



**SOM v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 9912 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E029 OF 2023**

**F GIKONYO, J
JULY 30, 2024**

BETWEEN

SOM APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. M.I.G Moranga
(S.P.M) in Kilgoris SPM SOA Case No. 62 of 2020 on 09/11/2023)*

JUDGMENT

Claim of trumped-up charges

1. This appeal is against the appellant's conviction, and sentence of 15 years imprisonment imposed on 09/11/2023 for the defilement of the complainant- a girl aged 12 years.
2. The petition of appeal dated 09/11/2023 cited the following grounds of appeal;
 - i. The Learned Trial Magistrate erred in law and fact in making a finding that the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#) No.3 of 2006 had been proved against the appellant to the required standard of beyond reasonable doubt.
 - ii. The Learned Trial Magistrate misdirected herself both in law and fact by relying on contradictory evidence of witnesses which contradictions ought to have been resolved in favour of the appellant.
 - iii. The Learned Trial Magistrate erred in law and fact by failing to rely on a medical examination report which clearly revealed a fact of no bruises and/or laceration noted on the minor which then rules out penetration.



- iv The Learned Trial Magistrate erred in law in relying on hearsay evidence to convict the appellant without examining the credibility of the prosecution witnesses which issue was raised by the defence.
 - v The learned trial magistrate erred in law by finding that the complainant had been defiled without corroboration from the medical evidence which is crucial in establishing evidence of defilement.
 - vi. The learned trial magistrate erred in law and fact in failing to record the reasons for believing the complainant and therefore failing to satisfy herself that the complainant was telling the truth.
 - vii. The learned trial magistrate erred in law and fact in failing to consider the evidence of the appellant and his witness which raised a doubt on the prosecution's evidence.
 - viii. The learned trial magistrate erred in law in failing to give the appellant a benefit of the doubt over the allegations of defilement on the basis of lack of evidence on penetration which is an important ingredient of the charge of defilement.
 - ix. The Learned Trial Magistrate erred in law in convicting the appellant for the offence of defilement without evidence of contact between the appellant and the complainant which would have been readily gathered since the appellant was allegedly arrested in the act.
 - x. The Learned Trial Magistrate erred in law and fact in convicting the appellant without adequate evidence proving committal of the offence by the appellant.
3. The appellant urged this court to review the evidence and the original trial court record with a view of quashing and setting aside the conviction and sentence against the appellant. The appellant prayed that the trial court judgment be substituted with an acquittal of the appellant and the appellant be ordered set free forthwith unless lawfully held for another offence.

Directions of the court

4. The appeal was canvassed by way of written submissions. The appellant and the respondent have filed. The appellant has also filed further submissions.

The Appellant's submissions.

5. The appellant submitted that there were contradictions, discrepancies, and inconsistencies in this case. There is an apparent inconsistency between the evidence in the recorded witness statements and the oral testimony of PW2 and PW3 in court.
6. The appellant submitted that no medical corroboration evidence was adduced to indicate that specimens were collected from the complainant and /or the accused for examination. What connects the appellant to the alleged offence is evidence of recognition by the victim (PW1). The appellant relied on *E v Turnbull & Others* [1976] quoted with approval *Mercy Chellangat v Republic*; Kericho High Court Criminal Appeal No. E002 of 2024.
7. The appellant submitted that the trial court did not consider the evidence of the appellant and that of his witness in defence. The appellant relied on *Richard Munene v Republic* [2018] eKLR.
8. The appellant submitted that there were instances of crucial witnesses and evidence being withheld from the court and the same should be resolved in favour of the appellant.
9. The appellant submitted that the prosecution did not prove its case to the required standard.



10. The appellant prayed that this appeal be allowed the conviction be set aside and the appellant be set at liberty.

Respondent's submissions.

11. The respondent submitted that the conviction of the appellant was unsafe.
12. The respondent submitted that they would leave the alternative charge of indecent act with a child to the court to re-evaluate the evidence.

Analysis And Determination.

Court's duty

13. As a first appellate court, will re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] EA 32
14. This court considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. This court finds the main issues for determination are;
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

15. The appellant 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.
16. It was alleged that on 12/09/2020 within Narok county, the appellant intentionally caused his penis to penetrate the Vagina of LS a girl aged 12 years.
17. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
18. It was alleged that on 12/09/2020 within Narok county intentionally and unlawfully touched the vagina of LS a girl aged 12 years with his penis.

Elements of offence of defilement

19. Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* establishes the offence of defilement as follows:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) 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 twenty years.”

20. The prosecution must prove beyond reasonable doubt that:
 - i. The complainant was a child- age;



- ii. Penetration in accordance with Section 2(1) of the *Sexual Offences Act* did occur. See *Mark Oiruri Mose v R* [2013] eKLR; and
 - iii. The accused caused the penetration of the child.
21. See the case of *Charles Wamukoya Karani v: Republic*, Criminal Appeal No. 72 of 2013.
 22. PW 1 a child aged 13 years SL testified that she was leaving home when the appellant took her into a sugarcane/ maize plantation where he defiled her before her Daddy/ brother could come and find her, she was treated at Enosaen and confirmed she knew the appellant before the incident.
 23. When the appellant got legal representation PW I was recalled and the trial court had an opportunity to see her testify.
 24. She confirmed she knew the appellant well as he used to live at their home.
 25. She confirmed he did tabia mbaya. However, when the counsel for the appellant commenced cross-examination, she got frightened and cried uncontrollably.
 26. The court also noted she was physically and mentally challenged and was a student at Poroko Special School.
 27. She was recalled and still insisted that the appellant 'alini rape'.
 28. She clarified that E and S were her brothers. Dady or Kinyua was the person she referred as to 'Daddy'. She however denied S was the person she was referring to as E or Daddy.
 29. PW2 Jane Kakenya a resident of Enosaen testified that PW 1 was her granddaughter.
 30. She learnt on 12.12.2020 that the child had disappeared. She learnt the appellant had defiled her. She examined her and saw some wetness on the child's private parts and rushed her to the police station.
 31. Upon recall she stated that on 12.09.2020 is when she was seated outside her house when some young man SLk as 'Daddy' informed her that PW 1 had been found in a sugarcane plantation: She further explained that E was her elder son and uncle to the complainant.
 32. Solomon had informed- her he had found PW 1 emerged out of a sugarcane plantation where she was heard calling one 'Onduso' the accused's name. The accused had fled the scene.
 33. Solomon had brought the child home as neighbours helped arrest the accused. He was later handed over to the police station.
 34. PW3 LST uncle to the complainant testified that on 12.09.2020 at around 12 pm — 1 pm he was harvesting maize in a shamba next to his home.
 35. After lunch he heard screams from the home of a mzee known as Olakuya. He ran towards the home. That is when he heard from him that he had heard the complainant say 'Onduso niache' he told him to go check what was happening.
 36. He went with his brother Edwin Saitoti. They found the appellant with the complainant' in the sugarcane plantation. She PW 1 was screaming when he saw them; and the appellant escaped. They had seen him standing where PW 1 was lying on the ground with her face up. They saw him pull up his trousers and found her underpants removed and her dress lifted up to the upper part of her body.



37. They managed to arrest the accused after he was trapped while making his escape. Villagers had joined in the close and beat him up. He restrained them and he took a motorcycle and drove the accused to the Enosaen police station.
38. PW2 and PW2 followed them to the police station and later were referred to the hospital where PW 1 was treated,
39. The appellant was known to him as a neighbour prior to the incident for 5 years. He had no grudge or differences with the accused.
40. PW4 PC Esther Matei confirmed receiving a report on 12.12.2020. a few minutes later the minor went with her grandmother PW2 and aunty D.
41. PW5 Hillary Ngeno Koskei a clinical officer at the Transmara subcounty hospital testified that he has worked with Nelson who filled the P3 form.
42. According to the age assessment report he found her to be approximately 12 years old. He produced the report dated 14.09.2020 as P, Exhibit 2.
43. He clarified the names on the report were so written because of the pronunciation of the complainant.
44. PW6 Irene Melep a senior clinical officer based at Transmara West Sub-County hospital testified that she had worked with Nelson Lekishon and was familiar with his handwriting and defence having proceeded to Narok an employment she produced the p3 form and PR form on his behalf. She noted that upon examination PW1 was found to have been defiled. Although no bruises or lacerations were seen, she had discharge on her vulva, pus and epithelial cells. She received a blood stained underpant. The hymen was broken and old looking. She produced the p3 form as p exh3, the treatment notes as p exh1 and prc form as p exh4. She explained that the p3 form makes no provision for the doctor's name except for a signature.
45. DW1 The appellant SOM testified that on 12.09.2020 he had left shamba at 12.45 pm. He was found by Jared Osoro his colleague. One E or Daddy came armed with a rungu and panga. He hit him on the head with a panga thrice. As Jared ran out to seek help. He crossed the road as he escaped and that is when he found neighbours who ordered him to be seated and urged Edwin to stop beating him. He was taken to the police station booked in the cells and came to learn of the charges.
46. On 13.09.2020 he was taken to hospital at 5 pm where he was examined for HIV and returned to the cells. He noted PW I was a neighbour for 7 years, He acknowledged PW3 was the elder son,
47. He disputed that Solomon was Daddy but insisted it was Edwin who was also known as Daddy,
48. He produced the statement of PW3 as D, Exhibit 1. He denied that the PW3 had chased and arrested him instead he had found him already seated. He claimed that the charges were a frame-up. He denied having been found in a sugar cane plantation. He acknowledged the complainant's family had a good relationship with him and that one Alauyia was behind the charges. He claimed 4 months before a man had been framed over similar charges but there was no evidence.
49. DW2 Jared Osoro Gichoc who was staying with the accused testified that on 12.09.2020 he was preparing lunch when Edwin hit the accused with a rungu on the head. He also had a panga. He Edwin had demanded to know what he was doing at the shamba with the child.
50. He raised an alarm. He recalled that all day he was with the accused and that the accused had gone to buy cooking oil as he prepared a fire.



51. He was talking with neighbours when the accused dashed out of the house while Edwin in pursuit.
52. That is when he learnt of the allegations of defilement. The accused was taken on motorcycle to the police station. The defence closed its case.

Of false witness

53. This defense reminds of Exodus 20: 16- Thou shalt not bear false witness against thy neighbour.
54. And the punishment for false witness in Proverbs 19: 5- A false witness shall not be unpunished, and he that speaketh lies shall not escape.
55. And Proverbs 19: 9 A false witness shall not be unpunished, and he that speaketh lies shall perish.
56. Deuteronomy 19: 18 requires that, the judges shall make diligent inquisition: and, behold, if the witness be a false witness, and hath testified falsely against his brother; nevertheless, the court is human and limited; it judges on evidence. But, God judges on the truth for He knows all and nothing can be hidden from Him. He will surely deliver his ultimate judgment on whomever has given false testimony against another. None of the false witnesses or accusers will be spared; they will perish.

Findings

57. Be that as it may, P Exh2 showed that, upon assessment, PW1 was approximately 12 years of age; and therefore, a child.
58. Contrary to the submissions by the appellant, except for minor discrepancies, the evidence adduced by the prosecution witnesses was consistent with defilement of PW1.
59. The hymen was not intact. According to the doctor's opinion penetration occurred. The same was corroborated by P Exh 2, 3 and 4. This court find that penetration of PW1 occurred.
60. The appellant was well known to the complainant. The appellant was arrested a few minutes after the incident in the sugar cane plantation. This court finds that there was positive identification of the appellant as the person who caused penetration of PW1.
61. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled LS. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by PW2. The defense was a red herring and an afterthought. It is dismissed.
62. On the basis of the evidence adduced by the prosecution, this court finds that the appellant caused penetration of the victim- a child of the age of 12 years.
63. Accordingly, contrary to the submission by the DPP, the court finds that the appellant was properly convicted on the basis of evidence that proved the case against him beyond reasonable doubt.
64. In the upshot, the appeal on conviction is dismissed.

On sentence.

65. The relevant penalty clause under which the appellant was sentenced is Section 8 (3) of the Sexual Offences Act which section provides that:
 - 8(3) "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."



66. The prosecution submitted that the sentence was within the law.
67. The appellant simply stated that the minimum sentence was harsh and excessive but did not forcefully argue the matter. Thus, it may not be proper to determine the issue of minimum sentence in section 8(3) of SOA on sketchy submission. Nevertheless, it hurts not some observations.

New jurisprudential hints

68. Jurisprudential hints coming through from the Supreme Court are that; minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. See. the Supreme Court in *Republic v Joshua Gichuki Meangi and Initiative for Strategic Litigation in Africa (ISLA) And 3 Others* Supreme Court Petition No. E018 of 2023.
69. But, the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in ‘a proper case’, or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion towards ‘the ceiling’; whilst limiting exercise of discretion below ‘the floor’ in sentencing; whether such approach fits within the constitutional concept of least severe sentence; as well as what, ‘it is Parliament...that sets the parameters of sentencing for each crime in statute’, means or entails; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and ‘legislative sentencing’.

Relevant Factors in sentencing

70. The trial magistrate considered all the necessary factors and the sentencing policy guidelines. The trial court, therefore, exercised its discretion in sentencing the appellant.
71. The court has also considered that the offence is serious. The victim was a child of tender age- she was 12 years old and with disability. The manner the offence was committed was brutal. The effect of the offence upon the life of the girl; loss of personal worth and integrity of person apart from agonizing memories of the incident. In addition, the prevalence of the offence is sickening and justifies a 15 years sentence or longer period. Therefore, a deterrent sentence is necessary.
72. The sentence imposed will punish for the offence as well as deter others from committing similar serious offences. Yet, giving him an opportunity to be reintegrated back into society and eke a living as a free man at some point
73. The trial court did not commit any error in principle, and the sentence is not illegal. In the circumstances, the 15 years of imprisonment is upheld.

Conclusion and orders

74. The appeal on conviction and sentence is dismissed.
75. The sentence of 15 years imprisonment is upheld.
76. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF JULY, 2024.



HON. F. GIKONYO M.

JUDGE

In the Presence of: -

C/A: Leken

Appellant – Present

Begi for Appellant – Present

Isaboke for DPP – Okeyo holding brief present

