



REPUBLIC OF KENYA



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**Kigen v Republic (Criminal Appeal E037 of 2021)
[2023] KEHC 1173 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E037 OF 2021
RL KORIR, J
FEBRUARY 24, 2023**

BETWEEN

NICHOLAS KIPKURUI KIGEN APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number E001
of 2020 by Hon. Jackson Omwange in the Magistrate's Court at Sotik)*

JUDGMENT

1. The Appellant herein was convicted by Hon. J. Omwange, Senior Resident Magistrate for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the Charge were that on diverse dates between 2016 and May 2020 in Sotik Sub County, within Bomet County, he intentionally caused his penis to penetrate the vagina of FC, a child aged 16 years.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the Charge were that on diverse dates between 2016 and May 2020 in Sotik Sub County, within Bomet County, he intentionally touched the vagina of FC, a child aged 16 years with his penis.
3. The appellant also faced a second Charge of supplying drugs to procure an abortion contrary to section 160 of the *Penal Code*. The particulars of the Charge were that on 5th September 2020 in Sotik Sub County, within Bomet County, he wilfully and unlawfully supplied FC, a child of 16 years with an unknown drug to induce abortion and caused the said FC to successfully abort a conceived foetus.
4. The Appellant pleaded not guilty to the Charges before the trial court, and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case.



5. At the close of the prosecution case, the trial court ruled that a *prima facie case* had been established against the accused and he was put on his defence.
6. At the conclusion of the trial, he was convicted of the two charges and sentenced to serve a cumulative of twenty one and a half (21.5) years in prison.
7. Being dissatisfied with the Judgment, the accused appealed to this court on the reproduced verbatim grounds:-
 - i. That, I pleaded not guilty at the trial and still maintain the same.
 - ii. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.
 - iii. That the trial magistrate erred in law and in fact by relying on evidence adduced by the prosecution side which was inconsistent, contradictory and full of irregularities.
 - iv. That the trial magistrate erred in law and in fact by failing to analyse that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing the Appellant.
 - v. That the trial magistrate erred in law and fact by failing to find that he was not medically examined and that DNA was not done as stipulated under section 36 (1) of the [Sexual Offences Act](#).
 - vi. That I pray to be present during the hearing of this appeal.
8. The Appellant further filed an amended memorandum of appeal and relied on the following grounds:-
 - i. That the trial magistrate erred in law and in fact in failing to consider that there was no cogent and credible evidence to connect the Appellant to the commission of the alleged offence and also failed to consider the sharp contradiction contrary to section 163 of the [Evidence Act](#)
 - ii. That the trial magistrate erred in law and in fact when he failed to observe that PW1's evidence was a sham & shallow to prove count two.
 - iii. That the trial magistrate erred in law and in fact by giving the mandatory minimum sentence of 20 years imprisonment which was too excessive, harsh and discriminatory.
9. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in the case of [Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & co. Advocates](#) (2013) eKLR, restated this duty as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

The Prosecution's Case.

10. It was the Prosecution's case that the Accused defiled the minor FC on diverse dates between 2016 and May 2020. F.C (PW3) testified that the Accused had been her boyfriend from the year 2016 to 2020. That sometime in 2016, the Accused raped her at her uncle's place.



11. PW3 testified that he knew the Accused who was his neighbour. That the Accused took her to Bungei dispensary and left her at the gate. PW3 further testified that she was found stranded by WCS who later took her to hospital after she complained of a stomach ache. It was her further testimony that she miscarried.
12. It was PW3's testimony that she was taken to Ndanai hospital and then later to Kapkatet hospital where she was admitted for 3 days. It was PW3's further testimony that she had been given tablets to induce an abortion by the Accused.
13. Kennedy Laboso (PW1) testified that he was a clinical officer and that he had examined F.C on 17th September 2020. That he found dry blood stains on her underwear and tenderness on the lower side of the abdomen, an injury he approximated to be 2 weeks old. PW1 further testified that the pregnancy test was negative and that an ultrasound revealed products of conception.
14. It was PW1's testimony that PW3's uterus was bulky but empty. That the victim (PW3) was given intravenous which was consistent with the termination of a pregnancy. It was PW1's further testimony that there were no lacerations on the vaginal walls which indicated that the termination was done by drugs. It was his conclusion that there was defilement.
15. No. 258355 PC Carolyne Serem (PW2) testified that she was the investigating officer. That on 8th September 2020, she escorted PW3 to Sotik Health Centre. She further testified that PW3 was examined and referred to Kapkatet hospital after which she recorded her statement.
16. PW2 testified that the accused was positively identified and upon investigations, she ascertained that the Accused is the person who defiled PW3, made her pregnant and later on gave her drugs to procure the abortion.
17. WCS (PW4) testified that she met PW3 alone along the road at around 7 p.m. as she left her shop. That PW3 told her that she had not experienced her menstrual period for 4 months and that she had taken pills to abort that were given to her by the Accused. PW4 further testified that she took her to Ndanai hospital when she began to bleed.
18. It was PW4's testimony that she called PW3's mother and informed her of the situation.
19. ER (PW5) testified that she was PW3's mother. She testified that PW3 had been missing for a period of about 2 weeks. That DR called and informed her to go to the police station and later the hospital. She further testified that PW3 had taken tablets and was being treated to clear her womb.
20. It was PW5's testimony that she was aware that PW3 was expectant but did not know the age of the pregnancy. That the Accused was her neighbour and that she pleaded with the court to release him as the two families had had discussions and that the Accused had been pardoned. It was PW5's testimony that the Accused's children were suffering and that her testimony was geared towards having the Accused released.

The Prosecution's/Respondent's Submissions.

21. The Respondent submitted that the PW3 was three months shy of attaining the age of 16 years. That the age was supported by the Birth Certificate produced in the trial court as P.Exh6 which confirmed that she was a child.
22. Regarding penetration, the Respondent submitted that PW3's testimony was manifestly clear that penetration not only occurred, but it resulted into a pregnancy. That independent medical evidence led by PW1 led credence to PW3's testimony. The Respondent further submitted that PW1 observed



vaginal bleeding that was consistent with termination of a pregnancy. They relied on *Eric Onyango Odeng v R* (2014) eKLR and *Twebangane Alfred v Uganda* 2003 UGCA, 6.

23. The Respondent submitted that the issue of identification was not in doubt as PW3 had testified that the Accused was her neighbour and boyfriend from 2016 to 2020.
24. It was the Respondent's submission that PW1 not only identified the accused as the person who defiled and impregnated her, she also testified that he gave her unknown drugs to terminate the pregnancy. That the same was corroborated by PW1 who examined PW3 and observed vaginal bleeding that was consistent with termination of a pregnancy. It was the Respondent's further submission that PW1 noted no lacerations on the vaginal wall which meant that the termination was probably done by drugs.
25. The Respondent submitted that the Defence contended that he had been framed but did not raise it with any of its witnesses. That it was clearly an afterthought.

The Appellant's Case.

26. The Accused, Nicholas Kipkurui Kigen testified that he was not at home on the alleged date of the offence. That on 5th September 2020 he was arrested and taken to the police station where he was charged. It was the Accused's testimony that he did not commit the offence as he did not even know the medicine one uses in procuring an abortion. It was his further case that he was being framed.

The Appellant's Submissions.

27. It was the Appellant's submission that PW3's testimony was full of contradictions and this made her evidence doubtful. He relied on the case of *Ndungu Kimanyi v R* (1979) eKLR to support this submission.
28. The Appellant submitted that the investigating officer did not bring Jonathan Tanui, the MCA, Chief Charles, Satina, Mercy and members of Nyumba Kumi as witnesses. That failure to avail these witnesses meant that the prosecution did not prove its case beyond reasonable doubt. It was his further submission that this case was a fabrication.
29. Regarding count 2, the Appellant submitted that the witnesses did not give sufficient evidence to link him to the drugs that PW3 took. That it was not clear where PW3 took those drugs. It was his further submission that this case was not fully investigated as he was not at home at the time of the alleged offence and that he did not know who gave PW3 the drugs.
30. It was the Appellant's submission that the sentence given by the trial court was a mandatory minimum sentence. That mandatory minimum sentences were unjust because the Magistrate's and Judge's discretion was taken away.
31. It was the Appellant's final submission that this court exercise its judicial discretion to either give him a second chance in life or a lesser sentence. That he was a young unmarried man and that he had involved himself with course skills to improve his life.
32. I have given due consideration to the trial court's proceedings, the memorandum of appeal filed on 17th November 2021, the amended memorandum of appeal and appellant's written submissions both filed on 5th September 2022, the Respondent's written submissions dated 13th October 2022. The following issues arise for my determination:-
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Defence places doubt on the Prosecution case.



iii. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

i. Whether the Prosecution proved its case beyond reasonable doubt.

33. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

34. The Accused was charged with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. Section 8 (1) of the Act states that any person who commits an act which causes penetration with a child is guilty of an offence of defilement. A child is defined in the Children's Act no. 8 of 2001 as any human being under the age of eighteen years.

35. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic (2016) eKLR, as follows:-

“The importance of proving the age of the victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello v Republic Cr. App 203 of 2009 (Kisumu) this Court stated as follows:-

In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of 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. This must be so because dire consequences flow from proof of the offence under section 8(1)”.

36. The age of the victim may be proved through the production of a birth certificate or a parent's testimony. In the case of Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000, the Ugandan Court of Appeal held that:-

“Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”

37. No. 258355 (PW2) produced a Birth Certificate (P.Exh6). The Birth Certificate indicated that PW3 was born on 6th August 2004. The authenticity of the Birth Certificate was not challenged during the trial. The victim's mother, ER (PW5) also testified to the age of the victim where she stated that she was 16 years old. I am satisfied by the aforementioned facts and find that at the time of the alleged offence, PW3 was aged 16 years.

38. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga v Republic(1989) eKLR expressed itself as follows:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.



39. In *Ali Mlako Mwero v Republic* (2011) eKLR the Court of Appeal expressed itself as follows:
- “The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken ... ”
40. PW3 testified that the Accused was her neighbour and her boyfriend between 2016 and 2020. The Accused could not be a stranger to the victim (PW3) as they had a sexual relationship for over 4 years. The victim stated during cross examination that the Accused would go to her room and they would have frequent sexual intercourse from the year 2016 to 2020. PW5 who was the victim’s mother also testified that the Accused was her neighbour.
41. PW3 and PW4 positively identified the Accused in the dock. In the case of *Muiruri & others v Republic* (2002) KLR 274, the court held that:-
- “...We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”
42. Flowing from the above, I am satisfied that the Accused was positively identified by PW3, PW4 and PW5.
43. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of *EE v Republic* (2015) eKLR, Riechi J. stated that:-
- “An important ingredient of the offence of defilement is that there must have been penetration. Penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement”.
44. In the case of *Bassita v Uganda* S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.
45. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.
46. PW3 testified that they had been having regular sexual intercourse with the Accused. She also testified that it was the Accused who made her pregnant and later on gave her tablets to induce an abortion.



47. Kennedy Laboso (PW1) who was the clinical officer at Kapkatet sub county hospital testified that when he examined PW3, he found dry blood stains in her underwear and tenderness in her lower abdomen. That he carried out a pregnancy test which turned out to be negative. PW5 carried out an ultrasound test which revealed that there were products of conception in PW3's womb. It was his observation that the said womb was bulky but empty.
48. According to the clinical officer, PW3's condition was consistent with the termination of a pregnancy. He further observed and stated that there were no lacerations on the vaginal wall therefore the termination could have been done by drugs. It was his conclusion that there must have been defilement. His findings were contained in the P3 form and PRC Report which were produced and marked as P.Exh 1 and P. Exh 2. He also produced as ultra sound report and the same was marked as P.Exh 3.
49. The Appellant stated that he was not subjected to a DNA test in accordance to section 36 (1) of the *Sexual Offences Act*. In the case of *Robert Mutungi Mumbi v Republic*, Criminal Appeal number 5/2013, the Court of Appeal held that:-
- “Section 36 (1) of the *Act* empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”
50. In the case of *Lawrence Chamwanda & another v Republic* (2016) eKLR the court held that:-
- “Furthermore, the law is now settled that rape or defilement is not proved by a DNA test or medical examination but by evidence of the victim, and that evidence could include circumstantial evidence. This position was stated in the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR. In that case, it had been argued for the appellant that there was no medical examination to link the appellant with the offence of defilement. The court stated:-
- “In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her.”
51. It is therefore my finding that the absence of a DNA test to the Appellant was not fatal. The oral testimonies and documentary evidence were sufficient to point a finger to the Accused.
52. I am satisfied and convinced on the strength on the evidence contained in the P3 form, Post Rape Care Form and the testimonies of PW3 and PW5 that there was penetration. Consequently, it is my finding that the element of penetration was established.
53. Regarding the 2nd Charge, PW3 testified that the Accused gave her tablets to swallow and induce an abortion. The Accused did not lead any evidence to counter PW3's testimony. The presence of foetal matter was confirmed by the ultrasound (P.Exh 3) and the consequent removal of the foetus was confirmed by PW1. PW1 also testified that he observed that there were no lacerations in the vaginal wall which in his opinion meant that she had induced an abortion by way of drugs. I am satisfied that the prosecution proved this charge.
54. The Appellant faulted the prosecution for not calling material witnesses. In criminal proceedings, the prosecution is solely responsible for deciding how to present its case and choosing which witnesses to



call. The court cannot compel any party to call any particular witness. I am guided by the precedent in *Oloro and Daltanyi v Reginam* (1956) 23, 23 EACA 49 where the court held thus:-

“Prosecution have a duty to call material witnesses. If they fail, the presumption is that if the evidence had been called that evidence would have been unfavourable to prosecution.”

55. I am further persuaded by Mutungi J. (as he then was) in *Peter Nagweya Chagome v Honourable Attorney General* (2006) eKLR, where he held that:-

“The court cannot force any party to call any particular witness. If the court deems a particular witness essential, however, the court has the power to summon such evidence, on its own motion

56. It is my finding therefore that after considering the totality of the evidence produced, the prosecution discharged its burden of proof. They proved their case against the Accused on both Charges to the required legal standard.

ii. Whether the Defence places doubt on the prosecution case.

57. I have considered the Appellant’s defence in which he denied committing the offence. DW1 stated that he was not at home on the alleged date. That he did not know what medicine was used in procuring an abortion. It was his further testimony that he was being framed.

58. The Appellant did not lead any evidence that would back up his claim of being framed. He had the opportunity to cross examine the prosecution’s witness and bring up the same issue but he did not. I have considered his defence. It did not hold water and did not place any doubt on the prosecution’s case.

iii. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

59. The principles guiding interference with sentencing by the appellate Court were set out in *S v Malgas* 2001 (1) SACR 469 (SCA). In this persuasive authority, the Supreme Court of Appeal of South Africa 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”

60. Similarly, 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.”

61. Section 8 (4) of the *Sexual Offences Act* provides that:-

“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.”

62. Section 160 of the *Penal Code* provides that:-

“Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.”

63. In mitigation, the Appellant stated that he depended on himself and that his children also depended on him. He prayed for a probationary sentence.

64. The court has discretion in issuing of sentences and the minimum nature of this sentence does not make it illegal. In the Supreme Court case of *Francis Karioko Muruatetu and another v Republic*, Petition no. 15 & 16 (consolidated) of 2015 it was held that:-

“We therefore reiterate that, this Court’s decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute”.

65. The *Criminal Procedure Bench Book* at page 116 provides that:-

“The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):

- i. Retribution.
- ii. Deterrence.
- iii. Rehabilitation.
- iv. Restorative justice.
- v. Incapacitating the offender.
- vi. Denouncing the offence, on behalf of the community”.

66. I have noted with concern that the victim and the Accused were in a sexual relationship for over four years. The Accused was 31 years old when he was arrested in the year 2020 and the victim was 16 years old. This means that when the relationship started in the year 2016, the victim was 12 years old and the Accused was 27 years old. In my view, it was impossible for this relationship to go on for the period of 4 years without either the knowledge or the silent blessings of the victim’s parents. The circumstances of this case suggests that the offence was only brought to light after the appellant assisted the victim in procuring an abortion. The accused being an adult should have known better than to have sexual relations with a 12 year old. Such behaviour should be abhorred and treated with contempt.



67. I have however considered that the charge which was neither challenged nor amended stated that the victim was 16 years. Under Section 8 (4) of the *Sexual Offences Act*, the minimum sentence prescribed is 15 years. I grant the appellant the benefit of the minimum sentence.
68. In the end, I confirm conviction on both counts. I set aside the 20 year sentence and substitute it with a sentence of 15 years imprisonment on count 1. I affirm the sentence of 1 ½ years for count 2. Both sentences shall run concurrently.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF FEBRUARY, 2023.

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the appellant, Mr. Njeru for the State and Siele (Court Assistant)

