



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mungai v Republic (Criminal Appeal E103 of 2023)  
[2024] KEHC 7918 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7918 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E103 OF 2023  
RC RUTTO, J  
JUNE 28, 2024**

**BETWEEN**

**HERMAN NGIGE MUNGAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence to life imprisonment by Hon. G.Omodho (PM) at Kiambu Law Court in Criminal Case No SO 26 of 2017 Republic v Herman Ngige Mungai)*

**JUDGMENT**

**A. Background**

1. 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*, Cap 63A Laws of Kenya. The particulars of the offence were that on the 13<sup>th</sup> day of February 2017 at [particulars withheld] village within Kiambu County, you intentionally and unlawfully caused your penis to penetrate the vagina of EW a child of 7 years old. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were on the 13<sup>th</sup> day of February 2017 at [particulars withheld] village within Kiambu County, you intentionally and unlawfully touched the vagina of EW a child of 7 years old with your penis.
2. He pleaded not guilty and the matter proceeded to trial where the prosecution, in a bid to prove its case, availed six (6) witnesses.

**B. The prosecution case**

3. E.W., PW1 gave unsworn testimony after the learned trial magistrate conducted a voire dire examination and held that the witness was unable to comprehend the nature of an oath. In her



- testimony, PW1 stated that she left school as usual and on her way home, she met someone who asked her name and introduced himself to her as baba Muiru. The person then asked her to go change her clothes and come back quickly so that he could go buy her sweets.
4. She stated that she went, changed and went to the back of the house where he pulled her through the fence and took her to his house. While at the house, he removed her clothes and inner wear, removed his clothes and put her on his bed and inserted the ‘thing which he uses to urinate’ into her vagina. She started feeling pain and screamed but he covered her mouth. Then he heard her mother calling her and that is when he let her go and told her not to inform the mother.
  5. PW1 stated that she then went home and told her mother what had happened, her mother screamed and people came to their home. Her father then told her to take them to baba Muiru’s house. Her father called the police who arrested him. She also stated that she was taken to Nairobi hospital where she was treated and later on was taken to the police station where the case was reported. From the record, The trial court noted that E.W was able to identify the appellant by pointing at him in the dock.
  6. SM, PW2 evidence was that, she is the mother of E.W who was born on 15/12/2009 as per the birth certificate that was marked and produced as Exhibit 1. She stated that on 13<sup>th</sup> February 2017 she went home after work when her daughter came from school and informed her that someone called baba Muiru had asked her to change and go back so that she could buy her sweets. That when asked to show the baba Muiru, she pointed to a person standing on the road alone. That person was known to her as Ngige, their neighbour.
  7. PW2 stated that she warned E.W not to go where he was standing hoping that the child would adhere to her advice. She then went to fetch water and on returning, she did not find E.W.
  8. When she asked the other children where E.W was they said she had gone to the person who wanted to buy her sweets. She then went outside to look for her, there was no response of E.W at the appellant’s home. She then left to go to the nearby shopping centre where she met a lady named Joy whom she asked if she had seen E.W. She pointed at the appellant as the person who had gone with E.W to buy sweets for her. She then went back to the house to inquire whether E.W had returned. She then saw E.W come from the toilets in the compound with blood flowing down her legs from her private parts.
  9. It was her testimony that upon asking E.W who had injured her, she said it was baba Muiru who had done that to her. She then screamed attracting members of the society. E.W father wanted to arrest the appellant only to be restrained by his family members. E.W. father then went to call the police and on returning the appellant had run away.
  10. She stated that she took E.W to Kiambu District Hospital and were referred to Nairobi Women’s Hospital where they were admitted for 4 days. The treatment notes were marked and produced as Exhibit 2.
  11. JNG, PW3 evidence was that he is the father to E.W. That on the 13.2.2017 at around 5.00 p.m he came from work only to find a crowd of people at his home. His wife was crying and upon asking why she was crying he saw blood flowing from E.W private parts. He was informed that someone had slept with the minor. E.W showed him the appellant as the person who had defiled her. He had rented house from the appellant’s family and on asking the appellant, his family wanted to attack him. He went to the police post to report the matter. Meanwhile E.W was taken to Kiambu hospital and later transferred to Nairobi Women’s hospital for specialized treatment. It was his evidence that E.W was born on the 15.12.2009.



12. Sgt Alfayo Shiundu, PW4, from Kiambu police station testified and stated that he received a report on defilement from PW3 on the 13<sup>th</sup> February 2017. Together with his colleague, they rushed to PW3's home and found the appellant, herein, had been arrested by members of the public but later released. That they pursued him but did not manage to get him. Later on, the 8/5/2017 he was found and arrested at Githogoro slums where he had rented a house. It was PW4's testimony that the victim's family was staying in the rental house belonging to the appellant's family and it was hard arresting him since he was surrounded by family members who always helped him escape.
13. PW4 also stated that, when they got to the scene, they found the victim bleeding from her private parts and advised PW2 to take E.W to the hospital. He produced E.W underwear which had blood stains as prosecution Exhibit No. 6, and navy blue pair of trouser were also produced as Exhibit 7.
14. Dr.Fatma Mohamed, PW5, testified and stated that she was a medical doctor. She told the court that the P3 Form had been filled by Dr. Kevin whom she had worked with. E.W had given history of being defiled. On examination she had blood, broken hymen, tears on the vagina which looked sour. She was admitted at Nairobi Women Hospital and taken to theatre for check up on any extent of injury. The PRC form was produced as Exhibit 5. On cross-examination she stated that E.W was torn deeply, she had second degree tears and because of the injuries they concluded she was defiled. She confirmed to the court that DNA was not done.
15. PC Brenda Chiachi, PW6, testified and stated that a defilement report was made by PW3 who informed PC Shiundu that PW1 had been defiled. A P3 Form was filled out, she also confirmed that, the appellant escaped from the public when he was arrested but was later traced and arrested on 8<sup>th</sup> May 2017.
16. Upon close of the prosecution case, the trial court found that the prosecution had established a prima facie case and placed the appellant on his defence.

### **C. Defence case**

17. In defence, the appellant gave unsworn evidence and did not call any witnesses.
18. It was the appellant's case that he was called for a job on the 1<sup>st</sup> January 2017 when he left to go work. At that the moment his mother had rent arrears issues with PW3. He further testified that his name was Herman Ngigi Muingai and not Ngige Muingai. He challenged his name and stated that he had arrested before in possession of bang.
19. At the conclusion of the case, the trial court found the appellant guilty and convicted him as charged. He was sentenced to life imprisonment.

### **D. Appeal before Court**

20. Aggrieved by that decision, the appellant filed a petition of appeal premised on the following amended grounds of appeal;
  - I. That the learned magistrate erred in law and in facts, to sentence the appellant to life imprisonment;
    - a. When the voire dire examination was conducted in contravention with section 19 of the *Oaths and Statutory Declarations Act* as PW1 neither understood the nature of oath or telling the truth.
    - b. Based on identification by recognition of alleged baba Muiru who is not the appellant;



- c. While relying on both PW2 and PW3 on the element of identification evidence yet;
    - i. They were not eye witnesses in this case.
    - ii. PW1 and PW2 were recalled and testified without being re-sworn or re-confirmed as it was done on diverse dates.
  - d. When the prosecution failed to advance the requisite corroboration evidence from PW2 and PW3,
- II. That the learned trial magistrate misdirected in law and facts to pronounce life sentence which is harsh and disproportionate with adduced veracity of evidence;
  - III. That the learned magistrate erred further to disregard sworn defence of the appellant who was arrested innocently and implicated due to previous offence of dealing with narcotics NOT a subject matter in this case.
21. The parties amplified their positions through their submissions.

### **E. Appellant's Submissions**

22. Urging his appeal before this Court, the appellant submits that his identification was not properly determined when the learned magistrate held that it was by recognition by both PW2 and PW3. That the failure by the complainant, PW1, to point out the name Ngige to PW3 was a mistaken identity. That the name baba Muiru did not refer to the appellant herein.
23. In addition, he submits that the voire dire examination conducted established the complainant could not understand the meaning of an oath. The learned magistrate therefore erred in going against section 19 of the *Oaths and Statutory Declarations Act*. He placed reliance on the case of *Julius Kiunga M'birithia v R, Cr. App. No. 111 of 2011* in submitting that the court needs to establish whether the child understands the nature of an oath and if the child does not, then whether the child possess intelligence to justify the reception of the evidence. Further, the appellant submits that even when the complainant, PW1 and the mother, PW2, were recalled, an irregularity was occasioned.
24. On the burden of proof, the appellant submits that his arrest was premised on an unknown informer. That there was a dispute between the police and himself. That from the evidence of the arresting officer it seems that he was implicated as baba Muiru yet he was Herman Ngigi Muigai.
25. On the sentence meted on him, the appellant urges the court to find that it was harsh and that his arrest and subsequent conviction was sufficient punishment for him and therefore the court should proceed to set aside the conviction and sentence.

### **F. Respondent's Submissions**

26. The respondent opposed the appeal for the reasons that the prosecution established the key ingredients of the offence of defilement: age; penetration and the identification of the accused at the scene.
27. Regarding the age of the complainant, the respondent submitted that it was proved through production of a birth certificate that she was 7 years. This Court was referred to the decision in *Kaingu alias Kasomo v, Republic C.A 504 of 3010(UR)*.
28. On penetration, it was submitted that the complainant, PW1, clearly elaborated on how the appellant had removed his trouser and inserted his 'thing for urinating' into hers, and that she started feeling



pain. Further evidence by PW2 was that she found the minor bleeding from her private parts. This was also established by the medical evidence which documents were produced in court.

29. On the identification of the appellant as the person who committed the act of defilement, it was submitted that the same was proper. The complainant was able to identify the appellant, whom she also showed to her mother, PW2. That upon his arrest on the material day, 13<sup>th</sup> February 2017, he was able to run away only for him to be re-arrested on the 8<sup>th</sup> May 2017,
30. On the basis of these submissions, the respondent has urged this court to find no merit in the appeal, and affirm that the conviction was safe and the sentence was legal.

### **G. Analysis and Determination**

31. This is a first appeal and the court is cognizant of its duty to reconsider the evidence tendered at the trial, and make its own conclusion. The court bears in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. Republic*[1972] E.A 32.
32. Borne out of the amended grounds of appeal, the evidence adduced during trial, and the respective submissions, the issues that arise for determination are:
  - I. Whether the prosecution proved its case beyond reasonable doubt;
  - II. Whether the voire dire conducted was proper;
  - III. Whether the defence was considered;
  - IV. Whether the sentence was too harsh in the circumstance.

#### **i. Whether the prosecution proved its case beyond reasonable doubt.**

33. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. In the case of *George Opondo Olunga v Republic* (2016) eKLR the ingredients for the offence of defilement were set out as:
  - a. Proof of the age of the victim;
  - b. Proof of penetration or indecent act;
  - c. Identification of the perpetrator;
34. Therefore, for the prosecution to prove its case they had to tender sufficient evidence to prove the age of the complainant, that is, that the complainant was a minor; they had to prove the act of penetration; and prove that the accused was identified as the perpetrator of the offence.
35. On the age of the complainant, a birth certificate was produced which showed that the complainant was born on the 15<sup>th</sup> December 2009, thus she was 7 years at the time of the offence. From the record, the appellant did not dispute the production of the birth certificate or challenge its veracity. He did not equally challenge the age of the complainant. A person of this age is a child within the meaning of a child both under the *Sexual Offences Act* and the Children's Act.
36. The trial court in finding that this ingredient was satisfied, relied on the birth certificate as evidence that the victim was aged 7 years at the time of the occurrence of the alleged offence. Further, the court noted that the age was not in any way challenged by the accused person. This court therefore, agrees with the finding of the trial court that this ingredient was fully and sufficiently established.



37. On proof of penetration, 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. In this instance, PW1 testified that the appellant inserted the thing which he uses to urinate into mine. PW2 stated that she saw E.W coming from the sides of the toilet, she had blood flowing upto the legs from her private parts.
38. PW5, Dr Fatma Mohamed testified that E.W was treated at Nairobi Women Hospital. On examination of E.W private parts she had blood, broken hymen, she had tears on the vagina which looked sour. She confirmed that the victim had second degree tears and was admitted at the hospital. She was even taken to theatre for further examination. The witness produced medical evidence, to wit, the P3 Form (exhibit 3) as well as the PRC Forms which confirmed the act of penetration.
39. This foregoing evidence, taken holistically leaves no doubt that the victim was defiled. I have also observed that the trial court did not raise any question on the demeanor of the prosecution witnesses, particularly PW1 and PW2 were never found to be not credible. Hence their evidence on the act of penetration was admissible and unshaken. In particular, the appellant made no response to this element of the offence, only denying knowledge of what transpired.
40. The trial court found the prosecution evidence as being unchallenged and that the injuries sustained were consistent with the history given of defilement. The Court proceeded to find that this ingredient had been proved to the required standard that there was penetration of the complainant genital organ by her assailant. I concur with the trial court's finding. There is sufficient evidence to proof penetration.
41. The third ingredient is identification which is greatly opposed by the appellant. The appellant challenges his identification by recognition. The complainant while at the dock pointed at the appellant as the person who had introduced himself as baba Muiru and testified that baba Muiru was the person who had inserted his penis into her vagina. It was her testimony that:  
"he asked me if I knew him and I said no. He then told me that he was "baba muiru". He asked me to go and change my clothes and come back immediately so that he could buy me sweets. I went and changed clothes and went to the back of the house, he pushed me through the fence and took me to his house. He removed my clothes, he removed his clothes too and put me on his bed. He removed my inner wear. He removed his trouser and he inserted the thing which he uses to urinate into mine. I started feeling pain. I started to scream and he covered my mouth."
42. PW2 in her statement told court that she asked E.W who had done that to her and she said baba Muiru and when asked to show who baba Muiru was, she pointed at Ngige. The trial court observed that E.W pointed out the appellant to PW2 and later to PW3 all of whom confirmed that it was Ngige who the complainant identified as baba Muiru and thus arrived at the conclusion that identification was by way of both recognition by PW2 and PW3 and identification twice by the victim.
43. In his defence the appellant stated that he is Ngigi and not Ngige, leading us to ask ourselves what is in a name. The trial court observed that the spelling of one of the names does not alter the main issue of identity since the person facing trial is the same as the one who interacted with the witness at the scene. I agree with the trial court. It is worth noting that from the evidence, the incident happened during day light. The victim identified the appellant almost immediately after the incident by pointing him out to both PW2 and PW3.
44. Based on the above testimony of the complainant, as collaborated by PW2 and PW3 it is my conclusion that the appellant was positively identified. E.W was able to recognize him and the appellant's argument that it was a frame up is without merit. The evidence of recognition is more reliable and weightier than that of identification by a stranger. The complainant was able to remember the name given to her by



the person who had defiled her. The appellant in his own evidence had stated that the complainant family had rented out his mother's house. Therefore, this is a person who was known and even though the complainant did not know his name he was able to identify himself to her as baba Muiru. In the case of *Anjononi & others v Republic*, [1976-80] 1 KLR 1566, 1568, Madan, Law & Potter JJA held as follows:

“recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

45. Immediately after the incident, the victim pointed out the appellant as her assailant. It turned out that the appellant was in fact their neighbour. Hence this was not identification of a stranger but identification through recognition. The identification was not solely based on the name 'Ngige or Ngigi'. In fact the victim gave out the name given to her by the assailant as "baba Muiru". This name was apparently not known to the parents, who asked her who baba Muiru was and that it was when she pointed out the appellant. That is when the parents (PW2 and PW3) realized, it was the appellant whom they knew as Ngige. Hence not true that he was identified by the name Ngige.
46. In addition, the appellant had been arrested after identification by the complainant immediately after the incident. The complainant father, PW3 had gone to call the police who arrived but he was able to escape from the people. The investigating officer, PW4 was able to see and even followed him but they were not able to trace him. This court takes note of the appellant's conduct of disappearing once he realised that he was being sought. In *Republic v Sudi Wambanda* [2018] eKLR, the court stated that "the conduct of the accused of disappearing for several months after learning of the deceased death points to nothing else but guilt on his part which fortifies the assertion by PW1." Consequently, the appellant cannot say that his arrest later on the 8<sup>th</sup> May 2017 was a mistaken identity because his name was Herman Ngigi Muigai and not baba Muiru, when it is evident that he had fled from the scene to avoid being arrested.
47. I thus find that the identification of the appellant as the person who had committed the act of defilement to the complainant herein was proper.
48. The upshot is that the first ground of appeal fails. The prosecution proved its case against the appellant when it proved all the ingredients of defilement.

## **ii. Whether the voire dire was conducted properly**

49. The appellant raises issue with the voire dire examination by the court on the complainant. In *Oloo s/o Gai v. R* [1960] E.A 86 and *Gabriel s/o Maholi v. R* [1960] E.A, it was held that voire dire examination is done to establish whether the children understood the importance of telling the truth and the need to observe the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) Cap 15 Laws of Kenya.
50. The complainant was 7 years. It was important for the trial court to conduct a voire dire, which it did. The trial magistrate upon doing so held that the complainant could not understand the nature of an oath and that she could not understand where they were, therefore she gave unsworn evidence. It is important to note that the complainant was subjected to cross-examination by the appellant on 26<sup>th</sup> March 2019 when the complainant (PW1) was recalled to take stand. The appellant has not precisely pointed out his misgivings with the conduct of the voire dire hence I find no fault in the manner in which the voire dire was conducted.



51. Further, the appellant contends that he did not cross-examine PW2. The record shows that he did cross examine her on the 12<sup>th</sup> October 2017, and that PW2 had been sworn contrary to the appellant's contention. This ground of appeal therefore fails for lack of merit.

### iii. Whether the appellant defence was considered

52. On the ground that his defence was not considered, I note that the appellant gave unsworn statement and testified that he was at work elsewhere when the alleged offence was committed therefore, he could not be the person who had committed it. He also stated that his mother had commotions with tenants over rent arrears, he claimed to have exhibits. Further he raised issue with the PRC Form not being stamped, and that he had been previously arrested by the investigating officer over bhang. He also stated that his name is Herman Ngigi Mungai and not Ngige Mungai.

53. It should be noted that the trial court in its judgment addressed itself to all these issues and made a finding that the defence was unsubstantiated, a mere denial of the charges is not sufficient to challenge the ingredients of the offence. Notably, in stating that he was at work somewhere else, the appellant was raising a defence of alibi. Now, this alibi was being raised in defence and more so during the giving of unsworn evidence where the prosecution has no chance to rebut the alibi.

54. Be that as it may, the law is clear that where an alibi is raised at defence, and the prosecution has no chance to rebut the same, the court is duty bound to consider the alibi alongside the totality of evidence on record. See the case of Juma Mohamed Ganzi & 2 other v Republic [2005] eKLR where it was held:

“The trial Magistrate considered the case of each appellant separately. She weighed the defence of alibi of each appellant against the weight of the prosecution evidence. This is the correct approach where the defence of alibi is first raised in the appellant's defence and not when he pleaded to the charge – see Wang'ombe v The Republic [1980] KLR 149.”

55. Considering the evidence of PW1 which was credible and unrebutted and that of PW2 and PW3 which corroborated the fact that the appellant was at the scene, was arrested by members of the public but escaped with the help of the family members, I find that the purported defence of alibi lacked merit. I therefore find that this ground also lacks merit.

56. The upshot is that I find the appellant's appeal on conviction lacks merit and uphold his conviction.

### iv. Whether the sentence was harsh

57. On sentence the appellant was sentenced to serve life imprisonment as stipulated in section 8(2) of the *Sexual Offences Act* which sentence is the minimum and mandatory. The trial court noted that the accused had remained in custody from the date of plea but that it lack options and hence the accused would serve life imprisonment.

58. The issue of mandatory sentences and life imprisonment has been addressed in recent jurisprudence. In Philip Mueke Maingi & 5 others v Director of Public Prosecutions and another[2022] KEHC 1318(KLR), Odunga J, (as he then was) addressed the issue as follows:

“whereas the sentences prescribed may not necessarily be unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose, the court must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of *the Constitution*. In other words, since the provisions of the *sexual offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the



said sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 case. Not is construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.”

59. This court is further guided by the decision of the Court of Appeal sitting in Malindi which rendered itself on indeterminate life sentence in *Manyeso v Republic* (Criminal Appeal no. 12 of 2021 [2023]KECA 827 (KLR) where the appellate court found that there was unjustifiable discrimination which was repugnant to the principle of equality before the law in imposition of mandatory life sentence, as the convict was denied an opportunity to be heard in mitigation.
60. Further in a decision by the Court of Appeal sitting in Kisumu in *Evans Nyamari Ayako v Republic* (unreported), life sentence or imprisonment was reduced to 30 years. The court found the sentence of life imprisonment to be unconstitutional.
61. In light of the foregoing jurisprudence, this court finds that the appeal on the sentence must succeed as the mandatory life sentence that was imposed was unconstitutional. The trial court did not have the opportunity to exercise its discretion and that the indeterminate life imprisonment contravenes Article 28 of *the Constitution* as it is inhumane and violates the appellant’s dignity.
62. The appellant defiled a 7-year-old girl. This offence is serious and deserves a deterrent sentence. The age of the victim, being only 7 years is an aggravating factor. Further, the injuries occasioned as described by the doctor, PW5, to wit, second degree tear, coupled with the ordeal of the victim flowing blood as stated by PW2 demonstrates the gravity of the incident. Consequently, guided by the decision in *Evans Nyamari Ayako* (Supra) this court shall translate the indeterminate life imprisonment as imposed upon the appellant to a term of 30 years’ imprisonment.
63. The upshot of the above is that the appeal against conviction is dismissed. The appeal against the sentence is allowed to the extent that the life imprisonment is set aside and substituted with a term sentence of 30 years imprisonment. Further, I have noted the trial court sentiment that the appellant had remained in custody from the date of plea, throughout his trial and direct that this period be consider as per the requirements of Section 333(2) of the Criminal Procedure Code.

Orders accordingly.

**RHODA RUTTO**

**JUDGE**

**DATED THIS 28<sup>TH</sup> DAY OF JUNE 2024**

**For Appellants: Present in person – at Kamiti Maximum Prison**

**For Respondent: Ms. Lubanga**

**Court Assistant: Peter Wabwire**

