



REPUBLIC OF KENYA



**Mbogo v Republic (Criminal Appeal E049 of 2022)
[2023] KEHC 286 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E049 OF 2022
LN MUGAMBI, J
JANUARY 27, 2023**

BETWEEN

MIKE MBOGO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against conviction and sentence of (S. Ouko, SRM) dated 6th September, 2022
in the Chief Magistrate's Court at Runyenjes in Sexual Offences Case No. 20 of 2019)*

JUDGMENT

1. The appellant Mike Mbogo was charged in the Chief Magistrate's Court at Runyenjes 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.
2. The particulars of the offence were that the appellant, on the August 25, 2019 at about 1600 hours in Kathageri sub-location in Embu County intentionally caused his penis to penetrate the vagina of (PM) a child aged 15 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars of the alternative charge being that on August 25, 2019 at about 1500 hours in Kathageri sub-location in Embu County intentionally touched the vagina of (PM) child aged 15 years with his penis.
5. At the close of the trial, the lower court found that the prosecution had established the main count of defilement beyond reasonable doubt and convicted the appellant. After taking mitigation of the accused, the trial magistrate imposed a sentence of twenty (20) years imprisonment indicating that it was the minimum statutory sentence provided for in the law.



6. The appellant was dissatisfied with the conviction and the sentence and thus appealed based on the following grounds:-
 1. That the learned trial magistrate erred in both law and fact by failing to note that the prosecution evidence was insufficient and contradictory to sustain a conviction.
 2. That the pundit trial magistrate still erred in both matters of law and fact by failing to consider the evidence of both the prosecution and the defence in their entirety and for totality hence arriving at erroneous findings.
 3. That the pundit trial magistrate still erred in both matters of law and facts by failing to record reasons for believing a single eye witness contrary to S. 124 of the *Evidence Act*.
 4. That the pundit trial magistrate still erred in both matters of law and facts by rejecting the appellant's defence without giving cogent reasons.
7. He thus prayed that this Court be pleased to allow the appeal, quash the conviction and set aside the sentence.
8. In the trial before the lower court, the prosecution called five witnesses. The appellant gave sworn evidence in his defence and called one witness.

Facts

9. The complainant, (PM) testified that she was aged 15 years in the year 2019. At the time of testifying in court she was 17 years. At the time of this incident, she was a class 8 pupil at (Particulars Withheld) primary school. She narrated that the day was on a Sunday around 10.00 a.m., when Carol called her. She accompanied Carol to her home. She was with Carol when the appellant came and told her to follow him towards his house. He held her hand and led her towards the house. However, the complainant refused to enter the appellant's house and sat outside. At that point, the appellant pulled her by the hand. He then put her on the bed and turned on the radio at high volume. He then lay on her and penetrated her sexually. After the incident, she fell asleep. Afterwards, she woke up and dressed. She went and requested Carol to escort her home. She informed her mother (PW2) what had happened. The mother went and reported the incident to the police.
10. The complainant's mother ((PW2, MW) told the court that she became worried when it reached 4.00 pm without seeing her daughter. In the morning she had heard her say she would visit Carol. She started looking for her. At around 6.00 pm the daughter arrived home. The bikers she was wearing had blood stains. The complainant then informed her that the appellant, Mbogo had forcefully slept with her. (PW2 decided to go to Carol's home to make inquiries. She neither found the appellant nor his mother at their home that evening. On her part, Carol informed her that she had escorted her daughter back home at around 3.00 pm and left. (PW2 decided to take her daughter to hospital where she was treated and P3 Form plus the PRC forms filled.
11. On cross-examination, she said the complainant returned home in a blood-stained biker.
12. The Clinical Officer, Dennis Mwenda testified that the complainant was presented for medical examination on August 26, 2019 with a soiled white inner wear which was torn at the middle. It had blood stains.
13. The complainant was epileptic and had some slight mental retardation. There was no visible physical injury except for the genitalia and labia were both injured. The hymen was broken. There was inflammation and redness in the vagina which was also oozing reddish discharge. He concluded that



- she had been defiled and assessed degree of injury as grievous harm. She was put on medication. He produced the two P3 form and PRC forms as exhibits. He also produced the mental assessment report done by Dr. Thuo on January 7, 2020. According to the report, the complainant was found to have mild retardation and was also epileptic and thus could not explain herself well.
14. This report was produced as P.Exh.3.
 15. The Police Officer, Jared Rono took over the case from his colleague P.C. Moraa who had been transferred. He produced the certificate of birth by the complainant – P. Exh.4. He said her clothing was handed over to him as exhibits.
 16. The appellant was placed on his defence and he testified on oath in his defence. He said that the complainant was not known to him and the first time to see her was in court. He further testified that on the date when the incident is alleged to have happened he was not at home. He had been sent by his mother to go and take a letter to his sister Judy Mumbi at Rukurire. He had left his house at 8.00 a.m. and came back later that evening at 8.00 pm.
 17. He contended why the complainant lied about him.
 18. CW, (DW2) testified that she was in Form 3. She said the appellant was his uncle. She denied that she knew the complainant. She insisted that she knows no one at her grand mother's home area. She said on August 25, 2019, she was with her grandmother at home. The appellant was away as he had left early that morning to visit his sister and returned in the evening.
 19. In its findings, that trial court found that all the elements of the defilement charge were proved. It identified them as age, penetration and identification of the offender. It made a finding that that all the three elements had been proved beyond reasonable doubt by the prosecution.
 20. The trial court disbelieved the appellant's defence in which he had claimed that the complainant was a stranger to him. It found that this was neither raised during cross-examination of the complainant nor in cross-examination of (PW2, her mother.
 21. Concerning the identification of the appellant, the magistrate found as follows: -

“(PW1 was concise in where the defilement took place. From her evidence, she knows the accused and his family well enough. (PW2 also visited their home in search for answers ... I have also considered the possibility that he was being framed by (PW1 and (PW2. He had the opportunity to cross-examine the witnesses. At no point did he raise the issue of any disagreements with either of them. There is no reason to falsely accuse him. This Court had the opportunity to see the witnesses as they gave evidence in court. (PW1 did not strike this court as insincere. The evidence was even corroborated by the doctor...”

Appellants Submissions

22. In his submissions, the appellant despite raising five grounds of appeal questioning the trial court's findings on facts and law, he majored his submissions on the severity of the sentence.
23. He submitted on the unconstitutionality of the mandatory minimum sentence handed down by the trial court and relied on a number of recent judicial decisions to buttress stand. He cited the following cases: *Christopher Ochieng v Republic* (2017) eKLR, *Jared Koita Njiri v R* (2019) eKLR and *Evans Wanyonyi v R* (2019) eKLR as well as *Francis Karioko Muruatetu & Anor v Republic*. He also relied on *Evans Wanjala Sis v R*. (2019) eKLR, *Eliud Waweru Wambui v R* (2019) eKLR.



24. He also submitted on what appeared to me to be mitigation. He said that his parents are elderly and depend on him for support. That he has been of good conduct for the duration he has been serving this sentence in prison. That he had lived as a good citizen prior to this incident. He also promised to atone with the victim and not be vengeful should his plea for reduction of the sentence be considered.

Respondent's Submissions

25. In response, the respondent (Director of Public Prosecutions) relied on the case of *Simiyu & Anor v Republic* (2005) eKLR and submitted that the appellant was properly convicted as the three elements of defilement namely: penetration, age of complainant and positive identification were proved by the prosecution.
26. Other than medical evidence of the clinician, the prosecution also submitted there was oral evidence, which even alone was sufficient to convict. M/s Mary Gakuo for the DPP cited the case of *AML v R* 2012 eKLR where it was held as follows:
- “ ... The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence...”
27. In regard to the prove of age, the prosecution referred to the evidence of the mother, ((PW2) who testified the complainant was fifteen years old. She further referenced the birth certificate and submitted as follows: -
- “ A birth certificate was presented as (PW4 which confirmed she was sixteen years old at the time of the offence. The complainant's age was properly established.”
28. The respondent/DPP argued that identification was through recognition and there was no possibility of a mistake. It was thus the State's position that the defence of the appellant was correctly and fully analysed and found to be lacking in merit by the trial court.
29. On sentence, the State submitted that the sentence passed by the lower court was the least minimum it could pass as per the law and was imposed in accordance with the law in respect of that offence.

Determination

30. In his petition of appeal, the appellant has raised various grounds. However, in his submissions, he mainly confined himself to severity of the sentence.
31. It should however be appreciated that the appellant is in custody and is appearing in person. The inadequacy of his preparedness should therefore be viewed from this viewpoint. Consequently, even though he did not make submission on all the grounds raised, I will still consider those grounds my analysis based on the on record.
32. Indeed, as a 1st appellate court, my obligation is to re-evaluate the entire evidence and make my own conclusions but being mindful of the fact that I did not hear or see the witnesses testify. The time-honoured decision of *Okeno v R.* (1972) EA 32 laid down the responsibilities of the 1st appellate court as follows: -

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*SHantilal M. Ruwala v R.*, [1957] E.A. 570). It is



not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.”

33. The 1st ground raised by the appellant was that the prosecution evidence was insufficient and contradictory to sustain a conviction.
34. I have read through the entire testimony including the defence of the accused. The fact that the complainant was penetrated is not in doubt. As ably submitted by the prosecution, there was medical as well as the testimony of the complainant to affirm that fact.
35. The other element of the offence was age. Section 8(3) of the *Sexual Offences Act* which formed part of the charge the appellant pleaded to makes the age of the victim a key component. For purposes of Section 8(3), the victim's age bracket must be between 12-15 years of age.
36. Evidence led by the prosecution on age slightly differed. The complainant and her mother ((PW2) said she was fifteen (15) years old when the offence was committed. However, the certificate of birth produced (P. Exh.4) was to the effect that the complainant was born on April 20, 2013 which meant that at the time of the offence, which was August 25, 2018, she was sixteen (16) years old.
37. In her analysis the trial magistrate addressed her mind to this issue and made the following conclusion of fact:

“(PW4 produced the birth certificate showing the child was born on April 20, 2003 proving she was sixteen years at the time of the offence...”
38. The State acknowledges that position in its submissions as well. Ms. Mary Gakuo stated: -

“A birth certificate was presented as an exhibit which confirmed she was sixteen at the time of the offence.”
39. Clearly then, this fact makes the finding on conviction that the accused committed the offence under Section 8(3) untenable. The complainant was not fifteen years old but sixteen years old and therefore the appropriate Section to charge was 8(1) as read with Section 8(4). Section 8(4) is the one that applies to defilement of a child between sixteen – eighteen years of age.
40. Does this finding make the conviction of the appellant fatal?
41. As a result of this finding, the trial court said it was imposing a statutory minimum sentence of 20 years imprisonment. Had the court convicted the appellant under the correct section therefore, the minimum statutory sentence that the court would have passed would have been 15 years as the court appears was keen on imposing the minimum provided.
42. Nonetheless, there is cogent evidence that a minor of less than eighteen years of age was penetrated sexually, which act constitutes the offence of defilement.
43. The age bracket only material in so as sentence is concerned.



44. Under Section 8(1), defilement is committed where:

“A person commits an act which causes penetration with a child”

45. There was defilement but not with a child of 12-15 years as particularised but an older child of 16 years. Defilement was committed. The only issue therefore that this appeal should concern itself with is on legality of the sentence-imposed in view of this finding.
46. Although the appellant raised the ground that the trial court failed to record the reasons for believing a single identifying witness, I have perused the lower court record and I have satisfied myself that the trial magistrate gave sufficient reasons including her observation of demeanour of the witnesses as the reason for trusting the evidence of the complainant.
47. There was also the ground that the reasons for rejecting the defence were not cogent. However, I have also looked at the record and I have found that the trial court gave plausible reasons for rejecting the defence. The appellant failed to confront the complainant and her mother on most of issues during cross-examination on most of the issues he raised against them in his defence afterwards. The trial court thus justified in terming his defence an after-thought. For instance, he said he was meeting the complainant in in court for the first time yet he did not confront her with this allegation or the fact that she was telling lies about him.
48. On the issue of sentence, I have already found that the minimum sentence imposed was severe than what should have been imposed on the accused going by the proved age of the complainant which was sixteen years at the time of the commission of the offence.
49. Further, the court imposed what it referred to as mandatory sentence. I have read the submissions of the appellant and the State/respondent. The State submits that minimum sentences are provided for in law and there is no room to depart from the sentence once conviction is proved.
50. I however prefer the emerging jurisprudence on minimum sentences as articulated in the Court of Appeal sitting at Nyeri in Criminal Appeal No. 84 of 2015- [*Joshua Gichuhi Mwangi v Republic*](#) where their Lordships stated as follows:

“... We acknowledge the powers of legislature to enact laws as established in the [*Constitution*](#). However, the imposition of mandatory sentences by legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what Constitutes appropriate sentence yet it does not adjudicate particular cases hence it cannot appreciate the intricacies faced by judges in their mandate to dispense justice...

This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the judiciary in Article 160 of the [*Constitution*](#). Further, the Judiciary has a mandate under Article 159(2)(a) and (e) of the [*Constitution*](#) to exercise judicial authority in the manner that justice be done to all and protect the purpose and principles of the [*Constitution*](#). This includes provision of Article 25 which provides that right to fair trial is among the Bill of Rights that shall not be limited...”



51. The guiding principle in altering sentences was laid down in *Ogolla S/o Owuor v R* (1954) EACA 270 where it was held that:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. To us we would add, third criterion namely: the sentence is manifestly excessive in view of the circumstances of the case... (*R. v Sherbosky* (1912) 28 TLR 263).”

52. In the instant case, this Court has already found that the trial court convicted the appellant under Section 8(3) instead of 8(4), and proceeded to impose what it described as minimum sentence in 8(3) that had a more severe minimum penalty than provided in section 8(4). That sentence imposed was therefore erroneous. It prejudiced the appellant by subjecting him to inapplicable sentence.

53. In view of the findings of this court, I hereby make the following orders: -

1. The conviction for the offence of defilement under section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* is altered, in place thereof, this court enters conviction under section 8 (1) as read with Section 8 (4) to be in accord with the evidence on record, whereby defilement in question involved a girl of the age bracket of between 16-18 years of age.
2. Accordingly, the appeal on sentence succeeds, in that it was erroneous to impose a minimum statutory sentence of 20 years for an offence of defilement where the victim fell within this age bracket. I thus substitute the sentence noting the mitigation advanced in the submissions of the appellant, the seriousness of the offence which involved a minor and considering that my hands are not fettered by the statutory minimum sentence prescription. The appellant will serve a sentence of fourteen (14) years imprisonment.
3. The sentence will commence from the date of the sentence imposed by the trial court since the appellant has been in custody.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JANUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of :-

Coram:

Court Assistant: Kinyua

Appellant: Present

DPP for Respondent: Mary Gakuo (Ms)

COURT

Judgment delivered virtually.

L.N. MUGAMBI

JUDGE

