



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutua v Republic (Criminal Appeal 111 of 2020)
[2023] KECA 278 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 278 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 111 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
MARCH 17, 2023**

BETWEEN

BENARD MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against the judgment of the High Court at Machakos (P. Nyamweya, J.) delivered on 28th April 2017 In Criminal Appeal No. 14 of 2014)

JUDGMENT

1. The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars were that on July 12, 2009 in Machakos District within Eastern Province, intentionally and unlawfully caused his penis to penetrate the vagina of CN, a child aged 11 years. In the alternative, he was charged with an indecent act in that he touched the breasts and vagina of the CN, the complainant.
2. The appellant pleaded not guilty to the charge. At the conclusion of the trial, he was found guilty of the main charge, convicted accordingly and sentenced to life imprisonment. Aggrieved by the conviction and sentence, he preferred a first appeal against both conviction and sentence to the High Court at Machakos. By a judgment of P. Nyamweya, J. (as she then was) delivered on April 28, 2017, both the conviction and sentence were upheld. Further aggrieved, the appellant has preferred this second appeal.
3. A brief recount of the prosecution case is that, PW1, CN, after a *voire dire* examination testified that on July 12, 2009 she was at home with her brother as her mother had gone to see another brother who was unwell. She needed to use the latrine which was outside about 30 meters away. Just after she had lowered her skirt, the appellant came in the latrine, held her by her neck and removed his pair of trouser. He warned her that if she raised alarm he would harm her. He then inserted his penis in her vagina, touched her breasts and buttocks. She hit the inner side of the latrine with her elbow alerting a



- neighbor PW2, Jane Mumbua who heard and came into the latrine. Soon, PW3, Mercy Mwikali and other people came to the scene and her mother was called. The appellant tried to run away when people screamed but members of the public together with the community policing members apprehended him and together with PW1 took them to the police station and later to a health clinic where PW1 was examined and treated. She initially did not see her attacker but once PW2 came to the latrine with a hurricane lamp, she was able to identify the appellant as her attacker.
4. PW5, Dr. Daniel Mukirana of Machakos General Hospital testified on behalf of his colleague, Dr. Isika. Upon examination, PW1 had no physical injuries, there were vaginal lacerations and the hymen membrane was missing. It was concluded that she had been defiled due to the vaginal lacerations and the presence of spermatozoa. PW6, CPL Jemima Murugu previously attached to Athi River Police Station was the investigating officer who recorded the witness statements, issued a P3 form to PW1 and escorted her for age assessment and then charged the appellant. PW7, Dr. Patrick Litunga based at Machakos General Hospital assessed the age of PW1 to be 11 years.
 5. In his sworn defence, the appellant averred that on the material day, he was at his place of work when 2 women and a man came and arrested him saying he was a thief. They took him to the police station where he was charged with the offence of which he knew nothing about. He owed the complainant's mother Kshs. 2000/- for bhang and chang'aa she had sold to him. He denied being arrested at the scene of crime.
 6. The appellant has raised three grounds of appeal which we have condensed into two, that; his right to a fair trial under articles 25, 27(1), 29(d), 47(1), 50(1),(2)(b)(j)(k), (4), 157(11) and 159(2)(d)(e) of the *Constitution* and sections 329 and 354 of the *Criminal Procedure Code* were violated; and, the sentence imposed was harsh and unconstitutional and did not take into account his mitigation.
 7. The appeal came up for hearing before us on a virtual platform on December 13, 2022. The appellant was in person while learned Prosecution Counsel, Mr. Okatch represented the respondent. Both parties relied on written submissions. Those of the appellant are undated while for the respondent are dated December 7, 2022. He submitted that his right to a fair trial was violated as the medical evidence adduced was doubtful and not credible and the complainant's age was not properly ascertained. The age assessment report indicated she was 11 years while the P3 form indicated she was 9 years. He contended that this was inconsistent and contradictory evidence, hence the conviction was unsafe. He further cast aspersions on the medical evidence because the medical officer who filled the P3 form was not called as a witness, thus, it ought not to have been admitted in evidence.
 8. As regards the sentence, he submitted that he had offered sufficient mitigation which justified his release by this Court. He relied on the cases of *Hamisi Bakari & Another v R* (1987) eKLR, *Francis Muniu Kariuki v R* (2017) eKLR and *Yawa Nyale v R* (2018) eKLR to buttress this position.
 9. Mr. Okatch submitted that the ingredients of the offence were proved beyond any iota of doubt and the appellant was found guilty, convicted and sentenced in accordance with the law. He urged us to dismiss the appeal in its entirety.
 10. We have considered the record of appeal, the respective rival submissions and the law. The role of this Court as a second appellate court was succinctly set out in *Karani v R* [2010] 1 KLR 73 as follows: -

“ 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.”

11. We are therefore, only enjoined to consider matters of law unless on matters fact, both the trial and first appellate courts considered matters they ought not to have considered or failed to consider matters they ought to have considered. Having this in our minds, we have isolated the issues that commend for determination to be whether the case was proved beyond a reasonable doubt and whether we should interfere with the sentence meted out.
12. On the first issue, the appellant submitted that the case was not proved to the required standard because his right to a fair trial under articles 25, 27(1), 29(d), 47(1), 50(1),(2)(b)(j)(k), (4), 157(11) and 159(2) (d)(e) of the *Constitution* and sections 329 and 354 of the *Criminal Procedure Code* was violated. Under this head, he was of the view that the complainant’s age was not proved and the P3 form was inadmissible because the medical officer who filled it was not called as a witness.
13. It is trite that, the age of a complainant in a case of defilement must be proved before reasonable doubt, the rationale being that, under section 8 of the *Sexual Offences Act*, sentences for the offence are determined by the age of the complainant. In this case, the record is clear that PW6, escorted PW1 to hospital for purposes of age assessment which was carried out by PW7. The latter testified that he assessed her age to be 11 years. The P3 form on the other hand indicated her age to be 9 years. Our view is that if a court is faced with such a situation, the best evidence to rely on is that of an expert. This may have informed PW6 to escort PW1 to hospital so he could, without iota of doubt, ascertain her age. We do not say this in vain. This Court in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited with approval the case of *Francis Omuromi v Uganda*, Court of Appeal Criminal Appeal No 2 of 2000 which held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense....”
14. It follows then that, the doctor having ascertained PW1’S age to be 11, there cannot be any guess or assertion that her age was not established in accordance with the law. In the circumstances, we cannot fault the concurrent reliance by the two courts below on the age assessment report. We hold that PW1’S age was established to be 11 years.
15. As regards the complaint that the P3 form was inadmissible since it was not adduced by the maker, section 77 (1) and (2) of the *Evidence Act* envisage such a situation. They state that:
 - “(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
 - (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.”
16. PW5, Dr. Daniel Mukirana testified on behalf of his colleague, Dr. Isika who was doing her studies. Both were in the same field of medicine. His testimony was that he was familiar with her handwriting



and signature which made it easy for him to recognize a document made under her hand like the P3 form in issue. This Court has previously stated in *Joseph Mabende v Republic* (2019) eKLR that:

“Our interpretation of section 33 (d) of the *Evidence Act* as read with section 77(1) & (2) of the *Evidence Act*, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under section 48 of the *Evidence Act*. However, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under section 33 (d) of the *Evidence Act* and which evidence by dint of Section 77 (1) & (2) of the *Evidence Act*, is admissible and presumed as genuine and authentic.”

17. We accordingly find the ground of appeal in this regard to be unmerited and dismiss it. Besides, the appellant was accorded an opportunity to cross examine the medical officer which he did, he did not tell us what exact information he sought from PW5 that could only be provided by the maker of the document. A P3 form is an expert document whose content, unless with exception, can only be ascertained by an expert in the medical field. PW5 sufficiently discharged this task and we accordingly cannot impeach the P3 form merely because the maker did not adduce it. Further, no prejudice was occasioned to the appellant by virtue of PW5 testifying on behalf of the maker of the P3 form.
18. The appellant’s submission that he was not accorded a fair trial is therefore baseless; we find no evidence that his right to a fair trial was contravened.
19. Having held that the complainant’s age was conclusively established, the other elements of the offence the prosecution was required to prove are penetration and the appellant’s culpability. The complainant testified that the appellant inserted his penis into her vagina. PW1’s evidence remained uncontroverted as regards penetration and was corroborated by PW5 who produced the P3 form which showed, *inter alia*, that there were spermatozoa. We find that the medical evidence on record proved the offence of defilement.
20. We need not belabour the issue of identification of the appellant. He was caught red handed at the scene of crime. The prosecution’s evidence was that he attacked the complainant while she was trying to use the pit latrine. A neighbor heard a commotion and came to check, she raised alarm and members of the public came, apprehended him and escorted him to the police station. We cannot fathom how the appellant can then deny that he was not arrested at the scene. He was positively identified as the perpetrator of the heinous act.
21. We find that both courts below properly analyzed the evidence before them on all the ingredients of the offence charged. There is no possible scenario that the appellant was not the perpetrator. There was overwhelming evidence to support a charge of defilement and the prosecution’s case was proved beyond a reasonable doubt.
22. On the sentence, the appellant submitted that it was harsh and unconstitutional. He urged us to consider his mitigation, which is that; he was remorseful, was arrested while he was only 20 years old, he was a first offender and is in good terms with his family who would welcome him back into society. On our part, we consider the appellant nothing more than a predator. He preyed on a young girl, then only aged 11 years. We do not think he deserves clemency from us. Furthermore, the sentence meted out accords with the law. We have no reason to interfere with a lawful sentence.
23. Accordingly, the appellant’s appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.



ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

