



REPUBLIC OF KENYA



KENYA LAW
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**JKN v Republic (Criminal Appeal E028 of 2021)
[2023] KEHC 1584 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E028 OF 2021
RL KORIR, J
FEBRUARY 28, 2023**

BETWEEN

JKN APPELLANT

AND

REPUBLIC RESPONDENT

*(From Conviction and Sentence by Hon. Kipkurui Kibelion, PM in
Bomet Principal Magistrate's Court Sexual Offence Number 72 of 2020)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 7 day of April 2020, at 1500hrs within Bomet County, intentionally and unlawfully caused his penis to penetrate the vagina of AC a child aged 6 years.
2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 7th day of April 2020, at 1500hrs within Bomet County, intentionally and unlawfully touched the vagina of AC a child aged 6 years with his penis.
3. The Appellant was arrested on 9th October 2020 and arraigned in court on 12th October 2020 where he took plea and denied the main and alternative charges. The matter proceeded to full trial with the Prosecution calling four (4) witnesses in support of their case.
4. At the conclusion of the Prosecution case, the Appellant was placed on his defence and section 211 of the *Criminal Procedure Code* explained to him. He elected to give unsworn testimony and called no witnesses in his defence.



5. The trial magistrate convicted the Appellant on the main charge by Judgement dated 17th September 2021 and sentenced him to life imprisonment.
6. Being dissatisfied with the conviction and sentence, the Appellant filed a Memorandum of Appeal on 20th September 2021 where he raised 5 grounds of appeal to the effect that the case against him was fabricated and even then was not proved to the required legal standard.
7. The Appellant subsequently filed amended grounds of Appeal on 7th June 2022. He raised the following grounds:
 1. That the learned magistrate erred in law and fact by sentencing him to life imprisonment while basing his conviction on PW1 and PW4 who were incredible witnesses.
 2. That the learned trial magistrate misled himself both in law and in fact by convicting him to life imprisonment while basing his conviction on uncorroborated, contradictory, tainted evidence and scarcity. (sic)
 3. That the learned trial magistrate failed to establish that sentencing him to life imprisonment was not only excessive but ultra vires and a misdirection of law. (sic)
 4. That the learned trial magistrate misdirected himself further both in law and fact by not considering his touchable and compelling mitigation. (sic)
 5. That he humbly requests for the court proceedings to be availed as his defence witness during the hearing and disposal of the appeal and as per section 22 (1) of *the Constitution* of Kenya 2010. (sic)
8. On 5th September 2022, the Appellant again filed an Amended Memorandum of Appeal in which he raised two grounds as follows:-
 1. That the learned trial magistrate erred in law and fact by failing to observe that the Prosecution case was founded on differences between himself and PW2 the complainant's mother, who influenced the complainant to testify false testimonies against him.
 2. That the learned trial magistrate erred in law and fact by meting out a mandatory minimum sentence which was unconstitutional.
9. This Court issued directions on 27th July 2022 and asked the parties to canvass the appeal by way of written submissions.

The Appellant's Submissions.

10. The Appellant's submissions were filed on 5th September 2022. He submitted that he and PW2 the complainant's mother had a quarrel over a parcel of land after she moved back from her matrimonial home. He submitted that he was disabled and could not grab the child who was playing with her friends as stated by the Prosecution witnesses without causing commotion. He also submitted that the village chief and the nyumba kumi elders were aware of the quarrel between himself and the victim's mother, that he could not have committed the offence against his own relative and that he only ran away because he was afraid of the threats made by PW2.
11. The Appellant submitted that the mandatory minimum sentences fell short of the provisions of Article 28 of *the Constitution* and that the trial court in sentencing him to life imprisonment did not exercise its discretion. That the trial court did not consider that he was a first offender and that the sentence was manifestly excessive.



The Respondent's/Prosecution's Submissions.

12. The Prosecution filed their submissions on 14th October 2022. They submitted that the victim's age was proven by her immunization card P.Exh1 which indicated that she was indeed 6 years old which evidence was never challenged by the Appellant. Secondly, they submitted that the victim's oral account established that she was penetrated and this was corroborated by the evidence of PW4 the medical doctor who produced the PRC Form and the P3 Form (P.Exh 3 and P.Exh 1 respectively). The Prosecution cited section 2 of the Sexual Offences Act and the cases of *Eric Onyango Odeng vs R* (2014) eKLR alongside *Twehangane Alfred vs. Uganda* Criminal Appeal No. 139 of 2001 (2003) UGCA, 6.
13. On identification, the Prosecution submitted that it could easily be discerned that the Appellant and the victim were not strangers to each other because the Appellant was the victim's neighbour. Thus the issue of identification did not arise in the circumstances.
14. The Prosecution submitted that the Appellant's defence that he was framed was never raised during the trial and was clearly an afterthought. They urged the Court to dismiss the appeal in its entirety.
15. The duty of the first appellate court was succinctly stated by the Court of Appeal in *David Njuguna Wairimu vs. Republic* [2010] eKLR as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
16. Thus, this Court is expected to subject the entire evidence to a fresh scrutiny and arrive at its own conclusion and findings.
17. From my perusal of the trial Record, the amended Memorandum of Appeal filed on 5th September 2022 alongside the Appellant's submissions filed on the same date and the Respondent's submissions dated 14th October 2022, I find two issues for determination as follows:-
 - i. Whether the offence of defilement was proven by the Prosecution to the required standard.
 - ii. Whether the Sentence was lawful and just.

i. Whether the offence of defilement was proven by the Prosecution to the required standard

18. The offence of defilement is provided under Section 8 of the Sexual Offences Act No. 3 of 2006 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.
19. For the offence of defilement to stand, three ingredients must be proven:-
- a. The age of the victim
 - b. That there was penetration
 - c. That there was positive identification of the perpetrator.
- (See the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013).
20. The age of a victim in a defilement case is paramount as it is this ingredient that informs the punishment of an offender. In *Kaingu Kasomo vs. Republic* Criminal Appeal No. 504 of 2010, the Court of Appeal stated thus: -
- “Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.
21. In the present case, the victim herself testified that she was 6 years old. Her mother PW2 testified that she was born on 9th June 2014. She produced the victim’s Immunization Card (P.Exh1) which indicated the date of birth as 9th June, 2014. There is ample case law to show how the age of the victim can be proven. In *Richard Wabome Chege vs. R*, Criminal Appeal no. 61 of 2014 (2014) eKLR, the



Court of Appeal in Nyeri found the evidence of the complainant's mother to be sufficient proof of age. They expressed themselves thus:-

“On the contention of the complainant was not established, it is our considered view that age is not proofed primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supporting evidence was given by PW3 who examined the complainant and the complainant herself.”

The ingredient of age was thus adequately proven by the testimony of her mother PW2 and as evidenced by the victim's Immunization Card (P.Exh 1).

22. Further, the offence was committed on 7th April 2020 at which point the victim was 5 years, and a minor under the law.

23. The second ingredient is penetration. This is defined by section 2 of the Sexual Offences Act:-

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

24. It follows then that penetration need not be complete. The Court of Appeal in *Erick Onyango Ondeng v. Republic* (2014) eKLR stated thus:-

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

25. In this case, the Prosecution produced evidence through the victim's testimony and medical evidence to corroborate the victim's testimony. The victim testified that, “The Accused removed my clothes and did bad manners to me.... The Accused removed all of my clothes and did bad manners to me. He told me not to tell anyone....”

26. The above testimony was corroborated by that of PW4 Dr. Mutai who examined the victim on 8th April 2020 and testified that the victim had a broken hymen with lacerations on the labia majora and minora. He drew a conclusion that the minor had been defiled. Dr. Mutai produced the P3 and PRC Forms (P.Exh 2 and 3 respectively). This Court finds that there was sufficient evidence from the Prosecution that proved the ingredient of penetration to the required standard.

27. The last ingredient is identification. It was the victim's testimony that she knew the Appellant as her neighbour and that the incident occurred during the day. She also stated that she knew the Appellant's house and would often meet him on the road. Where the Prosecution produces only the evidence of a victim in a sexual offence case, the court must satisfy itself that the victim is truthful. Section 124 of the *Evidence Act* provides thus: -

“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 the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him 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 offense, 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.”

28. In the present case, the victim’s testimony indicated that she knew the Appellant which connotes that this is evidence of recognition rather than identification. Even then, this Court must be guided by the principles in *Turnbull and others* (1979) 3 AR ER 549 where it was held thus:-

“.....Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

29. The manner in which the victim described how she knew the Appellant and how often she saw him on the road leads this Court to conclude that she could not have been mistaken that the Appellant was the one who pulled her away from the other children and defiled her.

30. Further to this, the victim testified that the Appellant was their neighbour coupled with the fact that the incident happened in the afternoon. She could therefore not have been mistaken as to who took her away to defile her. Her testimony remained consistent during cross-examination and she was clear about what happened to her and who was responsible. Additionally, I have re-examined the *voire dire* conducted by the trial magistrate and noted that the victim was intelligent enough to express herself and give an account of what happened to her. I am satisfied that she was telling the truth.

31. It is the finding of this Court that the evidence of identification was watertight and free from any possible error.

32. From the totality of the evidence presented, the offence of defilement stands adequately proven and the Appellant was positively identified as the perpetrator. I therefore uphold the conviction by the trial court.

ii. Whether the Sentence was lawful and just.

33. The offence of defiling a child below 11 years attracts a life sentence upon conviction. The trial court in this case sentenced the Appellant to life imprisonment.

34. Sentencing in Kenya is governed by the Judiciary Sentencing Policy Guidelines of 2016. They require that any sentence passed must meet specific objectives as outlined in paragraph 4.1 at page 15. In the present case, I have reviewed the sentence of the trial court and noted that it was not only aimed at retribution but was meant for a deterrent purpose.

35. I have considered that the Appellant during his mitigation stated that he was an orphan and that he was a first offender. To my view, these mitigating factors did not warrant the Appellant to commit the crime that he committed. Bearing in mind that the innocence of a child was prematurely snatched away from her by the Appellant, I balance the gravity of that offence alongside the Appellant’s mitigation. The victim in this case was the Appellant’s niece and therefore, the Appellant had a position of trust and responsibility over her, which he abused. I have made the necessary considerations owing to the prevalence of this offence within this community and arrived at the conclusion that this case is fit for a sentence that would ensure that the community and Children in particular were protected from persons with propensity to commit such heinous offences.



36. It is a well-established principle that an appellate court should not arbitrarily interfere with the sentence of a trial court unless the same was manifestly excessive or was based on a wrong application of the law. In *R vs. Mohamed ali Jamal* (1948) 15 E A C A 126, the Court of Appeal for Eastern Africa observed:

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

37. In the final analysis, I am satisfied that the trial court properly applied the legal principles in meting out the sentence. I will however temper justice with mercy and substitute the indeterminate life sentence with a determinate sentence.

38. The Appeal against conviction therefore lacks merit and is dismissed. The Appeal against sentence succeeds to the extent only that the sentence is reduced to 35 years’ imprisonment. The sentence shall run from the date of 1st conviction and sentence by the trial court being 17th September, 2021.

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

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered virtually in the presence of the Appellant (Virtually present at Kericho Main Prison), Mr. Njeru for the State and Susan (Court Assistant)

