



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muhindi v Republic (Criminal Appeal E011 of 2022)  
[2024] KEHC 716 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E011 OF 2022  
JN KAMAU, J  
JANUARY 29, 2024**

**BETWEEN**

**KELVIN MUHINDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M. M. Gituma (SRM) delivered at Vihiga in  
Principal Magistrate's Court in Sexual Offence Case No E032 of 2021 on 26th July 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was convicted by Hon M. M. Gituma (SRM) on the main charge of defilement and discharged of the alternative charge. He was sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgement, on 20<sup>th</sup> September 2022, he lodged the Appeal herein. His Petition of Appeal was dated 14<sup>th</sup> September 2022. He set out five (5) grounds of appeal. On 10<sup>th</sup> October 2023, he subsequently filed Supplementary Grounds of Appeal dated 28<sup>th</sup> September 2023. He set out two (2) supplementary grounds of appeal.
4. His Written Submissions were dated 28<sup>th</sup> September 2023 and filed on 10<sup>th</sup> October 2023 while those of the Respondent were undated and filed on 15<sup>th</sup> November 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

### I. Proof of Prosecution's Case

9. Grounds of Appeal Nos (1), (3), (4) and (5) of the Petition of Appeal were dealt with under this head as they were all related.
10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

#### A. AGE

12. The Appellant agreed that as per the Certificate of Birth the Complainant (hereinafter referred to as "PW 1") was born on 14<sup>th</sup> June 2007 and was therefore fourteen (14) years of age at the material time. He submitted that PW 1 consented to the sexual intercourse he had with her and that she only turned against him in court.
13. On its part, the Respondent submitted that the Charge Sheet indicated that PW 1 was thirteen (13) years and that the Certificate of Birth that was produced by Margaret Chepkoech (hereinafter referred to as "PW 4") proved that the age of PW 1 was thirteen (13) years.
14. A copy of PW 1's Certificate of Birth that was produced as evidence showed that she was thirteen (13) years of age. As the Appellant did not adduce any evidence to the contrary, this court found and held that her age had been proven and that for all purposes and intent, she was a child aged thirteen (13) years at the material time of the incident.



## **B. Identification**

15. The Appellant did not submit on the issue of identification. On the other hand, the Respondent submitted that PW 1 testified that on the material day, the incident took place at 3.00pm and that she was able to identify the Appellant as she was in his compound. It added that she also positively identified him in court.
16. It contended that Hellen Mmbone (hereinafter referred to as “PW 2”) stated that she knew the Appellant as they were neighbours and that there was no grudge between them. It asserted that PW 2 indicated that when she went to look for PW 1, she identified her jerrican at the Appellant’s compound and was informed that PW 1 was in the Appellant’s house. It added that PW 2 called for the assistance of the Local Administrator who opened the window of the house and they were able to see PW 1 together with the Appellant inside the house.
17. It was therefore its case that the Appellant herein was positively identified by PW 1 and PW 2 who knew him before the incident and that PW 1 interacted with him during daytime where light would have allowed for his proper identification.
18. Notably, PW 1 positively identified the Appellant at the dock during trial. In her evidence, she testified that on the material day at about 3.00pm, she met the Appellant while coming from the river. She stated that he poured the water she had carried in her jerrican, took her hand and led her to his house where one Omwanga was sleeping. She told the Trial Court that the said Omwanga left and locked her and the Appellant in the house from the outside.
19. PW 2 was PW 1’s mother. She testified that the Appellant was their neighbour and that there was no bad blood between their two (2) families.
20. It was evident that PW 1 and the Appellant knew each other because they were neighbours. The Appellant had in fact submitted that the sexual intercourse between him and PW 1 was consensual and that she only turned against him in court. Without belabouring the point, the ingredient of identification was proven.

## **C. Penetration**

21. The Appellant did not submit on this issue. On its part, the Respondent submitted that the medical reports produced by Vonyali Ibrahim (hereinafter referred to as “PW 3”) who was a Clinical Officer corroborated PW 1’s testimony and that the same were filed by a professional within a reasonable time frame from the date when the offence against her was committed.
22. According to PW 1’s evidence, the Appellant pushed her on the bed, lifted his skirt, removed her pant and inserted his private parts into her private parts.
23. The Trial Court found PW 1 to have been truthful and did not contradict herself. PW 3 testified that when he examined PW 1, he noted that her hymen was freshly broken, there was whitish discharge and lacerations. He therefore concluded that she had been defiled. He dismissed the Appellant’s assertions that her hymen had been broken due to sports activities because sporting activities did not cause lacerations.
24. In view of the fact that the Appellant admitted in his submissions that PW 1 consented to having sexual intercourse with him scientific evidence proved that there was penetration, the Trial Court could not be faulted for having found that the Appellant did in fact penetrate her and that the Prosecution had proved its case beyond reasonable doubt.



25. In the premises foregoing, Grounds of Appeal Nos (1), (3), (4) and (5) were not merited and the same be and are hereby dismissed.

## II. Sentencing

26. Grounds of Appeal No (2) and Supplementary Grounds of Appeal Nos (1) and (2) were dealt with under this head.

27. The Appellant submitted that the Trial Court erred in sentencing him without a written judgment hence failed to satisfy the requirements as to its formal validity as provided in Section 169 of the Criminal Procedure Code. He placed reliance in the case of Republic vs Lute s/o Luzala 1 EACA 106 where it was held that a judgment must be written and read at the time of delivery.

28. He contended that Trial Court erred in not making a finding that the mandatory nature of the minimum mandatory sentence under Section 8(1) as read with 8(3) of the *Sexual Offences Act* No 3 of 2006 was unconstitutional and not warranted on plea as was held in the case of Petition No 97 of 2021 Edwin Wachira & 9 Others (eKLR citation not given) where the court cited the case of Eliud Waweru Wambui vs Republic [2019]eKLR.

29. On its part, the Respondent submitted that a probation report was merely a guide to judicial officer during sentencing and that the Trial Court was guided by the law which provided for a minimal legal sentence and therefore properly sentenced the Appellant.

30. It further contended that his submission that there was no written judgment was dead on arrival as in the digital era of online proceedings, digital documents, signatures and judgment were valid. It urged the court to dismiss the Appellant's appeal for lack of merit.

31. As pointed hereinabove, this court agreed with the Respondent that a Probation Report only guided the court in meting out a fair sentence but did not negate one's conviction. The court remained with the final discretion on the sentence to mete out on a convicted person.

32. Additionally, since the year 2020 when the Covid-19 pandemic struck, courts had embraced the virtual platform and digital documents and online judgments were inevitable. That notwithstanding, this court perused the court file and noted that there was a handwritten judgment in the file that was duly signed by Hon B.N. Ireri (Ag PM) on 21<sup>st</sup> March 2013.

33. The Appellant's assertions that the Trial Court failed to satisfy the requirements regarding the formal validity of judgments as provided in Section 169 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) thus fell by the wayside.

34. The Appellant herein was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. Section 8(3) of the *Sexual Offences Act* provides that:-

“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.”

35. The sentence of twenty (20) years that the Trial court had meted on him was therefore legal and in accordance with the law. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.



36. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR on 6<sup>th</sup> July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
37. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.
38. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
39. However, on 3<sup>rd</sup> December 2021 while the Supreme Court directions of 6<sup>th</sup> July 2021 were still in place, in the case of GK vs Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
40. On 15<sup>th</sup> May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
41. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
42. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
43. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to a lower sentence than the twenty (20) years imprisonment that had been prescribed in Section 8(3) of the *Sexual Offences Act*.
44. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.
45. Going further, Section 333(2) of the *Criminal Procedure Code* which provides that:-

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

46. It was evident from the proceedings that the Trial Court considered the period the Appellant spent while his trial was ongoing as it indicated that the Appellant’s sentence run from the date of remand.

**Disposition**

47. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was dated 14<sup>th</sup> September 2022 and filed on 20<sup>th</sup> September 2022 was partly merited only on the aspect of sentence only. His conviction be and is hereby upheld as the same was safe.

48. It is hereby directed that the sentence of twenty (20) years imprisonment be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to fifteen (15) years imprisonment from 22<sup>nd</sup> April 2021 in accordance with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).

49. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29<sup>TH</sup> DAY OF JANUARY 2024**

**J. KAMAU**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

