



**Philip v Republic (Criminal Appeal E061 of 2023)
[2024] KEHC 15613 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E061 OF 2023
AC BETT, J
NOVEMBER 29, 2024**

BETWEEN

NICHODEMUS ANEKEYA PHILIP APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment, conviction, and sentence of Hon. E. Wasike,
Principal Magistrate, in Butere SO No. 6 of 2021 delivered on 1st November 2023)*

JUDGMENT

Introduction

1. The Appellant herein was convicted for defilement contrary to Section 8(1) of the [Sexual Offences Act](#) as read with Section 8(3) of the same act and was consequently sentenced to 20 years imprisonment.
2. The particulars of the charge were that on the 1st day of January 2020 at (particulars withheld) within Kakamega county, the Appellant intentionally caused his penis to penetrate the vagina of R.W, a child aged 12 years.
3. The Appellant was charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences act](#). The particulars were that on the 1st day of January 2020 at (particulars withheld) within Kakamega county, the Appellant intentionally touched the vagina of R.W, a child aged 12 years, with his fingers. No findings were made on this charge.
4. The Appellant herein seeks to quash the said conviction and sentence, and in doing so, he relies on a Petition of Appeal dated 17th November 2023 where he submitted the following ground of appeal:
 - a. That the learned trial magistrate grossly erred in law and facts by failing to find that the three elements of defilement were not conclusively proved to the required standards of proof.



- b. That the learned trial magistrate erred in in law and facts by failing to deal with the contradictions and inconsistencies which marred the prosecution’s case.
- c. That the learned trial magistrate based the Appellant’s conviction and sentence on biased inconclusive medical findings and investigations.
- d. That the trial court erroneously relied on the evidence of PW3 and PW4 to produce evidence they did not examine and investigate.
- e. That the learned trial magistrate overruled the decision in Philip Mueke Maingi and Sothed Vs Republic which declared mandatory minimum sentence under the *Sexual Offences Act* as unconstitutional.
- f. That the sentence imposed on the Appellant is harsh and excessive hence not considerate of the period of time spent in remand custody by the Appellant.
- g. That the trial court failed to appreciate that the Appellant was not accorded a fair hearing contrary to Article 50(2) of *the Constitution*.

Background

5. The complainant R.W, PW1, testified in the trial court and stated that she was that she was walking home from the market when she met the Appellant who grabbed her and forcefully took her to some bushes. She stated that the Appellant pinned her down and pulled down her skirt and removed a knife from his pocket and threatened to stab her if she screamed. She narrated that the Appellant then took out his penis and inserted it into her anal opening and defiled her and on finishing, he again inserted his penis into her vagina and defiled her again. She averred that the Appellant then ordered her to go home and threatened to kill her if she reported the matter. She went home, changed her clothing and did not narrate to anyone the ordeal despite the pain she was feeling since she was scared the Appellant would have harmed her. After four (4) days, the complainant stated that she found the pain unbearable, and she reported the pains to her mother. She stated that her mother then took her to hospital where she was examined and treated.
6. The Appellant gave a sworn statement and denied committing the offence. He stated that the case was a fabrication, and all witnesses gave false evidence. He reiterated that he was innocent and stated that he was arrested for no reason.

Submissions

7. The appeal was canvassed through written submissions. The Appellant submitted that the trial court breached his constitutional rights under Article 50(2)(j) of *the Constitution*. He argued that he was not supplied with the witness statements that the prosecution intended to rely on, thus denying him his right to be informed in advance of the material the prosecution intended to rely on. He relied on the case of Thomas Patrick Chomondeley Vs Republic (2008) eKLR where the court held that the prosecution has a duty to disclose to the defence all relevant material supporting the prosecution’s case.
8. The Appellant advanced that the trial court, when passing the sentence, ought to have considered the time he spent in remand in accordance with Section 333(2) of the Criminal Procedure Code and Section 38(1) of the Penal Code.
9. The Appellant submitted that the minimum mandatory sentence under Section 8(3) of the *Sexual Offences Act* is unconstitutional and not warranted. He posited that he was found to be a first offender, gave his mitigation, and had already been in custody for 3 years. He argued that his progress towards



rehabilitation during the time in remand was not considered. He submitted that in the case his appeal is dismissed, this court should consider a least prescribed sentence compared to the one passed by the trial court.

10. The Respondent on the other hand submitted on five grounds. On whether the prosecution proved its case beyond reasonable doubt, it was submitted that the Respondent had to prove the age of the victim, penetration and identification of the Appellant as the perpetrator. The Respondent insisted that the age of the complainant was sufficiently proven since the certificate of birth (P EXH 3) adduced in the trial court showed that the minor was born on 5th May 2008.
11. On penetration, the Respondent argued that penetration was proven by the testimony of the minor. The Respondent averred that the evidence of the minor was corroborated with the production of the P3 form which stated that the medical examination showed that the hymen was absent and that there was slight bruising on the vaginal wall.
12. On identification, the Respondent advanced that the same was by way of recognition. It was submitted that the victim identified the Appellant as a neighbour and the incident happened at 4:00 p.m. and thus there were no conditions that would indicate that the victim's vision or observation was impeded. The Respondent further argued that the victim's mother corroborated the fact that the Appellant was well known to them because he was their neighbour. The Respondent submitted that the prosecution proved all the elements of defilement beyond reasonable doubt as against the Appellant.
13. On whether there were contradictions and inconsistencies that tainted the prosecution's case, the Respondent submitted that the only probable discrepancy in the matter was the age of the victim. It was argued that the alleged contradictions do not go to the root of the prosecution's case and thus can be ignored. The Respondent relied on the case of *Eric Onyango Ondeng V Republic* [2014] eKLR where the Court of Appeal cited the case of *Twehangane Alfred v Uganda* (2003) UGCA in which the Court of Appeal in Uganda stated:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”
14. The Respondent also relied on the case of *Edwin Nyambogo Vs Republic* (2016) eKLR where the court stated that the nature of evidence referred to in proof of the victim's age ought to be credible and reliable. The respondent submitted that the discrepancy in age is inconsequential because the conclusive proof of age that was relied upon was the certificate of birth.
15. On whether the evidence of PW3 and PW4 was admissible, the Respondent submitted that PW3 Rebecca Onkolo testified on behalf of her colleague, one John Wekhubi, and PW4 PC Maureen Akwama testified on behalf of PC Maureen Achieng, where PW3 produced the PRC and P3 forms which she was not the maker and PW4 produced the birth certificate. The Respondent advanced that the court relied on Section 77 of the *Evidence Act* as read with Section 33 of the same act on the law governing the production of expert documents by another person other than the maker. The Respondent posited that the key requirement is that a basis has to be laid by the prosecution as to why the maker of the document cannot come to court. The Respondent submitted that PW3 informed the court that John Wekhubi could not be availed because he had gone for further studies and PW4 informed the court that PC Maureen Ochieng had been transferred to Nairobi. The Respondent averred that there was proper reliance on Section 77 and Section 33 of the *Evidence Act*.



16. On whether the sentence meted on the Appellant was harsh, excessive and unconstitutional, the Respondent submitted that the court’s discretion was exercised properly. The Respondent relied on the Supreme Court’s decision in *Republic Vs Joshua Gichuki Mwangi* where the court stated that:
- “Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. 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. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words.”
17. The Respondent further submitted that the trial court did not comply with the provisions of Section 333(2) of the Criminal procedure code and thus it ought to have considered the time the Appellant spent in remand.
18. Lastly, on whether there was infringement of Article 50(2) of *the Constitution*, the Respondent submitted that the Appellant was not precise on the kind of infringement he referred to. The Respondent argued that the Appellant had the charges read out to him in a language he understood, he was supplied with statements and documentary exhibits, he was granted bail and was also granted an opportunity to cross-examine the witnesses and thus he was granted fair hearing. The Respondent relied on the case of *Chacha Vs Republic (2022) eKLR* and stated that the right to legal representation had to be qualified by the Appellant since the case against him was not a complex case that carried a severe sentence.

Analysis

19. This being a first appeal, this court is under duty to re-evaluate the evidence that was placed before the trial court and come up with its own findings while being conscious of the fact that it did not have the privilege of seeing or hearing the witnesses. In *Odhiambo Vs Republic (2005) eKLR* the Court of Appeal reiterated this principle and held that:
- “On a first appeal the court is mandated to look at the evidence adduced before trial afresh, re-evaluate and re-asses it and reach its own independent conclusions. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their direction.”
20. I have consequently perused the record and judgement of the trial court, the submissions by both parties and the authorities they relied upon. In my view, the following issues arise for determination:-
- a. Whether the prosecution proved the offence of defilement to the required standard.
21. In the case of *Charles Wamukoya Karani Versus Republic Criminal Appeal No. 72 of 2023*, the court held the critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant.
22. I will therefore endeavour to address each of the mentioned ingredients and consider whether they were proven beyond reasonable doubt.



I. Age of the Complainant

23. In this case, PW4 adduced the certificate of birth of the complainant as P Exh 3 and the certificate showed that the minor was born on 5th May 2008, meaning that the complainant was 11 years old at the time of the incident.

24. Rule 4 of the Sexual Offences Rules, 2014 which provides that: -

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.”

25. In the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, while citing the case of Mwolongochichoro Mwanjembe v Republic, Mombasa Criminal Appeal no.24 of 2015 (UR) the Court of Appeal stated:-

“... the question of proof of age has finally been settled by recent decisions of the court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent or the evidence of parents or guardian or medical evidence, among other credible proof...”

Guided by the authorities and legal provisions above, I find that a certificate of birth is conclusive proof of the age of a minor and thus the age of the complainant was proved beyond reasonable doubt.

II. Identification of the Appellant as the Perpetrator

26. Identification of a perpetrator is a crucial component in sexual offence cases. In the case of *Kariuki Njiru & 7 others v Republic, Criminal Appeal No 6 of 2001* (Unreported) the court held as follows:

“Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

27. From the testimony of the complainant, the Appellant was well known to her since he was their neighbour. The mother of the complainant also confirmed this averment when she reiterated that the Appellant was their neighbour. Identification was therefore considered to be by way of recognition.

28. It is trite that recognition is the best mode of identification of a person. The Court of Appeal in the case of *Anjononi & Others v Republic* [1989] KLR held the evidence of recognition to be “more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person’s knowledge of the assailant in some form or other.”

29. Courts have time and again warned themselves on the possibility of wrongful conviction even where the identification is by way of recognition. The Court of Appeal in the case of *Karanja & another vs Republic* [2004] KLR 140 also pronounced itself on the exercise of caution in admitting evidence of identification as follows:

“Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction, R - V – Eria Sebwato [1960] E.A. 174



a witness may be honest but mistaken. Roria – v – Republic [1967] EA 583 and a number of witnesses could all be mistaken. R – v – Turnbull & Others [1976].....3AER 549.”

30. The complainant herein claimed to have been acquainted to the Appellant since he was their neighbour. It was also her testimony that the incident occurred at around 4:00 p.m, which meant that the complainant could be able to clearly see and recognize the Appellant well at that time. Her evidence was also corroborated by her mother who confirmed that she had sent the complainant to the market at around 4:00 pm. She also confirmed that the Appellant was well known to them since he was their neighbour.
31. Having considered these factors, I find that identification was by way of recognition and this element was proven beyond reasonable doubt.

III. Penetration

32. Penetration has been defined under 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”
33. The court in *Sammy Charo Kirao v Republic* [2020] eKLR quoted with approval a decision by the Supreme court of Uganda in *Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995* where the court stated:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
34. It is trite that penetration can be proved by the testimony of the complainant and may be corroborated by medical evidence.
35. The complainant gave a clear account of how the Appellant accosted her and took her to the bushes where he defiled her and threatened to harm her if she tells anyone. This account is also corroborated by the complainant’s mother who narrated what the complainant reported to her. Her evidence was further corroborated by the medical evidence that was adduced by PW3 which showed that her hymen was missing, and her vaginal walls were slightly bruised. The clinical officer also concluded that the complainant had been defiled.
36. Having the concise testimony of the complainant and her mother, tied together with the medical evidence on record, I find that the prosecution proved the element of penetration beyond reasonable doubt.

Whether there were contradictions and inconsistencies that tainted the prosecution’s case.

37. The only contradiction pointed out by the Appellant is that the complainant testified that she was born on 24th April 2007 while the birth certificate showed that she was born on the 5th of May 2008.



38. The Court of Appeal in the case of *Richard Munene v Republic* [2018] KECA 186 (KLR) stated that:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

39. Upon analysis of the evidence, I find and hold that the contradiction in the age of the complainant is not a contradiction that is fatal to the prosecution’s case. If anything, a birth certificate was produced in court which put to rest the issue of the true age of the complainant and thus cured the inconsistency of the complainant’s testimony regarding her age.

Whether the evidence by PW3 and PW4 was admissible

40. The court in the case of *SCG v Republic* [2018] eKLR, while addressing the production of expert reports by persons other than those who made the report, held as follows:-

“In my opinion Pw1 was competent in producing the medical examination report on behalf of her colleague in accordance with section 33 and 77 of the *Evidence Act*. On examination of the P3 form dated 15th October 2016, it bears the stamp of the Nairobi women’s hospital Kitengela outpatient and a signature of the medical officer/ practitioner, therefore the P3 form produced was authentic and admissible in evidence.”

41. Section 33(b) of the *Evidence Act* Cap 80 Laws of Kenya provides:

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible ...”

(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty ...”

42. Section 77(1) of the *Evidence Act* Cap 80 Laws of Kenya provides:

“(1) In criminal proceedings any document purporting to be a report under the hand of a government analyst or of any geologist employed in the public service upon any matter or thing submitted to him for examination or analysis may be used in evidence.”

43. Based on the foregoing, I find that the evidence of both PW3 and PW4 were admissible by dint of Section 33(b) and 77(1) of the *Evidence Act*. The P3 form produced by PW3 bore the name and signature of the clinical officer who made the report, and the treatment notes bore the stamp of the hospital where the clinical officer who made the report worked. I also find that the reasons advanced by PW3, as to why the clinical officer who made the statement could not produce the report himself, were valid. PW4 also demonstrated that that the initial Investigations Officer in the matter had been



transferred to Nairobi, leaving her assigned to the case thus making her competent to testify in place of the previous Investigations Officer.

Whether the sentence meted to the Appellant was harsh, excessive and unconstitutional

44. On this issue, I will rely on two Supreme Court decisions on the constitutionality of the minimum mandatory sentences in the *Sexual Offences Act*.

45. The Supreme Court issued directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) and stated as follows:-

“In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.”

46. Further, the Supreme Court in *Republic V Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] eKLR where the court rendered itself thus:-

“Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in *Muruatetu* which must remain binding to all courts below.”

47. It is therefore clear that this court cannot render itself on the constitutionality of the minimum mandatory sentence contemplated in Section 8(3) of the *Sexual Offences Act*. I therefore find that the sentence meted on the Appellant was well within the parameters of the law.

Whether there was an infringement of Article 50(2) of *the Constitution*

48. The Appellant herein claims that he was not supplied with witness statements before the onset of the trial thus denying him the right to be informed in advance of the evidence the prosecution intended to rely on.

49. From the perusal of the record, I do not find any record of the Appellant complaining that he had not been supplied with witness statements. In fact, the Appellant cross examined the prosecution witnesses properly with no suggestion that he was ill-prepared for the trial.

50. I therefore find this claim to be frivolous, an afterthought and devoid of substance.

Determination

51. The upshot is that I find the instant appeal to lack merit and it is therefore dismissed. I find that the conviction is safe, and I hereby uphold it. I also uphold the 20 years imprisonment sentence of the trial court and order that the same shall run from the day the Appellant was remanded in custody in accordance with Section 333(2) of the Criminal Procedure Code.



DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2024.

A. C. BETT

JUDGE

In the presence of:

Appellant present virtually at Kisumu Maximum Prison

Ms. Chala for the Prosecution/Respondent

Court Assistant: Polycap

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