



**Munywoki v Republic (Criminal Appeal E022 of 2022)
[2024] KEHC 651 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E022 OF 2022
KW KIARIE, J
JANUARY 25, 2024**

BETWEEN

GEORGE ISUNGU MUNYWOKI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.32 of 2019 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Francis Nyamayi Rumba, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 16th day of April 2019, in Changamwe sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of N.Y., a child aged four years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The appellant was in person. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact by finding my conviction and sentence without considering that the expert's report did not prove the case of defilement beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact, convicting the appellant without humbly considering that there were contradictions and discrepancies in the prosecution case.
 - c. That the learned trial magistrate erred in law and fact by convicting the appellant without considering that the case was poorly investigated, which led to a miscarriage of justice.



- d. That the learned trial magistrate erred in law and fact by failing to comply with section 329 of the CPC as mitigation is part of the trial process.
 - e. That the learned trial magistrate erred in law and fact without considering the defence evidence.
 - f. That the learned trial magistrate erred in law and fact without considering that the sentence meted was harsh, excessive, unjust, unconstitutional, inhumane and degrading.
4. The state opposed the appeal through Mr Alex Gituma, who urged for the dismissal.
 5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they are proven.

7. The complainant was a child aged four years at the time of the offence. Her evidence was that "Babu" [Babu is the Kiswahili word for grandfather], whom she identified as the appellant, removed her panty and inserted his penis into her vagina. She referred to the penis as "dudu". He "poured water" into her genitalia. She felt much pain.
8. S.F. (PW1) is the complainant's mother. Her evidence was that when the complainant returned from the appellant's house, she said he had done "bad manners" to her. This was what Y.M.H. (PW3), the child's father, testified to. She checked her genitalia and confirmed the report. She involved a neighbour who also established the same.
9. The appellant contended that the complainant was in his house, but when called by her mother, she failed to go. The only thing he did was pinch her to prompt her to go. The evidence of Monica Muthana supported his version. She said that after the allegation of defilement by the complainant's mother, she checked the complainant but did not see any evidence.
10. When the complainant was examined by John Kingori (PW5), a clinical officer, on the 17th day of April 2019, he made the following findings: There were bruises on her vaginal walls; the hymen was ruptured. There was obvious bleeding. He concluded that there was evidence of forced penetration.
11. The direct evidence implicating the appellant was that of the complainant. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim



and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

12. In his defence, the appellant denied that he defiled the complainant; there was ample evidence to point at him as the perpetrator of the offence. The learned trial magistrate had sufficient reasons to conclude that the child was telling the truth. The appellant's defence was considered and was appropriately dismissed.
13. A copy of the Certificate of Birth of N.Y. was produced as an exhibit. It indicates that she was born on the 28th day of January 2015. At the time of the offence, she was four years and nine months old. Section 8 (2) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The prosecution, therefore, proved the age of the complainant.

14. The appellant argued that the sentence meted out to him was harsh, excessive, unjust, unconstitutional, inhumane and degrading. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v REX* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shersbewsity* (1912) C.CA 28 T.LR 364.

15. The sentence prescribed for the offence is life imprisonment. I have not been persuaded that the learned trial magistrate applied the wrong principle or overlooked some material factor.
16. I may agree with him that an indeterminate sentence is harsh. However, there is no other prescribed sentence for the offence. Parliament must define what a life sentence means. Until such a definition is legislated, courts will continue to pronounce the stipulated sentence. Secondly, in this case, the sentence is the most appropriate.
17. Based on the preceding analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

