



REPUBLIC OF KENYA



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**EKR v Republic (Criminal Appeal E038 of 2021)
[2023] KEHC 1586 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E038 OF 2021
RL KORIR, J
FEBRUARY 28, 2023**

BETWEEN

EKR APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence by Hon. Jackson Omwange
SRM at Sotik Magistrate's Court in S.O. Case No. 54 of 2020)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the *Sexual Offences Act* no 3 of 2006. The Particulars of the offence were that on the 18th day of December 2019 in Sotik sub-county within Bomet County, intentionally caused his penis to penetrate the vagina of MC a child aged 16 years.
2. The Appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* no 3 of 2006. The particulars were that on the 18th day of December 2019, in Sotik sub-county within Bomet county, intentionally touched the vagina of MC a child aged 16 years with his penis.
3. The Appellant was arrested on 3rd October 2020 and arraigned in court on 5th October 2020 where he took plea and pleaded not guilty to the main and alternative charges. The matter proceeded to a full hearing and the Prosecution called 4 witnesses in support of its case.
4. At the conclusion of the Prosecution's case, the trial court found that the Appellant had a case to answer. He was placed on his defence and elected to give sworn testimony and called 2 witnesses.



5. By judgement delivered on 4th August 2021, the trial magistrate convicted the Appellant of the offence of defilement contrary to section 8 (1) as read with section 8 (4) and sentenced him to serve 15 years imprisonment.
6. Being dissatisfied with the decision of the trial court, the Appellant filed a Memorandum of Appeal on 17th November 2021 where he raised 7 grounds of appeal to the effect that the trial court erred in convicting him on the Prosecution evidence which was uncorroborated and full irregularities and inconsistencies and that the trial court rejected his defence without reason.
7. The Appellant subsequently filed an amended Memorandum of Appeal on 18th August 2022 in which he raised three grounds as follows: -
 1. That the learned trial magistrate meted 15 years sentence without considering that the Appellant was 17 years old at the time of his arrest.
 2. That the learned trial magistrate erred in law and in fact by convicting the Appellant and passing a harsh and excessive sentence which was against the Constitution of Kenya.
 3. That he prayed to be present during the hearing of the Appeal.
8. By Court directions on 27th July 2022, the parties were directed to canvass the appeal by way of written submissions.

The Appellant's Submissions

9. The Appellant filed his submissions on 18th August 2022. He submitted that both he and the victim were minors and that his case was based on gender bias. He submitted that he was denied equal protection by the law as stipulated by the Constitution of Kenya, the Children's Act and the UN Convention on the Rights of a Child. That the ODPP erred in charging him without considering his age. To this end, he cited sections 143(1), 190(1) and 191(1) of the Children's Act together with section 35(1) of the Penal Code.
10. On sentencing, the Appellant submitted that the trial court sentenced him as an adult and passed a harsh sentence. He argued that the court ought not to have been bound by mandatory minimum sentences because they were unconstitutional. He submitted that the Court should consider his age, that he was a first offender, that he was remorseful and that he had learned behaviour change while in custody.

The Respondent's/Prosecution's Submissions

11. The Prosecution filed their submissions on 14th October 2020. They submitted that the victim was a 16-year-old school-going girl whose age was proven through her birth certificate. That this was never challenged by the Appellant during the trial. They also submitted that it was common ground that the Appellant took the victim to be his wife, that the victim testified that they had had a romantic relationship since 2017 and that they first consummated their illegal marriage on 18th December 2019. The Prosecution submitted that the Appellant and the victim continued to engage in sex until June 2020 when the victim left for her home and was discovered to be expectant.
12. The Prosecution submitted that the evidence of identification was conclusive because there was no way that the victim could have mistaken a person she knew as her husband. They also submitted that the Appellant admitted that he had carnal knowledge of the victim and that the Court should dismiss the Appeal.



13. This being a first Appeal, I am guided by the principles in *Selle v Associated Motor Boat Company* (1968) EA 123 where Sir Clement aptly explained the duty of a first appellate court: -

“This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression bases as the demeanor of a witness is inconsistent with the evidence in the case generally.”

(See also *Abdul Hamond Sarif v Ali Mohamed Solan* [1955] 22 EACA 270).

14. I have perused the Record of Appeal, the amended Memorandum of Appeal, the trial Record and the parties’ respective submissions. The issues for my determination are as follows: -
- i. Whether the offence of defilement was proven to the required legal standard.
 - ii. Whether the sentence was legal and appropriate.

i. Whether the Offence of Defilement was Proven to the Required Legal Standard.

15. The offence of defilement is premised under section 8 of the [Sexual Offences Act](#) no 3 of 2006. The law states as follows:-

8. Defilement

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.
5. It is a defence to a charge under this section if—
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. the accused reasonably believed that the child was over the age of eighteen years.
6. The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.



7. Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the *Children Act* (no 8 of 2001).
 8. The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.
16. Thus, for the Offence of defilement to stand, three ingredients must be proven. These ingredients were outlined in the case of *George Opondo Olunga v Republic* [2016] eKLR, as the age of the victim, positive identification or recognition of the offender, and penetration.
 17. The burden of proving the offence is vested on the Prosecution and the standard of proof is beyond reasonable doubt. In *Bakare v State* (1985) 2NWLR Lord Oputa of the Supreme Court of Nigeria explained this standard at page 465 as follows:-

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
 18. I will now delve into the evidence and consider the first ingredient of age. It was the victim’s testimony that she was 16 years old. PW4 the investigating officer produced her birth certificate P.Exh2.
 19. The importance of proving the age of a victim cannot be gainsaid. The Court of Appeal at Kisumu in *Alfayo Gombe Okello v Republic*, Cr App no 203 of 2009. (2010) eKLR stated as follows:-

“....In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”
 20. The age of a victim can be proven either through oral evidence or documentary evidence or by observation from the trial court. In *JOO v Republic* (2019) eKLR, it was held thus:-

“It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.”
 21. I have examined the victim’s certificate of birth serial number (particulars withheld) and noted that her date of birth was 20th April 2004. The offence was first committed on 18th December 2019 when she was a few months shy of 16 years and therefore still a minor in law. The ingredient of age stands adequately proven.
 22. The second ingredient is penetration. The victim testified that the Appellant took her to his brother Gideon’s house where they had sexual intercourse for an hour. She stated that she did not go back home



until June 2020. The victim also testified that she was later taken to Ndanai hospital where she was examined and discovered to be 6 months pregnant. The Prosecution also presented medical evidence from the clinical officer at Ndanai sub-county hospital PW3 who stated that she examined the victim and noted that she was 6 months pregnant. PW3 testified that though there was nothing peculiar in the victim's genitalia, her hymen was not intact and was not freshly torn.

23. I have considered the victim's testimony and the medical evidence and I am satisfied that the Prosecution proved penetration. Further to this, I have considered the Appellant's own defence and the fact that he admitted that he engaged in sexual intercourse with the victim whom he had taken as a wife. I find the evidence of penetration overwhelming and the same stands proven to the required standard.
24. The third ingredient is identification. It was the testimony of both the victim and the Appellant that they knew each other as man and wife. I need not delve further into this issue as it remained uncontested throughout the trial that they were well-known to each other.
25. In the premise, it is my finding that the three ingredients of the offence of defilement were adequately proven by the Prosecution and as such, the conviction of the Appellant by the trial court was lawful. I uphold the conviction.

ii. Whether the Sentence was Legal and Appropriate

26. The Appellant in this case was sentenced to 15 years imprisonment which is the mandatory minimum sentence stipulated by section 8(4) of the *Sexual Offences Act*.
27. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited the case of *Alister Anthony Pereira v State of Maharashtra* at paragraph 70-71 where the Supreme Court of India held thus: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

28. The above principles are replicated in the Judiciary Sentencing Policy Guidelines 2016 at page 15, paragraph 14 where the objectives of sentencing were set out as follows: -
 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.



4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of criminal conduct.
29. It follows therefore that barring any mandatory sentences, a trial court must meet the above objectives and must take into account the circumstances of a case before considering which punishment is appropriate for a convicted person.
30. In the famous Supreme Court case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR, the apex court outlined specific guidelines that were to be considered as mitigating factors in sentencing. These entail:
- a. age of the offender;
 - b. being a first offender;
 - c. whether the offender pleaded guilty;
 - d. character and record of the offender;
 - e. commission of the offence in response to gender-based violence;
 - f. remorsefulness of the offender;
 - g. the possibility of reform and social re-adaptation of the offender; and
 - h. any other factor that the court considers relevant.
31. I have keenly perused the trial Record and noted that the age of the Appellant was indicated on the Charge sheet OB no 08/3/10/2020 as 17 years. The Appellant filed his medical/clinic card and birth certificate which indicated that he was born on 28th December 2004. This means that by the time the Appellant and the victim were first engaging in sexual intercourse, he was only 14 years old and turned 15 on 28th December, 2019 while the offence was committed on 18th December, 2019. Meaning that the victim was actually a few months older than the Appellant.
32. In the English case of *R. v G* (Appellant) (on Appeal from the Court of Appeal (Criminal Division)) [2008] UKHL 37 cited in *P.O.O (a Minor) v. DPP & Anor* [2017] eKLR, Baroness Hale of Richmond (House of Lords) stated that: -
- “As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated might be the offender...Obviously...there will be wide variations in the blameworthiness of the behavior...both prosecutors and sentencers will have to make careful judgements about who should be prosecuted and what punishment if any is appropriate.
33. *G.O v Republic*, Siaya Criminal Appeal no 155 of 2016 (2017) eKLR Makau J. while dealing with a similar case, held:-
- “I find that the Appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the appellant for



the offence of defilement...in the instant case, I find that at the time of the commission of the offence, both the Appellant and the complainant were minors. I find indeed the complainant was a senior to the appellant and blame should not have been wholly shifted to the appellant, and both being minors, they need protection against harmful sexual activities and none should have been sent to prison.”

34. It was imperative for the trial court to have addressed itself on the issue of the Appellant’s age which was indicated on the charge sheet and called for evidence in respect of the same in order to determine the conduct of the trial. Indeed, the Court of Appeal in Eldoret took this position in the case of *Evans Wanjala Siibi v Republic* [2019] eKLR when it held thus:-

“We think, with respect, that had the two courts below adopted a more fair-minded and even-handed approach to the case, they would at the very least have sought to establish the appellant’s age. Instead, what emerges is a rush to punish him in a zealous deployment of the Sexual Offences Act for the supposed protection of the complainant. Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet’s Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect.}} A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term.

Where, as here, the person accused of a criminal offence is a minor, the law is cognizant of the attendant vulnerability of his position and puts in place measures to ameliorate the same and thus avoid injustice. This is in keeping with the Constitution’s own peremptory requirement at Article 53(2) that in every matter concerning a child, the best interest of the child shall be of paramount importance.” (emphasis added).

35. From my analysis of the facts herein and further to the above, it was discriminatory on the Prosecution to charge one of the minors (the Appellant) over the other (the victim) yet they both committed the criminal act of defilement and procured an illegal marriage. It was unfair to shift the blame wholly to the Appellant and leave the victim as an innocent party yet they were both under age. It was evident that this case involved two teenagers who freely engaged in sexual intercourse as man and wife, albeit illegally and therefore it was incumbent on the trial court to consider these circumstances.
36. Having stated the above, I have considered the fact that both the victim and the Appellant were equally culpable for the said offence and further, that their family members were involved in allowing the unlawful marriage to have taken place in the first instance. It became clear to this court that the complaint of defilement arose only after the alleged unlawful union collapsed.
37. In *S v Malga*: 2001 (2) SA 1222 SCA 1235 at para 25, the court held thus: -

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”



38. In the circumstances of this case, it was unjust for the trial court to have meted the minimum mandatory sentence of 15 years as stipulated by the law. This case was unique and called for a consideration of the surrounding circumstances and mitigating factors.

39. It is my considered view that the sentence imposed was too harsh and manifestly excessive. I find guidance in the Court of Appeal case of *Wagude v R.* (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag.JA.) held that: –

“The Court may interfere with the sentence only if it shown that it was manifestly excessive.”

40. In the end, it is my determination that the Appeal is merited and hereby allowed against sentence only. The conviction of the offence of defilement contrary to section 8(1) is hereby upheld.

41. I set aside the sentence of 15 years’ imprisonment and substitute therefor a probationary sentence of six months. The Appellant is therefore released from prison to serve the 6 months’ probation.

42. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2023

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant (Virtually present in Kericho Main Prison), Mr. Njeru for the State

