



**Macharia v Republic (Criminal Appeal E035 of 2022)  
[2024] KEHC 3969 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E035 OF 2022  
GL NZIOKA, J  
APRIL 23, 2024**

**BETWEEN**

**GABRIEL KAMAU MACHARIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of; Hon. H. O. Barasa, Senior Principal Magistrate (SPM), delivered on 30<sup>th</sup> January 2020, vide Sexual Offence No. 65 of 2018, at the Senior Principal Magistrate's Court at Engineer)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8(1) of the *Sexual Offences Act* No. 3 of 2006 (herein the *Act*) in the main count and an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Act*. The particulars of each count are as per the charge sheet.
2. The charges were read out to the appellant and he pleaded not guilty to both charges. The prosecution called a total of five (5) witnesses in proof of its case. It is the prosecution case that PW1, D.N.M (herein “the complainant”) was a pupil at Kiaratha Primary School in standard seven (7). That he was aged fifteen (15) years old at the time the offence herein was committed.
3. That on 15<sup>th</sup> November 2018, he was feeding their cows with grass when the appellant went to where he was. He inquired from the appellant where to take the cows to drink water. That the appellant directed him to the place 50 metres away. He took the cows to drink water. That he returned to where the appellant was and inquired from him whether his employer known as Guka was at home. The complainant wanted to go and purchase a rabbit from Guka. That the appellant informed him that Guka was at home and both left for Guka’s house, which was 200 to 300 metres away.



4. However, they did not find Guka at home and the complainant asked the appellant why he had lied to him but the appellant did not respond, instead he asked the complainant to fetch firewood to boil maize. The complainant, got the fire wood and the maize was boiled and they ate.
5. It was the complainant evidence that after eating the maize he felt dizzy and he found that strange but shortly there after he passed out. That when he woke up, he found that he did not have his trouser and pant on. He was also feeling pain in the anus. He found a lady known as Mama Shiro at the scene. The appellant too was there. That Mama Shiro informed him that he found the appellant on top of him while he was asleep. He was then taken to hospital and after treatment he was issued with the P3 form (Pexh 1). Later the Post Rape Card Form was filed and produced in court (Pexh 2)
6. That the appellant was well known to him as he used to meet him on the road and the distance between their homes was one and a half kilometers(1 ½km). That he had known him for two (2) years and they could meet three (3) times or thereabout in a week.
7. Upon receipt of the report of the incident PW4, No. 257345 PC Akuru went to the scene of crime where he found the appellant detained by members of the public, he arrested him and took him to the police station and after investigations he was charged with the offences herein.
8. At the close of the prosecution case, the appellant was placed on his defence. He told the court that, the evidence adduced against him was a lie as the witnesses wanted him to give them grass for their cows and he refused, and then they framed up the offence herein. That he was assaulted by Njenga and Mureithi and unleashed the crowd on him and told him they would teach him a lesson for refusing to give out grass.
9. At the conclusion of case, the court found the appellant guilty as charged on the main count, convicted him and sentenced him to serve twenty (20) years imprisonment.
10. However, he has appealed against the decision of the court based on the following grounds:
  - a. That the learned trial Magistrate erred in law and in fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.
  - b. That the learned trial Magistrate erred in law and fact by convicting the appellant yet failed to appreciate that there was no proper medical evidence linking the appellant to the commission of the offence.
  - c. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.
  - d. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.
  - e. That I pray to be supplied with a copy of he original trial court's proceedings and its judgment.
  - f. That further grounds shall be adduced at the hearing of this appeal.
  - g. That I wish to be present during the hearing and determination of this appeal.



11. The appellant, without leave of court, filed amended grounds of appeal together with his submissions as here below reproduced:
  - a. That the learned trial magistrate erred in law and fact by awarding a conviction on a prosecution case that was marred with uncorroborated evidence.
  - b. That the learned trial magistrate erred in law and fact by not finding that the ingredients of the offence were not proved beyond reasonable doubt.
  - c. That the learned trial magistrate erred in law and fact by awarding a sentence that is not only excessive but harsh in the circumstances of the offence leading to an unfair hearing.
  - d. That the learned trial magistrate erred in law and fact by failing to inform the appellant of his right to have an advocate assigned to the appellant by the state and at state expense if substantial injustice would otherwise result.
  - e. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not call a crucial witness who could shed light on this case.
  - f. That the learned trial magistrate erred in law and fact by failing to inform the appellant of his right to have an advocate by himself or assigned by the government making the trial unfair.
  
12. The respondent however opposed the appeal vide grounds of opposition dated 8<sup>th</sup> March, 2023 in which it is stated:
  - a. That the age of the complainant was sufficiently proved as provided under the *Sexual Offences Act*.
  - b. That penetration was proved under the *Sexual Offences Act* through the evidence of the doctor who examined the complainant and produced the P3 form and PRC form.
  - c. That the trial court considered the appellant defence and subsequently dismissed it.
  - d. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the *Criminal Procedure Code*.
  - e. That the sentence imposed by the trial court was proper and in line with the *Sexual Offences Act*. Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant.
  - f. That the petition is misconceived and lacks merit and ought to be dismissed forthwith and the conviction and sentence upheld.
  
13. The appeal was disposed of vide filing of submissions. The appellant in undated submission argued that, the prosecution failed to prove the element of penetration beyond reasonable doubt. That, the complainant was unconscious during the offence and only claimed he was feeling pain in the anus and therefore his evidence was merely hearsay.



14. Further, the prosecution failed to call Mama Shiro, who was a crucial witness thus the evidence of the complainant was uncorroborated. Furthermore, the prosecution did not conduct a DNA analysis and therefore the medical evidence was not supported by any other evidence to prove that he penetrated the complainant.
15. The appellant submitted that, the sentence of life imprisonment imposed by the trial court was harsh and excessive, as the trial court did not take into consideration that he is a first offender and the offence was based on probabilities.
16. That, the mandatory nature of the sentence was contrary to the provisions of Article 50 (2) that provides for fair hearing and relied on the case of; *Jared Koita Injiri v Republic* (2019) eKLR where the Court of Appeal substituted a sentence of life imprisonment with a sentence of 30 years imprisonment.
17. The appellant further submitted that, a sentence of life imprisonment cannot be reviewed by a higher court as provided for under Article 50 (2) (q) of *Constitution* of Kenya and therefore it denied him access to justice in contravention of Article 48 of *Constitution*.
18. Additionally, the mandatory nature of the sentence prevented the court from considering mitigation as envisaged under section 216 and 329 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, and deprived the trial court of the legitimate exercise of its discretion.
19. Lastly, the appellant submitted that, he was not informed of his right to have an advocate and/or have one assigned to him in contravention of Article 50 (2) (g) and (h) of *Constitution*, and section 43 of the *Legal Aid Act* (no. 6 of 2016) Laws of Kenya. As a consequence, he was greatly prejudiced taking into account that, he has no legal knowledge and the offence attracts a mandatory sentence of twenty (20) years imprisonment.
20. However, the respondent in submissions dated and filed on 8<sup>th</sup> March, 2023 opposed the appeal and argued that the elements of the offence being; age, penetration, and identification of the perpetrator were all proved beyond reasonable doubt.
21. That, the age of complainant was proved by the production of the complainant's birth certificate as prosecution exhibit 3 which showed that the complainant was born on 8<sup>th</sup> September, 2002 and was fifteen (15) years old at the time of the offence herein.
22. That as regards identification, the complainant knew the appellant for two (2) years as a neighbour and whose home was one and a half (1 ½) kilometres away and they met frequently on the road. Further, the complainant knew the appellant was employed by Guka.
23. Further, penetration was proved by the evidence of the complainant to the effect that, he lost consciousness after eating boiled maize he was given by the appellant. That, when he regained consciousness he was surrounded by people including Mama Shiro, who found the appellant in the course of defiling the complainant. Furthermore, the evidence was corroborated by the production of the P3 form by PW5 Dr Junius Murimi Ntwiga that indicated there was faecal matter at the anal orifice slightly gaping with reduced anal sphincter tone
24. Reliance was placed on the case of; *Mark Oiruri Mose v R* 92013) eKLR where the Court of Appeal held that, the law does not require evidence of spermatozoa as long as there is penetration only of the surface penetration is demonstrated.
25. The respondent argued that the appellant's defence was a mere denial that could not oust the prosecution's case. Finally, the respondent submitted that the trial court considered the appellant's mitigation before imposing the sentence, which sentence is in accordance with the law.



26. In dealing with the matter herein I note that the role of the first appellant court is to re-evaluate the evidence afresh and arrive at its own decision taking caution it did not benefit from the demeanour of the witnesses.
27. In that regard, the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32 stated that: -
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R 1975*) E.A. 336 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 (*Shantilal M. Ruwala V. R* [1957] E.A. 570. 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; it must make its own findings and draw its own 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”
28. Be that as it were, the offence the appellant was charged with is provided for under section 8(1) of the Act, that states: -
- “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”
29. The law is thus settled that, the ingredients of defilement as discussed in the case of; *Bassita Hussein v. Uganda* Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.
30. As regard this matter the particulars of the charge sheet states the complainant was fifteen (15) years old. In his evidence in chief he testified that, he was fifteen (15) years old and in standard 7 at Kiarathia Primary School. That he was born on 8<sup>th</sup> September, 2002 and identified his birth certificate that was marked and produced as prosecution exhibit 2.
31. Similarly, PW2 Topista Olunga, the complainant’s mother also testified that he was her second born child born on the aforesaid date as evidenced by the birth certificate.
32. The offence herein is stated to have taken place on; 15<sup>th</sup> November 2018, therefore at that time, the complainant was fifteen (15) years old, therefore a minor or child. A child is defined under the [Children Act](#) being a person below 18 years. It is the finding of the court that the complainant’s age was adequately proved.
33. As regards penetration, section 2 of the [Act](#) defines the same as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
34. The particulars of the charge over which the appellant was convicted states that he caused his genital organ to penetrate the anus of the complainant. In his evidence in chief, the complainant testified that after eating the boiled maize with the appellant, he became dizzy and when he woke up he realized that, he did not have his trouser and under pant on. That he was completely naked on the lower part of his body and was feeling pain in the anus. That he was taken to hospital for treatment and P3 and PRC form filed.



35. The other evidence on penetration was led by Dr Junius Murimi Ntwiga who produced a P3 form filed by Dr Rotich in relation to the complainant.
36. That upon examination of the complainant the doctor observed faecal matter on the anal orifice. That the orifice was slightly gaping with reduced sphincter tone. The doctor concluded that based on the history given by the complainant, there was a high case of sodomy as evidenced by the gaping anal orifice. That the complainant's anus had been penetrated.
37. PW4 No. 257345 PC Akumu told the court that he visited the scene immediately the incident was reported to the station and found the complainant at the scene and upon examining him he noticed liquid coming out of the complainant's anus and on examining the appellant who was also at the scene he noticed watery liquid from his private parts.
38. Pursuant to the afore evidence it is the finding of this court that that the element of penetration was proved.
39. The next element to consider is the perpetrator of the offence. The evidence of the complainant already summarized herein is that, he had taken grass to feed the cows when he met the appellant. That it was 8am. Therefore, daytime.
40. That he inquired from the appellant where to take the cows to drink water and after they drunk water they walked 200 to 300 metres with the appellant to one Guka's, the appellant's employer's, home. That they did not find Guka and the appellant could not explain why he lied Guka was at home. Anyway, it was the complainant's evidence that he fetched firewood and they boiled maize which they ate before he felt dizzy.
41. From the afore evidence of the complainant it is clear the complainant and the appellant were together for a long time. As such he cannot have not mistaken the identity of the appellant. In any case the appellant in cross examination of the complainant did not displace all the afore evidence.
42. PW2 Topista, the complainant's mother told the court that the appellant was her neighbour therefore the appellant was well known on the complainant.
43. Furthermore, the investigation officer PC Akumu testified that he found the appellant at the alleged scene of crime having been detained by the members of the public.
44. It is in evidence that one Mama or Baba Shiro found the appellant in the act but she/he was not traced to testify, but the question that arises is whether the evidence herein taken as a whole in the absence of the evidence of this witness is adequate to sustain a conviction. Before I address that question, I shall evaluate the appellant's defence.
45. He testified that he was being framed for refusing to give the accusers grass for their cows and that all the evidence adduced is a lie. Several issues arise, one did the appellant cross examine any of the witnesses on the subject allegation of grass, the answer is in the negative. As such that evidence that arose for the first time at the defence stage is an afterthought. Secondly at no time did the appellant address the events of the particular day. He did not deny luring the complainant to his house, drugging him and sodomising him.
46. As such it is the finding of the court that as much as the evidence of Shiro was crucial its absence does not render the entire prosecution evidence taken cumulatively as inadequate.
47. It is further the finding of the court that the prosecution adduced adequate evidence to sustain the conviction and I uphold it.



48. As regards sentence I find that, I find that the same is lawful as stipulated under the law and I uphold it.

49. Consequently, the entire appeal is dismissed for lack of merits.

**DATED, DELIVERED AND SIGNED ON THIS 23<sup>RD</sup> DAY OF APRIL 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Applicant present virtually

Mr Abwajo for the Respondent

Ms Ogutu: Court Assistant

