



**Macharia v Republic (Criminal Appeal 32 of 2013)
[2023] KECA 1556 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1556 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 32 OF 2013
F SICHALE, LA ACHODE & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

PHILIP NJOROGE MACHARIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru delivered by Hon. Justice R.P.V Wendoh dated 20th November, 2012 In Criminal Appeal No. 191 of 2011)

JUDGMENT

1. The appellant's appeal is against the sentence of life imprisonment for an offence of defilement. His first appeal was dismissed by the High Court.
2. The particulars of the charge against the appellant were that on 08.04.2011 he caused his penis to penetrate the anus of JGM a boy aged 9 years. According to JGM (he testified as PW1) he had been sent to the shop to buy sugar. On the way back he met the appellant, a person who was known to him. The appellant lured him into the forest under the guise of seeing a hyrax. Whilst in the forest the appellant committed the heinous act. PW3 filled the P3 form and found a tear on the rectal muscle.
3. In the undated supplementary grounds of appeal, the appellant raised 4 grounds of appeal.
4. However, in his submissions he merged the 4 grounds into two. Firstly, the appellant urged us to find that the evidence, both oral and documentary was contradictory as it was alleged that the offence was committed on 08/04/2011; that PW2 stated that PW1 was defiled on 26/4/2011; that PW3 said he filled the P3 on 26/4/2011, the date PW1 complained of having been assaulted; that the P3 gave the date and time of the commission of the offence as 10/04/2011.
5. Secondly, the appellant contested the age of PW1. According to him the age assessment report was not produced by the maker. The appellant faulted the fact that PW4, the investigations Officer as opposed



to the Medical Officer is the one who produced the age assessment report. He pointed out that PW1 was variously referred as JGM, JK and IG.

6. The respondent opposed the appeal. In their submissions dated 19/04/2023, the respondent argued that whereas the offence was committed on 8/4/2011, a report thereof was made on 26/4/2011 and PW3 examined PW1 on the said 26/4/2011 and that the P3 which bore the date of 25/4/2011 as the date of the commission of the offence was a minor error; that, the 1st appellate court found that PW1 who had been threatened by the appellant with dire consequences may have delayed the making of the report.
7. As to the discrepancy in the report, the respondent pointed out that this was not raised in the 1st appellate court and that in any event these were minor discrepancies occasioned by the misspelling of PW1's names. On the issue of the amendment of the age to read 9 years as opposed to 11 years on the charge sheet, the respondent contended that the appellant suffered no prejudice as S.8(2) of the [Sexual Offences Act](#) provides; that

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

8. As to the complaint that the appellants' defence was not considered the respondent reiterated that the appellant had denied the commission of the offence and made allegations that this was a frame up as he had excommunicated PW1's mother from his church.
9. On 4/7/2023 the appeal came up for hearing before us. The appellant relied on his supplementary grounds of appeal and his written submissions. The respondent also wholly placed reliance on their submissions dated 19/4/2023.
10. The appeal before us is a second appeal and hence this Court's mandate is restricted to addressing itself to matters of law only. This Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See the case of [Kaingo v Republic](#) [1982] KLR 213 at page 219 wherein this Court stated thus: -

“A second appeal must be confined 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 could find as it did (*Reuben Karoti S/O Karanja v Republic* [1956] 17 EALA 146).”

11. In our view this appeal is fairly straightforward. The issue of the apparent confusion as to whether the offence was committed on 8/4/2011 or 25/11/2011 is neither here nor there. PW1 told the trial court that the appellant warned him of dire consequences should he report and although the incident happened on 8/11/2011 it was not until 26/11/2011 that a formal report was made. The P3 form indicates that the matter was reported on the said 26/11/2011. The narration on the general medical history on the P3 indicates:-

“Assaulted sexually by known person to him and sustained injuries. Time 1.00p.m on 10th April, 2011. This happened on a certain day of the month of April, in a bush patient delayed to report the matter until 25/4/2011. Attended on 26th April, 2011”

12. In our view, this was a minor contradiction and the appellate court was right in rejecting it



13. As regards the issue of whether PW1 was JGM, JK or IG we are in agreement with the respondent that these do not vitiate the identity of PW1. In *Richard Munene v Republic* (2018) eKLR this court stated as follows on the issue of minor inconsistencies.

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

14. The inconsistencies raised herein did not affect the outcome of the trial and are inconsequential.

15. On the issue of the age of PW1, PW4 the investigating Officer produced the medical assessment report placing the age of PW1 as 9 years old. The initial charge sheet had placed his age as 11 years. This age was later amended to read 9 years. In our view the age difference (if any) did not prejudice the appellant as the sentence for a child of 9 years or 11 years is provided for in one section being s.8(2) of the *Sexual Offences Act*. It provides;

“...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.”

16. We also find that there was nothing offensive by PW4, the investigating Officer producing the medical assessment report on the age of PW1. Section 77 of the *Evidence Act* permits such production it provides; -

“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.

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.

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.”

17. Finally, the appellant complained that his defence was not considered. We have looked at the record. The defence preferred by the appellant was a mere denial as he thought PW1’s mother had framed him because he had excommunicated her from his church. This issue was not raised during cross-examination and it would appear that it was an afterthought.

18. The upshot of our above findings is that we find no merit in the appeal. It is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

F. SICHALE

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JUDGE OF APPEAL



L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

