



**Musungu Alias Nyawa v Republic (Criminal Appeal E066 of 2021)
[2023] KEHC 20300 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E066 OF 2021
A. ONG'INJO, J
JULY 13, 2023**

BETWEEN

RAMA KAFANI MUSUNGU ALIAS NYAWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment delivered by Hon. C.A. Ogwen, Resident Magistrate on 8th February 2021 in Mombasa Chief Magistrate's Court S. O. No. 62 of 2019, Republic v Rama Kafani Musungu alias Nyawa)

JUDGMENT

Background

1. Rama Kafani Musungu alias Nyawa was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars are that Rama Kafani Musungu alias Nyawa on diverse dates between 19th May 2019 and 20th May 2019 in Jomvu sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of C.A.O. a girl aged 16 years old.
3. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The trial magistrate considered the evidence of five prosecution witnesses and the unsworn statement of the appellant and convicted the appellant on the main charge who was sentenced to serve 15 - years imprisonment which ran from 2nd July 2019 when the accused was arrested.
5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -



1. That the learned trial court magistrate erred in law and facts by failing to see that the evidence of identification was insufficient to sustain conviction.
2. That the learned trial court magistrate erred in law and facts by failing to see that the prosecution did not establish the source and reason of my arrest.
3. That the trial court erred in law and fact by failing to see that medical evidence tabled by the prosecution did not sit in consonance with the allegations made against me with regard to the date of the incident.
4. That the trial court erred in law and fact by dismissing my defence testimony offhand.
5. That the trial court erred in law and fact by imposing on me a sentence that did not take into account my mitigation submissions.
6. The appellant prayed for the court to quash the conviction and set aside the sentence.

Prosecution's Case

7. PW1, C.A.O. the complainant herein said that she was 16 years old and that on 19.5.2019, she was sent to the shop by her mother at around 7.00 pm to buy kerosene. That a girl went to where she was and told her that someone was calling her and that when PW1 declined, the girl pushed her to the ground. That the man (PW1 pointing at the accused) showed up from the back, covered her mouth, carried her on his shoulders and took her to a house where he lay her on the bed, removed his clothes, removed his mdudu, wore a condom, removed her clothes, put her legs on his shoulders then did tabia mbaya to her using his mdudu. That when he was done, he closed the door and left and that when he went back, he slept on the bed and that he did tabia mbaya to her again. PW1 stated that at around 9.00 am, she tried to wake up to leave and that the accused woke up too, held a knife against her and threatened to slaughter her if she left. That he left the house and went back later during the day, pushed her to the door and allowed her to leave.
8. PW1 further testified that on her way home, A their neighbour informed her that there was a search for her and asked her to enter the house as she called her mother. That they reported the matter to the police and also went to hospital where she was given medication to take at 9.00 pm for 3 days. That she later learnt that the man who defiled her had been arrested. That she went to the police station and identified him to the police as the man who defiled her, and that the man was unknown to her before. PW1 stated that she took her mother and neighbour to the house where she had been defiled on the day when he released her but he was not there and there was a padlock on the door.
9. PW2, RAO said that the complainant is her daughter who was born on 27.12.2002 and had the clinic card (Exh-1). That on 19.5.2019, she sent PW1 to buy paraffin at around 7.00 pm and that when she took a while to return, she sent her brother who said PW1 had been referred to another shop. That he did not find her and when he asked around from the neighbours, they said they had seen her pass but no one knew where she was. PW2 informed court that they reported the matter to the village elder and asked all over until 10.10 pm when they reported the matter at Jomvu Police Post. That the next day at 7.00 pm, PW2 was called by Mama A her neighbour who had seen her and that the complainant was inside her house. That she appeared weak and sad, cried continuously and could not state where she had been. That PW2 spoke to her politely and the complainant said that she was abducted by a man who locked her in a house. That the man defiled her twice at night and in the morning, and that she slept hungry.



10. PW2 further testified that the complainant took her to the house where she was defiled. That it was dark, that they passed through some ruined houses and that the complainant pointed at an old Swahili house. That PW1 pushed the door open and entered the house and that the complainant identified a room on the left and that the door was locked but there were some blue sandals at the door. That a neighbour emerged and PW2 asked who the occupant of the house was and she was told the occupant was called Nyawai. That the neighbour identified the complainant's shoes as those that were seen by the door. That they went to Jomvu Police Post and they recorded their statement where they were referred to Port Reitz Hospital. That on 21.5.2019, PW2 took the complainant to hospital where a treatment book was filled on 21.5.2019 (Exh-2a) and that they returned to Jomvu Police Post. That later in June 2019, the police called her and referred her to Changamwe Police Station where they recorded their statements and were issued with a P3 Form that was filled on 4.7.2019 (Exh-2c). That PW2 was called to Changamwe Police Station and showed the man who had defiled PW1 who also identified him. That the PRC Form was filled on 21.6.2019 (Exh-2b)
11. PW3, Dr. Omar Said from Port Reitz Hospital produced a P3 Form that had been filled by Dr. Fadhil on 4.7.2019. That the complainant aged 16 years upon examination, the labia minora was bruised and the hymen was broken. That the VDRL test, HIV test, high vaginal swab, and urinalysis were negative. That the injuries were 6 weeks old, probably caused by a blunt object and that the injury was classified as maim. PW3 further testified that a PRC form was filled on 21.5.2019 for the complainant and that upon examination, there were lacerations on the labia minora, the hymen was broken and that she had bruises on the labia minor fourchette. That the PRC Form was filled by Patrick, a registered clinical officer and that he also filled the treatment book as the primary clinician. That the child was seen at 11.45 am on 21.5.2019 under Ref. No. 13943/19. PW3 produced the treatment note, PRC Form and P3 Form as PExh-2(A), (b) and (c) respectively.
12. PW4, No.96053 CPL Jackline Orioki, the Investigating Officer stated that on 12.6.2019, he was at the gender office when he was called by Senior Sergeant Andabwa in-charge Jomvu Police booth who informed him of a reported case of defilement. That they went to the hospital and collected the PRC Form which had been filled on 21.5.2019. That PW4 was called Senior Sergeant Andabwa who informed him that the suspect had been arrested in Jomvu. That information from the village elder led to his arrest at his new place of residence.
13. PW4 testified that while recording the complainant's statement, he established that on 19.5.2019, the complainant had been sent by her mother to buy paraffin at around 7.00 pm. That she was approached by one Khadija who told her that there was a man who was calling her and that when she refused to go, Khadija pulled her and that the man went and forcefully carried her to his house. That the suspect removed his and her clothes and defiled her. That the suspect defiled her again the next morning. That on 20.5.2019, at 7.00 am, the suspect tied the victim's hands on the back, her eyes and mouth and that he threatened to stab her using a knife if she made any noise. That at around 7.00 pm, the suspect went back home, defiled the child and set her free. That the girl went to a neighbour who called her mother and that the girl told them what happened.
14. PW4 said that on 19.5.2019, the mother had filed a missing person report at Jomvu Police Booth and that she took the girl back to the booth on 21.5.2019 and reported the incident where they were referred to hospital. That on 2.7.2019, PW4 interrogated the suspect, recorded his statement and preferred charges against him. PW4 stated that he escorted the child to Port Reitz Hospital on 4.7.2019 to have the P3 Form filled. That according to the child's clinic immunization card, she was born on 27.12.2002. That PW4 later called Senior Sergeant Andabwa to lead him to the scene and that the accused had already moved out of the house. PW4 testified that when they visited the new house at Cambridge Area, the neighbours did not know him well and had nothing much to say about him.



That the victim could only identify the accused physically and that her mother had established from the previous residence that he was known as Nyawa. That the accused also identified himself as Nyawa and that the victim positively identified him to PW4 and said she recognized him because the accused lit a candle in the house while wearing a condom and that she also saw him using the security lights at the shop. The mother had also reported the incident with the village elder. PW4 said that the man identified to him was the accused in court.

15. PW5, Dr. Fadhil Hussein, a medical officer at Port Reitz Hospital testified that he had a P3 Form filled 4.7.2019 with respect to C.A.O. and that he relied on the PRC Form filled at Port Reitz Hospital and his examination of the child. PW5 stated that he knows Dr. Omar Said whom he worked with for 8 months. He confirmed that the evidence he gave on 13.11.2019 was read out to him in court and is exactly as it had been entered in the P3 Form.

Defence Case

16. The accused, Rama Kafani Musungu, stated that on 2.7.2019 at around 6.00 am, he prepared his siblings to go to school when two men who assaulted him at gun point and told him that he was under arrest for defilement. That they claimed he had stolen from a lady and was taken to the police station. The accused said that the complainant who was stolen from was unable to identify him and that he was taken to Changamwe Police Station. That the accused was coerced into admitting the allegations which were unknown to him and that they alleged he had defiled a child, allegations which he denied.
17. This appeal was canvassed by way of written submissions.

Appellant's Submissions

18. The appellant submitted that the purported minor victim alleged that the incident took place at night and at the doorstep of a shop where she had gone for kerosene. The appellant states that it is not clear whether the said shopkeeper who allegedly received money from the complainant witnessed the said commotion in which PW1 was allegedly pushed to the ground, and if they witnessed it then what was their reaction to that. That the alleged incident took place at night at a time when visibility was poor and that evidence of identification particularly in cases where an offence is alleged to have been committed at night must be subjected to thorough interrogation and scrutiny before any reliance can be placed upon it to convict. The appellant states that the truthfulness of a minor victim of a sexual offence, particularly in a case where there was no eye witness to corroborate the victim's testimony ought to be in accordance with Section 124 of the *Evidence Act*. That it was therefore improper for the trial court to convict on the basis of doubtful evidence devoid of the prerequisite corroboration.
19. That further, there was no description of the perpetrator that was given by the complainant and that it is not clear how PW1 identified the appellant to the people who arrested him. That PW1 and PW2 were clear in their testimonies that they were only called by the police to identify the appellant at the police station after he had been arrested and that PW1 then identified him as the person who had defiled her on the material night. That from the pieces of evidence from PW4, it is clear that the complainant was not involved at all in the appellant's arrest and that it was the village elder who identified the appellant to the police.
20. The appellant states that he was ambushed at gun point by two men and arrested on allegations that he had defiled a minor. However, none of the two men was summoned to court to testify on what they knew about how and why he was arrested. The appellant cited the case of *John Kenga v Republic*, Criminal Appeal No. 118 of 1984 where the court held that "we acquit the appellant due to the fact that some of the witnesses were not summoned during the trial to clear the doubt of his arrest especially



those who were crucial to testify”. The appellant therefore prayed that the appeal be allowed, and the conviction and sentence set aside.

Respondent’s Submissions

21. The respondent stated that there was proof to the required threshold beyond reasonable doubt. That the evidence tendered established all the ingredients of the offence as was stated in [Remmy Wanyonyi Wanjoki v Republic](#) [2020] eKLR that “the ingredients of the offence of defilement which the prosecution must prove beyond reasonable doubt are the age of the complainant, there was penetration, and that it is the appellant who did the act of penetration.”
22. On the age of the complainant, the respondent argued that the victim’s mother produced her clinic card as PExh-1 which gave her date of birth as 27.12.2002 putting her age at the material time as 16 years.
23. On the issue of penetration, Dr. Omar Said, PW3, a medical officer at Port Reitz Hospital testified that the victim was seen on 21.05.2019 and it was noted that her hymen was broken with bruises on the labia minora fourchette and that the treatment notes and PRC Form were filled to that effect. The Respondent submitted that Dr. Fadhil Hussein, PW5, a medical officer at Port Reitz Hospital testified that he examined the victim and filled the P3 Form on 04.07.2019 which indicated that the probable type of weapon causing injury was a male genital organ. Further, that PW1 testified that the incident took place between 19.5.2019 and 20.5.2019 and that she was treated a day later on 21.5.2019 and a broken hymen together with lacerations noted on her labia minora.
24. On whether the appellant did the act of penetration, the respondent submitted that the victim positively identified the appellant as the person who defiled her. That the victim testified that the lights of the shop where the appellant took her from were on at the time. That further, she stated that before defiling her, the appellant lit a candle so as to put on a condom. That she also saw him in the morning before he kicked her out of the house as the sun was already out. It is therefore evident that the appellant was properly and clearly identified. The respondent contended that when the appellant was put on his defence, he elected to give unsworn evidence in which he merely denied defiling the victim and that he did not call any witnesses. The respondent submitted that the trial court properly evaluated the evidence and found that the prosecution had established a case against the appellant beyond reasonable doubt.
25. On the issue of sentence, the respondent averred that they were guided by Section 8 (4) of the [Sexual Offences Act](#) which prescribes imprisonment for a term of not less than 15 years. Therefore, the sentence was proper. The respondent therefore prayed that the court dismisses the appeal for lack of merit and upholds both conviction and sentence.

Analysis and Determination

26. This being the first appellate court, this court is guided by the principles in [David Njuguna Wairimu v Republic](#) [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered



the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

27. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -
- i. Whether the appellant was properly identified as the perpetrators
 - ii. Whether the medical evidence was consistent with the allegations of defilement with regard to date of incident
 - iii. Whether the appellant’s defence was considered
 - iv. Whether mitigation by the appellant was considered before imposing the sentence.

Whether the appellant was properly identified as the perpetrators

28. The appellant disputed that he was properly identified for reasons that the shopkeeper would have seen him carrying the complainant away as there was light from the shop. He also said that it was at 7.00 pm and visibility was difficult and evidence of identification at night cannot be relied on to convict unless the same is interrogated and scrutinised. That PW1 and PW2 were clear in their testimonies that they were only called by the police to identify the appellant at the police station after he had been arrested and that PW1 then identified him as the person who had defiled her on the material night. That further, he was ambushed at gun point by two men and arrested on allegations that he had defiled a minor. However, none of the two men were summoned to court to testify on what they knew about how and why he was arrested.
29. Although the complainant was abducted at night, when she said that she was able to see the appellant with the source of light at the shop, she remained at the appellant’s house until the following morning. That when she wanted to leave in the morning, the appellant held a knife and threatened to slaughter her if she left. That he left her in the house and on return, he pushed her out of the house and that is when she started going home. This was during the day in broad daylight and visibility was clear. The shopkeeper was not called to testify as to whether he saw the appellant whisk away the complainant and may not have seen the offence take place but the fact that the complainant was with the appellant during the day vitiates the appellant’s defence that identification was not proper.
30. PW1 led the mother, PW2, to the house where she was locked and defiled after being abducted and she was told by the assailant’s neighbor that the occupant of the house was called Nyawa. That when the assailant was arrested, the complainant went and identified him. According to the Investigating Officer, PW4, the appellant was arrested following information given by the village elder called Kyalo who also led them to the suspect’s house and found out that he had moved out.
31. This court finds that the appellant was properly identified as the perpetrator of the offence of defilement.
- Whether the medical evidence was consistent with the allegations of defilement with regard to date of incident
32. Dr. Fadhil Hussein produced a P3 Form which was filled on 4.7.2019. He said he relied on the PRC Form which was filled at Port Reitz Hospital and his examination of the complainant to fill the P3 Form. He found the complainant had bruised fourchette and broken hymen and concluded that the complainant had suffered maim.



33. From the treatment notes made on 21.5.2019, OP/No. XXXX/19, the complainant had swelling on the labia with vaginal bleeding and inflammation as well as bruises on the labia minora. The complainant was treated on 21.5.2019 and the P3 Form was filled later on 24.7.2019. PW5 clarified that when filling the P3 Form, he relied on the treatment notes and PRC Form apart from conducting physical examination of the complainant. PW5, the doctor, filled the P3 Form 6 weeks after the complainant had been treated. There is therefore no inconsistency between the medical evidence and that of other prosecution witnesses.

Whether the appellant's defence was considered

34. The appellant gave an unsworn statement and said that on 2.7.2019, at around 6.00 am, he was preparing his siblings to go to school when two men assaulted him at gunpoint saying he was under arrest for defilement and also for stealing from a lady. He said that at the police station, the complainant was unable to identify him and he was coerced into admitting allegation which were unknown to him. He denied having defiled a child called Mariam.
35. The trial court in considering the appellant's unsworn statement said: -

“The defence raised by the accused person was a mere denial that did not shake the credibility of the prosecution case in any way.”

36. The appellant closed himself out of interrogation of his defence by giving an unsworn statement and he steered clear of explaining where he was on 19th and 20th May 2019 when the offence was committed. The finding by the trial magistrate of the probative value of the said statement as mere denial was sufficient consideration. Furthermore, the appellant has not submitted on the ground that his defence was never considered.

Whether mitigation by the appellant was considered before imposing the sentence.

37. Although the appellant has also not submitted on what he thinks about the above issue, the proceedings in sentencing show that the appellant prayed for a non-custodial sentence and said that he had a family to take care of and the court called for a Victim Impact Statement as well as the Pre-sentence Report and upon consideration of the presentence report, the trial magistrate found that with the increase of sexual offences in the region, there was need of deterrent sentence to punish the offender and to deter other people from committing offences of a similar nature. The trial magistrate also said that the appellant had not showed any remorse or offered any ground for consideration by the court to enable it depart from the stipulated sentence and she passed a sentence of 15 years imprisonment to run from 2nd July 2019 from when the appellant was arrested.
38. Section 8(4) of the *Sexual Offences Act* provides: -
A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
39. The words of Section 8(4) connotes that it is a mandatory sentence. However, it is now settled that a law that deprives the trial court the discretion to pass sentence in consideration of the merits of each case is unconstitutional. Refer to the holding in *Philip Mueke Mainigi & Others v AG & Others*, Petition No. E017 of 2021, High Court of Kenya at Machakos.
40. The trial magistrate has therefore explained the exercise of her discretion to pass the sentence of 15 years i.e. the appellant waylaid the complainant and carried her to his house and defiled her through the night and into the following day, the complainant was not the appellant's girlfriend and she did not



know him and he caused her and her family physical and mental torture. This court finds no reason why that sentence should be interfered with.

41. In conclusion, the appeal on conviction and sentence lacks merit the same is dismissed. The appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 13TH DAY OF JULY 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

