



REPUBLIC OF KENYA



**Bundi v Republic (Criminal Appeal E113 of 2022)  
[2024] KEHC 2619 (KLR) (Crim) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 2619 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL E113 OF 2022**

**LN MUTENDE, J  
JANUARY 31, 2024**

**BETWEEN**

**FRANCIS GITONGA BUNDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Francis Gitonga Bundi, the Appellant, was charged with the offence of Sexual Assault contrary to Section 5(1) as read with Section 5(2) of the *Sexual Offences Act*. Particulars of the offence were that between the months of December 2016 and May 2017 in Langata within Nairobi County the accused intentionally and unlawfully used his fingers to penetrate the genital organs (vagina) of HM a child aged 4 years.
2. In the alternative, he was charged with the offence of committing an indecent Act with a child contrary to 11(1) of the *Sexual Offences Act*. Particulars of the offence being that on the said date at the said place he unlawfully and intentionally touched the vagina of HM a child aged 4 years old.
3. Having been taken through full trial, the appellant was convicted on the main charge and was sentenced to serve 15 years imprisonment.
4. Briefly, facts of the case were that in the month of December, 2016, PW1 MM, the mother of the complainant was bathing her when she mentioned that she had been molested by a male person. On the 4<sup>th</sup> January, 2017, the complainant went out to play as usual, and as she washed her in the evening, she complained of pain while she urinated. Upon checking she noted her daughter had injuries in her private parts and also complained of pain as she bathed and wiped her. Her daughter told her that a certain man touched her 'Kadudu', she also told her that she was able to identify the man who had big hair. That a particular incident was on 1<sup>st</sup> May, 2017 during her routine bath the child stated that



- she wanted to urinate, she complained of pain and on checking PW1 noted her clitoris was reddish and protruding as if it had been pulled. She inquired and the child told her that the person with big hair put his hand inside the stocking she was wearing and pulled her. The child took her to a gated flat which had a corridor where the assailant committed the offence.
5. That one day PW1 passed with her at a place where many men gathered and asked if she could see the man, the child looked at them then looked down making PW1 sense that the man was there. She later told her that the man was there with big hair which looked like braids.
  6. That on one Sunday morning as they went to church the child wanted to call her cousins so that they could go to church together, she also saw her uncle heading towards the place where she was assaulted, and the child ran to reach him. PW1 heard a man's voice call her child's name but she could not see the person.
  7. That she confronted the appellant who on a certain day was seated outside the gate of her house and asked if he knew of any children playing at the place, PW1 also pointed out her child but the accused denied having any knowledge.
  8. That on 12<sup>th</sup> May, 2017, she was told that her child came home limping and that she was crying. PW1 inquired and the child told her that she fell while coming out of the school bus which was a lie. The mother discovered that the child was pinched inside her thighs, the child declined to state what happened. On 14<sup>th</sup> May, 2017 after pleading with her, the child stated that the injury was caused by the same man and that the man said he would beat her if she told her mother.
  9. She reported the matter to Langata Police Station on 17<sup>th</sup> May, 2017 and the child was treated at Nairobi Women Hospital. Afterwards the appellant was arrested and charged.
  10. Upon being placed on his defence, the appellant came up with an alibi, that from 4<sup>th</sup> January to 12<sup>th</sup> May he was away in Meru; and, on 12<sup>th</sup> May, he did not see the people, he did not know them and had not seen them before. That he saw the child's mother for the first time when she went with the police at his place of work, and he saw the child for the first at the Police Station.
  11. The court considered evidence adduced and was of the view that the child demeanor demonstrated that she had a very bad experience with the appellant and this explained the reason she did not want to talk about him. That the prosecution failed to help the child who ought to have been treated as a vulnerable witness since her demeanor in court spoke for itself. Therefore, the court relied on the mother's evidence as proof of what happened to the child and the person who committed the act as supported by the PRC form. This resulted in the court returning the verdict of guilty.
  12. In reaching its verdict, the court referred to the Post Rape care form indicating that the hymen was slightly torn. The doctor concluded that the tear was consistent with finger vaginal penetration. That there was nothing in the defence or cross examination to make the court doubt the conclusion.
  13. On proof of identification of the perpetrator, the court also noted from the child's evidence that she said she did not know anybody at the dock and said no no when asked to identify the accused instead she turned on her back. The court's conclusion was that the child knew the appellant and did not want to look at him from the first time since she knew he was the one at the dock.
  14. That the accused came to the dock when she was in court and was also present when she came to give evidence after her mother. The child changed her sitting position and turned her back when asked to identify the appellant.



15. That the child avoided to talk about the case not because she did not remember or that the incident did not occur but for reasons known to her which was most likely threats. That the child could not testify on the events due to her age and fear but that limitation should not be used to deny the child her right
16. The mother did not have any reason to frame the accused as she did not know him before the time he was pointed out.
17. The court dismissed the alibi defence, which was rebutted by PW1 and the demeanor of PW2. That the incident did not happen on the cited dates and the appellant must have gone home before or after committing the offence.
18. Aggrieved by the conviction and sentence, the appellant proffered the appeal on grounds that: Identification of the perpetrator was not proved to the required standard; evidence was not properly evaluated; and, that Section 333(2) of the *Criminal Procedure Code* was not complied with.
19. Through written submissions the appellant contends that the burden of proof adduced at trial was too remote and wanting and that the lack of proper evaluation of the evidence was apparent in the case. That the evidence fell short of positive identification that PW2 was told that yule mtu wa manywele aliingisha mkono ndani ta stoking yangu. A description that was not sufficient to find that the identification was free from possible error. That many young men have hair and the physical features had to be described.
20. That the child did not say in her evidence that the appellant defiled her, hence the magistrate erred in drawing inference of guilt from the testimony adduced. That the child's eye contact with the appellant could be for many factors. That the case involved identification and not recognition and an identification parade was mandatory in such circumstances.
21. Further, that the court did not consider the provisions of Section 333 of the *Criminal Procedure Code*, as the appellant had been in custody before the sentence.
22. The respondent however submits that penetration was sufficiently proved by the Post Rape care form. Further that the appellant was positively identified by the child from a group of young men who sat outside. That the complainant's demeanor was evident that she had a bad experience with and feared the appellant and could not testify on the offence and could not look at the accused in court.
23. That the defence put up that the appellant was away in Meru did not come out during cross examination so as to discredit the prosecution witnesses.
24. This being a first appeal, the court is tasked with the duty of reappraising the entire evidence and coming up with independent conclusions on whether the prosecution proved its case. The court must be minded that unlike the trial court,  
it never saw or heard the evidence of the witnesses and therefore must give room for this exception. In the case of *Kiilu & Another v Republic* [2005]1 KLR 174, it was stated that:
  1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
  2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.



25. As to whether the elements of the offence were proved, the provisions of Section 5 of the *Sexual Offences Act* provide that:
- (1) Any person who unlawfully—
    - (a) Penetrates the genital organs of another person with—
      - (i) Any part of the body of another or that person; or
      - (ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
    - (b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.
  - (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

26. In *John Irungu v Republic*, (2016) eKLR , the Court of Appeal held that the essential ingredients of the offence of sexual assault are as follows;

“... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”

27. The appellant does not contest that the victim’s genitalia was penetrated using fingers as per the evidence adduced by PW1 and the post rape care form where the child’s mother and examining doctor found that her private parts were reddish, the hymen was torn and the tearing corresponded with the evidence tendered that fingers were used to cause penetration.
28. PW1 testified how on several occasions between the periods cited in the charge sheet and also on her evidence that the child often complained of pain during bathing and during this period she noted that she had vaginal injuries.
29. The appellant has vehemently contested identification evidence pointing him out as the perpetrator. The evidence confirms that the child was known to the appellant at all material times of the offence. Although the child could not identify him in court or speak about the incident, the evidence was clear that the appellant worked at a nearby flat where children used to play including the victim.
30. The identification was free from error. The child was also able to point out the appellant features which stood out from the crowd. It were these features that the Investigating Officer adduced in evidence as part of features that were used to identify him at the time of the offence.
31. In the case of *Kariuki Njiru & 7 Others v Republic*, Criminal Appeal No. 6 of 2001, (UR) the Court of Appeal emphasized the need to highlight descriptive features to the police where these were used to identify the suspect and also adduce them in evidence:

“The law on identification is well settled. ...the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered... Among the factors the Court is required to consider is



whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in *Mohamed Elibite Hibuy & Another v Republic* Criminal Appeal No. 22 of 1996 (unreported) held that:

“If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.”

32. In this case, the child did not merely describe the appellant as the man with big hair, she was able to point him out from other men who were at one place. The child was also able to identify the place she was sexually assaulted, PW1 testified that the child took her to the place where the appellant assaulted her. The child also said it was the appellant who did it the second time when the mother noted pinch injuries on her thighs and later noted serious injuries on her clitoris.
33. By the time appellant was arrested the case was no longer an incident based on single witness identification, instead the appellant was known to both the mother and the child and the mother had also confronted him.
34. The appellant did not dispute that he worked at the said place where he was a caretaker. He also admitted that PW1 went with the police and that is when he was arrested.
35. PW4 the Investigating Officer testified that the children were used to him as the caretaker, that the child even screamed when the appellant was arrested.
36. The evidence was firstly, beyond possibility of error and secondly was based on recognition evidence.
37. The appellant further contends that the child did not indicate that he was the perpetrator during the evidence. From the judgment, the court made elaborate notes on the child’s demeanor during her testimony finding inter alia that the child was playful during her testimony but avoided looking at the appellant while in the dock, she avoided talking about the incident and particularly became sad when told to look at him turned her back so that she could not make eye contact.
38. Such observation are within the mandate of the trial court which the appeal court does not have the advantage of seeing or making. The totality of evidence is clear that the child was a vulnerable witness and the prosecution did apply to have her testify through an intermediary and to have her declared as such under Section 31 and 32 of the *Sexual Offences Act*.
39. The courts findings that the child had a bad experience with the appellant and could not speak due to fear and threats was also from the evidence tendered and thus not misdirected or erroneous in law or fact.
40. The court did not err in relying on PW1’s independent and direct evidence on what she firstly observed as vaginal injuries and secondly told about the perpetrator.



41. The evidence was corroborated by the Investigating Officer who went to the scene and confirmed that the accused was known to the child and it was not mere coincidence that she screamed when he was arrested.
42. Lastly, the defence was considered as per the last paragraph of the judgment. The finding that it was dismissed on ground that PW1 and PW2's demeanor was sufficient rebuttal of his alibi defence.
43. The incident occurred between December 2016 and May 2017, PW1 discovered the injuries or anomalies sometime in December then pointed out isolated cases in May 2017 until 15/5/2017 when she noted the fresh injuries and interrogated the child who showed her the appellant in this period.
44. The alibi defence was not brought earlier and it also failed to shake the prosecution's case thus its dismissal as an afterthought in this appeal.
45. On the question of sentence, the appellant was arrested on 17<sup>th</sup> May, 2017 as per evidence of PW4 but was given cash bail pending issuance of the P3 form. He was later re-arrested on 13<sup>th</sup> June, 2017 and arraigned for charges on 15<sup>th</sup> June, 2017 and has been in prison since the day he was rearrested.
46. Section 333 (2) of the *Criminal Procedure Code* obligates the court to consider such period and further also deduct it from the period or spell the time when the sentence is expected to run. (See the case of *Abamad Abolfathi Mohammed & Another v Republic* (2018) eKLR)
47. The consequence is that unless the period is considered the accused would be incarcerated for an unjustified longer period and a further violation of right to freedom from under Article 29(a) of the *Constitution* which provides that:
- Every person has the right to freedom and security of the person, which includes the right not to be—
- (a) Deprived of freedom arbitrarily or without just cause;
48. This was also discussed by the High Court in *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] eKLR where the court found that:
- “...a person on whom a sentence has been imposed which does not comply with section 333(2) has recourse to this Court since he would by that fact been subjected to serve a sentence which does not comply with the law. Such a person risks serving a sentence which is in excess of the one lawfully prescribed thus being deprived of his liberty contrary to the law.”
49. The *Judiciary Sentencing Policy Guidelines* also provide that:
- The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.



50. As regard the period spent in custody, Section 5(2) of the *Sexual Offences Act* provides that:
- A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
51. The sentence is not mandatory in nature but gives the court discretion to mete anything between 10 years and life imprisonment. The record shows that the appellant was a first offender, but, did not demonstrate remorse.
52. It is trite that the sentence must correspond with the actions of the accused and the impact on the victim and justice must also cut across all spheres.
53. In the case of *Omuse v R* (2009) KLR 214 the court was emphatic that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence.
54. The sentence was within the law, but considering the fact that the appellant was a first offender, the court should have considered the minimum sentence. In the premises, I affirm the conviction and set aside the sentence meted out which I substitute with a sentence of ten (10) years imprisonment which will be effective from the date of arrest, the 13<sup>th</sup> June, 2017.
55. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**L. N. MUTENDE**

**JUDGE**

In the presence of:

Appellant

Mr. Mutuma for ODPP

Court Assistant – Habiba/Hadija

