



REPUBLIC OF KENYA



KENYA LAW
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**Owuor v Republic (Criminal Appeal E022 of 2022)
[2023] KEHC 143 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E022 OF 2022
RE ABURILI, J
JANUARY 20, 2023**

BETWEEN

SAMWEL ODHIAMBO OWUOR APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the judgement by the Hon. S.W. Mathenge on the
16.6.2022 & subsequent sentence passed on the 23.6.2022 in the Principal
Magistrate's Court in Bondo in Sexual Offence Case No. 63 of 2020)*

JUDGMENT

Introduction

1. The appellant herein Samwel Odhiambo Owuor was charged with the offence of defilement contrary to section 8(1) as read with subsection (3) of the [sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that that on unknown dates within the month of August 2020 at an unknown time in Bondo sub-county within Siaya County, intentionally and unlawfully, the appellant caused his penis to penetrate the vagina of JA a girl aged 12 years old. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#).
2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called 4 witnesses and at the close of the prosecution's case, the accused was placed on his defence. He gave a sworn testimony.
3. In his judgement, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and subsequently sentenced him to serve 20 years' imprisonment.



4. Aggrieved by the trial court’s finding, the appellant filed his petition of appeal in which he raised the following grounds of appeal”

That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.

- i. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.
- ii. That the court be pleased to consider that the investigation tendered was shoddy.
- iii. That the court be pleased to consider any aspect or condition that shall not occasion prejudice.
- iv. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in the article 50 (2) p of the *Constitution*.
- v. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

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

The appellant’s submissions

6. The appellant submitted that the prosecution failed in its burden to prove its case against him as it failed to call crucial witnesses specifically WA who knew the accused well and recorded statements against him as well as JM who knew the accused well. It was further submitted that the victim, PW2, was untruthful in her testimony.
7. The appellant further submitted that the trial magistrate did not consider carefully and evaluate the age of the victim as there were two assessments of age, one giving the victim’s age as 12 years and the other as 14 years old. He further submitted that the medical officers were not cross-examined and re-examined.
8. It was further submitted that consequent to the amended charge brought against him, the same should be made a nullity.
9. The appellant submitted that penetration was not proved as the correct perpetrator was not identified before conviction and sentencing. It was further submitted that the trial magistrate failed to consider the appellant’s defence especially that the case against the accused was made up by the accused’s father and his 2nd wife.

The respondent’s submissions

10. The respondent submitted that the offence was proved to the required standard. On the question of age of the complainant, it was submitted that the victim’s age was assessed at 14 years and a report produced to that effect as PEx 3.
11. Regarding penetration, it was submitted that the complainant gave graphic details on her defilement by the appellant on several occasions.



12. On identification, it was submitted that the appellant and the complainant stayed in the same house and she had been defiled on several occasions.
13. As regards the sentence being manifestly excessive, the respondent submitted that the complainant was aged 14 years and that the law provides for a minimum sentence of 20 years thus his sentence was within the court's discretion.

Role of the first appellate court

14. The role of this appellate Court of first instance is well settled. It was held in the case of *Okeno v R* (1977) EALR 32 and further in *Mark Oiruri Mose v R* (2013) eKLR by the Court of Appeal that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

Evidence before the trial court

15. PW1, Jared Obiero Opondo, a clinical officer testified and produced the complainant's P3 form which he had filled and signed as PEx1. It was his testimony that the complainant JA was 12 years old and presented before him with the allegation of having been defiled by 3 people known to her.
16. PW1 testified that upon examination, he found the complainant's hymen was ruptured, that she had ruptured vaginal mucosa and abnormal pervaginal discharge. He testified that he concluded that the complainant was defiled.
17. PW1 reiterated his findings in cross-examination and further stated that he only examined the minor and no other person. He further testified that the complainant was the one who told him that he was defiled by 3 people.
18. The complainant testified as PW2 after being taken through a *voire dire* examination and found understanding of the nature of an oath. It was her testimony that sometime in August 2020 whilst staying with the appellant, he told her that people slept without clothes and proceeded to remove his clothes then he inserted his penis in her vagina.
19. The complainant testified that the act was painful and that thereafter, she went to her grandmother's place where she stayed for 3 weeks and the police went and took her. She stated that the appellant and her mother had been living together and that at the time that the appellant defiled her, her mother was not present as she had gone to Bondo.
20. It was her testimony that the appellant defiled her severally and that it was during the night. She further stated that 3 other people came and defiled her at night specifically; Ambogo, Ajulu and Oloo. The complainant identified the appellant in court.
21. In cross-examination, the complainant reiterated that it was the appellant who defiled her and that she knew him as Samuel and not by his other names.
22. PW3 PC No 101835 PCW Julian Otieno, the investigating officer testified that on the May 16, 2020 at 10pm, he was informed that a juvenile JA had been defiled by one Samuel. He testified that the minor was issued with a P3 that was filled at the hospital. It was his testimony that the appellant was arrested by Chief Ayub Ogola. PW3 testified that he took the minor to Siaya Referral Hospital for age assessment as there was no Birth Certificate and the report showed that the minor was 14 years old.



23. In cross-examination, PW3 stated that he did not visit the scene and that the defilement had been going on for a duration of time. He further stated that the victim positively identified the appellant whom she knew as Ambogo. He further testified that Ambogo was the appellant's village name and that it was the appellant who gave the police his names Samwel Odhiambo Owuor. PW3 further testified that the 2 other suspects fled.
24. PW4 Ayub Ogola, the Assistant Chief for Nyawita testified that on the August 12, 2020 he received information on a minor who had been defiled and that after carrying out investigations, he arrested the appellant who had the alias Ambogo name. It was his testimony that he received information of the defilement from one John Mangana, a member of the Nyumba Kumi as well as the complainant's grandmother. PW4 testified that he knew the appellant prior to the incident and that he was not aware of any land dispute between the appellant's family and the complainant's family.
25. In cross-examination, PW4 testified that he took time to trace the complainant as she had been moved to an unknown place. He further stated that on the day of the appellant's arrest, he found him with his wife.
26. Placed on his defence, the appellant testified that on the August 16, 2020 he was shocked when three people went to his home including the Assistant Chief and arrested him but on inquiry as to why they were arresting him, he was not informed. The appellant denied committing the offence.

Analysis and determination

27. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both parties and the applicable law in this appeal. The issues for determination emanating therein are as follows:
 - a. Whether the prosecution's case was proved beyond reasonable doubt and
 - b. Whether the appellant's sentence was excessive and harsh.
28. In addition to the aforementioned issues for consideration, I will also consider the respective grounds raised in the appellant's petition.

Whether the prosecution proved its case beyond reasonable doubt
29. The appellant was charged 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.
30. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, where it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.
31. On the identity of the appellant, the complainant testified that she knew the appellant as the appellant stayed with her mother. The complainant was firm and resolute in cross-examination that it was the appellant who defiled her.
32. Contrary to the appellant's submissions that the perpetrator was not identified, the dock identification in this case was in addition to prior recognition by the complainant. To this end it is my finding that the appellant was identified beyond reasonable doubt.



33. Regarding the complainant's age, despite the testimony of PW1 that the complainant was 12 years old, PW3 produced an age assessment report (PEX 6) that showed that the complainant was 14 years old. I thus find that the prosecution proved this element beyond reasonable doubt.
34. On the issue of penetration, "Penetration" is defined under Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The complainant testified that the appellant defiled her. She testified that the appellant told her that people did not sleep with clothes then proceeded to remove his clothes before proceeding to defile her. The complainant vividly explained the incident stating that the appellant took his thing, his testicles, and put it in her thing for urinating. She further described the experience as painful.
35. PW1, the clinical officer who examined the complainant testified that on examination, he found that the complainant had a ruptured hymen and vaginal mucosa and that she had an abnormal pervaginal discharge leading him to conclude that the complainant was defiled.
36. On his part, the appellant denied committing the offence and pleaded in his grounds of appeal as well as his submissions that penetration was never proved.
37. Section 124 of the *Evidence Act* provides that:

"Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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."
38. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW1, the clinical officer as indicated in the PEX1 (the P3 form).
39. This evidence adduced by the prosecution when juxtaposed by the defence set by the appellant falls short. The appellant's defense in my view is an afterthought.
40. In the circumstances, it is my opinion that the prosecution proved penetration beyond reasonable doubt and as a result that there was defilement as contemplated by the Act.
41. The appellant pleaded in his grounds of appeal that the investigations were shoddy and not enough to sustain a conviction. I have perused the evidence adduced by the prosecution witnesses and find that the same was sufficient to uphold the appellant's conviction on the charges brought against him.
42. Finally, as to the appellant's submission that that consequent to the amended charge brought against him, the same should be made a nullity, I do note that the amendment of the charge sheet only related to the complainant's age changing the same from 12 years old to 14 years old.
43. It is my opinion that the amendment of the complainant's age did not prejudice the Appellant and that no miscarriage of justice has been occasioned as a result. The charge sheet and the particulars of the offence were read out to the Appellant afresh after the amendment and he responded and proceeded to participate in the trial process.



44. Moreover, Section 382 of the *Criminal Procedure Code* provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

45. I find that the amendment in the charge sheet did not materially affect the proceedings in the trial Court, and is curable under section 382 of the *Civil Procedure Code*.

46. The appellant further submitted that the trial magistrate failed to consider his defence. However, the judgement clearly shows that the same was considered and the same was found wanting.

47. Taking all the above into consideration, I am satisfied that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. I find no reason to interfere with the conviction of the appellant by the trial court.

Whether the appellant’s sentence was excessive

48. The appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive in view of Article 50 (2) (p) of the *Constitution*. Article 50 (2) (p) of the *Constitution, 2010*, which provides that:

“Every accused person has the right to fair trial, which includes the right.

(p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence.”

49. In *Alister Antony Pariera v State of Maharashtra*, as quoted in the case of *Margrate Lima Tuje v Republic* [2016] eKLR the court held that:

“Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”

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

“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”



51. The section spells out mandatory minimum sentences but the language in the sections 8(2) and 8(3) and (4) are different in that in section 8(2), the section provides that:

“(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.”

52. In subsection 3, the words “is liable” are used while in sub section 2, the words “shall upon conviction be sentenced to imprisonment for life” are used. The question is whether the language in subsection 3 and 4 imposes mandatory sentences of whether the court has discretion in sentencing.

53. This Court had the opportunity to discuss these sections in *Fredrick Owino Kangala v Republic* [2022] eKLR and elaborately cited other decisions on the same subject. I find no harm reproducing what I sated in the above case here as follows at paragraphs 54-63:

“

“54. Generally, the circumstances under which an appellate court interferes with the sentence by the trial court are set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

Equally, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

In the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, the predecessor of the Court of Appeal stated as follows on this issue:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

Odunga J citing the above decisions had this to say in the case of *Josiah Mutua Mutunga & another v Republic* [2019] eKLR:

“10. To this, I would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case.” (*R v Shershowsky* (1912) CCA 28TLR 263) while in the case of *Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No 253 of 2003* the Court of Appeal stated thus:



“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* (1989 KLR 306).”

The learned Judge further referred to the Court of Appeal decision in *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

In *Shadrack Kipchoge Kogo v Republic Eldoret Criminal Appeal No 253 of 2003* the Court stated:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

Section 8(1), (2), (3) and (4) of the *Sexual Offences Act* provides as follows:

8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (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.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

In the same case of *Josiah Mutua Mutunga & another v Republic* at Machakos High Court, the Court observed, comparing the wordings in the provisions of section 8 of the *Sexual Offences Act* on sentence and stated that:

“It is true 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 v 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.” [emphasis added]

In *Opoya v Uganda* [1967] EA 752 Sir Clement DeLestang VP stated:

“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.”

A similar position was accepted in *D W M v 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 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.”

In this case, the relevant provisions use the phrases “is liable, upon conviction to...” and “not less than” in the same breath. As correctly observed by Odunga J in the *Josiah Mutua Mutunga & another v Republic* case, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. This is so because 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, as was concisely put by Mativo J in *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR that:

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

This court agrees therefore that the twin subsections must be read as if the sentences provided are the maximum sentences. For that reason, and considering the circumstances of this case, I hold the view that the use of the words “is liable upon conviction” in section 11(1) of the *Sexual Offences Act* gives room for the exercise of judicial discretion in sentencing.”

54. Just like in the above decision, I have no doubt in my mind that Sexual Offences by their very nature are heinous and traumatizing to the victims especially the minors. It is a dehumanizing offence which brings indignity to the victim of the offence. It leaves stigma on the victims. This is the reason why the sentences provided for in law are harsh and appear in nearly all cases, to be mandatory minimums in



nature. This position was appreciated in *Tito Kariuki Ngugi v Republic* [2008] e KLR where it was stated that:

“The appeal against sentence has also no merit. The Appellant...caused her trauma which she will have to live with for the rest of her life.”

55. In my humble view, the sentence imposed upon the appellant by the trial court was the maximum sentence. Taking into account my observations and the fact that the appellant was a first offender and appreciating what the Court of Appeal in *Charo Ngumbao Gugudu v Republic* [2011] eKLR, had to say regarding imposition of maximum sentences that:

“It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries...”

56. I find the twenty-year imprisonment meted on the appellant to be excessive in the circumstances and calls for interference. I set aside the twenty years’ imprisonment meted on the appellant and substitute it with a prison term of ten (10) years to be calculated from the date of arrest of the appellant on August 16, 2020 in view of the fact that the appellant was granted bond but he never raised it until the trial was concluded. This is in line with the provisions of section 333(2) of the *Criminal Procedure Code* which provides that:

“

“(2) Subject to the provisions of section 38 of the Penal Code, 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.” See *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009] eKLR.

57. In the end, I find the appeal against conviction to be devoid of merit. I dismiss it and uphold the appellant’s conviction. I allow the appeal against sentence. I set aside the sentence of twenty years’ imprisonment imposed on the appellant and substitute it with a prison term of ten (10) years to be calculated from the date of his arrest on August 16, 2020

58. Orders accordingly. File closed

DATED, SIGNED AND DELIVERED AT SIAYA THIS 20TH DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE

