



REPUBLIC OF KENYA



KENYA LAW
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**LM v Republic (Criminal Appeal 179 of 2017)
[2023] KECA 1242 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1242 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 179 OF 2017
PO KIAGE, M NGUGI & JM NGUGI, JJA
OCTOBER 6, 2023**

BETWEEN

LM APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the judgment of the High Court of Kenya at Kakamega
(Majanja, J.) dated 1st September, 2017 in HCCRA No. 34 of 2016)*

JUDGMENT

1. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) (SOA). The particulars of the offence were that on diverse dates between 9th and 15th August, 2013 at Hamisi District within Vihiga County, he intentionally caused his penis to penetrate the anus of I.L (minor), a male child aged 8 years.
2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11(1) of the [SOA](#). The specifics of time, place and identity of the victim are the same as in the main charge.
3. In a second count, the appellant was charged with deliberate transmission of a life threatening sexually transmitted disease contrary to section 26(1)(a) of the SOA. The particulars were that on diverse dates between 9th and 15th August, 2013 at Hamisi District within Vihiga County, having knowledge that he was infected with Syphilis, a life threatening sexually transmitted disease, he intentionally had unprotected sexual intercourse with I.L (minor), which he ought to have reasonably known was likely to infect the said minor.
4. The appellant denied the charges leading to a trial in which the prosecution called 5 witnesses in support of its case. The minor testified as PW1 and narrated that on 9th August 2013, at around 7.30am,



his grandmother sent him to buy mandazi. After buying the mandazi and taking tea, he took his books and went to the appellant's house. While there he met his friend, S. PW1 testified that the appellant told him to stay with him since it was good for men to stay together. He thus spent the night there. PW1 explained that the following night the appellant called him to his bedroom, gave him water, removed his clothes and penetrated his anus four times. While doing so, he warned PW1 not to scream. The following day his friend S was also defiled. PW1 narrated that after sodomising them, the appellant would give them Ksh. 20 and tell them not to tell anybody what had happened. On the morning of 15th August 2013, upon being given Ksh. 20, the minor proceeded to a hotel to take tea, and while there, his uncles Luke and David approached him and took him to Serem Police Station.

5. At the Police Station, he told the police what had transpired and together with his grandmother, the police accompanied him to the appellant's abode. The police arrested the appellant, and PW1 retrieved his books and trousers. This account was corroborated by PW2 and PW5. PW2, NSA, testified that she lived with the minor. On the fateful day, she sent the minor to buy mandazi but he never returned. She tried to trace his whereabouts but she could not find him, prompting her to report him missing at the Police Station. PW2 stated that she was later informed that the minor had been sighted variously, at school, with streets boys and at a hotel. On getting this information, she sent her neighbor, Luke, to find him. The minor was found and PW2 met him at the Police Station. PW2 testified that together with the Police Officers, they accompanied the minor to the house of the appellant where the appellant opened his door upon the minor knocking and introducing himself.
6. PW3, Stephen Visenji, a Clinical Nursing Officer at Serem Health Centre, recalled that on 18th August 2013, he received a P3 form sent by the police for the examination and treatment of PW1. On examining him, he found that he had dry bruises on his anus. He concluded that PW1 had been defiled. He also examined the appellant and found that he had syphilis. He put both the minor and the appellant on treatment for syphilis. PW4, David Ongari, testified that the minor had been missing when they traced him at Green House hotel. Upon interrogating him, the minor told them that he was staying with someone who had been defiling him. PW4 testified that they took the minor to Serem Police Station and then informed his grandmother about the incident.
7. PW5, Teche Timei, a Police Officer, gave evidence that on 11th August 2013, PW2 made a report of a lost child at the police station and on 15th August 2013, the child was found at Green House hotel. The persons who found him, David and Luke, took the child to the Police Station where he was taken in as a child in need of care and protection. PW5 testified that the child told them that he had been sodomised by the appellant.
8. At the close of the prosecution case, the trial Magistrate, J.K Ng'arng'ar, SPM found that the appellant had a case to answer and placed him on his defence. A different Magistrate, D. Ogal, RM succeeded him and took over the matter at the defence hearing stage. Provisions of sections 200 and 211 of the Criminal Procedure Code were explained to the appellant before the hearing commenced. The appellant chose to proceed with the hearing from where it had stopped. He also opted to give unsworn evidence and call no witness.
9. The appellant denied defiling the minor claiming that, on 16th August 2013, he had just arrived at his home from hospital when Police Officers, who were in the company of the minor, arrested him.
10. The trial Magistrate evaluated the evidence tendered before the court and found the appellant guilty of the offence of defilement. He consequently sentenced him to life imprisonment. The appellant was, however, acquitted on the second count.



11. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Majanja, J. re-evaluated the evidence on the record and delivered judgment on 1st September 2017, dismissing the appeal in its entirety. The learned judge affirmed both the conviction and the sentence meted on the appellant by the trial court.
12. Still aggrieved, the appellant preferred an appeal to this Court raising six grounds of complaint in his self-crafted memorandum of appeal. We summarise the grounds as that the two courts erred by;
 - a. Failing to make a finding that the voir dire of PW1 lacked the necessary ingredients to allow him to give sworn evidence.
 - b. Convicting the appellant based on inconclusive evidence of penetration.
 - c. Relying on extraneous matters, conjectures and circumstantial evidence.
 - d. Using dock identification instead of an identification parade.
 - e. Failing to invoke section 162(a) of the *Penal Code* thus curtailing the appellant's right in Articles 24(1)(e), 50(2)(p) and 159(1)(d) of *the Constitution* of Kenya.
 - f. Failing to review the appellant's sentence in light of the Supreme Court's advisory opinion on minimum mandatory sentences.
13. During the hearing of the appeal, the appellant appeared in person while the respondent was represented by Mr. Okango, the learned Senior Principal Prosecution Counsel. Both parties chose to entirely rely on their written submissions.
14. The appellant contends that, the voir dire examination was deficient as it only tested the intelligence of the child and his ability to tell the truth, without testing whether the child understood the meaning and nature of an oath. It is argued that the element of penetration was unproven for the reason that, although the appellant was found to be infected with a sexually transmitted disease, the minor was not. Further, the bruises that were spotted in the minor's anus could have been caused by other occurrences other than defilement.
15. The appellant urges that the prosecution ought to have produced an inventory form showing that the minor's school books and trousers were found in his house. He challenges his identification as the perpetrator of the offence claiming that an identification parade ought to have been conducted so that the suspect could be positively identified. Moreover, he argues that the evidence on record disclosed the offence of 'unnatural offences' as enshrined under section 162(a) of the Penal Code, and so the two courts below erred in failing to invoke that section, and consequently sentence him to the 14 years' imprisonment as prescribed therein.
16. In reply to those submissions, Mr. Okango submits that, contrary to the numerous decisions of this Court directing that a second appeal should only focus on matters of law, most of the grounds raised by the appellant are matters of fact. Further, they were not ventilated before the first appellate court. It is asserted that the issue of the voir dire being defective is being raised for the first time before this Court, and while it is pragmatic for the specific questions posed to the victim to be recorded, failure to do so was not fatal. For this argument, counsel relies on this Court's decision in *Godfrey Oluoch Ochuodho Vs. Republic* [2019] eKLR.
17. To counter the contention that there was inconclusive evidence of penetration, it is submitted that the fact that the victim was not infected with syphilis is no reason to disprove penetration. For this assertion



counsel cites the decision in *SIMon Mutuku Musyoka Vs. Republic* [2013] eKLR where Majanja, J. held thus;

“The lack of spermatozoa is not of itself conclusive of lack of penetration nor is the fact that the appellant did not contract an infection from the victim.”

18. Moreover, counsel submits, PW3 testified that upon examination of the minor, he found that his anus had dry bruises. Counsel disapproves the appellant’s argument that no inventory was done to substantiate the claim that the minor’s books and trouser were found in his house. He agrees with the first appellate court’s reasoning that the appellant failed to furnish any explanation why the minor’s property was in his house. It is further urged that this was not a case that required an identification parade as suggested by the appellant since the minor knew the appellant as a neighbor. The appellant was also known to PW2 and PW4. On the alleged failure to invoke section 162(a) of the *Penal Code*, Mr. Okango asserts that the appellant having been charged with an offence which is legally founded in law, he cannot fault the prosecution for failing to charge him with a different offence.
19. Counsel, however, concedes on sentence, in view of the recent jurisprudence by the courts directing that, to the extent that the SOA prescribes minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall afoul *the Constitution*. In this respect, he cites *Maingi & 5 Others Vs. Director Of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and *Joshua Gichuki Vs. Republic*, Criminal Appeal No. 84 of 2015 (Unreported). Mr. Okango urges that this matter be remitted to the trial court for re-sentencing.
20. As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*. This has been restated in many decisions of the Court including *David Njoroge Macharia Vs. Republic* [2011] eKLR in which the Court stated: -

“That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with 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 *Chemagong Vs. R* [1984] KLR 611.”

21. It is thus clear that a Memorandum of appeal on second appeals to this Court ought to be confined, as a jurisdictional imperative, to points of law only. We will therefore deal only with the questions of law that arise from the memorandum of appeal, ignoring the factual issues raised. The issues of law can be narrowed down to three, namely; whether a proper voir dire was administered, whether the offence was proved as against the appellant and whether the appellant’s sentence should be reviewed in light of the recent jurisprudence on mandatory minimum sentences under the *SOA*.
22. On whether an effective voir dire examination was conducted, it is patent that the primary purpose of a voir dire is to establish a child’s intelligence and his/her ability to tell the truth. Indeed, the appellant acknowledged this very fact. While we note that the issue was not raised before the High Court, we are of the considered view that the answers recorded by the trial court while examining the minor are evidence of a properly administered voir dire, notwithstanding the failure to record the questions. The minor responded;

“I am called IL. I am from [Particulars Withheld] I am schooling at B School. I am in class 5. I have 9 years. I was born in the year 2005. I do attend [Particulars Withheld] church M.



I know the value of talking the truth. If you tell lies you will have sinned. The wages of sin is to be burned. It will be punished by God.”

23. We think the responses adequately demonstrated the minor’s level of intelligence and the duty to speak the truth, and consequently the competence to give sworn testimony. Accordingly, a conviction based on the minor’s account would be safe.
24. Turning to whether the prosecution proved its case against the appellant, it is contended that penetration was not proven, and no inventory was taken to show that the minor’s books and trouser were found in the appellant’s house. The appellant further challenges his identification as the perpetrator of the offence. We note that in finding the appellant culpable, the learned judge considered that the appellant did not furnish any explanation as to why the minor’s property was found in his house. The learned judge further reasoned;

“12. The evidence I have outlined and PW1’s testimony of the ordeal he underwent while he stayed at the appellant’s house leaves no doubt that there was penetration of his anus by the appellant. That testimony of penetration was corroborated by the medical evidence produced by PW3 which showed that PW1’s anus had dry bruises. In cross- examination, the child was resolute that he had been defiled at least five times. The appellant’s defence was threadbare. The evidence is clear that he knew PW1. In cross-examination, PW5 testified that when PW1 took the appellant’s house, (sic) the appellant asked who was knocking and when PW1 identified himself, the appellant opened the door. Given that PW1 had stayed in his house for a few days, the opportunity of mistaken identity is foreclosed...”
25. We agree with the learned judge given the minor’s detailed and compelling account of his encounter with the appellant, an account that was consonant with the rest of the prosecution witnesses. We think that sexual violation was proved both through oral testimony and medical evidence and we endorse the concurrent factual findings of the two courts below.
26. On sentence, it is rightly conceded by the prosecution that in view of the recent jurisprudence holding that mandatory minimum sentences under the SOA are unconstitutional, the appellant’s sentence of life imprisonment ought to be reviewed, and we thus must interfere with the sentence imposed by the two courts below.
27. In the result, this appeal partly succeeds to the extent that, we set aside the sentence to life and substitute therefor a term of thirty (30) years imprisonment to run from the date the appellant was first sentenced.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL



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

DEPUTY REGISTRAR

