



REPUBLIC OF KENYA



**Mwavadu v Republic (Criminal Appeal E086 of 2021)  
[2023] KEHC 511 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 511 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E086 OF 2021  
A. ONG'INJO, J  
JANUARY 31, 2023**

**BETWEEN**

**JUMA CHAKAYA MWAVADU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Sentence of Hon. Sandra Ogot, Senior Resident Magistrate, delivered on 2nd day of December 2020 at Msambweni Senior Resident Magistrate's Court Sexual Offences Case No. 13 of 2019)*

**JUDGMENT**

1. The Appellant Juma Chakaya Mwavadu was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 in Msambweni Magistrates Court Sexual Offence Case No. 13 of 2019.
2. The particulars were that the Appellant on the 1<sup>st</sup> day of May 2019 at 16.00hrs at Mivumoni Location, Kwale County within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of SM, a child aged 11 years.
3. Upon consideration of the evidence of 6 prosecution witnesses and the Appellants defence an oath, the trial Magistrate found the Appellant guilty & convicted him consequently. The appellant was sentenced to serve 33 years imprisonment.
4. The Appellant is aggrieved by the conviction and sentence and has preferred the appeal herein on the following amended grounds filed on 19<sup>th</sup> July 2022: -
  - i. That the trial magistrates court faulted in points of law & facts by convicting him to serve 33 years imprisonment without observing that the appellant was under 18 years at the material



date. That Article 53(i) (f) (i) of the Constitution of Kenya, 2010 was contravened & Section 18 (2) of the Children Act No. 8 of 2001 was breached.

- ii. That the learned trial magistrate erred in points of law & facts by failing to consider the probation report that was elicited in court by the probation officer if it was demanding the appellant to be placed on a 3 - year probation supervision order.
  - iii. The Appellant drew the attention of court to unconstitutionality of Section 8(1) & (2) of the Sexual Offences Act which contravened Article 29(a) & (f) of the Constitution. He relied on the holding by Justice Odunga in *Philip Mueke Mainigi & 5 Others vs DPP & AG* and the *Sentencing Policy Guidelines* to argue that discretion ought to be applied in all criminal cases.
5. The prosecution case was that the Complainant - PW2 was sent by her grandmother - PW5 to go and sell cashew nuts on 1.5.2019. That on the way she met the accused who wanted to take the cashew nuts but she refused. She said the accused who had a motorbike then put a cloth inside her mouth and carried her to a bush, undressed her, put her down and defiled her. That she screamed when she felt pain and bled. She said the Appellant then went to hide and left her to go home. That on her way home she met her grandfather who called her grandmother. PW2 told them what had happened.
  6. That the Chairman of Magedi Mikazungu was called and he in turn called Katenge and PW2 was taken to Kibaoni Police Station where matter was reported. PW2 was then taken to Msambweni Hospital where she was treated and admitted for 4 days. That she went and recorded a statement. PW2 said she knew the accused and even her grandparents knew him.
  7. PW2 said that accused disappeared for a while after the incident and he was arrested later. The complainant said that the incident happened at 4.00 pm and she could be well. She identified the reflector jacket. That the accused had green shorts and an Arsenal shirt. She also said that the accused had sandals on his feet. PW2 said the accused went to their home thrice. She said she had seen him in church and at the well. She did not know his name but she knew his 2 brothers, Matano and Hamisi, who are younger than him.
  8. The Complainant's mother PW1 testified that on 1<sup>st</sup> May 2019 at about 4.00 pm she was at Lungalunga where she works when she received a call from her mother, SM, who informed her that her child had been raped. She instructed her that they should meet at Msambweni after making a report at Kibaoni police. She said she met them at Milalani stage where she alighted from Lungalunga and they went to Msambweni Police Station where a report was booked and they proceeded to hospital.
  9. PW1 said her daughter was in a bad state and was bleeding profusely. She said she bought a pad to help with the bleeding. That at Msambweni Hospital the child was taken to the theatre, reconstruction done to her private parts and she was admitted for 3 days. PW1 identified P3 form and treatment notes in respect of the Complainant. PW2 - EXP 1, 2 & 3. She also produced certificate of birth - EXP 4.
  10. PW1 related what the Complainant told her on how the incident happened. That the assailant wanted the cashew nuts she was sent to sell by force and when she refused the perpetrator pulled her to the bush, stuffed a reflector jacket in her mouth to make her not to scream and raped her after which he gave her Kshs. 50 which she also declined to take. She said a neighbour known as Kioko saw the perpetrator leave and heard a child crying and he rescued her.
  11. PW1 said she did not know the accused but her parents and her brothers knew her. But when the report was made to the police, the suspect ran away. That as they continued looking for him, PW1 got his contact and lured him to Shimoni and PW2 informed the police and he was arrested and taken to Msambweni police station where he was placed in cells and charged after statements had been recorded.



12. PW1 identified the blood stained, checked orange and black kikoi - EXP 5(a), Green and peach dress - EXP 5(b) - blood stained. Black and white panty blood stained - Exp 5(c), Green sweater - blood stained. Red, yellow and black lessa - Exp 5(d) which PW1 sat on a motorbike while being taken to hospital. Always pad - EXP (f) - blood soaked. PW1 said it is Kioko and the Complainant who told her it is the accused who committed the offence. She said PW2, the Complainant, had been sent to the shops. PW1 said that she did not know of any other JC apart from the accused. She said that accused person's friend Roman Ngai gave her the accused person's photo.
13. PW3, Dr. Hussein J, from Msambweni Hospital testified that S - PW2 herein went to the emergency department with history of defilement. He said he found the 11 - year child crying. He said she was scared and frightened and her clothes had blood, grass and dirt stains. She gave history that she was walking to go and sell cashew nuts when the boy who was on a motorcycle called her and wanted the cashew nuts by force. She refused and the boy held her, covered her mouth with a reflector jacket and then defiled her. That he let her go when he saw someone pass.
14. PW3 said that at the hospital, the girl was bleeding heavily and she had to be taken to the theatre. On examination, her private part was very swollen and bleeding profusely. That the vaginal wall had a cut on the right and down. That they stopped bleeding for about an hour and stitched her and she was admitted in the ward. That the child was given medication to prevent HIV and antibiotics. The child was also counselled. That the child was discharged on 3.5.2019. PW3 was of the opinion that the injuries were caused by forceful penetration. PW3 produced P3 form, treatment notes - EXP 1 and 2 as well as discharge form - EXP 4 and PRC form - EXP 6. PW3 said the Complainant told him it was a man who forcefully penetrated her. He said he did not know who committed the offence but the Complainant knew the perpetrator.
15. PW4 - RK testified that the Complainant was her niece. That on 1.5.2019, she was in the shamba when she was called that the child had been defiled. She said it is PW2's grandfather who called her. She said that PW1's grandmother had given her cashew nuts to go and sell when the accused met her on the way and defiled her. PW4 said the Complainant was bleeding profusely. That the Complainant told them she was defiled by J. PW4 said she knew Jas he came from the same area and they called the mother but found the Appellant had run away. That they went to Kibarani police station called the Chairman who came to the house.
16. PW4 said they went to hospital after meeting with PW2's mother and they tried to stop the bleeding by even buying Always pad and covering the Complainant with a lesa. That PW2 was admitted and taken to the theatre. She was in the ward for 3 days. PW4 said that Jdisappeared until in August 2019 when he was arrested and PW4 recorded her statement. PW4 said that on the material day the accused carried her child and took him home and it is on the way that he met the Complainant and defiled her. PW4 said the accused ran away and did not go to school during the period he had escaped.
17. PW5, the Complainants grandmother, testified that on 1.5.2019 at 4.00pm. She was on the farm with RK and SM. She said she sent S to go and sell cashew nuts and come back with mboga. That after a while she saw her husband who told her S was at home and she had been defiled. When she went home, she found the child was crying and bleeding profusely. She told R to call the mother - PW1 and she instructed them to meet up at Kibarani. PW5 said the Complainant said it was J who defiled her. That the Complainant was taken to hospital and admitted for 3 days. She said Jwas known to her and he ran away from home and was only arrested in August 2019. She said the accused had gone to her home on the material day.
18. PW6 CPL Rael Rotich of Msambweni Police Station investigated the offence and preferred the charge against the accused. She said she found the Complainant seated at the report office and was bleeding



profusely from her private parts as a result of defilement. She took the history from the Complainant. PW6 produced the clothes the Complainant was wearing at the time she was defiled – EXP 5(a) to 5(g). That when the Accused was arrested, she interrogated him and he said that he committed the offence and that he had gone to his uncle’s place and did not run away. PW6 said she was called at 9.00 pm when the Complainant was taken to the station by her parents. She said the Complainant was not able to walk.

19. When placed on defence accused in his sworn statement testified that he was a student at [Particulars Withheld] Secondary School. He said he was 19 years. He said that on the material day he was at home and the following morning when he got up to go to school he heard the allegations but went to school and continued learning. That when he got home his mum told him police had gone to look for him. He said that his mother went to complainant’s home and they discussed and resolved the issue.
20. That on 23.08.2019 he went to his uncle’s place in Lungalunga and on being send to the shop he came across a boda boda that had stopped along the way. That they got hold of him, beat him and tied his hands and legs. That his phone and money were taken. That an officer went and arrested him and took him to Lungalunga Police Station. That later he was escorted to Msambweni Police Station and to court where he denied the charge.
21. The Accused said he had never seen PW1 until on the day she testified. The Accused said that he felt the Complainant’s family had a grudge against him since they kept on telling him they would teach him a lesson when he was on bond and he had no peace at home. The Accused in cross examination said he knew the Complainant as a neighbour. He said he finished class 8 in 2018 in same school where PW2 was a pupil. He said he also knows PW2’s grandmother - PW5. He said he had no problem with the Complainant and her grandfather. He said his father had land dispute with PW5.
22. He said his father was once arrested and put in the cell over land dispute. He said that on the material day after coming from the shop at 1.00 pm, he remained at home until the next day. He said he is not a bodaboda rider but he rides motorcycle. He said he did not go to work on the material day and he does not work as he is a student. He said he went to visit his uncle CK on a Thursday in August 2019 during school holiday and he got arrested on Friday. Accused alleged that his mum, grandmother to Complainant and other people had a discussion where it was resolved that he was not the assailant. He said he did not attend the meeting.
23. He said the aunt of the Complainant had a grudge against him and long after it had been resolved that matter be dropped. She had him beaten and arrested in Lungalunga. He said his brother was also falsely accused of similar charges. This appeal was canvassed by way of written submissions whereas the appellant filed his submissions and the Respondent filed grounds of opposition.
24. In his submissions the appellant stated that he was 16 to 17 years at the time he was arrested and the sentence of 33 years was in contravention of Articles 53(1)(f)(i) & (ii) & 53(2) of the Constitution of Kenya, 2010. He made reference to Section 18 (2) of the Sexual Offences Act which states, “...no child shall be subjected to Capital punishment onto life imprisonment.” and also relied on International Conventions as to Rights of a Child.
25. Appellant argued that the provisions of the Sexual Offences Act 2006 were overtaken by the provisions of the Constitution which came into effect in 2010. H further relied on the cases of Constitutional Petition No. 570 of 2015, A00 & Others vs AG., Evans Wangila Sirbi vs Republic (2019) eKLR, Philip Mueke Maingi & 5 Others vs AG & Another, (2022) eKLR, Petition No. E017 of 2021 where he alleged that he was not accorded fair trial as he was not provided with a lawyer.



26. The Appellant argued that it was imperative to consider the provisions of the Borstal Institution Act in relation to fair trial such as Section 5 & 6, Article 14(3)(d) of the *International Covenant on Civil & Political Rights*. The Appellant argued that he was not informed about his right under Article 50(2) (b) of the court yet he was under 18 years. *Karisa Chengo & 2 Others vs Republic*, Petition No. 5 of 2015 (2017) eKLR, *Thomas Alugba Ndegwa vs Republic*, C.A. No. 2 of 2004 pointed out legal representation in defilement. The Appellant said his age was assessed at 20 years.
27. In their Grounds of Opposition, the Respondent said identity of the Appellant was established, the age of the minor was also proved and fact of penetration was also proved. It was also the Respondent's position that the Appellant's defence was considered, a finding made on the same and the sentence meted was lawful.

### **Analysis and Determination**

28. This being a first appeal, the mandate of the court is as was aptly set out in the case of *Okeno v Republic* [1972] EA 32 as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.* [1957] EA 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] EA 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, see *Peters v Sunday Post*, [1958] EA 424.”

29. Issues for determination
- i. Whether the Appellant was a minor during the commission of the said offence and whether the sentence against him was lawful
  - ii. Whether the Probation Officer's Report dated 1<sup>st</sup> December 2020 was considered by the trial magistrate
  - iii. Whether the trial magistrate exercised discretion in meting out the sentence against the Appellant

### **Whether the Appellant was a minor during the commission of the said offence and whether the sentence against him was lawful**

30. From the charge sheet, it was shown that the apparent age of the Appellant was juvenile. In consideration of that indication when the Appellant was arraigned in court on 26<sup>th</sup> August 2019, the trial magistrate ordered for an age assessment. An Age Assessment Report from Medical Officer Kwale District Hospital was availed on 27<sup>th</sup> August 2019 indicating that the Appellant's age was assessed to be about 21 years. Based on that report, the charge was read to the Appellant and the trial proceeded to conclusion. When the Appellant was convicted, the issue of his age did not arise in mitigation and even during sentencing process.
31. Although it is acknowledged that the Appellant was a Form one student at [Particulars Withheld] Secondary School by the Prosecution witnesses, this court finds that the issue of him being a minor at



the time he committed the offence and at the time of conviction and sentence is an afterthought that is meant to remove him from the consequences of his criminal actions. In any event, he was convicted and sentenced when he was already an adult and the provisions of Article 53 (1)(f) of the Constitution, Section 26 of the Children Act No. 29 of 2022 and the Borstal Institution Act Cap 92 Laws of Kenya does not apply to him.

32. The Appellant's ground that the trial magistrate failed to observe that he was under 18 years on conviction and sentence to 33 years is faulty or cannot stand.

**Whether the Probation Officer's Report dated 1<sup>st</sup> December 2020 was considered by the trial magistrate**

33. The trial magistrate during sentencing said that it would be a mockery of the Complainant's injuries to place the Appellant on a 3 - year probation order for reasons that the Appellant savagely attacked the Complainant that her vaginal walls got torn and she required surgery to stop the bleeding and repair the tear and lacerations. She said the manner of attack was violent and vicious and the minor's childhood had been taken away. She said that the child had been harmed physically, psychologically and emotionally. It was her view and it is this court's view that the Appellant acted like an animal and does not deserve this court's sympathy. It is apparent that the Probation Officer's Report was considered.

**Whether the trial magistrate exercised discretion in meting out the sentence against the Appellant**

34. The offence for which the Appellant was convicted, defilement contrary to Section 8(2) of the Sexual Offences Act provide as follows: -

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

35. The trial magistrate discussed the finding in Francis Karioko Muruatetu & Another v Republic (2017) eKLR which took away the mandatory nature of the death sentence and which was followed in David Esokon Samuel v Republic (2020) eKLR and Dismus Wafula Kilwake v Republic (2018) eKLR where it was held that the provision of Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. In handing down the sentence of 33 years and not life imprisonment, the trial court considered the gravity of the offence and exercised her discretion. There is no reason to interfere with the discretion save that considering that the Appellant is a young adult, this court reviews the sentence to 20 years from the date of the judgment. The appeal is dismissed. The prison authority should facilitate Appellant to continue with education.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 31<sup>ST</sup> DAY OF JANUARY 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel- Court Assistant

Appellant present in person

Mr. Ngiri for Respondent

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

