



**Magara v Republic (Criminal Appeal 16 of 2022)  
[2023] KECA 747 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 747 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 16 OF 2022  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
JUNE 22, 2023**

**BETWEEN**

**OBADIAH KIRIABU MAGARA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 3rd April, 2020 in HC. CR. A. No. 251 of 2018)*

**JUDGMENT**

1. The appellant was charged at Makadara Law Court with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on April 13, 2013 he caused his penis to penetrate the vagina of a girl “SGW” aged 9 years.
2. During trial, the prosecution called 5 witnesses while the appellant gave an unsworn statement and did not call any witnesses. At the end of the trial, the court gave judgment on November 14, 2018 wherein it convicted the appellant and sentenced him to life imprisonment. The appellant filed Nairobi High Court criminal appeal 251 of 2018 seeking to quash the conviction and set aside the sentence. The High Court gave judgment on April 9, 2020 where it dismissed the appeal on conviction but substituted the sentence of life imprisonment with a sentence of 26 years imprisonment.
3. The appellant was dissatisfied with those findings and is now before us on a second appeal. Our mandate on a second appeal is limited by section 361(1)(a) *Criminal Procedure Code* to consider only issues of law. This mandate was stated by this court in *Peter Ngure Mwangi v Republic* [2014] eKLR:

“This being a second appeal, our mandate is as set out in section 361(1) of the Criminal Procedure Code namely to deal with issues of law.”



4. We shall revisit the record to see whether the two courts below carried out their mandate as required by law.
5. SGW (PW1) told the trial court that the appellant was known to her as Baba Peter, and he was a husband to her mother's friend. They were neighbours. On April 13, 2013, Mama Peter, her mother's friend, sent her to her (Mama Peter's) home for a baby shawl. She met Baba Peter in the house and he told her to sit on the bed and asked her if she had ever had sex before, to which she replied in the negative and tried to leave, but the appellant pushed her onto the bed, tore off her clothes, removed her underwear and threw it through the window. He took off his clothing and used a stocking to cover her eyes and mouth before defiling her. Afterward, he removed the bloody bedsheet and put another bedsheet on the bed, cleaned up the house, and gave her Kshs 20 warning her not to inform anybody. She went home and did not tell her mother as she feared that she would be punished by her mother, who beat her often. Their house help saw the torn skirt and told a friend named Faith and it was Faith who told PW1's mother that SGW had been defiled. The appellant was arrested 2 days later and his wife abused the complainant's mother. SGW was taken to the hospital.
6. In cross-examination she said that her mother had had a falling out with the appellant's wife prior to the arrest and that the complainant's mother had threatened the appellant's wife that her day would come.
7. NWN (PW2), mother to the complainant told the court that her daughter was born in 2004. She heard of the incident on April 29, 2013 when her house help said that PW1 was reluctant to bathe and that her biker and underwear were bloody. PW2 took her daughter to the hospital at National Youth Service and saw that she was bleeding and had a tear in her private parts. PW1 was treated and discharged and they reported the matter to Muthaiga Police Station and the appellant was arrested. She said that she and the appellant's wife were friends and would drink together but they quarreled after the appellant's arrest.
8. Dr Kezzie Shako (PW3) of Police Surgery, Nairobi, told the court that she examined SGW on May 2, 2013 and found that the child had normal genitalia though the labia minora was tender. The hymen was torn and there was the presence of a normal white discharge.
9. Corporal Virgina Murage, (PW4) attached to Muthaiga Police Station was the investigating officer. She stated that she received the complainant and her mother on April 29, 2013 and undertook investigations which culminated in the arrest of the appellant on May 7, 2013. She produced a birth certificate confirming that the child was born on March 27, 2004 and was 9 years old at the time of the offence.
10. Dorcas Mugure (PW5) of NYS Health Center at the material time testified that the minor was brought to the clinic on April 29, 2013. She noted that the child's hymen was broken but no physical injuries were noted. She was informed that the offence occurred two weeks earlier.
11. The trial court found that a *prima facie* case had been made against the appellant. Upon being placed on his defence, the appellant told the court in an unsworn statement that the complainant's father had an affair with his ex-wife, and after the two disagreed, he was framed on the defilement charges. He denied committing the offence and said that he was at work on the material day but he lost his job as the child's mother came to his workplace and had him sacked.
12. As earlier stated, the appellant was convicted by the trial court and sentenced to life imprisonment and the conviction was upheld at the High Court on the first appeal though the sentence was reviewed to 26 years imprisonment.



13. The appellant is now before us in this appeal but the memorandum of appeal appears to have been misplaced but the grounds of appeal are summarized in his undated submissions forwarded to our Registry through the Officer in Charge, Kamiti Medium Security Prison and signed by that office on February 2, 2023. The grounds of appeal are to the effect that the High Court on first appeal erred in law in upholding the conviction and sentence when his guilt had not been proved; that the High Court erred in law by failing to find that the charge sheet was defective; that the High Court erred in law by not finding that the ingredients of the offence were not established against him; that the High Court erred in law by failing to find that vital exhibits were not availed and that this contravened rights under article 50 (2)(c) and (j) of the *Constitution*; that the High Court relied on evidence that was riddled with contradictions and inconsistencies and was worthless and finally, that the High Court erred in law when it failed to consider the appellant's defence.
14. When the appeal came up before us for hearing on the virtual platform on February 22, 2023 the appellant appeared in person from Kamiti Prison while learned state counsel Mr Oriachi appeared for Office of the Director of Public Prosecutions. Both sides had filed written submissions. ODPP had, through Mr Charles Orinda, Senior Assistant Director of Public Prosecution, filed a "notice of intention to enhance sentence" dated February 16, 2023. Mr Oriachi asked us to inform the appellant, who was unrepresented, of the consequences of that notice. The court enquired from the appellant whether he had received the notice and if he understood the consequences. The appellant confirmed that he had received that notice and understood its consequences. He elected to proceed with the appeal even after the court informed him that if the appeal failed there was a likelihood of an enhancement of the sentence.
15. In our view, the issues of law arising in this appeal are whether the charge was proved to the required standard, whether the appellant's defence was considered, and in view of the notice to enhance sentence, what is the appropriate sentence if the appeal on conviction fails.
16. We have considered the record, the submissions made and the law.
17. The appellant complains that the High Court did not consider or analyze the evidence and upheld the conviction on a charge which had not been proved.
18. The record shows that SGW, the child aged 9 years, was sent by a woman who was their neighbour to collect a piece of clothing and when she entered that house, she found the appellant, a person she knew well as a husband of that woman and who was also her mother's friend. It was during the day. The girl narrated to the trial court how the appellant engaged her in a conversation involving whether she had had sex before and when she showed disinterest, in her own words:

"When I tried to leave he held me on the shoulder and pushed me to the bed. The house is a single room. The wife was at the stalls not far from the house. He tore my clothes. He also removed my pant and threw it through the window. He had sex with me. He used his stocking to close my mouth and eyes. He removed all his, he remained with the vest. He put his thing and put in mine. I do not know what it is used for. He did that for 30 minutes from 2.30 pm to 3.00 pm. I did not raise alarm. The accused then removed the bedsheet which had blood sheet and spread the new one. I also saw him remove the sperms from the carpet. I felt pain. I was still bleeding."
19. The doctor testified that on examination, the girl's labia minora was tender and the hymen was torn. His evidence was confirmed by the Clinical Officer who had first received the girl on a complaint of defilement.



20. The trial court considered that evidence which it believed in accordance with the provisions of section 124 of the Evidence Act. The magistrate found:

“... The witness gave details of what the accused did. In my opinion, a child of her age could not come up with such details unless she experienced them ... I believe her ...”

21. The High Court re-analyzed the evidence on first appeal and came to the same conclusion. The trial magistrate who had the benefit of seeing and hearing the witnesses and observing their demeanor believed that SGW told the truth of the ordeal she underwent when she entered the appellant’s house while on a mission to collect a piece of clothing. Not only was there corroborative evidence through medical evidence, but the testimony of SGW was unshaken and the trial court was right to believe it and dismiss the appellant’s defence.

22. The appellant complains that his defence was not considered and that his rights were prejudiced. He stated in his unsworn statement that he worked for Tusky’s; that his ex-wife and the complainant’s father had an affair and that he had been framed. The trial court found that the defence had been displaced by the strong case made out by the prosecution. The High Court analyzed the defence in detail and agreed with the trial court that the defence had been displaced by the prosecution case. We have gone through the record and come to the conclusion that the case was proved to the required standard and that both courts below considered the appellant’s defence and properly dismissed it.

23. The last issue for our consideration is that of the sentence.

24. The appellant was convicted of the offence of defilement contrary to section 8 (1)(2) of the Sexual Offences Act. The girl defiled was proved to have been 9 years old at the material time. That provision of law prescribes a sentence of life imprisonment for an offender who defiles a minor aged 11 years and below. The trial court imposed a life sentence but the High Court on first appeal set aside that sentence and substituted it with 26 years’ imprisonment. The High Court relied on the Supreme Court decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR where it was held by that court that it was wrong for parliament to impose a mandatory minimum sentence. The Supreme Court issued directions in Francis Karioko Muruatetu & another v Republic [2021] eKLR to the effect that the judgment in the case applied only to murder cases. This is probably the reason why ODPP has filed a notice to enhance sentence in this appeal. ODPP states in that notice:

“The appellant is hereby notified that the respondent herein shall ask this honourable court to enhance the sentence that was reduced by the High Court from life imprisonment as meted out by the lower court to imprisonment for 26 years.

The appellant has the option of withdrawing the appeal and continue to serve the 26 years given by the High Court should he so choose.”

25. As already stated we warned the appellant, who confirmed that he had received that notice and understood the consequences of proceeding with the appeal. Nonetheless, he decided to proceed with the hearing of the appeal.

26. Mr Okatchi, for the ODPP, submitted on that issue that the appellant had been properly convicted and the trial court had awarded the prescribed sentence. He submitted that the High Court had no basis to interfere with that sentence. In response, the appellant gave facts that led to his conviction.

27. We have found that the conviction was sound and was backed by the evidence. The appellant defiled a 9 year old child who knew him well as a neighbour and a friend to her mother. The sentence prescribed for that offence carried a sentence of imprisonment for life. The ODPP having given and served notice



to enhance the sentence, we find that the appropriate sentence in the case was the sentence awarded by the trial court. We set aside that part of the Judgment of the High Court sentencing the appellant to 26 years imprisonment, substituting it with life.

28. Accordingly, the appeal on conviction fails and is dismissed. The appellant is sentenced to serve imprisonment for life.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

