



REPUBLIC OF KENYA



KENYA LAW
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**Murungi v Republic (Criminal Appeal 21 of 2017)
[2022] KECA 710 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 710 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 21 OF 2017
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JULY 22, 2022**

BETWEEN

JAMES MURUNGI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Meru
(Kiarie, J.) dated 20th December 2016 in Meru HCCRA No. 91 of 2015)*

JUDGMENT

1. The appellant was charged before the Chief Magistrate’s Court at Maua with defilement contrary to Section 8(1) and of the *Sexual Offences Act*. The particulars were that, on the 4th day of October 2013 at [Particulars Withheld] village Ndoleni Division in Igembe North District within Meru County, the appellant intentionally caused his penis to penetrate the vagina of RM, a child aged 10 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge were that, on the 4th day of October 2013 at [Particulars Withheld] village Ndoleni Division in Igembe North District within Meru County, the appellant intentionally touched the vagina of RM, a child aged 10 years.
2. The appellant initially pleaded guilty but later denied the offence calling for a full trial. The prosecution case may be summarised as follows: After a *voir dire* examination, the complainant, PW1, was found capable of giving evidence under oath. PW1 testified that on the material day, the appellant came to her home at around 8:00 pm and, after eating supper, asked her to go with him to [Particulars Withheld] Church. This was not an unusual request as the appellant had taken the complainant to church on other occasions.



3. The appellant agreed and her mother gave her permission. Before reaching the church, the appellant grabbed the complainant's legs and she fell to the ground. The appellant proceeded to remove her inner clothes, covered the complainant's mouth with one hand, laid the complainant on her back and removed his trousers up to his ankles. The appellant touched her genitals with his penis, and inserted his penis into her genitals severally. The complainant started bleeding and felt a lot of pain. The appellant told her to keep quiet and that he would buy her *mandazi*.
4. After the ordeal, the complainant told one JK what the appellant had done. They went for her mother at the church and the complainant recounted to her what had happened. The mother checked her vagina and they went to the police post to record a statement. The appellant was arrested at the church. The following day, they went to hospital in Maua where the complainant was examined and treated.
5. PW2, the clinical officer who examined the complainant and prepared a P3 form, testified that the complainant's dress was stained with blood at the back. Examination of the complainant's genitals showed broken hymen, hyperemic (reddish) labia and vaginal opening. The High Vaginal Swab (HVS) showed yeast cells and a few pus cells. PW2 concluded that there was actual evidence of sexual assault.
6. PW3, who was attached to Kitune police post and assigned to the defilement case, testified that he recorded the statements of the complainant, her mother and uncle. He was told that the complainant's mother did not suspect the appellant when he accompanied the complainant to church as the appellant was a good church member. That after defiling the complainant, the appellant gave her Kshs 10/= and told her to go buy mandazi and not tell anyone. The appellant tried to seek reconciliation but they informed him that such cases are not open to reconciliation. The P3 form confirmed that the complainant had been defiled. PW3 then charged the appellant and arraigned him before court.
7. In his defence, the appellant gave an unsworn statement and stated that the case was a frame up; that his mother and the complainant's mother had a dispute over land boundary and the elders tried to intervene without success; and that they wanted the appellant to be jailed.
8. In his judgment, the learned trial magistrate found the complainant very consistent in her evidence and held that, considering the weight of the prosecution's evidence, it was difficult to accept the appellant's claim that he was being framed. Consequently, the trial magistrate found the appellant guilty, convicted him and sentenced him to life imprisonment.
9. The appellant lodged an appeal against the conviction and sentence in the High Court at Meru. The appellant's grounds as set out in his supplementary grounds of appeal were that the learned trial magistrate erred in both law and facts in failing to note that the age of the complainant was not ascertained; in failing to note that the prosecution did not call crucial witnesses, specifically Joyce Kabuthia and the complainant's mother, to testify; in failing to note that the appellant was not examined or DNA profiled; in failing to note that the prosecution did not produce the inner cloths worn by the complainant after the incident as an exhibit; and in failing to note that the case was fabricated due to a grudge.
10. In his judgment, the learned judge curiously noted that the appellant raised three grounds of appeal, namely that he was kept in custody longer than the law allowed; that the learned trial magistrate erred in law and in fact by finding that the charge had been proved; and that the learned trial magistrate erred in law and in fact by failing to factor the defence of the appellant.
11. The learned judge held that the appellant ought to seek redress on the issue of the breach of his rights by police in a civil court. As for the issue of the age of the complainant, the learned judge was satisfied with the evidence of PW2, the clinical officer, who examined her and said that she was 10 years. The learned judge held that the testimony of the complainant to the effect that the appellant had defiled



her was corroborated by the findings of the clinical officer. As for the appellant's defence, the learned judge observed that the complainant's testimony that the appellant had a meal with her family went unchallenged and contradicted the appellant's contention that their mothers had differences over a land dispute that could be exploited against him. The learned judge concurred with the finding of the trial magistrate that the defence of the appellant, when weighed against the prosecution evidence, was wanting, and proceeded to dismiss the appeal against both the conviction and sentence.

12. Still dissatisfied with the High Court judgment, the appellant lodged the present appeal. The grounds as set out in the amended grounds of appeal were that the learned judge erred by:
 - i. Failing to consider that the sentence passed upon the appellant was excessively harsh.
 - ii. Failing to consider that the age of the complainant was not proved beyond any reasonable doubt.
 - iii. Failing to consider that the trial magistrate did not comply with Section 169(1) of the Criminal Procedure Code when reaching the verdict.
 - iv. Failing to consider that the charge sheet was fatally defective.
 - v. Failing to consider that the trial magistrate relied on the evidence of a single eyewitness.
 - vi. Failing to consider that crucial witnesses were not availed to the court to testify.
 - vii. Failing to consider that the appellant's rights were breached when he was held in police custody for more than 24 hours.
 - viii. Failing to consider the existing grudge between the complainant's mother and appellant's mother over boundary.
 - ix. Failing to consider that exhibits were not produced before court to prove commission of the offence.
 - x. Failing to consider that the appellant's arresters were not availed to court to testify to that effect.
 - xi. Failing to consider that the appellant was not medically examined to prove the commission of the offence.
 - xii. Failing to consider that the trial magistrate did not give reasons for rejecting his defence.
 - xiii. Failing to consider that the clinical officer did not highlight her qualifications before the court as per the requisite of the law.
13. The appellant submitted that the life sentence imposed was not compatible with the correctional services' motto and the primary purpose of the sentence of imprisonment under the United Nations Standard Minimum Rules, and was hence a contravention of Article 28 and 51(1) of the Constitution.
14. Concerning the age of the complainant, the appellant submitted that her age was not proved beyond reasonable doubt; that the mother who was in the best position to give the exact age of the minor did not attend court; and that PW1 was not competent enough to give evidence of her age without the court confirming the same from her parents or from formal documents. In this regard, the appellant cited *Chemahong v Republic* [1984] eKLR.
15. Regarding the charge sheet, the appellant submitted that it was clearly defective. The appellant also faulted the trial magistrate for not setting out the points for determination as per the requirements of Section 169(1) of the Criminal Procedure Code, and the reasons for the decision. He further submitted



that the clinical officer did not highlight her qualifications to the court, and did not produce any documents before court to prove that she was really competent to carry out the examination on the complainant. No submissions were received on behalf of the respondent.

16. In a second appeal, the Court ought to confine itself to matters of law as provided under Section 361(1) (a) of the Criminal Procedure Code, unless it is shown that the findings of fact by the two courts below 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. See *Chris Kasamba Karani v Republic* [2010] eKLR.
17. There are a number of grounds of appeal in which the appellant introduces new issues for the first time in this second appeal. These issues are whether the trial court complied with Section 169(1) of the CPC; whether the charge sheet was defective; and whether the clinical officer ought to have highlighted her qualifications. These are entirely new issues that were not placed before the High Court on the first appeal for consideration. Therefore, these cannot be entertained in this second appeal. In *John Kariuki Gikonyo v Republic* [2019] eKLR, this Court, when faced with similar circumstances, held that:

“The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:

“... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

(18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”
18. In addition, it would appear that the supplementary grounds of appeal containing five grounds of appeal filed in the first appeal did not come to the attention of the learned judge. The ascertainment of the age of the victim is a crucial component of the offence of defilement and must be proved in the same manner as penetration. See *Kaingu Alias Kasomo vs. Republic* Criminal Appeal No. 504 of 2010.
19. In the present case, the age of the complainant was a forgone conclusion for the trial magistrate. The learned judge was however convinced by the evidence of the clinical officer, who indicated in the P3 form that the complainant was aged 10 years. The manner in which the clinical officer reached this particular finding was not pursued at the trial court. No other evidence was led regarding the age of the complainant.
20. In *Thomas Mwambu Wenyi v Republic* [2017] eKLR, this Court cited with approval the Uganda Court of Appeal decision in *Francis Omuromi vs. Uganda*, Court of Appeal Criminal Appeal No.2 of 2000 where it was held, inter alia, that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by birth certificate, the victim’s parents or guardian, and by observation and common sense...”



21. When considering whether information contained in a P3 form was sufficient proof of age, this Court in *Jackson Mwanzia Musembi v Republic* [2017] eKLR held that:

“The Sexual Offences Act adopts the definition of a child in the Children Act.

Section 2 of the Children Act defines “age” as,

“Where actual age is not known means the apparent age”.

17. Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act. Faced with a similar situation, as in this case, this Court in *Evans Wamalwa Simiyu vs. R* [2016] eKLR, observed that –

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that, in the Doctors opinion, the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

Having taken the foregoing in mind, it is our considered view that the minor’s apparent age was proved by the P3 form.”

22. The P3 form was therefore sufficient to prove the age, or the apparent age, of the complainant as being 10 years.

While the appellant faulted the investigating officer for not subjecting him to medical examination or DNA profiling, this was a decision that was purely for the investigating officer to make, and the failure to do so did not affect the credibility of the evidence before the trial court. As was held in *David Kabura Wangari v Republic* [2016] eKLR:

“There is no requirement for the appellant to be taken for treatment to establish an act of defilement. DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court.”



- 23. Similarly, failure to produce the clothes that the complainant wore during the incident does not displace the medical evidence indicating penetration. Section 143 of the *Evidence Act* provides that:

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”
- 24. In *Julius Kalewa Mutunga v Republic* [2006] eKLR, this Court held that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
- 25. While the complainant’s mother, JK and the appellant’s arresters were not called as witnesses, the evidence presented by the prosecution was sufficient to prove the charge to the required standard. The complainant was the only eyewitness to the incident and nothing emerged to raise any questions about her credibility. The complainant’s evidence was also corroborated with the medical evidence produced by the clinical officer.
- 26. Aside from the appellant’s own statement, no evidence was produced to indicate the existence of a grudge between the appellant’s mother and the complainant’s mother, or that there was a plot to frame the appellant. The learned judge cannot be faulted for disregarding the appellant’s defence.
- 27. Upon consideration of the record before us, we are unable to fault both the trial court and the High Court. The appeal is lacking in merit and the same is therefore dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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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

