



**WMM v Republic (Criminal Appeal 121 of 2018)
[2024] KEHC 1087 (KLR) (Crim) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1087 (KLR)

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

**CRIMINAL
CRIMINAL APPEAL 121 OF 2018**

**LN MUTENDE, J
JANUARY 25, 2024**

BETWEEN

WMM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. WMM, the appellant, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. Particulars of the offence were that on 10th June, 2016 in Embakasi Sub-County within Nairobi County he unlawfully and intentionally committed an act which caused penetration with his penis on the vagina of ANA a child aged 3 years.
2. In the alternative, he faced the charge of committing an Indecent Act with a minor, particulars being that the accused on the said date at the said place he unlawfully and intentionally touched the vagina of ANA. a child aged 3 years,
3. Having been taken through full trial, he was convicted for the main charge of defilement and sentenced to serve life imprisonment.
4. Aggrieved by the conviction and sentence, the appellant appeals against the judgment and sentence on grounds that: The trial court erred in matters of law and fact when he acted on the wrong principles of law by convicting without the evidence of the victim. The trial magistrate erred in law and fact by convicting and sentencing the appellant based on evidence of identification which was not conclusive; was coached coerced and lured to be given for purpose of incriminating the appellant. The magistrate erred in law and in fact in failing to find that the evidence adduced on penetration was insufficient to sustain the conviction and sentence. That the magistrate failed to consider the defence. The magistrate



erred in law and fact in sentencing the appellant to a harsh mandatory minimum sentence of life imprisonment.

5. Briefly facts of the case were that PW1 ANM, a bar maid, left home going to work on 9th February, 2016 at around 9:30pm. She returned at 11:00pm to find her child aged three (3) years missing and her son aged 14 years, PW3 KM told her that he saw the person who took her, He mentioned T, as he was popularly known at the estate as the person who had taken the minor. That he used a knife that he had to cut the iron sheet prior to opening the door hence gaining entry.
6. She called PW2 GW, a neighbour and friend, who accompanied her in search for the child and, they found her on 10th February, 2016. The baby had fainted, was bleeding and had no underwear. They reported the matter at Kayole Police Station, and they took her to Mama Lucy hospital but were transferred to Nairobi Women Hospital where the child was admitted and discharged after six (6) days. The matter having been reported to the police, investigations commenced. The scene where the child was found was visited. Some samples including the buccal swab of the child were submitted to the government chemist for analysis.
7. PW4 Boaz Omolo Ochieng, a bouncer encountered people searching for the child and following a request by the police, he participated in the arrest of the appellant who was identified by witnesses and subsequently taken to the police.
8. Upon being placed on his defence the appellant stated that he was called WM and was in the business of selling Aprons. That he knew PW1 as she would sell aprons for him. That on 10th February, 2016 he went to Gikomba to purchase clothes at 5:30am, then went to Mlolongo and sold his merchandise until 4:00pm where after he met his friend JK at whose friend he slept.
9. He went to sell the clothes the following morning and on finishing at 4:00pm, he went back to Nairobi at 8:00pm. Thereafter he went to Nyama Villa at 8.00 a.m, PW4 went and sought to know if he had defiled the child, they went to the D.O near Nyama Villa to discuss but they found a police officer and explained to him. He was taken to Kayole Police Station, Boaz, PW4 said that he had defiled the child and that is when he was placed in the cells.
10. He contended that he was arraigned on 16th February, 2016 and was officially charged on 25/2/2016 without being interrogated.
11. The court considered evidence adduced and found that the child had been defiled. On the identification of the perpetrator, the court found that PW3 saw the appellant pick the child while lights were on and also identified the accused before court.
12. That the evidence of identification was from a single witness who was the victim's brother. The court warned itself on the danger of relying on single witness evidence and the need to have such evidence examined carefully.
13. The appeal was canvassed through written submissions that I have taken into consideration.
14. This being a first appellate court the court's duty is to reappraise the evidence afresh and come up with its own conclusions on whether the trial court's findings were appropriate. The court must be minded that it did not get to see or hear the witnesses and observe their demeanor.
15. In the case of *Mark Oiruri Mose v Republic* (2013) eKLR the Court of Appeal stated that the first appeal court is "... duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind



that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

16. As to whether the charge sheet was defective, Section 134 of the *Criminal Procedure Code* provides:

Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

17. Section 137 of the *Criminal Procedure Code* also provides that:-

The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code.

A count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

After the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;

18. In this case both the provision of law informing the charges and the particulars of the offence were indicated on the charge sheet and read out in a manner that the appellant was able to understand, plead and tender his defence.

19. The fact that details of the occurrence book report were not reflected on the charge sheet did not go to the root of the offence. It was also immaterial in bringing the charges. The appellant was granted the opportunity of cross examining the Investigating Officer and other witnesses. PW1 and PW2 testified that the offence was reported in the morning of 10th February, 2016 after the child was found. Similarly, there was no doubt as to the date and time of the offence, PW3 testified that the child who was stolen on 9th February, 2016 at around 9:30pm while they were sleeping at the house was found on the morning of 10th February, 2016, therefore, the dates on the charge sheet corresponded with the evidence tendered that the child was defiled between 9th February, 2016 and the morning of 10th February, 2016.

20. Regarding the offence, Section 8(1) of the *Sexual Offences Act* provides that:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

21. The elements of the offence and which must be proved beyond reasonable doubt are: the age of the victim, penetration of genitalia, and, positive identification of the perpetrator.

22. Section 2 of the *Sexual Offences Act* defines “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person;



23. The ingredients of the offence of defilement that the prosecution is required to prove were also stated in the case of *George Opondo Olunga v Republic* (2016) eKLR to be: proof of the age of the victim, proof of penetration and identification of the offender.
24. The peculiarity of this matter is that the victim did not testify and the court relied on medical evidence (Post rape care form and the P3 form) which indicated that there were anal lacerations blood stains and also broken hymen.
25. Section 2 of the *Sexual Offences Act* provides for a ‘vulnerable witness’ and the *SO Act* states that the evidence of a vulnerable witness shall be presented by a person who is authorized by court on account of his expertise or experience and may include a parent, relative, psychologist, counselor, guardian, children officer or social workers.
26. Sections 31 (2) and 32 of the Act provides for the process of appointing an intermediary which entails the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. The court can also act on its own motion, through *voire dire* examination, declare a witness vulnerable and proceed to appoint an intermediary. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.
27. This is a case where the court found that the child was inhibited by the fact of age to complain and follow up her case, that the child was traumatized considering her age at the time of the offence. However, the court did not declare her a vulnerable witness or appoint an intermediary. As argued, the accused had the right to cross examine the victim and challenge all evidence against him. Further the omission to avail the child for purpose of trial and steps to be taken under Section 2 as read with Section 31 of the *Sexual Offences Act* may go to the root of the prosecution’s case.
28. But, the conviction could still be based on PW3’s evidence. This is because the court could rely on direct and independent evidence of a witness to convict. For this reason, the court did not err when it relied on PW3’s evidence. Also see the case of *M.M v Republic* [2014] eKLR where the Court of Appeal addressed the processes of appointing an intermediary and also found that that intermediary evidence is different from direct evidence of an independent witness. It delivered itself thus:

“It was sufficient to rely on her direct evidence as an independent eye witness. Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of *Robinson Tole Mwakuyanda v R*. HC. Cr. Appeal No 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak.”
29. The law is that penetration must be caused by the penile organ, this distinguishes the offence under Section 8 from Section 11 of the *Sexual Offences Act*. Both clinicians formed the opinion that the victim was defiled and sodomised.
30. I am alive to the fact of the government analyst report having indicated that buccal swabs obtained from the child and under pant showed blood stains, but, DNA analysis was inconclusive in that the blood was mixed and the analyst could not tell who it belonged to. Therefore, this was not evidence to be relied on by the court.
31. As afore stated PW3 testified that he was asleep with his young sister when he saw someone’s hand open the door. That the lights were on and he saw the individual, T. The witness testified during cross examination that the appellant had to cut off the iron sheet in order to open the door. The minor was



- 14 years of age and his evidence was taken on oath therefore corroboration was not necessary. See the case of *Kibangeny Arap Kolil v R* (1959) EA 92.
32. PW3 having seen the appellant take the minor, what transpired thereafter required some explanation. The evidence adduced was hence circumstantial in nature. In the case of *Kassim Ali v Republic* (2006) eKLR the court introduced circumstantial evidence as a means of proving defilement. It stated that:
- “... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”(Emphasis mine)
33. The threshold to be met was set out in the case *Abanga Alias Onyango v Rep* CR. A No 32 of 1990(UR) where the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
34. The appellant was seen taking the child who was subsequently found defiled. He was obligated to render an explanation as to what transpired but he did not. Therefore, circumstances evidently point unto him as the person who committed the crime.
35. On age, it is trite that age must be proved beyond reasonable doubt. In the case of *Mwalengo Chichoro Mwajembe v Republic* (2016) eKLR the Court of Appeal held that:
- “...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v Republic*, Criminal Appeal No 19 of 2014 and *Omar Uche v Republic*, Criminal Appeal No 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”
36. PW1 was the victim’s mother therefore did prove her age as required. In any case the question of age was not in doubt.
37. The trial court found that the appellant friend who he mentioned ought to be called to prove his allegations in the *alibi* defence.
38. An accused bears the burden of proof based on Section 109 of the *Evidence Act* in such a case and it must be considered on a balance of probability with key obligation remaining on prosecution to disprove the defence.



39. In the case of *Republic v Gachanja* (2001) KLR 425, the court held that:

“It is a cardinal principle of law that the burden to prove the guilt of an accused person, lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability.”

40. The defence is considered sufficient if it introduces some doubt in the mind of the court. In the case of *Said v Republic* (1963) EA 6 cited in *Kimotho Kiarie v Republic* (1984) eKLR. The court held that: An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of a court a doubt that is not unreasonable; *Said v Republic* [1963] EA 6.

41. In the case of *Erick Otieno Meda v Republic* (2019) eKLR the Court of Appeal more recently held that in considering an *alibi*, “An *alibi* needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view. An *alibi* defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.”

42. The *alibi* defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court. An accused does not need to prove the *alibi*, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the *alibi* to fail. (See *Mblungu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014) 24).

43. In the instant case circumstantial evidence pointed at the appellant as the one who must have committed the offence, therefore the *alibi* that was not introduced at the earliest opportunity so as to be interrogated by the prosecution did not hold water.

44. The appellant was sentenced under the mandatory provisions of Section 8(2) of the *Sexual Offences Act*. In the case of *Francis Kariokor Muruatetu v Republic* [2017] eKLR The Supreme court observed that mandatory sentences limit the courts discretion to consider the appropriate sentence in the circumstances and that the accused should also benefit from his mitigation further to his right to fair trial.

45. The appellant was allowed to mitigate, his response was that he denied the offence and that he was the only son. He was not remorseful. Considering the circumstances of the offence and with the judicial precedence discouraging indefinite sentence, life imprisonment is not appropriate, a non-custodial sentence could not be meted out. A lengthy and definite period is most appropriate in such cases to ensure deterrence, retribution and also full rehabilitation as objectives of sentence are met.

46. The upshot of the above is that the sentence meted out is set aside which I substitute with a sentence of thirty (30) years imprisonment that will be effective from the date of arrest.

47. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 25TH DAY OF JANUARY, 2024

L. N. MUTENDE

JUDGE

In The Presence of:



Court Assistant: Habiba

Appellant - present

Ms Ntabo for the Respondent

