



**JLL v Republic (Criminal Appeal E050 of 2022)
[2024] KEHC 13201 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E050 OF 2022
HI ONG'UDI, J
OCTOBER 30, 2024**

BETWEEN

JLL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment by Hon Y. I. Khatabi delivered on 9th June, 2022 in Nakuru Chief Magistrate's Court Sexual Offences Case No. 110 of 2021)

JUDGMENT

1. JLL 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. Particulars being that the appellant on 23rd June, 2021 within Nakuru county unlawfully and intentionally committed an act by inserting a male genital organ namely penis to a male genital organ namely anus of BL a child aged 12 years old which caused penetration. He faced an alternative count of committing an indecent act contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. He denied the charges and the matter proceeded to full hearing with the prosecution calling a total of five (5) witnesses. The appellant gave an unsworn statement in his defence. Thereafter the trial court found him guilty and convicted him on the main count, and sentenced him to twenty (20) years imprisonment.
3. Being aggrieved by the whole Judgment the appellant filed this Appeal on the following grounds:
 - i. That the learned trial Magistrate erred in law and in fact by failing to consider his defence yet the same was cogent plausible and strong enough to water down the prosecution case.
 - ii. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the nature of the appellant's arrest was consistent with innocence.



- iii. That the learned trial Magistrate erred in law and in fact by relying on the evidence of a single witness without cautioning herself on the dangers of relying on such evidence.
 - iv. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was marred with contradictions which greatly vitiated the credibility of the prosecution evidence.
 - v. That the learned trial Magistrate erred in law and in fact by failing to appreciate the glaring discrepancies in the witness statement on the date that the same was recorded.
 - vi. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the case was a mere fabrication in that there were no formidable reasons given as to why the case was reported on a later date.
 - vii. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced by the prosecution did not support or corroborate the charges and neither did create a nexus between him and the alleged offence.
 - viii. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the prosecution case was in totality not proved beyond reasonable doubt as required by law.
4. In the case before the trial court PW2 (PE) who is the minor's father testified that on 23rd June 2021 at 9.00pm the appellant who is his brother came to his house. He opened the door for him. By then PW1 (the minor) was already in bed. The appellant then had supper and went to sleep on the same bed with PW1 but each had his own blanket.
 5. The minor BL (PW1) aged 12 years testified that he was asleep in his room on his bed when his uncle the appellant came and removed the shorts he was wearing. He then removed the jeans he himself wore and removed his penis which he inserted in the boy's anus. He felt pain. He informed PW2 the same night.
 6. ME (PW3) who is PW1's mother confirmed the presence of the appellant in their house on the night of 23rd June, 2021. PW1 and PW3 told the court that later in the night PW1 came to their room crying saying he was asleep and woke up to find the appellant defiling him. PW1 went to the room but did not find the appellant there. The boy was taken to hospital the next day and the matter reported to police station.
 7. Dr. Milka Chepkorir Chebon (PW5) of Soni hospital attended to PW1 on 24th June, 2021 she also filled the P3 form on 25th June 2021. Her finding was that PW1 had a tear at 7.00 O'clock in his anal region and the anal swab had epithelial cells. She confirmed that PW1 had been sodomized. She produced the lab test, treatment note and P3 form as EXB 1, 2 and 3.
 8. No. 55691 P. C Joel Kosgei of Adenei police post (PW4) confirmed receiving the defilement complaint from PW2 and PW3. He also received the treatment sheet (EXB2) from the boy's parents confirming the report. He issued them with a P3 form to be filled at the hospital. The parents also availed the boy's birth certificate which he produced as EXB 4. He later arrested the appellant.
 9. In his unsworn defence the appellant denied the charge. He said he went to PW2's house on 22nd June, 2021 after work. PW2 opened the door for him. PW3 was asleep. He had dinner and went to bed. The children sleep in the sitting room. They slept until morning. He found PW1 outside and that's when he told him he had sodomized PW2. He asked why no one screamed and they had an altercation.



10. He then went to his mother's home and explained to her what had transpired. He reported the matter to the chief. He told the court that him and PW1 had issues over land that belonged to his father. He spent at his mother's home. He was arrested on 25th June, 2021 at 11.00pm.
11. The parties canvassed the appeal by way of written submissions.

Appellant's submissions

12. In his submissions filed on 30th April, 2024 the appellant sought leave to challenge the lower court decision but on sentence only and on the following grounds:
 - i. That the imposed sentence is excessively harsh and unjust considering that the appellant was a first offender, he is a family man who had a young family that needed his support thus needed a lesser sentence.
 - ii. That the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2020 under paragraph 4:1
 - iii. That the appellant is remorseful and regrets his actions. He is repentant.
 - iv. That the court considers his mitigation grounds and awards a lesser sentence or substitutes the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the Community Service Order.
 - v. That the court considers the provisions of section 333(2) of the Criminal Procedure Code to be factored in his sentence.
13. Based on the above he only submitted on review of sentence. He submits that the sentence meted on him was excessive given that he is a family man with children to look after. He argues that the 20 years sentence does not resonate with the objectives under paragraph 4:1 of the Sentencing Policy Guidelines. Relying on the case of Douglas Muthaura Ntoriki V Republic [2018] eKLR he submitted that he regrets his actions and that he is a reformed person. Annexed to the submissions is a recommendation from St. Maximilian Kolbe, Naivasha Prisons Catholic Chaplancy indicating that the appellant was spiritually rehabilitated. The appellant therefore sought for mercy from the court.
14. He urged the court to consider the period he had been in remand custody, as per section 333(2) of the Criminal Procedure Code from 25th June, 2021 to 9th June 2022. Reference was made to the case of Ahmad Abolfathi Mohammed & another V Republic [2018] eKLR.
15. In seeking for reduction of his sentence he cited the case of James Kariuki Wagana V Republic [2018] eKLR.

Respondent's submissions

16. These were filed by M/s Emma Okok Principal Prosecution counsel and are dated 22nd July, 2024. Counsel submitted that the 3 ingredients of defilement are: (a) penetration, (b) Age of the minor, (c) Identity of the accused were all proved in this case. She rehashed the evidence of PW1, PW2, PW3 and PW4 which supported the charge.
17. On the appellant's defence she submitted that it was a mere denial and not strong enough to rebut the prosecution case. That the allegation of the matter originating from an existing land dispute was a mere afterthought as he never raised it during cross examination of the prosecution witnesses. She urged the court to uphold the conviction.



18. On sentence counsel submitted that the trial court considered all that the appellant stated in mitigation and called for a pre-sentence report which was not favourable. She referred to the 2023 sentencing guidelines and submitted that the appellant is an uncle to the complainant and so abused the trust bestowed on him by the society by doing what he did. She supported the request for the provisions of section 333(2) of the Criminal Procedure Code to be invoked. She otherwise called for dismissal of the appeal.

Analysis and determination

19. This is a first appeal and this court has a duty to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent conclusion. However, it must warn itself of the fact that it did not have the benefit of seeing nor hearing the witnesses testify and so must give an allowance for that. This has been stated in several cases including:
- i. Okeno V Republic (1972) E.A 32
 - ii. Kiilu & another V Republic [2005] 1KLR 174
 - iii. Simiyu & another V Republic [2005] 1 KLR 192.
20. After due consideration of the evidence on record, grounds of appeal, supplementary grounds of appeal and submissions by both parties, I find two issues falling for determination namely:
- i. Whether the offence of defilement was proved
 - ii. Whether the sentence of twenty (20) years is excessive.

Issue No (i) Whether the offence of defilement was proved

21. From the supplementary grounds of appeal and the submissions by the appellant it is clear he no longer challenges the conviction. Despite that, this court must be satisfied that the conviction is safe.
22. For an offence of defilement to be proved there are three (3) ingredients which must be proved. These are:
- i. Age of the victim
 - ii. Proof of penetration
 - iii. Identification of the accused as the perpetrator.
23. In this case the minor (PW1) told the court he was 12 years old. This was supported by his parents (PW2 & PW3). A birth certificate EXB 4 produced shows PW1 was born on 17th October, 2009. This confirms that PW1 was a minor aged 11 years 8 months plus 3 weeks, at the time of the incident complained of.
24. On penetration PW1 told the court exactly what was done to him. He said his uncle removed his shorts and thereafter removed his own jeans. He thereafter inserted his penis in the boy's anus. The incident was reported to his parents (PW2 & PW3) the same night. The boy was taken to hospital the next day. The doctor (PW5) who examined him and treated him confirmed the complaint. She produced the documents (EXB 1 – 3) to prove the same
25. Finally, on identification, the perpetrator was known well to PW1. He is his uncle (brother to his father). It was confirmed he had come to PW2's house on the night of incident. The appellant did not deny being in PW2's house that night though in his defence he talks of 22nd June, 2021 and not 23rd



June, 2021 and raises an issue on a land dispute between them. He never put this to the prosecution witnesses in cross- examination. He should have asked them about it if indeed he found it to be critical for his case.

26. Upon assessing all this evidence, I am satisfied that all the ingredients forming a charge of defilement were proved beyond reasonable doubt. The conviction is therefore safe.

Issue No. (ii) Whether the sentence of twenty (20) years imprisonment is excessive.

27. Section 8(3) of the *Sexual Offences Act* provides:

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 of a term of not less than twenty years.

Twenty years imprisonment is therefore the minimum sentence. The appellant was given an opportunity to mitigate and upon consideration of the same a pre-sentence report was called for. The said report was also considered before the sentence was passed.

28. I have considered the appellant's submissions on the sentence and how he has reformed. The law which has not been amended provides for the minimum sentence of twenty (20) years imprisonment. The minor (PW1) who is the appellant's nephew was only 12 years old when this heinous act was committed against him by a person who should have protected him.
29. In line with the recent Supreme Court of Kenya decision in Republic V Joshua Gichuki Mwangi and Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) Petition No. E018 of 2023 I have evaluated this case to see if there is any good reason that would make this court interfere with the sentence and I have found none. The plea for revision of sentence therefore fails.
30. The upshot is that the Appeal lacks merit and is hereby dismissed. The conviction and sentence are upheld. The sentence will run from 29th June, 2021 when the appellant was first arraigned in Court.
31. Orders accordingly

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

