



REPUBLIC OF KENYA



**Mwajuma v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 650 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E017 OF 2023
KW KIARIE, J
JANUARY 25, 2024**

BETWEEN

GRANTON MWAMATI MWAJUMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case NO.3017 of 2019 of the Chief Magistrate's Court at Mombasa by Hon. V.O Adet-Principal Magistrate)

JUDGMENT

1. Granton Mwamati Mwajuma, the appellant herein, was convicted in count one of the offence of kidnapping contrary to section 257 of the *Penal Code*.
2. The particulars of the offence are that on the 13th day of August in Changamwe sub-county, within Mombasa County, kidnapped FAM. from lawful guardianship of EM.
3. In count two, the appellant 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.
4. The particulars of the offence are that on diverse dates between the 13th day of August 2019 and the 6th day of November 2019, in Changamwe sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the anus of FAM, a child aged four years.
5. The appellant was sentenced to five years imprisonment in count one and in count two to serve forty years 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 failing to conduct an unequivocal [sic] *voir dire* examination.



- b. That the learned trial magistrate erred in law and fact by failing to see that the evidence tabled did not prove the charges levelled against the appellant.
 - c. The trial court failed to see that the prosecution evidence did not disclose the offence of defilement.
 - d. That the trial court magistrate erred in law and fact by failing to see that the prosecution case was not presented to the required threshold of evidence.
 - e. That the learned trial court erred in law and fact by failing to appreciate the appellant's age in light of the sentence imposed.
6. The state opposed the appeal through Mr Ngiri Wangui, who urged for the dismissal.
7. This is the first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions while 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.
8. The voir dire examination is meant to satisfy the *Oaths and Statutory Declarations Act* for children of tender age. The Court of Appeal in the case of *Kibageny Arap Kolil v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that:
- ... for the purpose of section 19 of the *Oaths and Statutory Declarations Act*, the phrase “a child of tender years” means a child under the age of 14 years.
- In the instant case, the examination of the complainant satisfied the legal requirement. The learned trial magistrate cannot be faulted.
9. Section 257 of the *Penal Code* provides:
- Any person who kidnaps any person from Kenya or from lawful guardianship is guilty of a felony and is liable to imprisonment for seven years.
10. The ingredients of the offence are:
- a. The taking away of a minor from lawful custody.
 - b. The action must be without the consent of the guardian.
11. FAM. (PW1) testified that when she was returning home from a church activity, she found her mother at a shop. After she had enquired where she was coming from, she sent her to call her friend, whom she said was in her company, to confirm. However, her friend's father declared it was late and denied the permission. She set to return alone. On the way, the lights went off when she was near a story building. Suddenly, someone covered her nose with a cloth, and she became unconscious. When she regained consciousness, she found herself in a room without windows. It had a small TV set.
12. She went on to say that she would be fed under the door. After eating, she would go back to sleep. This was repeated several times until the door was opened, and she was asked to go and bathe. This is when she saw the person who spread the door for her and recognised him as Babu.
13. During her stay in captivity, she was fed, and her main activity was watching TV. Apparently, she was being drugged, for she testified that upon eating, she would instantly fall asleep.
14. She further testified that she used to sleep in that house alone, and the only person who had the key was Babu.



15. PM (PW4) testified that when they rescued her, she was dumb and confused. This was after Joseph Omukaba (PW5) had passed information that he had seen her.
16. Janerosa Galonga Gesare (PW8) said she was a tenant of the appellant. She testified that the complainant was in the appellant's house, where she was rescued on the 5th day of November 2019.
17. The appellant denied the offence and contended that the people who arrested him wanted money and his phone. This defence is an afterthought, for he did not challenge these witnesses with these facts during cross-examination.
18. I, therefore, find that the offence of kidnapping was proved to the required standards.
19. To sustain a conviction for the offence 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 Nguu v 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.

20. The complainant, as observed earlier, must have been drugged and was almost always under the influence of the said drugs to the extent that she may not have known what happened to her when she slept. Her guardian testified that when she was rescued on the 5th day of November 2019, she had grown fat.
21. When Dr Muhamed examined the complainant and whose report was produced by Dr Gabriel Mungila (PW9), he made the following findings: There were healing lacerations at the anus. The hymen was intact. He concluded that there was evidence of forced penetration.
22. A copy of the Certificate of Birth of FAM was produced as an exhibit. It indicates that she was born on the 6th day of September 2008. At the time of the offence, she was ten years and eleven months old. Section 8 (2) of the *Sexual Offences Act* provides:

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.

23. The appellant argued that the sentence meted out to him was harsh. 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] E.A. 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.

24. 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.
25. 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

