



**Mwendwa v Republic (Criminal Appeal 203 of 2013)
[2022] KECA 588 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 588 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 203 OF 2013
W KARANJA, F TUIYOT'T & KI LAIBUTA, JJA
JUNE 24, 2022**

BETWEEN

GEORGE MUSAU MWENDWA APPELLANT

AND

REPUBLIC RESPONDENT

*(This was appeal from the conviction and sentence of the High Court at Nakuru
(Emukule, J.) dated 8th November 2013 in H.C. Cr. C. No. 172 of 2012)*

JUDGMENT

1. George Musau Mwendwa, (the appellant) was charged with the offence of defilement in violation of section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The particulars of the charge were that on diverse dates between 5th and 7th January 2011 in Narok North district within Rift valley province, he unlawfully and intentionally did cause his penis to penetrate the vagina of HM, a girl aged 11 years. In the alternative he was charged with the offence of indecent act with a child contrary to section 11(1) of the [sexual offences Act](#). He pleaded not guilty of the main and the alternative charges.
2. The trial proceeded with six (6) state witnesses lined up in support of the prosecution case. The child, who we shall refer to as HM (PW1), testified after a voir dire examination by the trial court. It was her evidence that she was 14 years old and was in standard 7 at [particulars withheld] Academy in Narok. On 5th January, 2011 at about 5. 00 p.m, she was sent by her aunt JKO (PW3) to the supermarket to buy stock for the aunt's shop and some personal items for herself. She went to Kilungu supermarket where she met the accused, who assisted her to carry the items she had bought. She narrated how the appellant booked a hotel room where he took her and defiled her not once but severally and they kept changing hotels where the appellant would have intercourse with her. They stayed together at different hotel lodgings for a week after which the appellant tried to force her to board a vehicle to Kisii. While at the bus terminus, they were found by K (PW3) and the sister who were looking for her. The police were alerted, and the appellant was arrested. HM was taken to Narok District hospital where she was



examined by Hillary Kiptoo (PW2), a clinical officer attached to the said hospital. The witness observed that the child had tender lower abdomen, her hymen was torn, the labia minora had bruises and there was a discharge and blood stain on the labia majora, a confirmation that the child had been defiled.

3. JKO, (PW3) the child's aunt who had sent her to the supermarket on the date in question, testified that, when the child failed to return home from the shop, she got worried and the next day she enquired from the child's mother whether she was at home. On realization that the child had not returned home the previous day, the witness embarked on looking for her and also reported the matter to the police station. She had been informed that the appellant who worked as a security guard had been seen with her. Her search yielded results when she found the child at the bus terminus ready to board a matatu to Kisii. After he was arrested, the appellant is said to have taken the arresting officer, (PW5) to his house from where the items the child had bought from the supermarket were recovered.
4. When placed on his defence, the appellant opted to give unsworn evidence and denied committing the offences he was charged with. He explained that he could not remember where he was on 5th November 2011, but that on 7th January, 2011 he was working at Seasons' hotel on night shift when at 11.00 am on the same day he met people who identified themselves as police officers and asked him to accompany them to the police station. At the police station, he found two ladies and the child, who he said he did not know before. He stated that nothing was recovered from his house.
5. In its judgment the trial court found that the prosecution had proved the case beyond reasonable doubt and convicted the appellant on the main charge of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* since the complainant's age was 14 years according to the assessment report and not 11 years as indicated in the charge sheet and sentenced to 20 years' imprisonment.
6. Aggrieved by the decision of the trial court the appellant appealed against both conviction and sentence. The High Court (Emukule, J.) heard the appeal and, in a judgment delivered on 8th November, 2013 held that the prosecution had proved the charges against the appellant beyond reasonable doubt and dismissed the appeal in its entirety.
7. Being further aggrieved, the appellant has now moved to this Court on second, and perhaps, last appeal. He has challenged the said judgment on grounds that the trial court erred by upholding the conviction and sentence with poor investigations; that the evidence on record was not evaluated; that the evidence on record was an afterthought; that the court convicted him in the absence of his defence witnesses; that the P3 form was inconsistent with the evidence of the clinical officer and that the prosecution had not proved its case beyond reasonable doubt.

When the appeal came up for virtual plenary hearing before us on 8th March 2021, the appellant appeared in person while the office of the DPP was represented by Miss. Chelagat, learned prosecution counsel. The appellant urged that his appeal be allowed. The appellant relied on his written submissions which were on record and urged the Court to allow the appeal and set him at liberty saying that he has stayed in prison for long time, and that he has learnt his lesson and also acquired some life skills which he can put to use outside prison.

8. On her part, Miss Chelagat also relied on her submissions and urged the Court to confine itself to matters of law and not facts. She reminded the Court that severity of sentence is a question of fact, and that the Court should not, therefore, interfere with the sentence. She maintained that the P3 form showed that the victim's vagina was inflamed, reddish and had mild laceration and a blood stained discharge; that the element of penetration had been proved; that the prosecution had proved all the ingredients of the offence of defilement; that the sentence imposed was legal; that the age of the minor had been proved to be 14 years as at the time of the commission of the offence and that the appellant was the perpetrator of the offence.



9. This being a second appeal, we are enjoined by the provisions of section 361(1) of the Criminal Procedure Code to entertain only matters of law. In the case of *Njoroge v Republic* [1982] KLR 388, this principle was enunciated as follows;

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence.”

Similarly, in *Adan Muraguri Mungara v Republic* [2010] eKLR, this Court reiterated the circumstances under which we may interfere with the concurrent findings of fact by the trial court and the first appellate court, as follows:

“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

We have perused the record of appeal, the written submissions and the oral highlights. The issues that arise for determination are: whether the prosecution proved penetration, and the age of the child; whether the appellant was properly identified as the offender and whether the evidence tendered proved the offence he was convicted of.

10. This being a case of defilement three ingredients must be proved in order to sustain a conviction, as was held in *George Opondo Olunga v Republic* [2016] eKLR, they include: identification or recognition of the offender; penetration and the age of the victim. On the first issue, both courts below found that the child had been defiled. Her evidence was corroborated by that of the clinical officer who testified in court and produced the P3 form as an exhibit. No basis has been laid for us to interfere with the concurrent findings of fact by the two courts below on this point.
11. On the issue of identification, HM properly identified the appellant as the person who defiled her. She said that she knew the appellant before as he used to buy items from her aunt’s shop and that he worked in a bar in town. The evidence was corroborated in material aspects by her aunt, who found that the appellant was working at Seasons Bar and that he had not reported on duty for three days. The appellant did not dispute that fact, but stated that he worked on night shift on the 5th January to 7th January 2011. We note that the appellant met the child at about 5.00 pm, which was in broad daylight. There was no evidence that the child was at all times blind-folded or that she could not identify the appellant for any other reason. Thus, the identification of the appellant as the perpetrator of the crime cannot be in doubt. Both courts below made concurrent findings of fact that the child properly identified the appellant. Again, we have no reason for interfering with that finding of fact.
12. With regard to the age of the complainant, we agree that there could have been some discrepancy in the testimony of the child, her aunt and the P3 form. The age given by the witnesses was between 11 years and 14 years of age. Of importance, however, is the fact that the child was below 18 years old and the charge of defilement was therefore proved. Section 2 of the Sexual Offences Act defines a child as any person under the age of 18 years. The age of HM was established to be 14 years, which was



important for purposes of sentencing. In Hadson Ali Mwachango v. Republic [2016] eKLR this court held as follows:

“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. In Alfayo Gombe Okello v Republic Cr App No 203 of 2009 (Kisumu). This Court stated as follows;

In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1):”

13. As already stated, the appellant was charged with the offence of defilement and section 8(3) of the Sexual Offences Act, which was the Penal section in regard to the charge against the appellant provides:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.” (Emphasis Added)

14. The trial court sentenced the appellant to 20 years’ imprisonment, which is the sentence imposed for defilement of children between the ages of 12 and 14 years. The appellant was not in the circumstances prejudiced by the courts’ finding that the child was 14 years old. It would have been different had he been sentenced for defiling an 11 year old, as that would have taken him to a different sentence band, which would have attracted a more severe sentence. We find no reason to interfere with the sentence meted out by the trial Magistrate and upheld by the High Court. Accordingly, this appeal fails both on conviction and sentence and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

