**Siela v Republic (Criminal Appeal 46 of 2018)**
**[2023] KEHC 673 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 673 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**CRIMINAL APPEAL 46 OF 2018**

**F GIKONYO, J**

**JANUARY 31, 2023**

**BETWEEN**

**SAITABOU SIELA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From the conviction and sentence of Hon. H. Ng'ang'a (S.R.M) in Narok SOA No. 12 of 2018 on 19th December 2018)***

## JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve life imprisonment for the defilement of a ten-year (10) old girl.

2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide the memorandum of appeal received in court on December 24, 2018 setting out 7 grounds of appeal. On June 9, 2022, the appellant sought leave to amend the grounds of appeal pursuant to provisions of Section 350 (2) (v) of the *CPC* as follows;

    i. That the sentence awarded, that of life imprisonment does not promote the purposes of rehabilitation as stipulated under the policy guidelines and as stipulated under the *Constitution*.

    ii. That the learned trial magistrate erred both in law and fact by holding that the offence of defilement was proved without proof of penetration and identification of the assailant.

    iii. That the appellant's defense was not considered.

3. The appeal was canvassed by way of written submissions.

**Appellant's Submissions.**

4. The appellant's submissions are considered in detail in the analysis. I record also that the appellant relied on the following authorities;

   i. Section 8(2) of the *Sexual Offences Act*.

   ii. article 48, 50(2) (q) and 159 of the *Constitution*.

   iii. Section 216, 309, and 329 of the *Criminal Procedure Code*.

   iv. Section 66(1) of the *Interpretation and General Provisions Act* cap 2 laws of Kenya.

   v. Section 26(3) of the *penal code*.

   vi. *Thoma Mwambu Wenyi Vs Republic* [2017] eKLR.

   vii. Supreme Court of India In *Alister Anthony Pereira Vs State Of Mahrashtra* At Paragraphs 70-71.

   viii. Section 7 of the transitional provisions under the sixth schedule of the *constitution*.

   ix. *Loree Naparit Vs Republic*.

   x. *Arthur Mshilla Manga Vs R* [2016] eKLR.

   xi. *Abdalla Bin Wendo and Another V Republic* [1953] 20 EACA 166.

   xii. *Roria Vs Republic* [1967] EA 583.

   xiii. *Kamau Vs Republic* [1975] EA 139.

   xiv. *Francis Kariuki Njuri And 7 Others Vs Republic*.

   xv. *Victor Mwendwa Mulinge Vs Republic* [2014]

   xvi. *Uganda Vs Sebyala and Others* [1969] EA 204.

**The Respondent's Submissions.**

5. The Respondent's Submissions are also discussed in detail in the analysis by the court. I also record that the appellant relied on the following authorities;

   i. Section 8(1) (2) *SOA*.

   ii. Section 2 of the *Children's Act* No 8 of 2001.

   iii. Section 19 of the *Cap 15* laws of Kenya.

   iv. *Moboya Mwangangi V Republic* [2014] eKLR.

   v. Criminal Appeal No 279 of 2011, *Dennis Osoro Obiri V Republic* (Kihara Kariuki (Pca) M'inoti & J Mohammed, JJ A)

**Analysis and Determination.**

**Court's duty**

6. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs Republic* [1972] EA 32

7. I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination are;

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the appellant's alibi defense was considered.

    iii. Whether the sentence was manifestly harsh and excessive

**Elements of the offence of defilement**

8. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) "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."

9. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) Age of the complainant;

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and

    3) The accused was the assailant.

10. See the case of *Charles Wamukoya Karani Vs Republic*, Criminal Appeal No 72 of 2013.

11. The appellant submitted that penetration was not conclusively proved and that PW1 did not identify the person who defiled her.

12. The respondent submitted that it was proved that PW1 was 10 years old, there was penetration supported by medical evidence, and the appellant was positively identified through recognition by PW1.

13. What does the evidence portend?

**Age of the complainant**

14. Upon conducting *voir dire* examination on August 15, 2018, the trial court found that the minor, though a child of tender years, had responded intelligently to the questions put to her and possessed sufficient intelligence for her age and understood the duty to speak the truth. She also understood the consequences of an oath and speaking lies. She, therefore gave sworn evidence.

15. She testified as PW1. She stated that she was in class 2 at [particulars withheld] primary school and is 10 years old.

16. PW3, the father of PW1, told the court that PW1 was his first-born daughter and is 10 years old.

17. PW2, a clinical officer who examined the complainant on 8/2/2018 ascertained that the girl was aged 10 years. He produced the age assessment report as P Exh 4.

18. On proof of age, the court stated in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR: -

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

19. See also the Ugandan Court of Appeal in the case of *Francis Omuroni vs. Uganda*, Criminal Appeal No 2 of 2000 where it was held thus:

> In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense... [Emphasis added]

20. A parent is better placed to know the age of a child. In this case, the father stated that PW1 was 10 years old. The same was corroborated by medical evidence (age assessment report).

21. On the basis of the evidence adduced, I find the age of the victim was 10 years old.

**Penetration**

22. According to Section 2(1) of the *Sexual Offences Act* penetration is defined as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

23. Penetration in the sense of section 2(1) of the *Sexual Offences Act* was further defined in the case of *Mark Oiruri Mose v R* [2013] eKLR by the Court of Appeal as follows:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

24. PW1 in her testimony stated that on the material day, as she was leaving home from school on a footpath, the appellant held her by the neck. The appellant told her that if she cries, he will cut her neck. He then took her inside the forest and told her to remove her clothes. When she refused, he cut her inner cloth with a knife. He also removed her school uniform '*akamfanyia tabia mbaya*' while seated. She stated that *alipitisha ile nini yake kubwa pale natolea mkojoo aliniingisha le kitu yake ya mkojoo*. She stated that she felt pain. PW1 further stated that she received medical treatment at Ololunga hospital.

25. PW2 examined the victim. A vaginal examination revealed bruises on the hymen, the hymen was fresh and broken. there was the redness of the hymen. Examination of the head and neck revealed right

cheek and neck bruises. the complaint stated that the appellant bite her. He also noted the presence of epithelial cells a sign of UTI infection after conducting a high vaginal swab. He produced the P3 form, treatment notes, and post-rape care form as P Exh 1,2, and 3.

26. The trial court in its judgment noted that PW1 was truthful and credible. The court relied on the proviso of Section 124 of the *Evidence Act*. She painted a picturesque of what happened. Her evidence was that the appellant, by his penis, caused penetration of her vagina.

27. PW2 examined her and concluded with medical certainty that penetration did occur of PW1.

28. The inescapable conclusion from the analysis of the evidence is that the prosecution proved to the required standard that penetration did occur of PW1.

29. I accordingly find that the medical evidence supports the claim that there was a penetration of the child. But by whom?

**Was the appellant the perpetrator?**

30. According to PW1, the offence took place at around 4.00 p.m. She also stated that she knew the appellant as the person who herds sheep at Ntoboi's farm. she had also seen the appellant before the incident as the appellant's employer lived not so far from their school.

31. The appellant in his testimony confirmed that he was employed to herd goats by Amos Tomboi.

32. At 4.00 p.m., there was sufficient light to enable PW1 identify the appellant. The appellant was also known to PW1. She had seen him before.it was not the first time she was seeing him. Identification was therefore, by recognition.

33. Similarly, the evidence and details given by PW1 as to how and by whom she was defiled leave no doubt that the appellant caused the penetration of PW1 on the material day. I see nothing to show PW1 was under any delusion about the appellant as her attacker and defiler.

34. On the basis of the evidence adduced, the appellant caused the penetration of PW1.

**Whether the appellant's alibi defense was considered**

35. The appellant submitted that the trial court did not analyze his alibi evidence.

36. The prosecution submitted that the appellant defended himself that he was framed by his employer ole Tumboi due to his unpaid salary. the appellant did not cross-examine the prosecution witnesses on the aspect. There was no connection established between his employer and PW1 and PW3. PW3 stated that he did not know the appellant prior to the incident. Therefore, the defense by the appellant was an afterthought which did not dislodge the prosecution's case. The trial court did not find any credibility in the alibi defense as the issue of unpaid salary never came up during the prosecution's case.

37. The appellant gave unsworn evidence and did not call any witnesses. It was his contention that he was employed by one ole Tumboi to herd goats at a monthly pay of Kshs 5,000/= he had worked for 1 year and 5 months. He asked his employer to give him the accumulated salary to enable him to go home but the employer declined and stated that the money was stolen. His employer then reported him to the police who arrested him in the evening and took him to Oldonye Narasha chief office. He met another man in the chief's office who had been locked up and told him that they had been arrested for defiling a girl. They were later taken to Mulot police station. The other man who he stated was called Amos Tomboi was released. He contends that he was framed by his employer for demanding his salary.

38. of the prosecution witnesses.

39. I do note that the issue that the appellant was framed by his employer did not arise during the cross-examination of PW1 or PW3.

40. I do not find anything which shows that there was a grudge between the complainant's father (PW3), or PW1, and the appellant.

41. I do not also find anything which shows any collision amongst PW1, PW2 and the employer of the appellant to frame the appellant for the offence herein.

42. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled PW1. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by his employer. The defense was a red herring and an afterthought. The trial court considered the defense. I also dismiss it.

43. I, therefore, find that the appellant was properly convicted on the basis of evidence which proved the case against him beyond reasonable doubt.

44. In the upshot, I dismiss the appeal on conviction.

**On sentence**

45. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act* which section provides that:

> 8(2) "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."

46. The prosecution submitted that the conviction was safe as against the appellant. and, urged the court to uphold it as well as the sentence.

47. The appellant submitted that his mitigation was not considered before determining the most suitable and appropriate penalty to impose. He argued that the mandatory nature of section 8(2) of *SOA*. fetters judicial discretion. He, therefore, urged this court to impose a sentence that punishes the offender but also giving him an opportunity for reintegration into society to eke a meaningful life after imprisonment.

48. This now brings me to mandatory sentences.

**Mandatory and mandatory minimum sentences**

49. This subject of mandatory sentences as well as mandatory minimum sentences in *SOA* is still raging on in Kenya. It has become almost a unison argument by convicts that *SOA* provides for mandatory sentences or mandatory minimum sentences.

50. Notably, except in section 8(2) of *SOA* where the penalty clause uses the phraseology; '...shall upon conviction be sentenced to...'; in all the other sections, the penalty clause has used; '....is liable upon conviction to imprisonment for a term not less than....', or '...is liable upon conviction to imprisonment for a term which shall not be less than.'.

51. No doubt, section is 8(2) is a peremptory command and is, therefore, mandatory sentence.

52. However, I doubt whether this could be said about the other penalty clauses.

53. When I dig the ancient wells, I find Odunga J (as he then was) had comprehensively dealt with the phraseologies used in these sections, to wit: '....is liable upon conviction to imprisonment for a term not

less than....', or '...is liable upon conviction to imprisonment for a term which shall not be less than.' I am content to cite his work below in the case of *Patrick Muli Mukutha v Republic* [2019] eKLR: -

> "14. It is true that section 8(3) and (4) of the *Sexual Offences Act* applies the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively. Sir Henry Webb CJ in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to":
>
> "The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."
>
> 15. The predecessor of the court went further in Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement DeLestang VP picked up the conversation inter alia thus:
>
> "It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."
>
> 16. A similar position was adopted in D W M vs Republic (supra) where the Court held that:
>
> "As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was http://www.kenyalaw.org - Page 3/6 Patrick Muli Mukutha v Republic [2019] eKLR within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."
>
> 17. In this case, however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. As a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as Mativo, J graphically put it in Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR:
>
> "The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite

child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

54. No doubt legislative intervention is needed.

55. In other writings, it has been suggested that prescriptive or presumptive methods could help in resolving the dilemmas arising from mandatory minimum sentences. These methods prescribe for minimum- not mandatory minimum-sentence where stated aggravating factors exist, but leaving the discretion to the court, for reasons to be recorded, to determine the appropriate sentence- which may be the minimum or below or above the minimum. The methods also avoid violation of right to a less severe sentence. Nevertheless, I am aware it has been argued that such is a legislative sentencing scheme which, although it may survive judicial scrutiny, is exercise of legislative power albeit akin to judicial function of sentencing.

56. But, as that distinction is not subject of this appeal, I stop there.

57. Be that as it may, this appeal relates to section 8(2) of *SOA* which provides for a mandatory sentence, and in respect therto, I am content to cite the Court of Appeal in *Dismas Wafula Kilwake vs. Republic* [2018] eKLR that: -

> " We hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

58. It appears from the judgment of the trial court that the trial magistrate believed only one sentence is prescribed in law for the offence; a life sentence and to which he condemned the accused. He stated, thus: -

> " .... I have considered the mitigation. The accused treated as first offender and remorseful. The offence, however, attracts a minimum mandatory sentence and my hands are tied."

59. In so far as the trial court felt it did not have discretion, was a misconception of the law.

60. The trial magistrate, nonetheless, was careful to note the aggravating factors in the case as follows: -

> The offence of defilement is prevalent in the jurisdiction and the court must send a clear deterrent message. The accused defiled a child of tender years. The circumstances were aggravated and the minor will live with the trauma. I sentence the accused to serve life imprisonment....."

61. I will exercise discretion in sentencing, and impose appropriate sentence- which must be dictated by the circumstances and facts of the case.

62. I have taken in into account the fact that the accused is a first offender, and is remorseful.

63. I also consider that the offence is serious. The victim was a child of tender age- she was 10 years old. The manner the offence was committed was brutality causing her injuries and infection. The child also suffer post traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, these kind of offences lave the victim with post-traumatic experiences, and the fact of prevalence of the offence, despite him being a first offender and remorseful, justify life sentence in this case. Therefore, the sentence imposed by the trial court is not excessive but appropriate sentence.

64. In the circumstances, I uphold the sentence of life sentence.

**Section 333(2) CPC.**

65. Except, I have perused the trial court record and found that the appellant was first arraigned in court on 9/02/2018. The sentence will run from the date he was first arraigned in court; 9/02/2018.

**Conclusion and Orders**

66. The appellant is hereby sentenced to life imprisonment.

67. The sentence will run from the 9/02/2018 when he was first arraigned in court.

68. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF JANUARY, 2023**

**.....**

**F. GIKONYO M.**

**JUDGE**

In the presence of:

1. Ms. Koina for DPP

2. The Appellant

**3. Mr. Kasaso - CA**