



REPUBLIC OF KENYA



KENYA LAW
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**Mugure v Republic (Criminal Appeal 45 of 2012)
[2022] KECA 162 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 162 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 45 OF 2012
RN NAMBUYE, PO KIAGE & J MOHAMMED, JJA
FEBRUARY 18, 2022**

BETWEEN

SAMUEL GITAU MUGURE APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nakuru
(Ouko, J.) dated 17th October, 2012 in H.C.CR. A No. 6 of 2011)*

JUDGMENT

1. Samuel Gitau (the appellant) has preferred this second appeal challenging his conviction and sentence for the offence of defilement as affirmed by the 1st appellate court. Our role as the second appellate court was succinctly set out in *Karani vs. R* [2010] 1 KLR 73 wherein this Court expressed itself as follows: -

“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.”

2. The prosecution called five (5) witnesses to prove its case. AN (name withheld) (the complainant) testified that on 29th October, 2007 while from school she went to request for water from the appellant whom she knew quite well as her home was near his. The appellant lifted her, took her to his bedroom and placed her on his bed where he proceeded to defile her. The appellant then gave her sugar and she left to go home. She did not tell her mother about the incident on the material day.



3. Ms. LN (name withheld) (PW2) (the complainant's mother), testified that she met her daughter running from school. On enquiring why she was running, the complainant informed her that she had seen the appellant who wanted to give her a sweet. Upon further interrogation the complainant disclosed that the appellant had defiled her the previous day. The incident was reported to the village elder who called police officers and the complainant was taken to hospital.
4. As per the evidence in the P3 form produced by Ms. Cecilian Wanjiku Njoroge (PW4), a Clinical Officer at Nyahururu District Hospital, the complainant's hymen was torn and she had bruises which were noticeable on the vaginal wall which evidenced penetration of her vagina. Consequently, the appellant was arraigned and charged at the Principal Magistrate's Court at Nyahururu with one count of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(a) of the *Sexual Offences Act*.
5. The particulars of the main count were that on 29th October, 2007 at [Particulars Withheld] village in Laikipia District within the Rift Valley Province, the appellant unlawfully and intentionally caused his genital organ namely penis to penetrate the vagina of AN, a girl aged 5 years. On the alternative count, the particulars read that on the above-mentioned date and place, the appellant unlawfully and intentionally caused his genital organ namely penis to touch the vagina of AN, a girl aged 5 years.
6. The appellant when placed on his defence pleaded not guilty to both counts and gave an unsworn statement. He stated that on the material day he had gone for a casual job at Jackwel Lodging and Boarding; the following day he was not on duty and went to his maize farm where he worked until 1.30pm; and that on 30th October, 2007 he received information from the Village elder that he was suspected of defiling the complainant whereupon he was arrested and taken to the police station.
7. At the conclusion of the trial, the trial court convicted the appellant for the offence of defilement and sentenced him to life imprisonment. Aggrieved with his conviction and sentence, the appellant appealed to the High Court. The High Court (Ouko, J., as he then was) in a judgment dated 17th October, 2012 dismissed the appeal. It is that decision that gave rise to this second appeal.

Submissions

8. The appellant was acting in person and filed written submissions. In his written submissions, the appellant cited the decision in *Hillary Nyongesa vs R* [2010] eKLR as well as this Court's decision in *Kaingu Elias Kasomo vs. R - Criminal Appeal No. 504 of 2010* (unreported) to underscore the importance of establishing the age of the victim in an offence of defilement. The appellant submitted that the age of the complainant was not proved in evidence; and that no birth certificate, baptism card or school leaving certificate was produced in evidence.
9. The appellant also submitted that the prosecution failed to prove its case beyond reasonable doubt due to contradictions and inconsistencies which point to lack of credibility. According to him, the complainant testified that her pants had blood stains while her mother (PW2) testified that when she bathed the complainant the previous evening, she did not see any blood on her pants.
10. The appellant challenged the mandatory minimum sentence of life imprisonment meted out on him. He submitted that mandatory minimum sentences do not permit the court to consider the peculiar circumstances of each case in order to arrive at an appropriate sentence informed by the circumstances of the case. He cited the case of *Francis Karioko Muruatetu & Another vs Rep*, petition No. 15 of 2015 for the proposition that if a judge does not have discretion to take into account mitigating circumstances, it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability.



11. The appellant further submitted that in the instant appeal, he was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(2) of the *Sexual Offences Act*; and that if the reasoning in the Muruatetu case is applied to the circumstances of the instant appeal, Section 8(2) should be considered unconstitutional on the same basis.
12. In his concluding remarks, he urged that the victim's age was not proved; the prosecution's case was marred with contradictions and inconsistencies; and that the sentence imposed was harsh in light of the circumstances of the offence. He urged this Court to allow the appeal and quash the conviction.
13. In opposing the appeal, learned counsel, Ms. Mercy Chelangat, for the State, submitted that the case against the appellant was proved beyond reasonable doubt; that the trial court and the 1st appellate court found that the age of the complainant was sufficiently proved; at the time of the commission of the offence the complainant was 5 years old; the offence occurred in 2007 when the complainant was 5 years old but at the time of testifying she was 7 years; and that the P3 form indicated the complainant's estimated age as 5 years.
14. On the sentence meted on the appellant, Ms. Chelangat submitted that the severity of sentence is a question of fact and not law; and that Section 8(2) of the *Sexual Offences Act* provides for a sentence of life imprisonment when the complainant is aged 11 years or less. Ms. Chelangat also submitted that the appellant has not shown any remorse or indicated that he is remorseful; and that it is a reasonable expectation that the appellant will place material before the court to prove that he is remorseful. Ms. Chelangat urged the Court to dismiss the appeal.

Determination

15. We have considered the grounds of appeal, the record, submissions by counsel and the appellant as well as the law. In our view, the issues that arise for determination are as follows:
 - a. Whether the ingredients of the offence of defilement were proved to the required standard;
 - b. Whether the age of the complainant was proved; and
 - c. Whether the sentence meted out was lawful.
16. The appellant was charged with the offence of defilement. 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.
17. In *John Mutua Munyoki v Republic* [2017] eKLR, this Court stated that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:
 - i. The victim must be a minor, and
 - ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.
18. In the circumstances of this case, the prosecution was therefore required to prove that the victim was below the age of 18 years at the time of the commission of the offence; and that the appellant committed an act which caused penetration with a female person who to his knowledge was a minor.
19. From the record, the testimony of the complainant, PW1, was to the effect that on the material day she was coming back home from school and went to request for water from the appellant who defiled her. Further, per the medical evidence of PW4, the complainant was examined by Dr. Kiori who found that



her hymen was torn and that she had noticeable bruises on the vaginal wall and blood was oozing from her vagina. Dr. Kiori concluded that there was physical penetration. PW2, the complainant's mother, also testified that on 30th October, 2007 she met her daughter running from school and upon further questioning the complainant informed her that the appellant had told her to collect a sweet from him. She went on to tell her that on 29th October, 2007 the appellant had defiled her. PC Ahmed Abdullahi (PW3) and Joseph Kisau (PW5) corroborated this evidence.

20. Having made all these factual findings, the trial court was satisfied beyond any reasonable doubt that the appellant was guilty as charged and convicted him accordingly.
21. The High Court after re-assessing, re-evaluating and re-analyzing the prosecution evidence concluded as follows:

“For all these reasons, I find no merit on the grounds that the offence was not proved.”

The learned judge went on to state as follows;

“In any case, the evidence on record was sufficient to find a conviction as I have noted.”

22. As for the complainant's age, it is common ground 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 the victim.
23. The appellant relied on the case of *Hadson Ali Mwachongo vs. Republic* [2016] eKLR to stress the point that age is a critical element that should be established by the prosecution in an offence of the nature he faced. In that case the Court stated that:

“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.”

24. In the same spirit, this Court in *Eliud Waweru Wambui vs. Republic* [2019] eKLR stated that:

“There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt.”

25. On her part, learned counsel for the respondent, Ms. Chelangat whilst agreeing that age of the victim in sexual offences is a critical ingredient of the offence, submitted that the victim's age was indicated in the Post Rape Care Form as well as the P3 form as 5 years. The victim also testified and informed the Court that she was aged 7 years as at the time of testifying.
26. A birth certificate or age assessment are not the only means for establishing the age of a victim in sexual offences. As the Court of Appeal of Uganda stated in *Francis Omuroni – Vs- Uganda*, Court of Appeal No.2 of 2000, “apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
27. In the instant case, beyond the testimony of the victim regarding her age, there was the post rape care form and P3 form. We therefore find that, the victim's age was proved to the required standard.



28. The other elements of the offence which must be proved, are penetration and identification of the accused person. Section 124 of the *Evidence Act* provides as follows:

“Notwithstanding the provisions of Section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

PW3 & PW5 corroborated the evidence adduced by the complainant and her mother (PW2). The two elements were therefore proved, to the required standard. The trial court in its judgment observed that the complainant was a witness of truth and observed as follows:

“She was then aged only 5 years. PW1 gave a consistent account of what happened on 29.10.2007 after she left school. She stated that the accused person is their neighbor. Accused on the hand never disputed that fact. The court has no reason at all to doubt the evidence of PW1. She was very young then. I am not able to imagine of any reason why she would frame the accused person.”

It was the complainant’s evidence that the appellant was her neighbour and was well known to her and that he defiled her.

29. The appellant’s last grievance relates to the sentence. The appellant submits that the lower court should have exercised discretion in meting out the sentences. In *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR, the Supreme Court of Kenya held that sentencing is at the discretion of the court depending on the circumstances of each case, this Court has applied the principle in relation to sexual offences under the *Sexual Offences Act*.

30. We note that the appellant did not offer any mitigation in the trial court. The trial court while sentencing noted, that the offence committed is serious and the law is clear on the punishment to be meted.

31. The complainant in this case was aged 5 years and the offence was serious and exacerbated by the fact that the victim was the appellant’s neighbour and he should have protected her and not taken advantage of her. Considering the circumstances of this case, we find that the sentence meted out was appropriate. We find no basis for this Court to interfere with the same.

32. The result of the foregoing is that this appeal is devoid of any merit and is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE



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JUDGE OF APPEAL
J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

