrepresented and Mr. Okatch, the learned prosecution counsel for the respondent relied on their written submissions. The appellant argued that the charge was defective both in form and substance as it did not accord with the evidence tendered which was a violation of article 50 of the *Constitution* and section 134 of the *Criminal Procedure Code*. He pointed out that the charge sheet made reference to “diverse dates between October 29, 2017 and January 28, 2018” but from the evidence of PW2, the incidents happened during the August holiday. He submitted that such discrepancy raises questions on when exactly the alleged incidents occurred and whether he was the one responsible.
11. It was his further submission that a key ingredient of the offence was not established as it was not proved that he was the one responsible for the alleged defilement. He contended that there was uncanny resemblance in the minors’ narration which showed they had been coached and their narration was a fabrication. Additionally, he stated that the trial court shifted the burden of proof to him when it questioned why he had not laid a basis for being framed or named the person who was framing him. He argued that he has no duty in law to raise a serious defence or elicit any crucial evidence to exonerate himself. In his view therefore, he gave a sworn defence which the court did not consider. It was also his submission that he is an elderly man aged 85 years and his health has severely been ravaged by the imprisonment. He argued that his age ought to have been taken into account in sentencing and contended that the current sentence amounts to inhumane and degrading treatment.
12. On the other hand, the respondent, through Mr. Okachi submitted that the prosecution proved its case beyond any iota of doubt. Counsel argued that the prosecution produced documentary evidence to prove the ages of two of the minors. He urged the court



to take cognizance of the fact that the offences in question have mandatory sentences. It was thus his view that the High Court erred in substituting the life sentence with 30 years' imprisonment when a minor who was below 12 years was involved. He urged the court to correct the glaring error on the face of the record by substituting the same with a life sentence.

Analysis and determination

13. We have accordingly considered the appellant's grounds of appeal and the respective rival submissions. The first issue that arises for determination is whether the charge sheet was defective. This issue arises from the appellant's contention that the charge sheet only generalized the dates the offences were committed as opposed to indicating the specific dates. He also contended that evidence adduced disclosed that the offences were committed during the August holiday. Section 134 of the *Criminal Procedure Code* deals with the framing of charges and states that: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

14. In our view, the fact that PW2 stated that the alleged offence began during the August holiday does not in itself preclude the period after February 7, 2018 when the incidents came to light. None of the complainants testified that the alleged incidents stopped after

August. Rather, it appears that it was an every Sunday occurrence until the school came to know. The mere fact that the months of August and September were omitted from the charge did not make the charge sheet defective.

15. This court in *Peter Ngure Mwangi v Republic* [2014] eKLR, while considering the effect of a defect in a charge sheet, cited the case of *Peter Sabem Leitu v R*, Cr App No 482 of 2007 (UR) where it was stated as follows: -

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

16. Similarly, in the present case, we are of the view that the appellant suffered no prejudice or miscarriage of justice. The charges contained statements of a specific offence which the appellant understood upon being read out to him and pleaded or responded to accordingly. The particulars of the offences also made clear reference

to the offence of defilement and the period when the same was alleged to have been perpetrated against the complainants.

17. The second issue is whether the appellant was positively identified as the person who sexually violated the three minors. We have arrived at the conclusion that, the two courts below did not err in finding that the appellant was positively identified as the culprit. We may add that the appellant was well known to the minors as they had interacted with him and visited his house on different occasions. The three of them gave consistent and corroborated accounts of the events that took place whenever they visited



which included washing his utensils and making tea. There was therefore no possibility of mistaken identification.

18. The third issue is whether the appellant's defence was considered by the trial and the first appellate court. The record is clear that both courts considered the appellant's defence that he was framed and found that it was not believable but was just a mere afterthought. The defence only came up upon being put on his defence as there was no suggestion of any grudge between him and anybody during his cross-examination of the witnesses.
19. On the issue of the sentence, the first appellate court substituted life imprisonment with 30 years. Mr. Okach for the prosecution had filed a notice of enhancement of sentence which he withdrew on the hearing date. In this regard, we shall not interfere with the sentence as affirmed by the High Court.
20. In totality therefore, we find that the prosecution proved its case to the required standard which is beyond any reasonable doubt. All the ingredients of the offence of defilement were accordingly established and were based on sound evidence. In the premises, there is no basis upon which this court can lawfully interfere with those findings.
21. The result is that the appeal fails in its entirety and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

