



REPUBLIC OF KENYA



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**Mungatu v Republic (Criminal Appeal 89 of 2020)
[2023] KECA 725 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 725 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 89 OF 2020
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
JUNE 9, 2023**

BETWEEN

JUSTUS MUTUKU MUNGATU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya (C. Kariuki, J.) dated on 11th October, 2019 in Makeni HCCRA No. 59 of 2018)

JUDGMENT

1. Justus Mutuku Mungatu, “the appellant”, in an attempt to have a second bite of the same cherry has preferred this second and perhaps last appeal challenging his conviction and sentence for the offence of defilement.
2. The particulars of the offence were that on the October 9, 2017 in Kilungu sub- county within Makeni county, the appellant intentionally caused his penis to penetrate the vagina of WK a child aged 15 years. On an alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act*. The particulars being that on the same day and place he intentionally touched the vagina of WK, a child aged 15 years. The facts giving rise to the appeal can be summarized as follows: PW1, WK, was a standard 7 pupil. On October 9, 2017, as she was heading to school, she met the appellant who asked her to accompany him into the bush and she complied. The appellant then sexually violated her and thereafter released her to go to school.
3. PW2, PM, a Standard 8 pupil at the same school, on the same day whilst similarly heading to school, saw a red cardigan hanging on an avocado tree and went to check only to find the appellant lying on top of PW1. She knew the appellant and also saw PW1’s school bag lying on the ground. She retreated slowly and went to PW1’s uncle and informed him of what she had observed. Together, they went to



- the scene and met the appellant zipping up his trousers. PW1 then used a different route to school. The duo proceeded to the school and informed the class teacher what had transpired, whereupon the class teacher called PW1 and thereafter, proceeded to the police station to make a report.
4. On his part, PW3, DKM the uncle to PW1, on the material day, was at home when PW2 came and told him that she had found the appellant having sex with PW1 under an avocado tree. They went to check and found the appellant having sex with PW1. When confronted, the appellant requested him not to escalate the issue and owned up to committing the act under the influence of alcohol and requested to settle the matter amicably as a family. PW4, the area Assistant Chief was called and informed that the appellant had been found in the bush having sex with PW1. Together with PW3, they proceeded to school and interrogated PW1 and thereafter, reported the incident to the police station, and later, went to the hospital. That the appellant often took advantage of the complainant's unstable mind to sexually assault her.
 5. PW5, PC Florence Munaya Mukelemani, on the October 9, 2017 received a report from PW3 regarding defilement of PW1. She also interrogated PW1 who reiterated that she was heading to school when she met the appellant who lured her into the bush and defiled her. She subsequently filled the Post Rape Care "PRC" form. PW6, Eric Kasyamani a clinical officer at Kilungu Sub-District Hospital filled the P3 form for PW1. The complainant had been examined by one, Dr Patrick Kihiu on October 10, 2017, who found that the PW1's hymen was broken and had an infection. He was of the opinion that PW1 had been defiled.
 6. Put on his defence, the appellant in an unsworn statement denied the charges and claimed that the case was a frame up due to a grudge in the family. Upon consideration of the entire case, the trial court found the appellant guilty, convicted and sentenced him to 20 years' imprisonment.
 7. Being aggrieved with the decision, the appellant lodged an appeal in the High Court which was duly heard and dismissed in its entirety.
 8. Undeterred, the appellant is now before us on second appeal on grounds that the High Court erred in law by: not observing that the age of PW1 was not proved; failing to observe that the case for the prosecution was full of contradictions and inconsistencies; and, failing to observe that the evidence relied upon by the prosecution fell too short of the certainty required.
 9. The appeal was canvassed by way of written submissions with limited oral highlights. Whereas the appellant appeared in person, the State was represented by Mr Orinda, learned prosecution counsel. The appellant in his submissions merely reiterated the grounds of appeal.
 10. On the other hand, the respondent submitted that the High Court was justified in holding that the evidence presented against the appellant in the trial court proved the offence of defilement to the required standard. That the appellant was well known to the witnesses and the first appellate court rightly concluded upon re-evaluation of the evidence that the appellant was properly identified as the person who defiled PW1. Further, that the first appellate court rightly concluded that the age of PW1 was 15 years as testified to by PW1 herself and as indicated in the P3 form.
 11. Lastly, it was submitted that the first appellate court discharged its duty and re-evaluated the evidence as required before arriving at its own independent findings. The appellant's defence was duly considered before it was dismissed as not being sufficient to dislodge the strong evidence presented by the prosecution during the trial. In the premises, it was urged that the appeal be dismissed.



12. Our role as the second appellate court was succinctly set out in *Karani v Republic* [2010] 1 KLR 73 wherein this court expressed itself thus:

“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.”

13. After going through the evidence on record, submissions, and the law, we find that the only issue of law falling for our determination is whether the offence of defilement was proved beyond reasonable doubt against the appellant. It is trite that for the charge of defilement to stand, the prosecution must prove three main ingredients as provided for under section 8(1) of the *Sexual Offences Act*. These are, the age of the victim (must be a minor), penetration, and proper identification of the perpetrator. See the case of *George Opondo Olunga v Republic* [2016] eKLR.

14. In this appeal, one of the appellant’s major complaints is that the age of the complainant was not proved to the required standard and that the document produced as her birth certificate could not be relied on to prove her age. There is no doubt that in an offence such as the one that faced the appellant, the age of the victim determines the nature of the offence and the consequences that flow from it. It is therefore a matter of the greatest importance that such age be proved beyond reasonable doubt. That has been the consistent holding of this court and we are content to adopt what this court stated in *Hadson Ali Mwachongo v Republic* [2016] eKLR thus;

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello v Republic* Cr App No 203 of 2009 (Kisumu) This court stated as follows;

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1):”

15. In the trial court, PW1, testified that she was 15 years of age and in standard 7. PW3 in his testimony, equally, stated that the complainant was 15 years of age at the time of the incident and that she was mentally challenged. This information is similarly reflected in the P3 form which was tendered in court. The charge sheet indicated that the complainant was 15 years of age. The High Court while dealing with the issue stated thus:

“PW3 the child’s uncle also stated in court that she was 15 years of age. The treatment card also indicated that the child was aged 15 years.

The trial court did not see any justification to deviate from these estimates just for lack of paper proof. This court agrees that there was sufficient material to support prove of age of the victim. In any case the appellant never contests the element of age. The trial court also took judicial notice that the children in this area are usually born at home and any form of



age documentation may be a tall order and strictly insisting on the document or certificates would be limiting this court cognitive ability to papers. This court not fault trial court on that. In any case the trial court had the opportunity to see the child in court and opined that it did discern by common sense that the age that was given by oral evidence without doubt. Thus, this ingredient of this offence was properly proved. The identity of the assailant is not in dispute.”

16. On our part, having gone through the record thoroughly, we are satisfied that this element was succinctly proved to the required standard. We are further fortified in our finding by the decision of this court in the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa criminal appeal No 24 of 2015) (UR) cited in *Edwin Nyambaso Onsongo v Republic* [2016] eKLR where the court stated that:

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”

“..We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

17. The other ingredients of the offence of defilement were equally proved going by the record. The appellant was caught in the act by PW2 and PW3. Further, the appellant was willing to settle the matter at a family level without involving the local administration, which fact the appellant did not dispute. The identity of the perpetrator cannot therefore be in dispute. Penetration was confirmed by the PW6 and the complainant herself. In any case, these were concurrent findings by the two courts below and we have no reason to depart from them.

18. As to the appellant’s complaint that the case for the prosecution contained contradictions and inconsistencies, thus, contrary to section 163 of the *Evidence Act*, this is a second appeal and the guidance that we should adhere to, has already been given, *supra*, in this judgment. Furthermore, this issue was not before the first appellate court, hence we need not say more.

19. The upshot is that the appeal is lacks merit and is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed



DEPUTY REGISTRAR

