



**Muema v Republic (Criminal Appeal 104 of 2021)
[2023] KECA 1023 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KECA 1023 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 104 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
AUGUST 4, 2023**

BETWEEN

ONESMUS MUSYOKI MUEMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the High Court at Nairobi (L.N Mutende, J) delivered on 16th December 2014. in Makeni HCCA No. 132 of 2012)

JUDGMENT

1. This is a second appeal from the judgment of the trial court delivered on June 22, 2012, where the appellant, Onesmus Musyoki Muema was charged with the offence of defilement of a child aged 10 years contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on December 10, 2010 in Mbooni West District within Makeni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of NJ PW1 a child aged 10 years.
2. The alternative charge stated that 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 the appellant intentionally and unlawfully did an indecent act to the child by touching her private parts.
3. The appellant pleaded not guilty and during the hearing, the prosecution called 4 witnesses. After a full trial, the trial magistrate found the appellant guilty, and sentenced him to life imprisonment.
4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court where his appeal was dismissed and both the conviction and sentence were upheld.



5. The appellant was further aggrieved and filed an appeal to this court on grounds set out in a memorandum and supplementary grounds of appeal where he contended that the learned judge: failed to find that exhibited documentary evidence was obtained contrary to article 50 (4) of the *Constitution*; failed to find that the witnesses were incompetent; failed to find that he was denied his right to representation; failed to find that penetration was not proved in this case; failed to properly re-evaluate the evidence the record; failed to take into account his defence and alibi; failed to find that the charge sheet was defective, and that crucial witnesses were not called to testify and failed to find that the life sentence meted upon him was illegal.
6. The appellant filed written submissions. When the appeal came up for hearing, he appeared in person from Kamiti Prison and informed us that he would be relying on his submissions in their entirety. In the submissions, it was submitted that, the elements of the offence of defilement were not established to wit; that there was no medical assessment report to prove the age of the complainant; that there were no injuries on her genitalia including bruises or lacerations and further, that there was no male discharge such as semen or spermatozoa was present, to prove that there was penetration. He also claimed that he was not properly identified. It was further submitted that crucial witnesses were not called and that his *alibi* defence was unjustifiably disregarded; that furthermore, the evidence of George Gichuhi Kamande, PW3, the clinical officer was not properly received by the trial court as he was not the maker of the treatment card and therefore ought not to have produced it.
7. On the sentence, the appellant submitted that it was discriminatory since it gives differential treatment to accused persons convicted under the same provisions. He prayed that the sentence be reduced.
8. In response, learned prosecution counsel for the state, Mr Okachi submitted that the offence of defilement was proved to the required standard; that the complainant's age was established through her evidence and that of her mother; that penetration was established and that the appellant was caught red handed and was properly identified. Counsel submitted that the clinical officer proved that there was penetration and that the evidence pointed to the appellant as the perpetrator.
9. The mandate of this Court on a second appeal is limited to consideration of matters of law only by reason of section 361 of the *Criminal Procedure Code*. In the case of *Rashid v Republic* (Criminal Appeal 90 of 2021) [2023] KECA 596 (KLR) this Court reiterated that;

“As already stated, this being a second appeal, this court is restricted to addressing itself to matters of law only. The court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or the courts below acted on wrong principles in making the findings.”
10. Guided by the above, the issues that arise for determination are;
 - (i) whether the failure to provide him with legal counsel violated his rights;
 - (ii) whether the offence of defilement was proved to the required standard
 - (iii) whether the first appellate court properly re-evaluated the evidence that was before the trial court;
 - (iv) whether the trial court and the first appellate court considered the appellant's *alibi* defence;
 - (v) whether the evidence of PW3, the clinical officer was properly admitted and
 - (vi) whether the sentence was unlawful and discriminatory.



11. Beginning with whether his rights to legal representation were violated, the appellant complained that he was not represented by an advocate nor informed of his right to legal representation at the state's expense pursuant to article 50 (2) (g) and (h) of *the Constitution*.
12. The provision states that;
 - (2) Every accused person has the right to a fair trial, which includes the right –
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly:
 - (h) to have an advocate assigned to the accused person by the state and at state expense if substantial injustice would otherwise result, and to be informed of this right promptly.”
13. It is apparent from the record that the appellant was not represented by counsel during the trial, and in the high court. There is no evidence on record to show that he requested for legal representation. Indeed, this issue was not even raised on appeal before the High Court.
14. In the case of *Mohammed Abudullahi v Republic* [2019] eKLR, this Court stated as follows;

“Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. article 50(1) of *the Constitution* does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate Court the appellant did not seek legal counsel either. The learned Judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation.”
15. In the present appeal, the appellant did not raise the issue of legal representation either in the trial court or the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses. It is also not evident that he suffered any substantial injustice. It is our view that, the appellant's arguments that his rights to legal representation were violated have no merit.
16. Now, turning to whether the offence was proved to the required standard, we will briefly set out the facts that were before the trial court.
17. After the conduct of a voir dire examination, NJ (PW1) gave sworn evidence that on December 10, 2010 at about 2.00 p.m. while she had gone to relieve herself in a structure made of sacks that served as a pit latrine, the appellant entered as she pulled up her underpants; that he offered her Ksh.20 held her hand and led her to a napier grass plantation where he removed her underpants, unzipped his jeans trousers, pushed her to the ground and partially inserted his penis into her vagina. She stated that although the appellant had covered her mouth with his hands, she managed to scream and call out to her mother who came to her rescue causing the appellant to run away.
18. During cross examination, she reiterated that the appellant tore her skirt, removed her underpants and partially inserted his penis in her vagina and ran away when he heard her mother calling out her name.



19. PW2, NJ's mother, arrived home and found her grandson whom she had left in NJ's care lying on the ground near the latrine. When she called NJ, she heard her faint response coming from the napier grass plantation. She rushed into the napier grass, and she saw the appellant running away. NJ was lying on the ground crying with her underpants besides her. She picked NJ and her underpants up and took her to the house. She later informed her husband and they took NJ to Mbooni District Hospital for treatment, and thereafter reported the matter to the police station. She confirmed that NJ was 10 years old at the time of the incident, and produced her health card. When cross examined, she confirmed seeing the appellant who was a person known to her running away; and that he used to work for a neighbour.
20. PW3, a clinical officer at Mbooni District Hospital, filled NJ's P3 form. He based his report on treatment notes that indicated that NJ was examined four hours after the alleged incident and that the examination revealed that her hymen had been freshly broken. He concluded that there was partial penetration.
21. Corporal Nasra Abdallah, PW4, the investigating officer, received PW2's report of an alleged defilement of NJ by the appellant. She referred her to Mbooni District Hospital for treatment and later issued her with a P3 form. She also collected NJ's soiled clothes from PW2 which she produced as evidence.
22. In his defence, the appellant stated that on the material day he was sent to take chicken to his employer's residence in Machakos. He returned at 4.00 p.m; that at about 11.00 p.m, he was arrested by the village elder and Mary Wambua and taken to NJ's home, where Mary Wambua examined the child. The following day he was taken to the police station. He called 2 witnesses.
23. Patrick Mbithi Lungu, DW1, the village elder of [Particulars withheld] village stated that he saw NJ with her mother on the fateful date at 3.00 p.m. He was assigned the duty of arresting the appellant.
24. Joshua Mule Mbondo, DW2, the appellant's employer stated that he sent him to Machakos on the December 9, 2010 as he was away in Eldoret, and that the appellant returned the same date day at about 4.00 p.m.
25. As to whether the offence was proved to the required standards; the offence of defilement is founded on three main ingredients; namely, the age of the victim, penetration and the proper identification of the perpetrator. These ingredients for the purposes of the offence are specifically provided for under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. In the case of *Muthama v Republic* [2022] KECA 1214 (KLR) it was observed that;

It is now settled law that to warrant conviction for an offence of defilement under section 8(1) of the *Sexual Offences Act*, three elements should be satisfied before conviction of an accused person can arise. These are penetration, apparent age of the victim and identity of the perpetrator”
26. On proof of age, this Court in *KM v Republic* [2023] KECA 289 (KLR) held that;

There are many ways of establishing age which may take the form of production of a birth certificate, baptismal card or other religious document or other documents. But it must always be remembered that a trial court is possessed of the necessary intelligence to make an appropriate decision in regard to age.”
27. NJ testified that she was 10 years old at the time she was defiled. PW2 also produced a Health Card which indicated that NJ was 10 years old. Her evidence was corroborated by PW3, the clinical officer such that there is no question that NJ's age was properly proved.



28. Regarding penetration, section 2 of the [Sexual Offences Act](#) defines penetration;

“as the partial or complete insertion of the male genital organ to the genital organ of a female.”

29. In so far as partial penetration is concerned, this Court in the case of [Mutali Nyamwea v Republic](#) [2019] eKLR observed that;

“... for the offence of defilement to be proved, the prosecution evidence must show that the appellant inserted his penis into the vagina of the child. It is not sufficient that the said organs came into contact. However, partial insertion suffices for the purposes of penetration as the said insertion need not be complete.”

And in the case of [Erick Onyango Ondeng v Republic](#) [2014] eKLR stated thus;

“We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence.”

On the absence of spermatozoa, this Court in the case of [Mark Oiruri v Republic](#) [2013] eKLR opined that;

“... In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...”

30. The afore cited authorities are clear that, notwithstanding that penetration was partial, and no male discharge such as semen or spermatozoa were present, did not mean that penetration had not occurred.

31. NJ testified that the appellant partially inserted his penis into her vagina. He ran away when he heard PW2 calling NJ. This was confirmed by PW2 who entered the napier grass, and saw him running away. He left NJ lying on the ground with her underpants beside her. The trial magistrate who had the benefit of observing NJ and hearing her evidence, found her to be a truthful witness, and believed her testimony that she was partially defiled. As a consequence, the court was entitled to reach a finding that there was penetration, and convict the appellant in accordance with section 124 of the [Evidence Act](#).

32. Needless to say, NJ’s evidence was corroborated by PW3’s medical report that specified that partial penetration had occurred. The medical report disclosed that her hymen was ruptured which showed that there was penetration. Both the trial court and the High Court reached the same conclusion that there was penetration. In view of the concurrent findings of the two courts’ below, we have no reason to reach a different finding. In effect, we too are satisfied that penetration was proved.

33. On the assertion that the evidence of PW3 (the clinical officer’s) evidence was not properly received by the trial court, the appellant contended that since the clinical officer did not prepare the treatment notes, he was not qualified to produce them.

34. The production of expert evidence is governed by section 48 of the [Evidence Act](#). Further, section 77 of the [Evidence Act](#) provides;



- (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
 - (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
 - (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”
35. In the case of *Joseph Bakei Kaswili v Republic* [2017] eKLR this Court held;
- “Section 33 of the *Evidence Act* Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable. Section 77 of the *Act* on the other hand makes provision for the admission in evidence of medical evidence.”
36. A perusal of PW3, the clinical officer’s evidence shows that the witness introduced himself as a clinical officer at Mbooni District Hospital, and explained that he arrived at the findings contained in the P3 form after he made reference to the treatments notes which were part of the Hospital records relating to NJ’s medical history. The appellant did not object to the production of the treatment notes, but instead, he cross-examined the witness on the contents of the treatment notes. There having been no objection from the appellant as to their production, they formed a part of the prosecution evidence, and the court rightfully admitted them. This ground is accordingly dismissed.
37. As pertains to his identification, NJ stated that the appellant was well known to her. PW2 who saw the appellant running away from the scene also stated that he was well known to her. The incident took place in broad daylight when the appellant could be recognised. This was therefore a case of recognition as opposed to identification of a stranger, with the result that the appellant’s identification was also satisfactorily proved.
38. As concerns the complaint that his *alibi* defence was not taken into account, the appellant asserted that since DW2, his employer’s evidence supported his claim to have been in Machakos on the day in question, it was wrong for the courts below to have disregarded it.
39. The trial court considered the appellant’s *alibi* defence and concluded that the appellant was at the scene when the incident occurred. In this regard the court had this to say;
- “... the Appellant gave an *alibi* defence. He alleged that his employee sent him to Machakos, therefore it was not possible that he was at the scene of the crime. Indeed, his employer DW2 admits having sent him to Machakos but the date alluded was December 9, 2010.”
40. On *alibi* defence, this Court in *Kiarie v Republic* [1984] KLR observed;
- “An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of a court a doubt that is not unreasonable.”



41. In the case of *Erick Otieno Meda v Republic* [2019] eKLR this Court after considering comparative decisions, made the following observations;
- (a) An *alibi* needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
 - (b) An *alibi* defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
 - (c) The *alibi* defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
 - (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the *alibi* to fail. (See *Mblungu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).”
42. In his *alibi* defence, the appellant asserted that his employer had sent him to Machakos on the material day and that he returned home at 4.00 p.m., after the alleged incident had already taken place. A consideration of DW2's evidence shows that it accounted for the appellant's whereabouts on the December 9, 2010 and not on the December 10, 2010 when the offence took place. As such, DW2's evidence was of no value, as it did not corroborate the appellant's *alibi* defence as to his whereabouts on the date and time the alleged incident occurred. This being the case, the courts below rightfully dismissed his *alibi* defence.
43. As to whether the High Court re-evaluated the evidence that was before the trial court, the case of *JWM v Republic* [2019] eKLR is explicit that;
- “This Court has often times held that the re-evaluation, which is akin to a mini trial need not follow any specific format. What is important is for the court on first appeal to relook critically at all the evidence adduced before the trial court and arrive at its own independent conclusion either way. This duty was amplified in this Court's recent decision in *Eliud Waweru Wambui v Republic* (2019) eKLR in the following words;
- “It (the court) is required to and must be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant, the only limitation to its task being a remembrance that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance.”
44. A consideration of the judgment shows that the first appellate court, reconsidered the evidence before it in its entirety and arrived at the determination that NJ was defiled. The High Court concurred with the trial court that NJ was a truthful witness and that the medical report corroborated her evidence. So that when the appellant's *alibi* defence was weighed against the prosecution evidence, the court found, and rightly so, that the defence did not displace the prosecution's case with the result that the conviction was rendered safe. We are satisfied that the High Court carefully re-evaluated the evidence and reached the right conclusion that the appellant had defiled NJ. Therefore, this ground has no merit.
45. From the foregoing since both the High Court and the trial court arrived at the concurrent findings that the prosecution proved its case to the required standard that the appellant defiled NJ. Once again,



we too have no reason to depart from those findings. As such, the appeal against conviction has no merit and is dismissed.

46. Finally, the appellant complained that the sentence was illegal and discriminatory. This Court in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR had this to say on sentencing;

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

47. The sentence imposed on the appellant is as prescribed under section 8(2) of the *Sexual Offences Act*. Section 8 (2) of the *Sexual Offences Act* specifies that;

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

48. The sentence of life imprisonment imposed on the appellant is a lawful and legal sentence, and this Court has no basis upon which to interfering with it. Ultimately, the appeal against the sentence is also dismissed.

49. In sum, the appeal against conviction and sentence is unmerited and is dismissed in its entirety.

50. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

