



**Wanjiku v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 10607 (KLR) (28 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E023 OF 2023
CJ KENDAGOR, J
AUGUST 28, 2024**

BETWEEN

WILLIAM MWANGI WANJIKU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence arising in Mukurwe-ini Law Courts Sexual Offences case number E009 of 2022 delivered on 09th March, 2023 by Hon. D.K Matutu, S.P.M)

JUDGMENT

1. The Appellant, William Mwangi Wanjiku , was charged and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that on the 17th August, 2022 at around 1800hours at [Particulars Withheld], Nyeri County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of EWM, a child aged 17 years, who is mentally handicapped. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The particulars of the alternative charge were that on the 17th August, 2022 at around 1800hours at [Particulars Withheld], Nyeri County, the appellant unlawfully and intentionally touched the vagina of EWM, a child aged 17 years, who is mentally handicapped, with his penis. The Appellant pleaded not guilty, and the case proceeded to full trial, with the prosecution calling six witnesses. The Appellant testified in his defence and did not call any witnesses.
2. At the conclusion of the trial, the learned trial magistrate found the appellant guilty. He was convicted on the main charge and sentenced to 15 years imprisonment. Being dissatisfied with both the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 29th March, 2023 in which he raised four grounds of appeal as follows;



- i. That the learned trial magistrate erred in both law and fact to convict him while relying on contradicting prosecution evidence.
 - ii. That the learned trial magistrate erred in both matters of law and fact to convict him without considering that the prosecution evidence was full of inconsistencies and hence unworthy to warrant any conviction.
 - iii. That the learned trial magistrate erred in both matter of law and fact to disregard his defense statement without cogent reason, bearing in mind that the same was not challenged by the prosecution evidence.
 - iv. That the learned trial magistrate erred in law and fact to impose maximum sentence without considering that being a first offender, he was and still is constitutionally guaranteed for the benefit of the least sentence or punishment under the charge.
3. The parties relied entirely on their written submissions at the appeal hearing. The appellant did not adduce any additional grounds at the appeal hearing as indicated in the petition. He submitted that the prosecution's evidence lacked credibility, was inconsistent, contradictory, and could not sustain a conviction. He also submitted that the subsequent sentence was inappropriate and excessive. The respondent submitted that the case was proved beyond reasonable doubt, that the conviction was safe, and the sentence was appropriate.
4. PW1 was the complainant; she testified that on 17th August 2022, she was on her way home from the farm with her grandmother. She testified that she met the appellant along the way, who followed her and pulled her behind an abandoned house, where he held her breast and buttocks, kissed and hugged her. She stated that the appellant removed her trousers and lowered her panty and lowered his shorts, and inserted his penis into her vagina from behind. According to the complainant, the appellant warned her not to inform her grandmother, stating that he would beat her if she did. She stated that the appellant wore a white t-shirt and told her to meet him on Sunday at Baptist Church. The complainant further informed the court that on 21st August, 2022 she saw the appellant in church and told PW3, leading to the appellant's arrest and escort to the police.
5. PW2 was the complainant's grandmother. She testified that on the material day, along with PW1, they were headed home from the farm at around 5:00 p.m. when the appellant passed them along the way. Since she wanted to pass by the shop, she asked PW1 to head home. According to PW2, when she got home, she found that PW1 hadn't arrived and met her at the gate crying. Upon prompting, PW2 disclosed that she had been defiled at Kahehia's home behind the house. She testified that they made a report at the police station and took the complainant to the hospital, where she was examined. PW2 told the court that on 21st August 2022, the appellant was arrested after the complainant saw him in church and informed PW3.
6. PW3 testified that on 17th August 2022 at around 8.00 p.m., PW2 and one RM went to her home and informed her that PW1 had been defiled while on her way home. She stated that she accompanied them and took PW1 to the hospital. They were directed to the police, and the police then escorted them back to the hospital. PW3 testified that on 21st August, 2022 she attended church in the company of her husband and PW1 and at around noon, PW1 notified her that she had seen the boy who defiled her. She stated that PW1 identified the appellant outside the church as the person who defiled her, leading to his arrest with the assistance of motorcyclists.
7. PW4 was a clinical officer at (particulars withheld) hospital. His evidence was that on 17th August, 2022, he examined the complainant, who was in the company of her grandmother and escorted by the



- police. He stated that on medical examination, there was no injury on her genitalia, and the hymen was broken, though not freshly broken. He said further that pus cells were seen, indicating an infection, but no spermatozoa were seen. He produced the P3 form (Pexh4), treatment notes (Pexh5), and lab results (Pexh6). PW5 was a Psychiatrist at (particulars withheld) hospital; she testified that she examined PW1 and concluded that she suffers from intellectual disability. She produced a report dated 30th August 2022 (Pexh7).
8. PW6 was the investigating officer. She testified that she escorted PW1 to the hospital in the company of her grandmother, where she was examined following the defilement report. She told the court that she visited the scene, which was at an unoccupied house, and that on 21st August 2022, the appellant was escorted to the police station by PW3 in the company of PW1, where he was re-arrested, and witness statements were recorded.
 9. Upon being placed on his defence, the appellant denied committing the offence and stated that on the 20th August 2022, at around 1.00 p.m., he was at the stage when three motorcyclists accosted him, bundled him into a car boot, and took him to the police station where he was informed that he was arrested for defiling a girl.
 10. This is a first appeal to the High Court. I have examined the record, re-evaluated the facts, and drawn independent conclusions per the principles enunciated in the authorities of *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32, and *Felix Kanda v Republic*, Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.
 11. I have considered and analyzed the evidence tendered in the trial court by the prosecution and the appellant, the grounds of appeal, and the written submissions by the parties herein. The issues for determination are two pronged;
 - i. Whether the prosecution proved their case to the required threshold;
 - ii. Whether the sentence was appropriate.
 12. 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. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of *George Opondo Olunga v Republic* [2016] eKLR that the ingredients of an offence of defilement are:
 - i. Age of the victim
 - ii. Penetration
 - iii. Positive identification of the perpetrator
 13. Regarding age, PW1 told the Court that she was 17 years old; the birth certificate (exhibit 2) indicates that she was born on 27th April, 2005. The incident complained of is stated to have occurred on 17th August, 2022. I am thus satisfied that the complainant was 17 years and 4 months old as of the date material to this case. This falls within the confines of the law with which the appellant is charged.
 14. The date of the incident and the complainant's whereabouts are corroborated by the testimony of PW2, who confirmed that they were proceeding home from the farm on that date. PW2 testified that she had instructed the complainant to go home. She met her at the gate crying when she went back to check on her after she arrived ahead of her. The complainant reported to PW2 that she had been sexually assaulted. The complainant was elaborate as to what transpired when she was proceeding home; the assailant followed her, held her hand, and took her behind the abandoned house, where he hugged her, caressed her breasts, and removed her trousers and underwear. The complainant described



that the assailant then removed his shorts and inserted his penis into her vagina from behind while holding her buttocks, and she felt pain. She also used the Swahili words ‘tabia mbaya,’ which is a euphemism term used to describe sexual intercourse.

15. Penetration is defined in Section 2 of the [Sexual Offences Act](#) as: -

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

16. The sexual assault history is what was reported on the same date, including at the medical examination. The clinical officer explained that not all sexual encounters result in the presence of spermatozoa. With the evidence on record, I am persuaded that the complainant understood what had transpired, and her description amounted to penetration of her vagina by the assailant using his penis.

17. On the assailant's identity, the incident happened during daylight; the complainant stated that the appellant engaged her in a conversation, and she could identify him. She described what he was wearing, which was corroborated by PW2. PW2 told the court that she saw the appellant, who was known to her earlier that day, as they proceeded home, and he was wearing the white shirt as described by the complainant. The appellant was arrested near the church, and the complainant testified that the appellant had told her he would meet her there on Sunday. From the evidence of PW3, there is certainty that the complainant referred to the appellant when she stated that she had seen the person who defiled her. From that evidence, I entertain no doubt that the complainant positively identified the appellant. This was evidence of recognition, far more reliable than simple identification.

18. The evidence on record shows that the complainant was mentally challenged. A disability assessment was conducted, and a report dated 30th August 2022 was produced. Her school assessment report cards were also produced, and the court noted that she can communicate well, interact well with others, and be well-adjusted to the environment. The trial court made a finding from his assessment during the trial that he disagreed with the assessment that she could not follow the court proceedings. The trial court referred to and relied on the school reports from the special school the complainant attended. The trial court, in the judgment, made the finding below;

“..I do find the alleged victim was telling the truth. I have no reason to doubt them. I am satisfied the victim was telling the truth that she was defiled. That it was the accused who defiled her.”

19. From the proceedings, the complainant testified with clarity during the examination in chief and cross-examination of the complainant. I find no reason to depart from the findings of the trial court as to her competency and credibility. PW1 came across as a truthful witness.

20. The appellant submitted that the trial court did not consider his defence. That is not true. The learned trial magistrate analyzed the defence in paragraph 9 of the typed judgment. However, the learned magistrate concluded that the evidence produced by the prosecution was watertight, remained unshaken by the defence and that the alibi tendered was not plausible. I concur fully with those findings.

21. The ingredients of the offence of defilement contrary to Section 8(1), as read with Section 8(4) of the [Sexual Offences Act](#), were proved to the required standard beyond reasonable doubt, and the conviction was safe.



22. On the sentence, Section 8 (4) of the *Sexual Offences Act*, which is as stipulated hereunder:-

“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.”

23. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe unless it was manifestly excessive. The Court of Appeal of East Africa stated in *Wanjema v Republic* [1971] EA 494 that:-

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on the wrong principle, or the sentence is manifestly excessive in the circumstances of the case.”

24. The Supreme Court has given guidance on minimum sentences under the *Sexual Offences Act* in *Republic V Joshua Gichuki Mwangi* Petition Kiambu Cr. Appeal E022 Of 2023 Judgment 15 No. E018 of 2023. The Supreme Court held that where a sentence is set in statute, the legislature has already determined the course unless declared unconstitutional.

25. The trial court considered the appellant’s mitigation and the pre-sentence report dated 15th February, 2023 while meting the sentence of 15 years imprisonment. I find no basis for interfering with the trial court’s decision on sentence. However, I note that the learned trial magistrate did not consider the period the appellant had been in custody during sentencing. In accordance with Section 333 (2) of the Criminal Procedure Code, the period spent in remand custody from the date of his arrest on 21st August, 2022 shall be deducted from the sentence.

26. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined in paragraph 28 of this judgment.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 28TH DAY OF AUGUST, 2024.

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Hellen

ODPP: Mr. Mwakio

Appellant: WMW

