



**PL v Republic (Criminal Appeal 169 of 2018)  
[2023] KECA 52 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 52 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 169 OF 2018  
HM OKWENGU, PO KIAGE & F SICHALE, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**PL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at Kisii  
(Okwany, J.) dated 3rd November, 2015 in HCCRA No. 55 of 2014)*

**JUDGMENT**

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on 21<sup>st</sup> November, 2013 in Transmara West District of Narok County, he caused his penis to penetrate the vagina of SC (minor), a girl aged 10 years.
2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
3. The appellant denied the charges leading to a trial in which the prosecution called 6 witnesses in support of its case. The minor testified as PW1 stating that she was 11 years old, and that on 21<sup>st</sup> November 2013, at about 11pm while she was in the house of PW3, their casual labourer, the appellant, a husband to her mother approached them. He asked that PW1 goes and sleeps at his house. At the time the minor's mother was away. The minor explained that when she went to sleep, the appellant followed her to the house, and defiled her the whole night. The following morning she met her mother (PW2) and informed her of what had happened, upon which they reported the incident to the police, and she was taken to hospital.



4. PW2 testified that the appellant was her husband, but not the biological father to the minor. She explained that on the material day she had sought refuge at a neighbour's home after disagreeing with the appellant. On her return, she met the minor walking with a strange gait and she learnt that she had been defiled by the appellant. PW2 stated that she checked the minor and found that she had blood and white discharge on her private parts. Her dress was also soiled. PW2 proceeded to report the matter to the police and took the minor to hospital for treatment. PW3 corroborated the minor's assertions, that on the fateful day at around 11pm, the minor was at her house when the appellant insisted that she goes to his house to light a fire. Later, she heard the minor crying saying "leave me, leave me".
5. PW4, the investigating officer, confirmed receiving a report of defilement of the minor on 22<sup>nd</sup> November 2013. Upon receiving the report, he explained, he issued the mother of the minor with a P3 form and asked them to visit a hospital for examination. PW5, a medical doctor who filled the P3 form testified to having examined the minor and established that her labia majora was swollen, the labia minora was hyperemic and there was increased blood flow to the region suggesting that there was inflammation. The hymen was also broken but not freshly so.
6. At the close of the prosecution case, the learned Resident Magistrate found that the appellant had a case to answer and placed him on his defence.
7. The appellant gave a sworn statement and called 2 witnesses in support of his case. In his testimony, he denied defiling the minor, claiming that on the material day he went home at 7pm and found his wife missing. He went to sleep after dinner and the following day he went looking for his wife at a neighbor's house where he had been informed she had fled to. The appellant testified that upon finding his wife, they resolved their differences and went back home. He claimed that he later learnt that his wife had reported him to Lolgorian Police Station, leading to his arrest on 10<sup>th</sup> December, 2014. The appellant further contended that he had been framed by his wife because he had not paid dowry. DW2 and DW3's evidence was that they had seen the minor the morning after the incident and she looked fine.
8. Upon the close of both the prosecution and defence cases, the prosecution applied to have the doctor who assessed the age of the minor summoned to present his report on the same. The doctor (PW6) gave evidence that he examined the minor on 20<sup>th</sup> January, 2014 and determined that she was 10 years old at the time. He produced the age assessment report.
9. The trial Magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to life imprisonment.
10. The appellant's first appeal to the High Court was dismissed by Okwany, J., hence this appeal captured in the Supplementary Memorandum of Appeal filed by his learned counsel, Mr. Nteng'a Marube as follows:
  1. That the learned judge erred in law in not evaluating the whole evidence before the Lower Court, as is incumbent upon her as the (sic) 1<sup>st</sup> Appellant Court, weigh all the evidence and draw her own inferences and conclusions and had she done so, she would have arrived at a different conclusion by finding that:-
    - a) The trial court had no jurisdiction to reopen the prosecution case (sic) u/s 150 CPC."
11. At the hearing of the appeal, learned counsel Mr. Marube and learned Principal Prosecution counsel Mr. Kakoi appeared for the appellant and the respondent, respectively. Counsel had filed written submissions which they sought to highlight.



12. Mr. Marube faulted the trial court for re-opening the prosecution case, arguing that section 150 of the *Criminal Procedure Code* (CPC) does not allow parties to call or recall witnesses after the close of the defence case. In this regard counsel cited the decision of this Court's predecessor in *Murimi vs. Republic* [1967] EA 542. Counsel contended that by the trial court allowing the prosecution to reopen its case, it allowed the prosecution to fill gaps in their case, which was prejudicial to the appellant, and which decision further resulted in the breach of the appellant's right to fair trial. Mr. Marube urged that allowing the prosecution to reopen its case was an admission that no case had been made out against the appellant, and consequently he ought not to have been put on his defence.
13. Next, counsel contended that there were glaring inconsistencies in the prosecution evidence that reduced its probative value. The inconsistencies being that; whereas PW1 testified that on the material night the appellant said that he would sleep with her if her mother was not there, PW3 did not testify to that fact yet they were together that night. Further, whereas PW1 stated that after collecting milk the morning after the incident she went to PW3's house and the only thing that PW3 told her was to collect her uniform, PW3 stated that, that morning when she went to the appellant's house, PW1 informed her that the appellant had defiled her. Moreover, while PW4 stated that PW3 had told him that she had heard screams from the appellant's house, and she had physically checked the minor and confirmed that she was defiled, PW3 herself did not include such information in her evidence.
14. Mr. Marube submitted that the medical evidence as adduced by PW5 was inconclusive for the reasons that; although he stated that there was some inflammation in the minor's labia, he did not give the cause of the same. He could also not tell if PW1 had been defiled nor whether the hymen had been broken by penetration or otherwise. Citing the decision in *Mutonyi & Another vs. Republic* [1982] eKLR, counsel contended that PW5's expert opinion was unsatisfactory. Mr. Marube further challenged the probative value of the P3 form, on grounds that although the form was said to have been filled on 20<sup>th</sup> January 2014, PW4 stated that it was prepared on 25<sup>th</sup> November 2013.
15. Counsel further urged us to interfere with the decision of the first appellate court for failing to properly re-evaluate the evidence on record and arrive at its own conclusions as expected of a first appellate court.
16. Mr. Kakoi opposed the appeal, asserting that section 150 of the Criminal Procedure Code allows the court to recall any witness, and in this case, the witness called was crucial, even though the age of the minor had already been proved through oral evidence of PW1, PW5, and DW2. To him, the evidence of PW6 was merely corroborative. In any case, counsel submitted, the appellant had not raised any issue concerning section 150 in the trial courts, citing the decision in *Alfayo Gombe Okello vs Republic* [2010] eKLR, where this Court refused to consider a matter that had been raised for the first time on second appeal. Mr. Kakoi further referred us to the decision of the Court of Appeal of Uganda in Criminal Appeal No. 2 of 2000 where the court held that in defilement cases medical evidence is paramount in determining the age of the victim.
17. Counsel urged that the question of glaring inconsistencies and discrepancies was one of fact, and this Court 'is bound' by the concurrent findings of fact by both trial courts. Further, any minor discrepancies are curable under section 382 of the Criminal Procedure Code. Mr. Kakoi discounted the appellant's contention that the medical evidence adduced was inconclusive affirming that the evidence was incontrovertible. In the end counsel urged that given the age of the minor was between 11 to 12 years, the appellant's sentence could be reduced to at least 15 years imprisonment.
18. In reply to the foregoing submissions, Mr. Marube for the appellant responded, as a matter of fact, that what the court allowed on reopening of the case was 'very important' and the age assessment was critical.



19. As rightly stated by the respondent’s counsel, as a second appellate court, our jurisdiction is limited to a consideration of matters of law only. Section 361(1)(a) of the Criminal Procedure Code expressly prohibits our consideration of matters of fact. This Court has recognized and honoured this jurisdictional limitation on many occasions including in *David Njoroge Macharia Vs. Republic* [2011] eKLR where it stated;

“ 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.”

20. The first question of law that falls for our consideration in this appeal is whether the trial court erred by allowing the prosecution’s application to summon the Doctor who conducted the age assessment (PW6) in accordance with section 150 of the Criminal Procedure Code. However, even as we proceed to examine this issue, we are minded that the matter was never raised in the courts below in the first instance, hence strictly speaking, not worth our review.

21. It is pertinent to cite the provision in contention herein;

“ 150. Power to summon witnesses, or examine person present

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.” (Emphasis ours)

22. A plain reading of the provision indicates that a court is empowered to summon or recall any witness at any stage of the trial if the evidence of such witness is critical to the just decision of a case. Granted that age is a vital ingredient of the offence with which the appellant was charged, the evidence of PW6 was essential to the case, since he is the one who assessed the age of the minor. Besides, the witness merely confirmed what had been stated in oral evidence by the minor herself and PW5 the medical doctor, to the effect that she was between ages of 10 and 11 years. In the circumstances, we think the learned Judge properly exercised her discretion within section 150 of the Criminal Procedure Code in summoning the doctor who assessed the age of the minor.

23. The second question of law is whether the learned judge properly discharged her duty as the first appellate court to re-evaluate the entire evidence in a fresh and exhaustive manner and arrive at her own independent conclusions of fact. We are satisfied upon our consideration of the record that the learned judge did so. The criticism that she failed in this regard is therefore, with great respect, unwarranted.



24. It is thus clear to us that the appellant's conviction was based on sound and solid evidence leaving no doubt as to his guilt and we have no basis upon which to disturb the judgment of the High Court.
25. That leads us to the issue of sentence. We address it as a point of law, not because of the severity of the sentence meted, but because of the mandatory nature of the sentence imposed. Recent jurisprudential developments in the Court or High Court post the Supreme Court's landmark decision in *Francis Kariokomuruatetu & Another Vs. Republic* [2017] eKLR (Muruatetu 1) are quite consistent that courts retain discretion in matters sentence. See *Joshua Gichuki Mwangi vs. Republic*, Nyeri Criminal Appeal No. 84 of 2015 (unreported); *Maingi & 5 Others vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 may 2022) (Judgment).
26. Given the concession of the prosecution by Mr. Kakoi for the State, and properly so, and his going further to propose that the sentence be reduced to 15 years on the basis that the complainant's age was between 11 and 12 years, we think this is a firm basis for interference. Indeed, that age bracket attracts a minimum sentence of 20 years imprisonment under section 8(3) of the Sexual Offences Act. The proposal by the respondent accords with current law, roperly applied.
27. In the result, this appeal succeeds on sentence only. We set aside the sentence of life imprisonment and substitute therefor with a term of fifteen (15) years imprisonment to run from the date the appellant was first sentenced.

Order accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

