



**Omondi v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 15971 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E029 OF 2023
JN KAMAU, J
DECEMBER 18, 2024**

BETWEEN

SIMON OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in Senior Principal Magistrate's Court in Sexual Offence Case No E022 of 2022 on 31st October 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) 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 S. Manyura (RM), on the charge of defilement and sentenced to thirty (30) years imprisonment.
3. Being dissatisfied with the said Judgment, on 17th August 2023, he lodged the Appeal herein. His Petition of Appeal was undated. He set out seven (7) grounds of Appeal.
4. His undated Written Submissions were filed on 11th April 2024 while those of the Respondent were dated 21st May 2024 and filed on 22nd May 2022. 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 and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Appellant was accorded a fair trial;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. 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. Fair Trial

9. Although the Appellant did not raise a ground of appeal on this issue, he submitted on the same. He contended that his rights were infringed right from the onset of trial to its conclusion. He pointed out that he was made to over stay in police cells from 27th April to 4th May 2022, which was beyond the twenty-four (24) hours period without any explanation. He added that he was given abnormal bond terms for having been a foreigner and was discriminated during trial. He was categorical that the Trial Court failed to adhere to the principle of equality, equity and non-discrimination as enshrined in *the Constitution* of Kenya, 2010 at Article 27.
10. On the other hand, the Respondent reproduced the proceedings of the Trial Court and submitted that the Appellant was accorded ample time to prepare for trial and was therefore ready for the trial prior to conviction.
11. Under Article 49(1)(f) of *the Constitution* of Kenya, an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty four (24) hours after being arrested or if the twenty-four (24) hour period ends outside court hours or on a day that is not an ordinary court day, the end of the next court day as provided.
12. The Appellant herein was arrested on 27th April 2022 and was arraigned in court on 4th May 2022. Clearly, that was outside the stipulated twenty four (24) hours period. However, the arraignment of an accused person outside the stipulated twenty four (24) hour period did not, however, result in an automatic acquittal. This was because an accused person was at liberty to seek remedy, in damages, for the violation of his constitutional rights as held in the case of *Evans Wamalwa Simiyu vs Republic* [2016] eKLR.
13. Ordinarily, the best practice would be to raise such an issue at trial for it to be properly addressed for it to be put to rest by the investigating and arresting officers.



14. From the evidence on the record, there was nothing to show that the five (5) day delay affected the trial process or prejudiced the Appellant's case. This court therefore found that the delay was not fatal to the Prosecution's case for it to order a re-trial. This was an infringement that could be compensated by way of damages if proven to the required standard.
15. Turning to the issue of bond, a perusal of the proceedings showed that the Trial Court granted the Appellant a bond of Kshs 1,000,000/= as it was showed that he was a foreigner from the Republic of Uganda and was thus a flight risk. In the mind of this court, the high bond was also not fatal to the Prosecution's case or discriminative against him.

II. Proof Of Prosecution's Case

16. Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal were dealt with under this head as they were all related.
17. 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.
18. 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.
19. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

20. The Appellant did not submit on this issue. On its part, the Respondent pointed out that Beatrice Atieno Adhiambo (hereinafter referred to as "PW 2") testified that her daughter, the Complainant, KRA, (hereinafter referred to as "PW 1") was seven (7) years old at the time of the incident and nine (9) years old at the time she reported. She produced a Birth Certificate in support thereof. It was its case that the ingredient of age was proved beyond reasonable doubt. It added that the Appellant did not dispute the age of PW 1.
21. Notably, PW 2 testified that PW 1 was born on 5th April 2013. The aforementioned Birth Certificate showed that PW 1 was born on 5th April 2013. The offence herein was committed on diverse dates between 23rd January 2020 and 31st December 2021. She was therefore aged seven (7) years at the material time of the alleged incident herein.
22. 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 seven (7) years old at the time of the first incident and was therefore a child at the material time.

B. Identification

23. The Appellant did not submit on this issue. On the other hand, the Respondent reproduced the evidence of PW 1 and Raphael Chole Mugesia (hereinafter referred to as "PW 4") and submitted that PW 1 testified that it was the Appellant who defiled her. It added that she (PW 1) knew him by name and appearance as he was a workman at her home. It cited Section 124 of the *Evidence Act* and submitted that the Trial Court considered the said provision and found PW 1 who was the most crucial



witness in this case to have been a credible witness and hence the Prosecution had proven its case beyond reasonable doubt.

24. PW 1 testified that on 27th April 2022, at around 9.00pm, when her mother came back home at night, she told her how the Appellant had defiled her when she was seven (7) years old. She stated that on the material day, her mother took her sister who was pregnant to hospital and when she went to sleep, the Appellant who was cooking followed her to the bedroom and defiled her. She said that he removed his boxer, trouser and clothes, touched her on the waist and put his private part into her private part. She further stated that she did not tell anyone because he threatened to kill her. She added that he defiled her in January, February, March, May, June and July (sic). PW 2 and PW 4 corroborated her evidence.
25. 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.
26. 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).”
27. 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.
28. The incident was said to have taken place several times. PW 1 and the Appellant knew each other as the Appellant was a workman in her parents’ home. In his sworn evidence, he also confirmed that he knew her. There could not therefore have been any possibility of a mistaken identity because they were not strangers as they also spent considerable time in the home together.
29. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition. The question of whether the Prosecution had proven its case the ingredient of penetration was a different matter altogether.

C. Penetration

30. The Appellant mainly focused on this issue in his submissions. He placed reliance on the case of *Kiilu & Another vs Republic* (2005) 1 KLR 174 where it was held that the first appellate court must weigh the conflicting evidence and draw its own decision. He invited the court to consider the fact that PW 1 took time to report the incident. He pointed out that the same arose just when he demanded to be paid for his work at her parent’s home.
31. He questioned why PW 2 did not notice any changes in PW 1. He contended that the Trial Court had caused an injustice to him by failing to weigh the defence evidence to his favour. In this regard, he relied



- on the case of OKK vs Republic [2021] eKLR where the court questioned the extent to which prior facts and circumstances surrounding the offence entailed dishonesty to evenly impede the credibility and reliability of a witness.
32. He pointed out that it was not every crime that was reported that had to be prosecuted in court and that where the evidence was weak or in favour of the accused person, then an acquittal was expected. He blamed the Prosecution and the Trial Court for taking advantage of his naivety to sacrifice him (sic). In this regard, he relied on the case of Kenga Hisa vs Republic [2020] eKLR which cited the case of Pett vs Greyland Association (1968) 2 All ER 545 and held that it was not every man who has the ability to defend himself.
 33. He pointed out that both the medical evidence and the oral evidence herein were far-fetched and displaced from the truth. He argued that it was difficult to prove an incident that occurred two (2) years before even through verbal testimony unless it was reported on time. He was categorical that the absence of hymen had been refuted to be a proof of penetration as held in the case of The Queen Manuel Vincent Quintanilla 1999 ABQB 769.
 34. He further placed reliance in the case of Absalom Ambaka Okila vs Republic [2020] eKLR where it was held that the circumstances under which an offence was alleged to have been committed could not be ignored. He referred to Section 33 of the *Sexual Offences Act* and also relied on the case of PON vs Republic [2019] eKLR where it was held that to base a conviction entirely substantially upon circumstantial evidence, it was necessary that guilt of the suspect should not be the only rational inference that could be drawn from the circumstances.
 35. He pointed out that at no time did he behave strangely to infer guilt on his part. He was emphatic that he was a loyal worker and that he was only being fixed by his employers who had not fully paid his dues and the fact that he was a foreigner. He prayed that he be acquitted and be handed over to Ugandan Embassy for safe deportation back home.
 36. On the other hand, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic [2020] eKLR where it was held that the key evidence relied on by courts in rape cases and defilement in order to prove penetration was the complainant's own testimony which was corroborated by the medical report presented by the medical officer.
 37. It argued that PW 1's evidence was corroborated by that of the Clinical Officer, Charles Ongaya (hereinafter referred to as "PW 3") which proved the ingredient of penetration.
 38. It further placed reliance on the case of R vs Kipkering Arap Koskei & Another(1949) 16 EACA 135 where it was held that in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts had to be compatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the case of Simon Musoke vs R Criminal Appeal No 188 of 1956 (eKLR citation not given) where it was held that there should not be any co-existing facts in or circumstances which could weaken or destroy inference of the guilt of the accused person. It contended that it had availed sufficient circumstantial evidence that inferred guilt upon the Appellant to warrant a conviction.
 39. PW 3 confirmed that PW 1 had no fresh injuries but that her hymen was missing. He stated that he could insert his two (2) fingers in her vagina whereas for a virgin, one could not insert a finger. He produced the Post Rape Care (PRC) Form and P3 Form as exhibits in support of the Prosecution's case.



40. The fact that PW 3 could insert two (2) of his fingers in PW 1's vagina and that her hymen was missing was not proof that the Appellant had defiled her. A report of an incident in which no medical evidence was collected and findings reduced into writing made it difficult for this court to say with certainty that the Appellant defiled PW 1.
41. The Prosecution may have proven that she was child and that she and the Appellant knew each other. However, as a single witness of an incident that happened two (2) years before she testified, her evidence ought to have been corroborated by medical evidence. Two (2) years was a long time and any medical evidence, if all could not be retrieved.
42. In the absence of any medical proof that the Appellant defiled her, this court was not persuaded that the Prosecution proved its case beyond reasonable doubt, which was the standard of proof in criminal cases. It could only therefore give the Appellant the benefit of doubt. Indeed, it was more just to set free a guilty person than to convict an innocent person merely on suspicion. It was the finding of this court that the Trial Court therefore erred when it found that the Appellant penetrated PW 1.
43. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal were merited and the same be and are hereby upheld.

III. Sentencing

44. Having established that the Prosecution did not prove its case to the required standard, it would not have been necessary for this court to have analysed the evidence relating to the sentence that was imposed on the Appellant herein. However, noting that this court could be found to have been wrong on appeal, it found it prudent to consider the Written Submissions in this regard. Grounds of Appeal Nos (5), (6) and (7) of the Petition of Appeal were therefore dealt with under this head.
45. The Appellant had urged this court to consider his mitigation. He had placed reliance on the case of Constitutional Petition No E017 of 2021 where it was held that the sentences meted must be commensurate with a proportionate uniqueness of the circumstances of each individualized case. He had argued that his thirty (30) years imprisonment was manifestly excessive and against the weight of evidence and should be interfered with as held in the case of *Ogano s/o Owuora* 1954, 24 EACA 70.
46. He had further relied on the case of *S vs Scott Crossney* 677/06 (2007) ZASCA where it was held that any sentence imposed must have deterrent and retributive force but one must not sacrifice an accused person on the altar of deterrence. He had therefore urged the court to mete upon him the least prescribed sentence and consider Section 333(2) of the Criminal Procedure Code.
47. On its part, the Respondent had submitted that the sentence that was meted upon the Appellant herein was very lenient considering the nature of the offence as the statute required the Trial Court to mete out life imprisonment.
48. The Appellant herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The same provides as follows: -

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
49. Had this court found the Prosecution to have proved its case beyond reasonable doubt, it would have found the Trial Court to have been very lenient for having sentenced him to thirty (30) years imprisonment as it had the option of sentencing to the Appellant to life imprisonment.



50. 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.
51. 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.
52. 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*.
53. 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.
54. As this court was bound by the decisions of courts superior to it, its hands would have been tied as regards the exercising of its discretion to reduce the Appellant's sentence. It would have had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.
55. Going further, this court would have been 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).
56. 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).
57. 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.”
58. 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.



59. The Appellant was arrested on 27th April 2022. He was sentenced on 31st October 2022. Although he was granted bond, he did not seem to have posted the same. He therefore spent six (6) months and three (3) days in custody before his conviction.
60. A perusal of the proceedings showed that the Trial Court did not take into account the said period while sentencing the Appellant. If this court would have found that the Prosecution proved its case beyond reasonable doubt, then it would have considered the said period while computing his sentence.

Disposition

61. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Petition of Appeal lodged on 17th August 2023 was merited and the same be and is hereby upheld. His conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.
62. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause and placed in the custody of the Immigration Department for immediate deportation to the Republic of Uganda where he originates from as per the Affidavit of Bond Objection of No 225270 CPL Beatrice Soimo that was sworn on 5th May 2022 and filed on 6th May 2022 in the lower court matter.
63. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF DECEMBER 2024

J. KAMAU

JUDGE

