



**Jimmy Mwanzo v Republic (Criminal Appeal 104 of 2022)  
[2023] KECA 692 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 692 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 104 OF 2022  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
MAY 26, 2023**

**BETWEEN**

**JIMMY MWANZO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgement of the High Court of Kenya at Mombasa delivered by Njoki Mwangi, J. on 7th June 2019 in Criminal Appeal No. 2 of 2017 Original Mombasa CM Criminal Case No. 53 of 2016)*

**JUDGMENT**

1. The appellant Jimmy Mwanzo, has lodged this second appeal to this Court against his conviction and sentence for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act](#), hereinafter SOA. The appellant has appealed against the judgment delivered on June 7, 2019 by the High Court Judge, (Njoki Mwangi, J) in High Court Criminal Appeal No. 2 of 2017. The High Court upheld the appellant's conviction for defilement but reviewed the sentence from life imprisonment to 35 years imprisonment.
2. The Appellant had on June 2, 2016 been charged before the Chief Magistrates Court at Mombasa (Hon. Rabera) with one count of the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the [SOA](#). The particulars of the charge were that on the May 30, 2016 in Changamwe within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of H S a girl aged 8 years old. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the [SOA](#).
3. He pleaded not guilty to the charges and was taken through trial where 4 witnesses testified for the prosecution and the appellant testified for the defence. The learned trial Magistrate, *vide* judgement delivered on January 3, 2017, found that the age of the victim was proved *vide* her immunization card;



that penetration was proven *vide* the medical reports as well as the account by PW1; that the appellant was well-known to PW1 for they were neighbors. The learned Chief Magistrate found the appellant guilty of the main count of defilement contrary to Section 8 (1) as read with Section 8 (2) of the SOA and sentenced him to life imprisonment.

4. The appellant appealed to the High Court, challenging the learned trial Court's judgment on grounds the element of penetration was not proved; crucial evidence was not tabled by the prosecution; that the case was a fabrication intended to unfairly incarcerate him; that the investigations into his case was shoddy and unreliable and that his defence was dismissed without any justification.
5. The learned Judge of the High Court, after analyzing and evaluating afresh the evidence adduced before the trial Court was satisfied that the prosecution had proved that the appellant defiled the victim, PW1 HS, through medical examination which established that there were fresh abrasions on her vagina and oedema of her labia majora, which was conclusive proof of penetration. Further that the act of the appellant running out of his house leaving the victim behind when he heard her mother, PW2, DC calling the victim was conduct of a guilty mind.

The learned Judge agreed with the finding of fact by the trial Magistrate that the victim was truthful, untainted, and her evidence was not contradicted. The learned High Court Judge did not find the failure to call the person who arrested the appellant fatal to the prosecution case, as he was not an eyewitness to the commission of the offence, and calling him was not a value addition to the case.

6. As to whether the learned trial Magistrate considered the appellant's defence, the learned Judge of the High Court found that the defence was sufficiently considered. The Judge re-considered it and found that it did not weaken the prosecution case but instead bolstered it. Regarding the inconsistency in the prosecution evidence of PW1 and 2 on one hand that PW1 had been admitted in hospital, and PW3 on the other who said PW1 was never admitted, the learned Judge found that PW3 was not the one who examined PW1 and so could not have personal knowledge of the matter. His role was to produce the P3 Form filled by his colleague, which was itself silent regarding the admission. The learned Judge did not find the inconsistency material.
7. As to whether the sentence was harsh, the learned Judge applied Muruatetu & another v Republic Supreme Court Petition No. 16 of 2015 (sic) and the Court of Appeal decision in Jared Koita Injiri v Rep (2019) eKLR and found that the mandatory nature of the sentence under Section 8(2) of the SOA was unconstitutional. She proceeded to set aside the life sentence and to substitute it with 35 years' imprisonment.
8. The appellant was dissatisfied with the judgement of the High Court and so filed this second appeal. The grounds of appeal were six. However, when the appeal came up for hearing, the appellant relied on supplementary grounds of appeal in which he faulted both Courts below for; failing to find that the *voire dire* examination conducted on the complainant was not unequivocal; for failing to find that the evidence of the complainant was not corroborated by medical evidence as required by law. As against the first appellate Court, the appellant faulted the Judge for dismissing his defence even though the prosecution had not discharged its burden; and, the Court failed to take into account the appellant's advanced age before imposing sentence.
9. The appeal was heard on the virtual platform on the November 15, 2022. The appellant was present appearing from Shimo la Tewa Prison, while learned Prosecution Counsel Ms. Vallerie Ongeti appeared for the State. Both the appellant and the Prosecution Counsel briefly highlighted their written submissions before us.



10. Our role as the second appellate Court was succinctly set out in *Karani v R* [2010] 1 KLR 73 wherein this Court expressed itself 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. In order to appreciate the grounds raised by the appellant and the submissions made in this appeal, let us begin by summarizing the evidence that was adduced before the trial Court.

The complainant victim in this case was PW1, HS (hereinafter PW1). Her evidence was that she was at home on 30<sup>th</sup> May 2016 when the appellant sent her to the shop. Upon her return, he pulled her into his house and defiled her. PW1 said she heard her mother calling her. That the appellant ran out of his house and disappeared. PW1 came out from the appellant's house crying and told her mother, PW2, DC that the appellant had defiled her. PW2 took her to Makadara Hospital, where Dr. Raita, who also filled the P3 form and the PRC form, examined PW1. PW3 Dr. Mohammed Abdulaziz, who was familiar with his handwriting, produced Dr. Raita's reports. The examination revealed that PW1 had fresh erythematous abrasion, oedema on the labia majora and her hymen was broken. The opinion formed was that the injuries were indicative of defilement. PW4 Sergeant Josephine Mwangeno of Changamwe Police Station investigated the case and charged the appellant. PW4 testified that members of the public arrested and took the appellant to the police station. She also told court that PW1's age was indicated on the immunization card presented by PW2 to the police station.

The appellant in his unsworn defence denied committing the offence. He said that on the material day he was on his way out of his house when he met PW2 and requested her to allow him send PW1 to the shops, which she agreed. That PW2 called PW1 and he sent her to buy milk and mandazi with 100/-. He told Court that PW1 purchased the items and delivered them to him in his house. That he heard PW2 discussing with a neighbour after which they called PW1 and interrogated her, questioning her why she entered his house. He said that he received a call from a village elder. That he went to meet the elder in his house at 5.30 pm and then returned home. That the next morning he was woken by a group of youths who beat him up and alleged that he had committed the offence. He denied the charges.

12. The appellant in his written submissions raised issue with the manner in which the trial Court dealt with the evidence of PW1. He urged that pursuant to Section 19 of the *Oaths and Statutory Declarations Act*, the trial Court is obligated to satisfy itself that PW1 was possessed of sufficient knowledge to testify.

The appellant, placing reliance on the case of *John Muiruri v Rep* (1983) KLR 445 urged that the trial Court did not conduct a *voire dire* examination of the child witness, PW1, in order to determine whether to receive her evidence on oath. The State did not have a response to this ground, as the supplementary grounds of appeal and the submissions were not served upon the State.

13. We note that the appellant did not raise the issue of *voire dire* before the first appellate Court. This is a new ground of appeal. It was not raised in the first appellate court, either in the petition of appeal or in the extensive written submissions filed in the High Court. Thus, it did not form the basis of the determination by the High Court since the issues now raised were not before the High Court. We cannot fault the judgment of the High Court based on the new issue.



14. That notwithstanding, we note that the High Court observed that the learned trial Magistrate took the complainant through *voire dire* examination and made an order for her to give a sworn evidence because he found her intelligent enough to do so. We say no more.
15. The other issue raised by the appellant was the failure by the two Courts below to find that the evidence of the complainant was not corroborated by medical evidence as the law requires. In his submissions however, the appellant argued issues of fact, that the medical examination found that the complainant had old scars in her private parts, and that having failed to disclose how they occurred her evidence should not be believed. He relied on the Court of Appeal case of *Maina v Republic* [1970] EA 370 where the Court held that the evidence of a woman or girl victim of a sexual offence needed to be corroborated to found a conviction.
16. Ms. Ongeti in her submissions, placing reliance on Section 124 of the [Evidence Act](#), urged that the prosecution proved defilement took place. Counsel urged that the appellant caused his male sexual organ to penetrate the complainant's sexual organ, a matter corroborated by the evidence of PW2 who came soon after the act and saw the appellant running away from the scene, and medical evidence which found fresh wounds on the complainant.
17. The appellant has relied on very old precedent that has been over taken by events, both through legislation and case precedent. Section 124 of the [Evidence Act](#) as amended by Act No. 5 of 2003 and Act No. 3 of 2006 is a case in point. That section provides as follows:

“Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#), (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” (Emphasis added).
18. The effect of the proviso to section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. (See [Denis Obiri v Republic](#) Cr App No 279 of 2011, [Jacob Odhiambo Omumbo V Republic](#) Cr. App. No 80 Of 2008 (Kisumu) and *Mohamed v Republic* (2006) 2 KLR 138. In the latter case, this Court stated emphatically:

“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”
19. We are satisfied, looking at the judgments of both Courts below that they considered carefully the evidence of PW1 and found it truthful. We can only pay homage to the concurrent findings of the two Courts below, and find no reason to depart from their findings.
20. The other issue raised in this appeal is that the learned Judge of the High Court did not consider the appellant's age when he handed down 35 years imprisonment. The issue of sentence is a matter of fact



and does not qualify consideration by the second appellate Court. There is a rider to that. In *Njoroge v Republic* [1982] KLR 388 it was held by this Court on the said mandate on a second appeal:

“On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.”

21. Section 361(1)(a) of the *Criminal Procedure Code* provides that “severity of sentence is a matter of fact”. The sentence meted out to the appellant is legal. The appellant benefited from the Muruatetu decision, *supra*, and had his sentence varied by the High Court from life to a determinate sentence. We have no mandate therefore to interfere with the same.
22. We have come to the conclusion that the appellant’s appeal lacks in merit and is accordingly dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF MAY 2023**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

