



REPUBLIC OF KENYA



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**Isalago v Republic (Criminal Appeal 96 of 2013)
[2023] KEHC 17895 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 17895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 96 OF 2013
SM MOHOCHI, J
JANUARY 20, 2023**

BETWEEN

JACTON ISALAGO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the Judgment, conviction and sentence of 20 years imprisonment for the offence of defilement contrary to section 8 (1) and (3) of the Sexual Offence Act No. 3 of 2006 in CM Cr, Case No. 3795 of 2012 - ELDORET, delivered by B.J. BARTOO, R.M. on 23.05.2013)

JUDGMENT

Introduction

1. The Court wishes to express regret for the delay occasioned in hearing and determining this Appeal that was filed almost 10 years ago.
2. Jackton Isalago (the appellant) was sentenced to serve 20 years in prison in Sexual offences case number 3795 of 2012 at the Chief Magistrate's Court at Eldoret for of the offences of Defilement contrary to Section 8 (1) as read together with Section 8(3) of the *Sexual Offences Act*. Being aggrieved, he seeks to upset the said conviction and sentence, citing five (5) grounds of appeal contained in his petition of appeal (rephrased where appropriate) as follows;
 - a. That, the Trial Court erred in law and fact by convicting on contradictory evidence.
 - b. That the Trial Court erred in law and in fact as it did not consider that the case was poorly investigated.
 - c. That the Trial Court erred in law and in fact, by failing to hold and find that the Medical report did not have presence of spermatozoa.



- d. That the Trial Court erred in law and in fact, by disregarding the Appellant's defense without reason.
- e. That essential witnesses were not called leaving out the truth.

Submissions

- 3. The Appellant filed his written submissions on the 19th November 2021 opting to mitigate on the excessiveness and harshness of the sentence and seeking its review, he equally abandoned his quest to disturb the conviction and submitted that;
- 4. The Age of the complainant as explicitly disclosed, in oral and documentary evidence as sixteen (16) years old was disregarded by the Trial Court during sentencing and that the sentence offended the provisions of Section 8(4) which provides for a sentence of not less than fifteen (15) years imprisonment.
- 5. That his mitigation as a first offender, and as the sole bread earner to his family was disregarded
- 6. That the Trial Court failed to factor in, or consider during sentencing, the pre-trial remand duration the appellant spent awaiting trial, thereby depriving the Appellant the benefit of the law.
- 7. The Appellant during hearing of the appeal highlighted his written submissions and mitigated.
- 8. The Respondent (ODDP) filed written Submissions Conceding to the Appeal and concurring with the Appellant that the error apparent was curable by reviewing the sentence and substituting an appropriate sentence within the provisions of Section 8 (4) of the *Sexual offences Act*
- 9. The Respondent submitted that appellant ought to have benefited to the provisions of Section 388 of the Criminal Procedure Code and urged the court to revisit while considering the sentence
- 10. This Court has a legal obligation to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to form its own conclusion(s) in line with the settled principles established in the case of *Okeno vs Republic* {1972} E.A, 32 at pg 36 EA 424,

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses.”

- 11. The accused was on 10th September 2012 arraigned and charged with the offence of defilement and the Plea of not guilty was entered. Accused to be supplied with copies of witness statements and charge sheet of the certificate of C. Bond of Ksh. 200,000/=.

Prosecution Case

- 12. PW 1 Female Minor FM aged 17 years states under oath that; -I Stay in J, a Student at [Particulars Withheld] Primary School in standard Eight, born in 1996 birth certificate in court it is written 5/3/1996. I was at J going to my mothers and on the way to [Particulars Withheld] kiosk I met a person who inquired where I was going and if I had transport. I replied I did not have. He said I enter his shop



so that he could give me fare. I entered his shop and he said I sit on the bench. He held my hand and took me to another room. The kiosk had a second room, it had a bed and other household items. On arrival, he undressed me first my skirt, and my inner pant. He then pushed me on the bed. He held me by force. I struggled I did not want to engage in sex. He penetrated me using his penis. He started from 12.00 to 4.00 pm, and continued the same at night. In the morning he left to the market to get stock. Two children came and open the door, they unlocked the door using a key. The children went and called people, they then called relatives to the girl one O uncle to the girl. The uncle then called the father who later took the girl to hospital. The girls step mother had arrived with the uncle. The father then went and came with officer from Kiambaa. Cloths had blood stains. The Jacket presented in court, it belonged to the accused (whitish in colour) Condoms were also recovered which were unused. The complainant confirmed the person who penetrated and had sex with her was before court.

Cross-examination

She claimed her house was approximately 10 meters from the shop. She said the accused close shop at 7.00. pm. The accused locked her inside and instructed her not to leave. The house of the accused and neighboring house are near. She did not scream. The children opened the door and said they wanted a bucket. I don't know where they got the key. My parents came at 10.00 pm.

13. PW 2 JKN Father to the complainant. Stays at [Particulars Withheld]. On 8/9/2012 I was at work in West indies I received a call that the child they were looking for had been found in a neighbor's house F, oozing blood. I went to Kiambaa police station and reported. I know the accused he was a hawker and a pastor at Amani PAG church. We proceeding at 10.00 pm to Jasho and a lady who claimed to be the accused wife was given the key, we found the girl inside. The following day I proceed to MTRH with PW 1.

Cross – Examination

I am the complaint father. I am here to testify about disappearance and sexual assault and kidnapping of PW1. She got lost on 6/9/2012, the house of FM is approximately 200 meters. On 8/9/2012 the child was found in the accused house at 10.00pm. She said she was unable to scream. I knew she was leaving for Kamkunji. I do not agree she was running away. She said you left for shopping. The child said the blood stain were hers. I don't know if it was menstrual or not. My brother O was at the scene first. It is not a family frame up. I do not know if there is individual evidence to show that the child was defiled or not.

14. PW 3 PO Stays at [Particulars Withheld] in Outspan Eldoret. A guard with G4s. At around 9.00 pm the neighbours kid come and said that F had been locked the neighbour. (V and S) that she had been locked at the Pastors house and that F had been raped. The girl was frightened. Her skirt had blood stains. I saw through window. I reported at AP who advised us to continue guarding the door and wait for police from Kiambaa. Police came with a lady claiming she was the accused wife. They did not allow us to enter into the house. I recorded my statement at Kiambaa police station. I had not seen the accused he was new and had opened a kiosk and my house is about 200 meters. I saw him at the police station.

Cross-Examination

The complainant is my niece.

The father J PW2 is my cousin, we belong to the same family.

I found almost 10 people at the scene. I stated there were many people at the scene as per my statement. I did not plan anything. The child was found in your place.

I did not ask her what the blood was for.



I was not there when the young children opened the door. I found the complainant still in the house. I do not know if the complainant was defiled by the father.

We were the people who reported but we found the accused at the police station.

15. PW 4 Government Analyst-Henry Kiptoo Sang On 18/9/2012 we received; -

- a. A blood sample in a container marked A. Jacton Isalakho (accused)
- b. Another blood sample in a container marked B. FM (complainant)
- c. A white Jacket in envelope marked letter C. (accused).

It was for us to determine if there was any blood stain on C and if it was in relation with A & B, they were brought by PC. Fredrick Wanjau of Kiambaa Police station. I examined the items and did a DNA analysis made the following conclusion. The blood stain on C the Jacket, matched those generated from B F.

Cross Examination

The blood stain on the jacket matched that of F.

16. PW5 DR. Cynthia Kibet- A medical doctor at MTRH. I have a P3 form from Kiambaa in respect to FM aged 16 years. At the time of examination clothings were not brought to us. She alleged that on 6/9/2012 the accused forcefully had sexually intercourse with her on 6th and 7th without using a condom. Upon examination; There were no injury on any other part of the body except the genitalia. The perennial and hymen were red, and the hymen was torn. There was a tear on the Labia Minora bilaterally there was a foul-smelling discharge from the vagina. HIV test was negative. She was not pregnant and urinalysis revealed no spermatozoa. Syphilis and UDR was negative. I filled a P3 form on 10/9/2012 and signed. That the 37 years at the time of examining the clothing was not availed. The history was that he was an allege perpetrator. He stated that her father had been defiling her severally and accommodated her till he reported at the police. He reported the child was having suicidal tendency.

Cross-Examination

The vagina had injuries. They were still fresh approximate 3-2 days. The object is blunt, most probably is penis or others which are blunt. I cannot say if it was her 1st sexual encounter or not. The child had been defiled recently. Exhibit 7 shows your genital organs were not injured. In many cases men's genital organs are normal. We did not get any semen in the vaginal of the minor. There was no indication of STD. There was no menstrual discharge, the girl came two days after the incident. PW6 CPL Mulongo Nyongesa No. 63569 Attached at [Particulars Withheld] Police Station crime section. I am the investigating officer in this case. On 6/9/2012 the father of the girl (complainant) made a report that her daughter FM had disappeared on 6/9/2012. On 8/9/2012 she was found locked in a house in the village and wanted police assistance. On the same day the accused came with a lady whom he state to be his wife, stated that there was a child in his house, he did not know her parents. The complainant father disclosed the accused was the one having his child. I also found information that members of the public were at the house baying for the accused blood, so I decided to retain him at the police station. The accuse handed the lady the key and we went and find the complainant in the house (bedroom). After interrogating the complainant, she claimed the accused called her and inquired where she was going and promised to give her 20/= to use as fare. He later locked her in the house and forced her to have sex with her without using a condom. The girl had a white jacket which she stated was given to her by the accused. The jacket had blood stain MFI 2. I took the accused and the complaint to MTRH where they were observed and treated. Got blood sample from the accused and the complainant and sent them to government chemist to ascertain the blood stain on the jacket. I got report that the blood stain on the jacket was human being and it was for the complainant. I also got birth certificate for the girl shows she



was born 5/3/1996. The girl was 16 years. I wish to produce it as exhibit, as well as the padlock of the door. I then charged the accused with the offence before court.

Cross-Examination

He reported at night. PW2 recorded statement at 6.30 p.m. of her missing child on 6/9/2012. Later it turned out it was a defilement. The accused came to the station with a girl, gladly reported the girl was at his place whom he did not know her parents. I did not record statement of the accused. It was recorded by PC Joseph. I did not look at your statement. It did comply with section 25 of the *evidence Act*. I did not value the evidence of the complainant only. There were so many people at the house I was not able to count them. They were people from the village and others members of the public. Other members of the public did not come to testify I could not compel them to testify. I investigated the scene again and established the home of PW1 is not far. PW3 is a neighbour. I interrogated PW1 and she stated the blood was from her vaginal, I cannot tell why she was oozing blood. She did not have complains about her family. She stated she was at your place since 6th to 8th September, 2012. The accused lives in the house. I cannot tell if it was previously opened. I did not get information that F wanted assistance. She had been brainwashed by yourself (accused) not to get help. There are other neighbours near if she could scream it could be heard. She had not been tied on the legs and hands. She could seek for help if she wanted. I do not know if there is a conflict between you and PW3 over business. Unless you have evidence you came to the police just to pretend and hide that you did not defile.

17. Submission by the Accused on no case to answer The investigating officer detained me pm 9/9/2012.

Contradiction

The evidence of PW2 (J) and PW1 (F). PW1 stated her parents knew where she was going while PW2 states he was not aware. Dr. Kibet stated the girl was still a virgin. PW6 (CPL Mulongo stated the girl had previously had sexual intercourse. In month of June 2012. PW 2 stated that PW1 did not explain if the accused had defiled her. PW 3 he stated that the accuse did not commit the offence. F tried to get assistance from him. But PW1 states she did not seek any assistance. PW6 stated that PW2 called the accused at 10.00am on 8/9/2012 while PW2 did not state the same. PW1 stated that she reached the accused house at 12.00pm while PW6 stated the accused reached there at 9.00am. PW 6 stated that the accused locked F three days in the house while PW1 stated that while in the house the shop was open and not locked. PW3 stated he got 20 people while PW3 got a big crowd of people. The exhibits are not enough as her inner clothes and clothing's were not availed in court. PW 3 stated that PW1 skirt had blood when he peeped through the window. Jacket stained was brought Exhibit 2 then that it was belonging to the accused. The padlock brought to court did not indicate if it was my house lock or not. The many people could still come to confirm the same. 4 Beddings and blankets mentioned by PW 6 were not availed as exhibit to court. PW6 stated the Bench which had blood stain but did not avail it to court. There was no documents to show the accused and the complainant were taken for medical attention. The blood on the jacket did not have enough evidence as it was not found with semen yet the complainant informed the court that the accused did not use condom. The investigating officer did not interrogate the accused nor the wife of the accused. The investigating officer declined in court that he could not use the investigation done by another officer. This case could be more highlighted if the wife of the accused could testify since the accuse is her husband and the house is hers. There is no independent witness who testified that he/she went to assist PW1. The case was not properly investigated if the police had no witness from the village where was the big crowd as mentioned by PW6 and PW3. There was no witness in this case since PW 2 and PW3 are family members to PW1. This case only means that the incident did not happen no other person witnessed the same. PW2 did not report the case of defilement. The wife of PW 2 be called as a witness as she is the one who called PW2 to inform him about PW1 being found in the house. Dr. Kibet could explain to court clearly if the complainant was a virgin or not. The evidence of the children was not availed. The investigating officer stated he went with



other officers at the scene, they were not called as witnesses. CPL Mulongo stated he is not the one who interrogated the accused but was done by another. He was not called to testify. PW1 stated blood was from her vagina and she did not seek any help at all. The case was not properly investigated.

18. Ruling

The accused to be placed to his defence.

19. Defense Case DW1 Jackton Idevete Isalako I stay at Langas. I am a pastor. I met FM while looking for a house in Langas to start a business. She told me that the business could do well in the village Jasho [Particulars Withheld]. I went and viewed the house and came back to inform my wife. We agreed and my wife moved to Jasho to start a business. On 8/9/2012 I visited my wife to deliver Makaa. At around 12.00 a girl came and she did not buy she said she had a problem and needed assistance. I inquired and she said she was running away from home going to Kamukunji where her mother stayed. She was asking for 20 shillings. I inquired why she was leaving she started crying. While interrogating her she disclosed that her father had been defiling her. My wife stated that we should call her mother and if she does not respond we go to the police station. The phone was on speaker and the mother replied that that was her father and she should be patient to finish KCPE. We decided to report the matter to the police. I advised her to stay till we came back. I was put to the cell for my own security. On 9/9/2012 my prints were taken and I was charged with defilement. Taken to MTRH and P3 form was issued. On 10/9/2012 I was brought to court and was charged and I denied the charges, later detained at Eldoret GK prison. I do not have a witness my wife fled she feared for her life. I do not know where she is now.

Cross-Examination

I do not have documents to show I am a pastor of PAG. My wife worked as a business lady. I was with my wife when PW1 came. I do not know the family of PW1. The information of PW1 that she was being defiled by her parents was saddening, that's why I decided to go to the police. I was not given an OB. The girl remained at my house. I wondered why the police did not take explanations on my side of story.

23/5/2013 JUDGEMENT

The accused was charged with the offence of defilement. The prosecution was supported by six witnesses. PW1 the complainant here in was a minor 16 years and a student at [Particulars Withheld] Primary school born in 1996. PW 1 was defiled at the shop of the accused, after the accused promised to give her fare to Kamukinji. The court thus finds the prosecution had proved its case beyond reasonable doubt on the evidence presented against the accused and thus finds the accused guilty of the offence of defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offence Act.

20. Mitigation The court has taken into consideration all parties. I believe the court will decide as per evidence presented.
21. Court After hearing the mitigation presented and the accused is a first offender the court states the accused to serve 20 years as stipulated by law.
22. The Court thus refined the sole issue under consideration to be Whether there is reason to disturb the sentence of the trial Court.

Findings

23. In this appeal, the appellant is only aggrieved with the sentence. It is therefore important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding



interference with sentencing by the appellate Court were properly, in my view, set out in *S vs. 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”

24. I have carefully evaluated the trial evidence I note that, the Appellant was arrested on 10.9.2012 and was never released on bail, he remained in remand until he was convicted and sentenced to 20 years imprisonment on the 23.5.2013 a period of seven (7) months after arrest.
25. I have equally noted the age of PW1 as per the particulars on the charge sheet and PW1’s oral evidence at pg. 33 of the record of appeal and in cross-examination at Pg. 36 of the record of appeal.
26. The Court notes the (age question) is further cemented by documentary evidence in the nature of exhibits 1,4,6 and 7 all which indicate the age of the complainant.
27. The Court has equally considered the written submission and supporting authorities by both the appellant and the respondent including the oral highlights.
28. Regarding the sentence, the Court observes that, sentencing is the discretion of the Trial Court and that this Court shall only interfere where it is demonstrated that the discretion was not exercised judiciously and that it failed to consider all relevant factors, or if it is demonstrated, that the sentence imposed is not legal, or is harsh and excessive, as to amount to miscarriage of justice.
29. The Court recalls the standard and test applicable as established in *Shadrack Kipchoge Kogo vs. Republic, Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, *Bernard Kimani Gacheru vs. Republic* [2002] eKLR and the Sentencing Policy Guidelines, 2016.
30. Having considered this appeal, the Court finds that the Trial Court exercise of discretion on the appellant on the 23.05.2013 was not judicious and allow this appeal on re-sentencing for the following reasons; -
 - i. The Trial Court was in grave error, to convict the appellant under the provisions of Sec 8 (3) instead of under Sec 8 (4) of the Sexual Offence Act 2016.
 - ii. The Trial Court was further in error whilst sentencing when it failed to observe the provisions of Sec 388 of the Criminal Procedure Code to the benefit of the appellant by specifying and including the period consisting of the pre-trial remand of seven and a half (7.5) months.

PARA 31.

Determination

- i. The Court hereby sets-aside and vacates the sentence imposed by the Trial Court on the 23.5.2013 and substitutes the same with, a sentence of 15 years imprisonment, as provided for under section 8 (4) of Sexual Offence Act.



- ii. That the pre-trial remand period by the appellant, shall form part of the sentence and for avoidance of doubt, that the appellant sentence shall run from 10.09.2012.
- iii. This is the judgement of this Court.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT BY;

S. MOHOCHI (JUDGE)

20.1.2023

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. N. Kemboi C.A

