



REPUBLIC OF KENYA



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**Omondi v Republic (Criminal Appeal E001 of 2023)  
[2024] KEHC 7853 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E001 OF 2023**

**JN KAMAU, J**

**JUNE 26, 2024**

**BETWEEN**

**HUDSON OPOMBE OMONDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M.M.Gituma (SRM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No 13 of 2021 on 1st December 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. He was convicted by the Learned Trial Magistrate, Hon M. M. Gituma (SRM), on the charge of defilement and sentenced to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgement, on 11<sup>th</sup> January 2023, he lodged the Appeal herein. His Petition of Appeal was dated 3<sup>rd</sup> January 2023. He set out five (5) grounds of appeal.
4. In his Written Submissions dated 28<sup>th</sup> December 2023 and filed on 10<sup>th</sup> January 2023, he incorporated five (5) more Grounds of Appeal.
5. The Respondent's Written Submissions were dated 8<sup>th</sup> February 2024 and filed on 12<sup>th</sup> February 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
8. Having looked at the Appellant's Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
9. The court dealt with the said issues under the following distinct and separate heads.

### I. Proof Of Prosecution's Case

10. Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (4) and (5) incorporated in the Appellant's submissions were dealt with under this head as they were all related.
11. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
12. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic* [2016] eKLR.
13. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

### A. Age

14. The Appellant submitted that age was an important ingredient in defilement cases as it determined the sentence to be meted against an accused person upon being found guilty. He pointed out that questions arose where the victim's age fell on the borderline of specific years, for example, age between 11 and 12 years or 15 and 16 years as was highlighted in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR CA Mombasa and argued that in such cases, the victim's age should be rounded off to the highest age in favour of the accused person with regard to sentencing in sexual offences.
15. In that regard, he cited the case of *Alfayo Gembe Okello v Republic* (eKLR citation not given) where the court had favourable doubt over the age of a child aged fifteen (15) years old and deemed it as sixteen (16) years in favour of the accused as there was no clarity in the evidence adducing her actual age. He was categorical that there were inconsistencies on the evidence tendered by the Prosecution witnesses on when the incident occurred and the date the Complainant (hereinafter referred to as "PW 1") was born. He questioned why PW 1's Birth Notification was produced in place of a Birth Certificate.



16. He further relied on the case of *Kiangu Alias Kasomo v Republic* [2010] eKLR where it was held that whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. He argued that PW 7 (sic) had failed to explain how he had assessed PW 1's age.
17. On its part, the Respondent submitted that No 107358 PC Desma Ochilo (hereinafter referred to as "PW 5") produced PW 1's Birth Notification despite the fact that PW 1 did not know when she was born. It pointed out that the said Notification indicated that PW 1 was born on 1<sup>st</sup> August 2005. In this regard, it placed reliance on the case of *Mwalongo Chiboro Mwajembe v Republic* Application No 24 of 2015 (UR) without highlighting the holding it was relying upon.
18. Notably, PW 1 testified that she was fourteen (14) years old though she could not tell the actual date she was born. PW 5 produced a Birth Notification which showed that PW 1 was born on 1<sup>st</sup> August 2005.
19. In the case of *Kaingu Elias Kasomo v Republic* Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of *Musyoki Mwakavi v Republic* [2014] eKLR.
20. Notably, the offence herein was committed on diverse dates between the month of July 2020 and December 2020. The said Birth Notification placed PW 1 at fourteen (14) to fifteen (15) years old at the material time.
21. In this case, PW 1's age was proven by the aforesaid evidence. The Appellant did not challenge the production of the aforesaid Birth Notification and/or rebut this evidence by adducing evidence to the contrary. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about fifteen (15) years old at the material time and therefore a child.

## **B. Identification**

22. Neither the Appellant nor the Respondent submitted on this issue.
23. PW 1 testified that the Appellant who was her uncle, defiled her three (3) times sometime in July 2020 and that every time he would turn on the radio and threaten to strangle her if she refused. She stated that out of that, she became pregnant and that she was nine (9) months pregnant at the time she was testifying in court. She said that the incidents happened several times at the Appellant's house.
24. Fredrick Nyakoyo (hereinafter referred to as "PW 2") was a brother to the Appellant and an uncle to PW 1. His evidence corroborated that of PW 1. He stated that he used to stay with PW 1 after her parents died but that in October 2020, the Appellant started staying with her.
25. PW 3 also corroborated PW 1's evidence. She testified that she knew the Appellant as her husband's friend. He led the Assistant Chief, Rubin Mwelesi (hereinafter referred to as "PW 3") and PW 5 into the house of one Truphena Asulwa's house where PW 1 had been hidden by the Appellant.
26. Although it was not clear from the evidence whether the incidents occurred at night or during daytime, there could not have been any possibility of a mistaken identity because PW 1 and the Appellant were not strangers. They were relatives who knew each other as she visited his home frequently.
27. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.



### C. Penetration

28. The Appellant submitted that although the Trial Court had ordered for a DNA test to ascertain the biological father of PW 1's child, the same was not carried out. He argued that PW 2 had indicated that he was not in good terms with him which was enough proof to create doubt on the evidence that was adduced by the Prosecution witnesses. He was emphatic that the Prosecution felt that it would lose the weight of its allegations and thus failed to discharge its duty to carry out the DNA test.
29. He blamed the Trial Court for having rejected his defence without cogent reasons and placed reliance on the case of *Reagan Mokaya v Republic* HCCRA No 49 of 2006 (eKLR citation not given) where the appellant's defence was improperly rejected.
30. On its part, the Respondent submitted that the Clinical Officer Michael Ochieng Otieno (hereinafter referred to as "PW 4") testified that PW 1 was examined by his colleague and confirmed that the hymen was not intact. It pointed out that it was also confirmed that she was pregnant. It asserted that the P3 Form and the (Post Rape Care) PRC Form were proof that PW 1 was defiled.
31. It cited Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) and contended that the court could convict in sexual offences on the sole evidence of the complainant where it found the complainant believable. It further added that the Appellant had a guilty mind to the extent of hiding PW 1 which alone, proved that he was defiler. It was its case that it had proven its case beyond reasonable doubt.
32. According to PW 1, sometime in July 2020, she was staying with his brother and when he left for work, the Appellant asked her to go to his room at around 8.00 pm. She testified that he removed her pant, removed his trouser and underwear and inserted his private parts to her private parts.
33. PW 4 confirmed that PW 1 had a tear and discharge on her vagina and that her hymen was not intact. He concluded that there was evidence of sexual penetration. He produced the P3 Form and PRC Form as exhibits in this matter.
34. Notably, PW 1's evidence was well corroborated by the oral evidence of PW 2, PW 3 and PW 5 and by the scientific evidence that was tendered by PW 4 which confirmed recent penetration.
35. Turning to the issue of DNA, this court had due regard to the case of *Evans Wamalwa Simiyu v Republic* [2016] eKLR wherein the court cited the case of *AML v Republic* [2012] eKLR where it was held that the fact of rape or defilement was not proved by a DNA test but by way of evidence.
36. Notably, the power of a court to order an accused person to undergo DNA testing under Section 36 of the *Sexual Offences Act* was not couched in mandatory terms but rather that power was discretionary. The Appellant's argument that a DNA test was not carried out therefore fell on the wayside.
37. Against the Prosecution's evidence, the Appellant's defense was simply a denial and did not outweigh the inference of guilt on his part as was depicted by the Prosecution. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt.
38. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (4) and (5) incorporated in the Appellant's submissions were not merited and the same be and are hereby dismissed.



## II. Sentencing

39. Ground of Appeal No 5 of the Petition of Appeal and Supplementary Grounds of Appeal Nos (2) and (3) incorporated in the Appellant's Written Submissions were dealt under this head.
40. The Appellant submitted that decisions and findings by the superior courts had discouraged mandatory minimum sentences under *Sexual Offences Act*. He pointed out that for him to benefit from Section 26(2) of the *Penal Code* and Article 50(2)(p) of the *Constitution* of Kenya 2010, this court ought to associate itself with the cases of *Makumbi Subui Wanyeso v Republic* Criminal Appeal No 110 of 2020 and *Edwin Wachira & 9 Others v Republic* Petition No E017 of 2021 (eKLR citation not given). He did not highlight the holding he wished to rely upon in the aforesaid cases.
41. He further contended that he was arrested on 4<sup>th</sup> February 2021 and convicted on 1<sup>st</sup> December 2022 thus he had spent one (1) year eight (8) months in remand. He invoked Section 333(2) of the *Criminal Procedure Code* and relied on the case of *Abamad Abolfathi Mobammed v Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009]eKLR in urging the court to consider the aforesaid period in meting out his sentence.
42. On its part, the Respondent submitted that the Appellant's sentence was proper in the circumstances. It pointed out that the offence was committed when PW 1 was fourteen (14) years and fifteen (15) years (sic) which was well within the age bracket offered in Section 8(3) of the *Sexual Offences Act*.
43. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”
44. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lenient.
45. This court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
46. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR on 6<sup>th</sup> July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
47. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences.
48. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and Another v Republic* (*Supra*) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
49. However, on 3<sup>rd</sup> December 2021 while the Supreme Court directions of 6<sup>th</sup> July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.



50. On 15<sup>th</sup> May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the Constitution of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
51. In the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* (*Supra*) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
52. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The *Sentencing Policy Guidelines* in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
53. Whereas the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, it could exercise its discretion to reduce the sentence to lower than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.
54. Having said so, this court was not persuaded that it should interfere with the sentence that the Trial Court meted out against the Appellant herein because the same was below the sentence that was prescribed by the law. It therefore left the same undisturbed.
55. Going further, this court found it prudent to consider if the Appellant had spent time in custody while his trial was ongoing and if so, to take it into account and further direct that the same be taken into account while computing the sentence that he was going to serve.
56. In this regard, Section 333(2) of the *Criminal Procedure Code* provides as follows:-  
  
“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall (emphasis court) be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.  
  
Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
57. This duty to take into account this period is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is provided that: -  
  
“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”



58. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.
59. A perusal of the proceedings of the lower court did not show if the Appellant herein was released on bond/bail while the trial was ongoing. He remained in custody throughout his trial. He was arrested on 4<sup>th</sup> February 2021 and sentenced on 16<sup>th</sup> December 2022. He thus spent one (1) year eight (8) months in remand. Notably, the Learned Trial Magistrate did not consider the said period while sentencing him. The same therefore ought to be taken into account while computing his sentence.

### **Disposition**

60. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 11<sup>th</sup> January 2023 and the Appellant's Supplementary Grounds of Appeal were not merited. His conviction and sentence be and are hereby upheld as the same were safe.
61. However, it is hereby directed that the period between 4<sup>th</sup> February 2021 and 16<sup>th</sup> December 2022 be taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
62. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26<sup>TH</sup> DAY OF JUNE 2024**

**J. KAMAU**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

