



**Kadenge v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 11480 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E003 OF 2023
JN KAMAU, J
SEPTEMBER 26, 2024**

BETWEEN

MACLOUD KADENGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Sexual Offence Case No 50 of 2021 on 20th February 2023)

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. Ochieng (SPM), on the charge of defilement and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgment, on 4th March 2023, he lodged the Appeal herein. His Petition of Appeal was dated 3rd March 2023.
4. His Written Submissions were dated 20th March 2024 and filed on 12th April 2024 while those of the Respondent were dated 21st May 2024. It was not clear from the court record when the same were filed as they did not bear the court stamp). The Judgment herein is 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. 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.
8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Petition of Appeal were dealt with under this head as they were all related.
10. 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.
11. 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.
12. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

13. The Appellant did not submit on this issue. On its part, the Respondent pointed out that Jackline Bulimu Vinayo (hereinafter referred to as "PW 2") testified that her daughter, the Complainant, PM, (hereinafter referred to as "PW 1") was born on 3rd November 2007. She produced a Birth Certificate in support thereof.
14. The aforementioned Birth Certificate showed that PW 1 was born on 3rd November 2007. The offence herein was committed between 9th August 2021 and 10th August 2021. She was therefore aged thirteen (13) years nine (9) months at the material time of the incident herein.
15. The Appellant did not challenge the production of the aforesaid Birth Certificate 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 thirteen (13) years, nine (9) months old and was therefore a child at the material time.



B. Identification

16. The Appellant blamed the Trial Court for failing to weigh the Prosecution's conflicting evidence that was inconsequential to his conviction. He pointed out that the evidence of PW 1 and PW 2 was inconsistent. He argued that although they both indicated that they knew he worked only one house from their home, PW 1 stated in her testimony that she did not know his place of work. He challenged the fact that PW 1 led the Assistant Chief to his work place yet she did not know where he worked. He also pointed out that Beatrice Alivitsa (hereinafter referred to as "DW 2") denied telling PW 1, PW 2 and the Assistant Chief that there was a worker in her home who had slept with PW 1 in the kitchen and that DW 2 denied witnessing his arrest as PW 1 and PW 2 had both alleged.
17. He further averred that the Trial Court failed to consider the evidence of the surrounding circumstances in order to ascertain if he committed the offence pursuant to Section 33 of the Sexual Offences Act No 3 of 2006. He argued that there were co-existing circumstances that showed that PW 1 must have slept at the house of Gwihila, her long-term boyfriend and he defiled her but she had framed him to shield the said Gwihila from the predicament.
18. He asserted that Prosecution's evidence that he locked up PW 1 in the kitchen from 6.00 pm was not credible as there were around four (4) people and a bee hive of activities going on at the said time yet none of the people saw him.
19. On the other hand, the Respondent submitted that PW 1 testified that the incident happened at 6.00pm and that she was able to identify the Appellant and the house she slept in on the material date. It added that she was able to take PW 2 and the Assistant Chief to the said house where the Appellant was found locking the door and was arrested. It further contended that PW 1 positively identified the Appellant by pointing at him and stated that he was her neighbour.
20. It further submitted that PW 2 also indicated that she knew the Appellant as they were neighbours and that she could not have been mistaken as to his identity. It pointed out that that was evidence of recognition which was more reliable and weighty than that of identification of a stranger.
21. In this regard, it relied on the case of *Anjononi & Others vs Republic* (1976-80) 1 KLR 1566 where it was held that recognition of an assailant was more satisfactory, more assuring and more reliable than identification of a stranger because it depended upon the personal knowledge of the assailant in some form or other.
22. It asserted that the Appellant's argument that PW 1 did not know his work place was irrelevant and did not relate to the material facts of the matter. It pointed out that the Trial Court properly addressed its mind to the issues he had raised and it found PW 1's evidence to have been credible and consistent. It added that the Trial Court relied on Section 124 of the Evidence Act which gave the exception to corroboration in sexual offence cases of a minor.
23. On the issue of contradictions, it placed reliance on the case of *MTG vs Republic* (citation not given) where it was held that minor or trivial contradictions did not affect the credibility of a witness and could not vitiate a trial. It further submitted that the Trial Court clearly noted that although PW 1 was a minor, the fact that she had previous sexual encounter with other persons did not discredit her as a witness and that the argument that she had slept with one Gwihila and was only framing the Appellant was immaterial.
24. It further submitted that the Appellant's submission that DW 2 would have seen PW 1 in her kitchen was false as during her re-examination, she stated that if the Appellant had someone in the house she would not have known.



25. PW 1 testified that on the material date of 9th August 2021, at around 6.00pm, she had gone to borrow a book from her friend, Jemima, when she met the Appellant. He held her hand, pulled her into his house where he worked, undressed her and then defiled her. Her evidence was that she wanted to go home but he told her that she could in the morning. In the morning, he escorted her to the tea bushes where a woman found her and took her to the sub-chief. PW 2's evidence corroborated her evidence.
26. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.
27. Notably, the proviso of Section 124 of the *Evidence Act* states that:-
- “Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis).”
28. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.
29. The incident took place at day time. PW 1 and the Appellant knew each other as they were neighbours. In his sworn evidence, he also confirmed that he knew her as his neighbour. There could not therefore have been any possibility of a mistaken identity because they were not strangers as they also spent considerable time in his house. PW 1 positively identified him by pointing at him in the dock during trial. It was immaterial that she did not know his place of work. Her assertion that he pulled her into his place of work was inconsequential and immaterial as she continued to refer to his house and not his place of work as the place where he defiled her.
30. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

31. The Appellant did not clearly submit on this issue. On the other hand, the Respondent submitted that under normal circumstances, victims of sexual offences were the only witnesses. However, it invoked Section 2 of the *Sexual Offences Act* and contended that the evidence of PW 1 and that of the Clinical Officer, Douglas Obare (hereinafter referred to as “PW 3”) proved the ingredient of penetration.
32. According to PW 1, on the material day, while at her friend's home, the Appellant touched her private parts and inserted his penis into her private parts.
33. PW 3 confirmed that PW 1 was in good general condition with no physical injuries. However, her hymen was not intact and that she had thick whitish discharge with proteins and pus cells on urine.



He concluded that there was probable vaginal penetration. He produced the Post Rape Care (PRC) Form, P3 Form and Treatment notes as exhibits in support of the Prosecution's case.

34. Notably, PW 1's evidence was well corroborated by the oral evidence of PW 2 and the Investigating Officer, No 92118 Corporal Lucy Chanzu (hereinafter referred to as "PW 4") and by the scientific evidence that was tendered by PW 3 which confirmed recent penetration.
35. The Appellant's defence was simply a denial as he testified that he was framed. His two (2) witnesses, DW 2 and June Musimbi (hereinafter referred to as "DW 3") were not eye witnesses and therefore their evidence was not watertight enough to displace the Prosecution's inference of guilt on his part.
36. 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.
37. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

38. This court noted that the Appellant did not include a ground of appeal with regard to his sentence. He, however, submitted on the same. However, to save the court's time, this court considered the legality or otherwise of his sentence pursuant to Article 159(2)(d) of *the Constitution* of Kenya, 2010 which mandates courts to administer justice without undue regard to procedural technicalities.
39. He placed reliance on the case of *Martin Charo vs Republic* [2016] eKLR where it was held that it was unfair to impose twenty (20) years imprisonment on a sexual offender when the complainant was enjoying the relationship. In this regard, he pointed out that PW 1 had a coloured history of sex with several people and that her conduct needed to be considered in the case of defilement. He thus urged the court to consider a least prescribed sentence preferably time already served.
40. On its part, the Respondent submitted that the Appellant's sentence was lawful and should be upheld.
41. 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”
42. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful. It was immaterial that PW 1 was sexually active. He was the one who was caught having sex with her and therefore had to carry his own cross.
43. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
44. 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.



45. 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*.
46. However, in a decision that was delivered on 12th 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.
47. 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 the Appellant herein undisturbed.
48. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
49. The said Section 333(2) of the Criminal Procedure Code stipulates 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).
50. Further, the Judiciary Sentencing Policy Guidelines provide 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.”
51. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
52. The Appellant was arrested on 10th August 2021. He was released on bond on 19th August 2021. He therefore spent nine (9) days in custody before his conviction. This period therefore ought to be taken into consideration while computing his sentence.

III. Validity Or Otherwise Of The Judgment

53. The Appellant had further pointed out that the Trial Court delivered its Judgment outside the mandatory statutory period as provided by law. The Respondent did not submit on this issue.
54. On 1st November 2022, the Trial Court reserved its Judgment for 27th January 2023. However, the decision was delivered on 20th February 2023.



55. Unlike under Order 21 Rule 1 of the Civil Procedure Code, 2010 where judgments are to be delivered either at once or within sixty (60) days from the conclusion of the trial notice of which shall be given to the parties or their advocates or at a later date, the Criminal Procedure Code did not specifically set out the timelines within which judgments should be delivered.
56. Assuming that the judgment was delivered outside any times, the Appellant did not suffer any prejudice. If he did, then he did not demonstrate the same. This court thus came to the firm conclusion that the Trial Court's delay in rendering a decision was not fatal and did not dislodge the Appellant's guilt in the commission of the offence herein.

Disposition

57. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 3rd March 2023 and lodged on 4th March 2023 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.
58. However, for the avoidance of doubt, the period between 10th August 2021 and 19th August 2021 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
59. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

