



**JE v Republic (Criminal Appeal 130 of 2017)  
[2023] KECA 1614 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1614 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 130 OF 2017  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**JE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of the High Court of Kenya at Nanyuki  
(Kasango, J.) dated 14th June, 2017 in Criminal Appeal No. 5 of 2016)*

**JUDGMENT**

1. The appellant, Joseph Ekiru, was arraigned before the Chief Magistrate’s Court at Nanyuki on January 5, 2015, and charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*. The particulars of the charge were that on November 11, 2014, at [particulars withheld] in Meru County, the appellant intentionally touched the vagina of E A (the complainant), a child aged five (5) years old, with his penis, who was to his knowledge, his daughter.
2. The appellant denied the charge prompting the trial in which the prosecution called a total of five (5) witnesses. The prosecution’s case was that on 11<sup>th</sup> November, 2014, the appellant’s wife, PW2, left home for work at 5.40 am . She left the complainant in the house with the appellant. The following day, the complainant informed her that she was experiencing pain in her private parts, and requested for pain medication. PW2 inquired from the complainant what was the cause of the pain. The complainant informed her that the appellant, her father, had done “*tabia mbaya*” to her, on the bed. PW2 stated that she examined the complainant and saw that her private parts were reddish. PW2 reported the matter to PW5, Inspector James Opiyo, at Timau Police Station. She afterwards took the complainant to Timau Dispensary for medical examination. She was referred to Nanyuki District Hospital for further treatment.



3. PW2 told the court that shortly thereafter, the appellant disappeared and relocated to Chumut area. On January 31, 2015, the appellant re-appeared at her house and chased her away. She informed the area Sub-Chief and a Children's Officer (PW4). They accompanied her to the police station where they reported the matter. The appellant was subsequently arrested. PW3, Ronald Mutai, a Clinical Officer based at Nanyuki Teaching and Referral Hospital, examined the complainant on November 18, 2014. He stated that upon examination, he established that her hymen was absent, and there was presence of laceration on her minor and major labia majora, which was indicative of penetration.
4. The appellant gave a sworn statement in his defence. He asserted that he had a disagreement with PW2 on November 4, 2014 over her previous partner, with whom she had two children. The appellant told the court that the following day on November 5, 2014, he left their matrimonial home and went to live with his brother at a place called Ethi. He stayed there until January 31, 2015, when he went back home to see his children. According to the appellant, PW2 warned him against ever stepping in their matrimonial home. She then left and came back with three village elders who asked him to accompany them to Timau Police Station. At the police station, he was arrested by PW5 and put in the cells. The appellant stated that he only came to learn about the charge against him when he was arraigned before the trial magistrate. He denied sexually assaulting the complainant. Upon cross-examination, the appellant admitted that on November 11, 2014, he was at home with wife and children, including the complainant, and not at Ethi as he had earlier stated in his evidence in chief.
5. The learned trial magistrate, upon assessing and analyzing the evidence tendered before the court found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. The appellant, aggrieved by this decision, filed an appeal before the High Court at Nanyuki.
6. In his petition of appeal, the appellant faulted the trial court for failing to find that the charge sheet was fatally defective, as it was at variance with the evidence tendered. He complained that the sentence meted on him was harsh. He was aggrieved that the trial court failed to take into consideration the fact that PW2 was not prompt in reporting the alleged sexual assault to the police. He pointed out that the evidence adduced by the prosecution witnesses was insufficient to support a conviction. He stated that the trial magistrate fell into error when he failed to find that the medical evidence adduced failed to sufficiently prove the element of penetration. Lastly, the appellant was aggrieved that the trial court failed to consider his defence in reaching the determination to convict him.
7. The learned appellate Judge (Kasango, J.) after re-evaluating the record of the trial court and the evidence tendered before it, saw no reason to disturb the conviction of the appellant by the trial court. The learned Judge, however, observed that the sentence of life imprisonment provided under Section 20 (1) of the *Sexual Offences Act* was not a mandatory sentence as stated by the trial court. After considering the appellant's mitigation and the circumstances of the case, the learned Judge substituted the life imprisonment sentence imposed on the appellant by the trial court, with a custodial sentence of thirty (30) years. The sentence was ordered to run from the date of his conviction by the trial court.
8. The appellant is now before this Court seeking to overturn the decision of the High Court, and has raised five (5) grounds in his amended grounds of appeal. In summary, the appellant states that: the trial magistrate improperly conducted voire dire examination before taking the complainant's evidence; the medical evidence adduced was insufficient to prove penetration; the clinical officer failed to observe the provisions of Section 77 of the *Evidence Act* when producing the P3 Form, and that the P3 Form was not signed by the examining medical officer; the first appellate court improperly interpreted the provisions of Section 20 (1) of the *Sexual Offences Act* in relation to the sentence meted on him; and finally that the first appellate court failed to take into account the provisions of Section 333 (2) of the *Criminal Procedure Code* when imposing the custodial sentence.



9. The appeal was canvassed by way of written submissions of both the appellant and respondent. It was the appellant's submission that the learned trial magistrate failed to record whether the minor understood the meaning of an oath, and further, that the first appellate court failed to consider this fact in reaching its determination. The appellant stated that the P3 Form failed to indicate whether the injuries suffered by the complainant were as a result of penetration. He asserted that the P3 Form was not signed by the examining medical officer, and further that the clinical officer, PW3, failed to inform the court, as per the requirements under Section 77 of the Evidence Act, whether he was authorized to produce the said P3 Form on behalf of the medical officer who examined the complainant.
10. With regard to sentence, the appellant submitted that Section 20 (1) of the Sexual Offences Act provides that a person convicted of the offence of incest is liable to imprisonment for a term of not less than ten (10) years. He submitted that the word 'liable' meant that the court retained discretion to award the appropriate sentence, and in the premises, he urged this Court to reduce his sentence to ten years' imprisonment. The appellant further urged us to take into account the time he spent in remand custody when reviewing his sentence.
11. In rebuttal, Learned State Counsel, Mr. Onjoro, made submissions to the effect that the ingredients of the offence of defilement were established by the prosecution to the required standard of proof beyond any reasonable doubt. Mr. Onjoro submitted that the complainant used the term "*tabia mbaya*" to explain what the appellant did to her. He cited the decision of this court in the case of Muganga Chilejo Saha vs Republic [2017] eKLR where the court observed that euphemisms like "*alinifanyia tabia mbaya*" are generally accepted as apt descriptions of the act of defilement. Mr. Onjoro submitted that the sentence awarded by the first appellate court was commensurate with the offence committed. He urged us to uphold the appellant's conviction and affirm his sentence.
12. This is a second appeal. The mandate of this court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Kaingo vs Republic [1982] KLR 213 at page 219 this Court stated thus:

"A second appeal must be confirmed to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karari S/O Karanja versus Republic [1956 17EACA 146]."
13. We have carefully considered the record, judgments of both the trial and first appellate court and the rival submissions set out above, in light of this court's aforesaid mandate. In our considered view, the issues that arise for our determination are:
  - i. Whether *voire dire* was properly administered before the testimony of the complainant was received as evidence by the trial court;
  - ii. Whether the prosecution established the element of penetration to the required standard of proof beyond any reasonable doubt;
  - iii. Whether the P3 Form was properly admitted in evidence by the trial court; and,
  - iv. Whether the sentence imposed upon the appellant is legal.
14. On the first issue, it was the appellant's submission that the learned trial magistrate, while conducting *voire dire*, failed to record whether the minor understood the meaning of an oath. The appellant further faulted the first appellate court for failing to take that fact into consideration while considering



the appeal. We note that the appellant failed to raise the question of the validity of the *voire dire* in his grounds of appeal before the first appellate court. He cannot therefore, fault the first appellate court for failing to make a finding on an issue that was never raised at the hearing of the first appeal.

15. In any event, we have perused the trial court's record. The requirement for *voire dire* examination of a child who is about to testify before court is provided under Section 19 of the *Oaths and Statutory Declaration Act*. It requires a trial court, before receiving the evidence of a child, to inquire from the child with a view of ascertaining whether the child understands the meaning of an oath; and to record whether in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of evidence and whether the child understands the duty of tell the truth.
16. In this case, the complainant was five years of age. She gave unsworn evidence on March 16, 2015. The *voire dire* proceedings were recorded by the trial court as follows:

“ Court: What is your name? Minor: I am Esther Arupe.

Court: Do you go to school?

Minor: I go to school. I am in Nursery. Court: Do you go to church?

Minor: I normally go to church Court: Which Church?

Court: Do you know what it means to take an oath?

Minor: I do not know what that is.

Court: Owing to the minor apparent young age and the fact that she does not understand the significance of an oath I direct that she gives unsworn testimony.”

17. From the foregoing, it is clear that the trial magistrate determined that the minor did not understand the nature and meaning of an oath, but would be able to give unsworn evidence. No objection was raised by the appellant regarding the *voire dire* examination or the subsequent admission of the complainant's testimony. The appellant's assertion that the trial court failed to record whether the minor understood the meaning of an oath is unfounded. The trial court properly found that the child did not understand the meaning of the oath hence the decision for the complaint to give unsworn testimony. It is our considered view that the trial court directed itself properly as required under Section 19 of the *Oaths and Statutory Declarations Act*, and that the complainant's evidence was properly admitted before court, the complainant having been subjected to a *voire dire* examination. Consequently, this ground of appeal fails.
18. The second complaint by the appellant is that the element of penetration was not established by the prosecution. The appellant submitted that the P3 Form did not indicate whether the injuries sustained by the complainant were as a result of a sexual assault, hence the prosecution failed to establish the element of penetration. The Supreme Court of Uganda in the case of *Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995* had this to say with regard to proof of penetration:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”



19. In the instant case, evidence of penetration was established from the complainant's unsworn evidence, and was corroborated by the medical evidence. The complainant told the court that the appellant had done '*tabia mbaya*' to her, in the bedroom. In the case of *Muganga Chilejo Saba* (*supra*), properly cited by the respondent, this court observed that courts in this country have generally accepted the use of euphemism, "*alinifanyia tabia mbaya*" as an apt description of acts of defilement. The complainant's mother, PW2, told the court that the complainant complained of experiencing pain in her private parts.
20. The complainant was examined a day after the alleged defilement was said to have occurred. The Post Rape Care Form (PRC) indicated that she was examined on November 12, 2014. According to the PRC, the complainant's hymen was perforated, and she had bruises on her *labia majora* and *labia minora*. These were the same findings made by PW3 who examined the complainant on November 18, 2014. He filled the P3 Form which was produced in evidence.
21. The medical evidence, considered together with the evidence of the complainant, established beyond any reasonable doubt that the complainant was defiled.
22. The appellant further contended that the P3 Form was not properly admitted in evidence. The P3 Form was prepared and produced by its author, Ronald Mutai (PW3), a clinical officer based at Nanyuki Teaching and Referral Hospital. Therefore, it was properly admitted into evidence. From our re-evaluation of the trial court's proceedings, it appears that the appellant was probably referring to the production of the Post Rape Care Form, which was prepared by one Jeremiah Mwangi, but produced in court by PW3. The provisions of Section 77 of the *Evidence Act* provides as follows:

Reports by Government analysts and geologists.

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."
23. This court in *Joseph Mabende vs. Republic* [2019] eKLR held thus: -
 

"Our interpretation of Section 33 (d) of the *Evidence Act* as read with Section 77(1) & (2) of the *Evidence Act*, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under Section 48 of the *Evidence Act*. However, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under Section 33 (d) of the *Evidence Act* and which evidence by dint of Section 77 (1) & (2) of the *Evidence Act*, is admissible and presumed as genuine and authentic."
  24. In the instant case, PW3 told the trial court that he had worked with Jeremiah Mwangi for three years, and was conversant with his handwriting. PW3 was a Clinical Officer. The appellant did not object to the production of the Post Rape Care Form by PW3. Further, the appellant cross-examined PW3 on the contents of the Post Rape Care Form. Accordingly, this Court sees no reason to reject the production of the evidence contained in the Post Rape Care Form because the same was properly admitted into evidence.



25. The appellant further complained that the P3 Form was not signed by the medical officer who examined the complainant. A perusal of the P3 and PRC forms produced as prosecution exhibits number 1 and 3 respectively shows that both documents were duly signed by the examining clinical officers. As a result, nothing turns on this ground and the same fails.
26. The last issue relates to the sentence imposed upon the appellant by the first appellate court. The appellant urged that Section 20 (1) of the *Sexual Offences Act* provides for a minimum sentence of ten (10) years. He implored us to reduce the sentence of thirty (30) years' imprisonment meted by the first appellate court, to reflect the minimum sentence of ten years' imprisonment.
27. Section 20 (1) of the *Sexual Offences Act* provides as follows:
- “ Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
- Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.” (emphasis ours)
28. In the instant case, the complainant was five (5) years old when the offence was committed, and therefore the appellant was liable to a sentence of life imprisonment upon conviction. The prescribed minimum sentence of ten (10) years is only applicable in instances where the complainant is not a minor, which was not the case here.
29. The first appellate court in varying the life imprisonment sentence meted on the appellant by the trial court, considered the appellant's mitigation, and the fact that the committed offence was serious, and further that the appellant was not remorseful for his actions. The first appellate court set aside the sentence of life imprisonment imposed by the trial court, and substituted the same with a custodial sentence of thirty (30) years. The appellant failed to establish that the learned Judge acted on wrong principles or overlooked any relevant material factor. The resulting sentence was within the limits permitted by law and we find no legal reason to interfere with the exercise of that discretion.
30. However, in imposing the sentence, there is no evidence on record that the first appellate court took into account the period the appellant had already spent in remand custody prior to his conviction. In this case, the appellant was arrested on January 3, 2015 and was not admitted to bail pending trial. Accordingly, in computing the sentence to be served by the appellant, the period he was in custody prior to his conviction ought to have been taken into account, by dint of the proviso to Section 333 (2) of the *Criminal Procedure Code*.
31. In the circumstances, we are satisfied that the High Court addressed itself correctly on the law and that there are no grounds for interfering with the concurrent findings of fact. The first appellate court properly carried out its duty of re- evaluation of evidence and reached the correct finding.
32. We find that this appeal has no merit and is hereby dismissed, save that we direct that the appellant's custodial sentence awarded by the first appellate court will commence from January 3, 2015, when the Appellant was arrested. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**JAMILA MOHAMMED**



.....  
**JUDGE OF APPEAL**

**L. KIMARU**

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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.

**DEPUTY REGISTRAR**

