



**Mbaabu v Republic (Criminal Appeal 80 of 2017)
[2023] KECA 1645 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KECA 1645 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 80 OF 2017
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JUNE 30, 2023**

BETWEEN

JAMES KINOTI MBAABU APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence of the High Court of Kenya at Meru
(Chitembwe J.) dated 31st January 2017 in Criminal Appeal No. 112 of 2016)*

JUDGMENT

1. The appellant James Kinoti Mbaabu was on December 5, 2016 convicted by the Chief Magistrate at Meru of defilement contrary to section 8(1) (2) of the [Sexual Offences Act](#), No. 3 of 2006, and sentenced to life imprisonment. The particulars of the offence were that on April 3, 2016 in Meru County, he had unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of SK (PW 1), a girl aged seven (7) years. He was aggrieved by the conviction and sentence, and appealed to the High Court at Meru. The learned Judge (Chitembwe, J.) heard the appeal, and on November 13, 2017 dismissed it by finding that the appellant had been properly convicted and sentenced. The appellant has come to this Court on second appeal to challenge the findings by the learned Judge.
2. Our jurisdiction on second appeal is limited to matters of law. This Court in [Karani -v- R](#) [2010] eKLR 73 explained the limits of the jurisdiction in the following terms:

“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.”

3. The record shows that, before the trial court the prosecution called five witnesses before the appellant was placed on his defence where he gave unsworn testimony and did not call a witness. PW 1 was aged 7 and was in class two. After voire dire examination, she gave sworn testimony to state that on April 3, 2016 her cousin, the appellant, had in his house removed her dress and, while threatening her, put his male organ into her female organ which had caused her a lot of pain, and which had led to her bleeding. She went home. Her niece (EM) (PW 4), aged about 12 or 13, was at home with her. She stated that PW 1 left at about 9.00pm. It was raining. When she returned she said she had been defiled by the appellant. She refused to eat. PW 4 did not know the appellant and did not witness the incident. PW 1’s mother was JN (PW 3). On this day, she returned home at about 10.00 pm to find that the children had slept. Next morning, she noticed that PW 1 was in pain, her clothes were blood-stained and dirty. PW 1 told her that the appellant had defiled her. PW 3 took PW 1 to Kiirua Police Station and reported the incident. They were issued a P3 form and PW1 was examined at Meru Level 5 Hospital by a Dr. Mohammed who found that her genitalia had a tear and there was minimal whitish discharge. In his opinion, PW1 had been sexually assaulted. The P3 was produced by PW 2 Dr. Michael Onyango who worked with Dr. Mohammed.
4. In defence, the appellant stated that he had been framed by his uncle who had a grudge against him because he thought his grandmother would bequeath property to him. His evidence was unsworn, and he did not call any witnesses.
5. This is the evidence that the trial court considered and came to the conclusion that the prosecution had established the guilt of the appellant beyond all reasonable doubt. He was convicted and sentenced. When he appealed to the High Court, his grounds were that:-
 - a. the trial magistrate erred in matters law by failing to note that the offence had not been proved beyond reasonable doubt;
 - b. the trial magistrate erred in law and fact by not considering that the undergarments worn by the victim prior and after the incident had not been produced as exhibits;
 - c. the trial magistrate erred in both law and fact by failing to note that the investigations had been shoddy;
 - d. the trial magistrate erred in law and fact by failing to observe that the medical examination report tendered by PW2 had been inconclusive; and
 - e. the trial magistrate had rejected the appellant’s defence without giving a cogent reason.
6. The learned Judge heard the appeal and, in his judgment, stated that he was persuaded that the prosecution had proved its case against the appellant beyond reasonable doubt. This is what the learned Judge stated:-

“The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The appellant contends that there is no eye witness to the alleged incident. The alleged blood stained clothes were not produced. The complainant testified that it is the appellant who defiled her. The incident occurred in the appellant’s house. A birth certificate was produced. The date of birth of PW1 is 20/5/2008. By 3/4/2016 she was 7 years old approaching 8 years. She knew the appellant as her relative. The medical evidence is to the effect that PW1’s hymen was broken. PW3 observed PW1 having difficulties when she went to the toilet. PW2 examined PW1 and concluded that PW1 was sexually assaulted. I do find



that the evidence on record does sufficiently prove that PW1 was defiled. It was not a framed up case. According to PW2, there was sexual assault.

The evidence shows that the appellant was living near PW3's home. He is a relative. PW1 knew the appellant even if the incident occurred at night. It is established by the evidence that PW1 knew the appellant as well as his house. PW1 gave the appellant's name to her mother. PW1 did not mention any other person other than the appellant.

The defence evidence is to the effect that the appellant was framed. It is the appellant's uncle who framed the appellant. The evidence on record shows that PW 1 was defiled. There is no relationship between defilement and the property owned by the appellant's grandmother. The issue of grudge is an afterthought.

The applicant's defence does not raise any doubt on the prosecution case ”

7. The appellant came before this Court, on second appeal, on the following grounds:-

- “ 1) That, the learned trial Judge flouted in matters of law by failing to note that the complainant didn't indicate the time the appellant defiled him if its day time or night.
2. That, the learned Judge flouted in matters of law by failing to note that there were irregularities in this case.
3. That, the learned trial judge flouted in the matters of law by failing to note that the charge- sheet was defective as the appellant was charged with the offence of defilement instead of incest.
4. That, the learned trial Judge flouted in matters of law by failing to note that the evidence adduced by the prosecution was contradicting and inconsistency.
5. That the learned trial Judge flouted in matters of law by convicting the appellant to life imprisonment hence failing to analyze the evidence tendered by the prosecution and came with his own conclusion.
6. That, the learned Judge erred in matters of law by failing to note there was a grudge between the appellant and his uncle who is the father to the complainant.
- 7 That, the appellant defence was rejected without cogent reasons.
- 8 That, I wish to be present during the hearing of this appeal.”

8. The appellant was not represented. He relied on his written submissions in which he contended that he had been convicted on inconsistent and contradictory evidence, and on the evidence of a single eye witness. On the question of contradictory and inconsistent evidence, he relied on the decision in *John Barasa – v- Republic*, Criminal Appeal No. 22 of 2005 in which it was held that:-

“It is trite law that where evidence is contradicted or inconsistent the court should never rely on the same.”



The appellant further submitted that DNA has not been conducted to prove him to be the perpetrator. He argued that the age of PW 1 had not been established. He then went on to state as follows:-

“Your Honor, even though the complainant was a young girl it is good to say that there was consent in having sex. The reason is that the girl did not complain during the time when they had sex. It was only when she began feeling pain sometimes later...”

9. The appellant, relying on the decision in *Francis Karioko Muruatetu & Another -v- Republic* [2017]eKLR, complained about the constitutionality of the mandatory life imprisonment for defilement under section 8(1)(2) of the *Sexual Offences Act* (the Act), and asked for the reduction of the sentence to a less severe one. He submitted that he was remorseful, and a first offender; that his father had died early, his mother was a pauper, he had been left to the care of his grandparents and that all these had denied him –

“moral values such as perseverance hence making him vulnerable to early lusts of the youths that led him to law breaking.”

10. In response, Ms. Macharia for the State opposed the appeal in its entirety. She submitted that the jurisdiction of the Court was limited only to points of law; and that, on the evidence, the guilt of the appellant had been proved beyond doubt; that the appellant and the PW 1 were related and known to each other; and that their houses were near each other. PW 1 had given the appellant’s name to her mother as the person who had defiled her, and that the fact of defilement had been confirmed by the medical evidence and her own condition as seen by her mother. Secondly, it was submitted, that the learned Judge had considered the appellant’s defence, including the alleged grudge, in reaching the determination that the prosecution had established his guilt. Lastly, on the question of the constitutionality of the sentence to life imprisonment, the Supreme Court had clarified that mandatory and minimum sentences under the *Penal Code* and other Penal Statutes remained statutory and valid. She urged the Court to consider the magnitude of the offence, the lifelong effects on PW 1 and her age, and dismiss the appeal altogether.
11. We have anxiously considered the evidence on which the appellant was convicted, his grounds of appeal and the rival submissions. We reiterate that, because this is a second appeal, our mandate is limited to considering points of law only. This Court will not normally interfere with the concurrent findings of fact by the two lower courts unless those findings are based on no evidence, or the courts are shown demonstrably to have acted on wrong principles in making the findings (*David Njoroge -v- Republic*) [2011]eKLR).
12. PW 1’s birth certificate was produced during trial to show that she was seven (7) years old. She stated that she had been defiled in the evening at about 9.00pm by the appellant when she went to his house. When her mother saw her in the morning, PW1 was in pain and her private parts and her clothes were stained with blood. When taken for medical examination her private parts were torn. The concurrent findings by the two lower courts were that she had been defiled. We have no reason at all to depart from those findings.
13. As to whether it was the appellant who had defiled PW1, it is true that she was the only witness to the act. It is true that hers was evidence of a single witness. That evidence was accepted to be true by the trial court, and confirmed by the High Court. It was evident that the appellant and PW1 were known to each other. They were cousins. The appellant had raised the defence of grudge, but the two courts had considered that defence and discounted it. We find no merit in the claim that the defence had not been considered, or that it had been rejected on no cogent grounds. We accept that the two



lower courts correctly found that there were sufficient reasons to find that the applicant defiled PW 1. It is preposterous for the appellant to suggest that PW 1, at her tender age, gave consent to be defiled!

14. Regarding sentence, section 8(2) of *the Act* provides as follows:-

“A person who commits an offence of defilement with a child of eleven years or less shall upon conviction be sentenced to imprisonment for life.”

The record shows that, in mitigation upon conviction, the appellant stated that his parents had died and that he lived with his grandmother. He gave his age as 23, and asked to be treated leniently. The trial court, in response, cited section 8(2) of *the Act*, and imposed the sentence of life imprisonment on the basis that it had no discretion in the matter.

15. We appreciate that the severity of sentence is a question of fact and is always at the discretion of the trial court. This was ably reiterated in *Wanjama -v- Republic* [1971]EA 493. However, as was stated in *Patrick Babati Maxwell -v- Republic*, Criminal Appeal No. 115 of 2017 at Kisumu, in *Joshua Gichuki Mwangi-v- Republic*, Criminal Appeal No. 84 of 2015 at Nyeri and *Chigongo Dzuye -v- Republic*, Criminal Appeal No. 31 of 2022 at Mombasa, there will be occasions when appellants convicted under the *Sexual Offences Act* will deserve minimum mandatory penalties. However, there will be other occasions when, after considering the mitigation and the peculiar facts of each case, such minimum mandatory penalty will be deemed to be manifestly harsh and excessive, and therefore challengeable on appeal.

16. In the instant appeal, the appellant’s mitigation was not considered. However, even after considering what he told the trial court in mitigation, we find that given the facts of this case where the appellant defiled his cousin who was only seven years old and damaged her private parts, the imposed minimum sentence was neither harsh nor excessive. We confirm it.

17. In conclusion, we find no merit in the appeal which we dismiss in its entirety.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE 2023

W. KARANJA

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JUDGE OF APPEAL JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

