



**Korir v Republic (Criminal Appeal 36 of 2020)  
[2024] KEHC 9206 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9206 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 36 OF 2020  
JN KAMAU, J  
JULY 30, 2024**

**BETWEEN**

**DOUGLAS KORIR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in Principal Magistrate's Court in Sexual Offence Case No 16 of 2020 on 26th May 2020)*

**JUDGMENT**

**Introduction**

1. The Appellant herein 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. 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. Ochieng (PM), on the charge of defilement and sentenced to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgment, on 8<sup>th</sup> October 2020, he lodged the Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of Appeal. On 10<sup>th</sup> January 2024, he filed Amended Grounds of Appeal dated 27<sup>th</sup> December 2023. He detailed two (2) Amended Grounds of Appeal.
4. His Written Submissions were dated 27<sup>th</sup> December 2023 and filed on 10<sup>th</sup> January 2024 while those of the Respondent were dated 27<sup>th</sup> February 2024 and filed on 28<sup>th</sup> February 2024. The Judgment herein was based on the said Written Submissions that both parties relied upon in their entirety.



## Legal Analysis

5. 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.
6. This was aptly stated in the case of *Selle & Another vs 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.
7. It was not clear to this court if the Appellant abandoned his appeal on conviction or not. As he was representing himself, this court found it prudent to address all the Grounds of Appeal and Amended Grounds of Appeal that he had raised herein.
8. Having looked at his said Grounds of Appeal and the Amended 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 therefore 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) and (5) of the Petition of Appeal 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 vs 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 claimed that the age of the Complainant, JM, (hereinafter referred to as "PW 1") was not established as required by law. On its part, the Respondent pointed out that her mother, EM (hereinafter referred to as "PW 2") testified that she was born on 21<sup>st</sup> March 2004. It relied on the Birth Certificate (sic) that the Investigating Officer, No 119569 PC Vincent Kiptoo (hereinafter referred to as "PW 5") adduced as evidence.
15. Notably, it was Child's Health Card that was produced as an exhibit and not a Birth Certificate as the Respondent had submitted. The same showed that PW 1 was born on 21<sup>st</sup> March 2004.
16. In the case of *Kaingu Elias Kasomo vs 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 vs Republic* [2014] eKLR.

17. The Appellant did not challenge the production of the aforesaid Health Card and/or rebut the said evidence by adducing evidence to the contrary. As the offence herein was committed on 30<sup>th</sup> March 2020, PW 1 was therefore about sixteen (16) years old at the material time of the incident herein. This court was thus satisfied that the Prosecution had proved that PW 1 was therefore a child at the material time.

## **B. Identification**

18. Both parties did not submit on this issue. The Respondent was, however, emphatic that all the ingredients of the offence of defilement had been proven.
19. PW 1's testimony was that on 26<sup>th</sup> February 2020, at around 6.30am, she was walking towards (Particulars Withheld) when she met the Appellant at (Particulars Withheld) Stage. She did not know him at the time. She asked him to take her to (Particulars Withheld) School, which he did. He then took her to his home at (Particulars Withheld) where his grandmother lived.
20. As she was afraid to go home, she stayed with him for one (1) month. PW 2 and NMA (hereinafter referred to as "PW 3") and PW 5 all testified that they found PW 1 at the Appellant's home.
21. In his defence, the Appellant did not deny knowing PW 1. He pointed out that she had agreed to be his wife and consented to live with him.
22. Identification which was by recognition was therefore not in contention. This court was therefore satisfied that the ingredient of identification had been proven.

## **C. Penetration**

23. Both parties did not also submit on this issue. It was PW 1's evidence that she and the Appellant had sexual intercourse.
24. Stephene Pidemii (hereinafter referred to as "PW 4") was a Senior Nurse at Likindu Health Centre. She said that PW 1 told her that she was married to the Appellant herein. She was emphatic that PW 1 had had sexual intercourse. However, she did not have any lacerations or bruises. He attributed this to the fact that PW 1 had stayed with the Appellant for a while and the injuries may have healed. He tendered in evidence medical notes and P3 Form in support of the Prosecution's case.
25. 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.
26. The Appellant's defence was not watertight enough to outweigh the Prosecution's case. His argument that the Prosecution's case was full of contradictions and inconsistencies therefore fell on the wayside.
27. 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.
28. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (5) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

## **II. Sentencing**

29. Grounds of Appeal No (3) and (4) of the Petition of Appeal and Amended Grounds of Appeal Nos (1) and (2) were dealt with under this head.



30. The Appellant placed reliance on the case of Edwin Wahira & 9 Others Petition No 97 of 2021 (eKLR citation not given) without highlighting the holding he relied on and urged the court to resentence him to a least prescribed sentence pursuant to Article 50(2)(p), Article 24 (i) and (e) and Article 25(c) of *the Constitution* of Kenya 2010.
31. He further relied on the case of Eliud Waweru vs Republic [2019]eKLR where the court cited the case of Gilcllick vs West Norfolk and Wisbech Area Health Authority (1955) 3 ALL ER 402 where it was held that it was unrealistic to assume that teenagers and maturing adults did not engage in and often sought sexual activities with their eyes fully opened.
32. He invited the court to consider the jurisprudence in England that only sex with persons less than sixteen (16) years of age was criminalised and that their sentences were much less stiff at a minimum of two (2) years as explained in the case of Archbold Criminal Pleading Evidence and Practice (2002) P 1720.
33. He pointed out that our prisons were full of young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent had been held immaterial because they were under age of eighteen (18) years. It was his argument that that needed serious interrogation. He was emphatic that in the circumstances, his conviction was not safe and the minimum mandatory sentence meted on him was harsh and excessive.
34. He urged the court to consider Section 333(2) of the Criminal Procedure Code while re-sentencing him and further to consider that he was a first offender, remorseful and that he was only twenty-two (22) years old when he was arrested. He therefore sought for social justice under Article 19 of *the Constitution*. He pointed out that he had served sufficient time to meet the requirements of punishment and deterrence and had been rehabilitated to a person who no longer posed a threat to the public.
35. On its part, the Respondent submitted that the Trial Court ought to have sentenced the Appellant under Section 8(3) and not Section 8(4) of the *Sexual Offences Act*.
36. The Appellant herein was sentenced under Section 8(4) 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 sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
37. As the Prosecution had proven that PW 1 was sixteen (16) years of age, the Respondent’s argument that the Appellant ought to have been sentenced under Section 8(3) therefore fell on the wayside. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lawful.
38. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
39. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs 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.



40. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences 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.
41. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.
42. However, in a decision that was delivered on 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.
43. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against him undisturbed.
44. As could be seen hereinabove, the Appellant had also sought that the court considers the period that he stayed in remand as his trial was ongoing as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). The said Section provides that:
- “Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall 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).
45. This duty was also contained in 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.”
46. 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 Ahamad Abolfathi Mohammed & Another vs Republic (Supra).
47. This court noted that the Appellant herein was arrested on 30<sup>th</sup> March 2020 and was sentenced on 26<sup>th</sup> May 2020. Although he was granted bond/bail, he did not appear to have come out on bond/bail while his trial was going on. He thus spent one (1) month and twenty five (25) days in custody before he was sentenced.



48. A reading of the Trial Court's Sentence showed that it did not take into consideration the time he spent in remand before sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

### **Disposition**

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Petition of Appeal that was lodged on 8<sup>th</sup> October 2020 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

50. However, it is hereby directed that the time the Appellant spent in custody between 30<sup>th</sup> March 2020 and 25<sup>th</sup> May 2020 when he was arrested and sentenced respectively be taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

51. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF JULY 2024**

**J. KAMAU**

**JUDGE**

