



**Mwangi v Republic (Criminal Appeal 57 of 2020)
[2022] KECA 842 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KECA 842 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 57 OF 2020
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
MAY 19, 2022**

BETWEEN

ELIAS NDUATI MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Kiambu (Mumbi
Ngugi, J.) dated 10th December, 2018 in HC. CR.A. No. 13 of 2018)*

JUDGMENT

1. Our mandate in a second appeal like this one is limited by Section 361(1)(a) Criminal Procedure Code to considering only issues of law. We are required to resist the temptation to revisit matters of law which were before the trial court and were determined and thereafter re-evaluated by the High Court on first appeal. This mandate has received various judicial pronouncements by this Court in cases such as *Stephen M'Irungi & Another v Republic* [1982-88] 1 KAR 360 where this passage appears:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

2. Our visit of the facts of the case will be only for purposes of establishing whether the two courts below carried out their mandates as required by law.

The appellant, Elias Nduati Mwangi, was charged before the Chief Magistrate’s Court, Thika, with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 particulars



being that on 11th day of July, 2016 at the place named in the charge sheet he intentionally caused his penis to penetrate the vagina of AW (hereafter “PW1”), a child aged 8 years. There was an alternative charge of committing an Indecent Act with a child contrary to Section 11 (1) of the said Act particulars being that on the said day at the same place he intentionally touched the vagina of PW1 using his penis. He was tried by that court, convicted on the main charge and sentenced to life imprisonment. His first appeal to the High Court of Kenya at Kiambu was dismissed by Mumbi Ngugi, J. (as she then was) in a Judgment dated 10th December, 2018 delivered on 20th December, 2018.

3. The facts of the case are not difficult to follow. The trial magistrate took PW1 through a thorough voir dire examination and determined that she was intelligent enough to give evidence but would give unsworn evidence as she did not understand the nature of taking an oath. PW1 testified that on the fateful day she arrived at her sister’s house from school and decided to go to bed as she was tired. She was alone. The appellant entered the house and on the issue of identification she stated thus:

“... I know him. He is called Nduati. I know where he lives. He lives in Ghetto near where we live ... Nduati came and did tabia mbaya with me. He promised to give me maize and a sweet....”

4. She gave details of how the appellant removed her shorts and panty, lay on top of her and inserted his penis into her genitalia and when he was finished he left after giving promises of the gifts we have stated above. She felt pain and immediately informed her grandmother (PW2) of what had happened. No action was taken. The following day she went to school and one of the teachers (PW3) noticed unusual behaviour and on examining PW1 she and her colleague determined that PW1 had been defiled as there was blood coming from her private parts.

Meanwhile her grandmother (PW2) with the assistance of the said teachers reported the matter to police; PW1 was taken to a dispensary and later to Thika Level 5 Hospital where according to Dr. Uncono Gachau,

5. (PW4), it was found, upon examination, that PW1’s genitalia revealed yellow body discharge caused by sexual assault where there was penetration.

Those facts were confirmed by Corporal Jonathan Cheruiyot (PW5), the investigating officer.

Upon being put on his defence the appellant, in an unsworn statement, told the trial court that he was arrested on 24th July, 2016 and informed that the cause for his arrest was that he had stolen a purse. He was assaulted at the police station and accused of having assaulted a minor; he denied the charge.

As we have said above, the appellant was convicted on the main charge and sentenced accordingly.

In homemade “Grounds of Appeal” the appellant faults both courts below for convicting him “..... on gravely unreliable evidence granted:-

- a. The relationship of the sore relationship (sic) between the appellant and the complainant’s parents.
 - b. The lack of probative medical evidence capable of unequivocally linking the appellant with the crime....”
6. The appellant also faults imposition of sentence of imprisonment for life citing the case of *Francis Karioko Muruatetu & Another* Petition No. 15 and 16 of 2015 by Supreme Court of Kenya and finally requests to be furnished with proceedings of the trial court to enable him file more substantive grounds of appeal.



7. The appeal came up for hearing before us on 21st February, 2022 when the appellant was present on the virtual “Go-to-Meeting” platform from Manyani Maximum Prison. Miss Margraret Matiru, learned counsel, appeared for the Office of Director of Public Prosecutions. Both the appellant and Miss Matiru had filed written submissions. The appellant, in a highlight of those submissions told us that the sentence of life imprisonment was very harsh; it should be reduced as he was entitled to be given another chance in his life.

Miss Matiru submitted that the sentence was well deserved as the appellant knew what he was doing; he had ruined the life of a child.

The only issue raised by the appellant in this appeal relates to sentence. We started this Judgment by identifying the limited mandate in an appeal like this one.

The trial court found the appellant guilty of the offence of defilement and sentenced him to life imprisonment because he had defiled a child who was 8 years old. The High Court, on first appeal, confirmed those findings.

Section 361 *Criminal Procedure Code* on second appeals donates power to a party on appeal from a subordinate court to appeal to this Court from a decision of the High Court in its appellate jurisdiction on a matter of law and we are not to hear an appeal:-

“ on a matter of fact, and severity of sentence is a matter of fact...”

8. The sentence imposed by the trial court was the sentence envisaged by the *Sexual Offences Act* where the offence is against a minor who was aged 8 years as was established in the evidence.

The appeal has no merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

