



**Mwiti v Republic (Criminal Appeal 88 of 2017)
[2023] KECA 1042 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KECA 1042 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 88 OF 2017
W KARANJA, J MOHAMMED & LK KIMARU, JJA
JUNE 30, 2023**

BETWEEN

PETER MWITI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decree and judgment of the High Court at Meru (K.W.Kiarie. J.) dated 27th April 2017 in HCCRA No. 100 of 2016))

JUDGMENT

1. The appellant, Peter Mwiti, is before us on a second appeal challenging both his conviction and sentence for the offence of defilement. The appellant was charged at the Chief Magistrate's Court at Meru with the offence of attempted defilement contrary to section 9(1)(2) of the [Sexual Offences Act](#). In the alternative he was charged with performing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars are that on June 23, 2013 in Imenti North District, within Meru County intentionally touched the vagina of JK a child aged 4 ½ years with his penis. He denied both the main and alternative charges.
2. The prosecution called 3 witnesses in support of its case. The child's mother testified as PW1, while the child testified as PW2 and the person who rescued her, JK, was PW3. When placed on his defence, the appellant gave unsworn evidence whereby he denied committing the offence and stated that on the material day he was at his home.
3. The appellant was ultimately found guilty on the main charge of attempted defilement contrary to section 9(1)(2) of the [Sexual Offences Act](#) and was convicted under section 215 of the [Criminal Procedure Code](#), and after mitigation, he was sentenced to 20 years imprisonment.



4. Being dissatisfied with the judgment he filed an appeal before the High Court challenging both conviction and sentence on grounds, inter alia, that; there was insufficient evidence; crucial witnesses were not called to testify; no documentary evidence was produced; weak evidence by PW1 and PW2 and that his defence was not considered.
5. The learned Judge (KW Kiarie, J) held that the evidence on record pointed to an act that was more than preparatory, and that but for the intervention of JK (PW3), the appellant would have defiled the child, therefore the conviction was proper and the appeal on conviction failed. On the sentence the learned Judge held that the child was aged 4 ½ years and the sentence cannot be said to be harsh in the circumstances, thus dismissing the appeal in its entirety.
6. The appellant is now before this Court challenging the decision of the High Court on grounds that the learned Judge erred in law and fact; that no medical examination was conducted on him; the demeanour of the witnesses was unbelievable; there was no direct evidence linking him to the offence; crucial witnesses were not availed in court; convicting him yet the offence was not proved beyond a reasonable doubt; sentencing him to serve 20 years and that his defence was rejected without cogent reasons.
7. This being a second appeal, our mandate is restricted to consideration of points of law by dint of section 361 of the Criminal Procedure Code. This position has been repeatedly reiterated by this Court in various decisions including *Njoroge vs Republic [1982]KLR 388*, wherein the Court expressed itself as follows:

' On a second appeal, the court of appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence.'

Briefly put, the law enjoins us not to interfere with the 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 also *Mwita v Republic [2004]2 KLR 60*.

8. The appeal came up for plenary hearing before us on December 7, 2022 whereby the appellant appeared in person while learned prosecution counsel, Miss Mbaya appeared for the State. In support of his appeal, the appellant urged us to allow his appeal for the reason that the prosecution failed to prove beyond reasonable doubt the circumstantial evidence and that the evidence was overly inconsistent, uncorroborated and, therefore, inconclusive to sustain a conviction. The appellant took issue with the evidence of PW2 and PW3 which he said was contradictory, and thus insufficient to support the conviction. On sentencing he urged that the sentence was too harsh and that the same should be set aside.
9. In opposing the appeal, Miss Mbaya urged that since the appellant was charged with the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act*, the prosecution was required to prove the ingredients of age and the positive identification of the offender. On the issue of penetration, counsel urged that what the prosecution needed to demonstrate were the steps taken by the offender to execute the defilement, which act did not succeed. See *George Kioji v Republic, Criminal Appeal No 270 of 2012(UR)*. Counsel urged that a medical report in respect of the appellant was not necessary to prove the offence of attempted defilement and that the prosecution's evidence was believable, especially that of the child which was taken after voir dire examination and she was found fit to testify.



In addition, the child's evidence did not have to be corroborated as long as the trial court was convinced that the minor spoke the truth.

10. In support of this assertion, counsel referred to the decision in *JWA v Republic [2014]eKLR* and also section 124 *Evidence Act*. In regard to identification, counsel submitted that the minor positively identified the appellant as the person who had given her kshs 20 so that they could do 'tabia mbaya', had pulled her out of the house and pulled down her trousers and inner wear and made her feel a lot of pain until she screamed. In addition, counsel urged that once the prosecution had satisfactorily discharged the burden of proving the main element of a charge, it did not have to call a multiplicity of witnesses to prove its case. She relied on section 143 of the *Evidence Act* and the decision in *Bukenya vs Uganda [1972]EA 549*.
11. It was further submitted that the appellant's evidence was considered by the trial court when it noted that his defence was a mere denial. Counsel, therefore, contended that the prosecution proved all the ingredients of the offence beyond reasonable doubt and that the conviction was safe and this appeal does not raise any basis to disturb the conviction which should be upheld and the sentence confirmed.
12. On sentencing we were urged to find that the trial court exercised its discretion and meted out a proper sentence keeping in mind that the child was 4 ½ years old and the nature of the offence required punitive measures to deter other errant members of the society from committing similar offences. Counsel urged that the appeal be dismissed.
13. We have considered the record of appeal; both written and oral submissions and the authorities relied upon. As stated earlier, we must steer clear of interfering with concurrent findings of the two courts below. The issues that arise for our determination are whether prosecution's evidence supported the charge; whether the absence of the medical doctor and investigation officer's evidence led to a wrong conviction and whether the appellant's defence was considered. As to the sentence, by dint of section 361(2) CPC, severity of sentence is a matter of fact and unless the sentence is unlawful, or the two courts below failed to consider some germane issues like the appellant's mitigation or there is other non-compliance with the law, we must decline the invitation to interfere with it.
14. The burden of proof in criminal prosecutions falls upon the prosecution to prove the guilt of an accused person beyond reasonable doubt, but where the evidence tendered by the prosecution creates reasonable doubt, such doubt will go to the benefit of the accused person and he will be entitled to an acquittal. In this case the appellant was charged under section 9(1) and (2) of the *Sexual Offences Act*. The said provision provides as:
 - ' 1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - 2) A person who commits an offence of attempted defilement with a child is a liable upon conviction to imprisonment for a term of not less than ten years'.

The two courts below were satisfied that the child told the truth and they believed her evidence. We have no basis in law for interfering with those concurrent findings of fact.

From the evidence adduced before the trial court, the appellant was caught red handed by PW3 as he attempted to defile the child. The child also narrated what had happened, the trial court believed her and her evidence did not require corroboration by dint of section 124 *Evidence Act*.



The same provides as follows:

' Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offense, 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.'

We are satisfied that attempted defilement was proved, and further, the appellant who was well known to the child, her mother and PW3 was properly identified as the perpetrator. Medical evidence is not required for a charge of attempted defilement to be proved. We also observe that the child was aged four and a half years and that does not appear to be in dispute.

See the decisions of this Court in *Sahali Omar v Republic*[2017]eKLR and *Arthur Mshila Manga v Republic*[2016]eKLR.

As regards the failure to call the alleged vital witnesses, Section 143 of the *Evidence Act* provides that:

' No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.'

The evidence adduced in this matter was adequate and needed no other corroboration. We find that the prosecution adduced evidence which proved the charge of attempted defilement beyond reasonable doubt.

15. The appellant takes issue with the trial court failing to consider his defence and the learned Judge upholding his conviction in the absence of his defence. We have perused the record and note that the appellant's defence was a bare denial and the same did not displace the evidence adduced by the prosecution. We find that nothing really turns on the appeal on conviction, and the same is hereby dismissed.
16. On the sentence, the appellant submitted that the time he spent in custody was not considered when he was sentenced and urged us to take that into account. He said that he was in custody for 2 years and 4 months. There is no indication that this period was considered by the 2 courts below. For that reason, we order that the sentence of 20 years imprisonment be reduced by the time that the appellant spent in remand.
17. This appeal only succeeds to that extent.

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

W. KARANJA

JUDGE OF APPEAL

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JAMILA MOHAMMED

JUDGE OF APPEAL



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L. KIMARU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

