



REPUBLIC OF KENYA



**Litali v Republic (Criminal Appeal E062 of 2022)
[2023] KEHC 1803 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E062 OF 2022
JWW MONG'ARE, J
FEBRUARY 22, 2023**

BETWEEN

AMOS BARASA LITALI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. E. Kigen
in Eldoret CMCR SO 58 of 2018 delivered on 25th March 2022.)*

JUDGMENT

1. The Appellant was charged with two counts of defilement contrary to section 8(1) and 8(2) of the [Sexual Offences act](#). The particulars of the offence were that on diverse dates between the 7th and 10th day of March 2018, in Kapseret Sub County within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of TN, a child aged 9 years.
2. He was also charged with a second count of defilement contrary to section 8(1) and 8(2) of the [Sexual Offences act](#). The particulars of the offence were that on diverse dates between the 7th and 10th day of March, 2018, in Kapseret Sub County within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of GWK, a child aged 6 years.
3. He faced two alternative counts. Firstly, in the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence were that on diverse dates between the 7th and 10th day of March, 2018, in Kapseret Sub County within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of TN, a child aged 9 years.
4. The Second Alternative Count was that, in the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The



particulars of the offence were that of diverse dates between the 7th and 10th day of March, 2018, in Kapseret Sub County within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of GWK, a child aged 6 years.

5. The Appellant pleaded not guilty and the matter proceeded to full hearing and upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate found the Appellant guilty on the two main counts and sentenced him to life imprisonment for each count, and the same to run concurrently.
6. Being aggrieved with the conviction and sentence, the Appellant instituted the present appeal vide a petition for appeal. The appeal is premised on the following grounds;
 1. That, the trial magistrate grossly erred in law and facts by convicting (me) based on hearsay, fabricated and far-fetched evidence.
 2. That, the trial magistrate greatly erred in law and facts by convicting (me) without proper evaluation of my defence of alibi despite my defence witness shading more light of my whereabouts on the material offence day and venue.
 3. That, the trial magistrate grossly misdirected himself in law and facts by convicting (me) based on the victim evidence especially PW1 thereby breaching section 124 of the *evidence Act*.
 4. That, the trial magistrate grossly misdirected himself in law and facts by convicting (me) based on the evidence that greatly breached sec.35 & 36 of *S.O.A.* No.3 of 2006 regarding subjecting the applicant to medical test.
 5. That, the trial magistrate grossly erred in law and facts by convicting (me) without proper evaluation of the fact that there existed great grudge concerning default of payment of tuition money between the victim's mothers & the Appellant.
 6. That, the trial magistrate grossly erred in law and facts by convicting (me) based on a single P3 form to address the degree of injury of two victims which is in contravention with the law.
 7. That more grounds to be adduced at the hearing of this appeal after being furnished with the law court proceedings.

The parties canvassed the appeal by way of written submissions.

Appellant's Case

7. On Conviction, the Appellant submitted that the trial court erred by relying on contradictory evidence as the witnesses were coached. He urged that the accusations were as a result of the complainant's mother refusing to pay him his salary for tuition. Further, that the medical evidence was not corroborative and the dates on which the minors were defiled was not indicated on the forms. It was his case that the forms indicated that the minors were HIV negative yet he was HIV positive therefore the same was contradictory as he would have transmitted the disease to the minors.
8. On sentence, the Appellant submitted that the life sentence was declared unconstitutional in Petition No.97 of 2021 at Mombasa by Hon. John Mativo and Hon. Githinji and also in *Petition E017 of 2021* at Machakos by Hon. G.V. Odunga. He urged that the trial court erred in law by sentencing him to life imprisonment. He prayed that the court allow the appeal.



Respondent's Case

9. The Respondent opposed the appeal on the basis that the offence was proved beyond reasonable doubt. The prosecution stated that these elements were proved to the required standard. He urged that the age of the complainant was approved by production of the health card and further, that the testimony of the witnesses corroborated the medical evidence.
10. Counsel stated that the Appellant was identified by recognition as he was a teacher in the school and given that the incident occurred during the day, the minors described very well the place and how they were defiled in turns.
11. The Respondent contended that the court had the liberty to impose sentences prescribed as long as the same are not deemed mandatory sentences. Counsel submitted that that order was given after the Appellant had been sentenced and therefore the sentence was constitutional. She urged the court to uphold the conviction and sentence.

Analysis & Determination

12. The duty of an appellate court was set out in *Okeno v Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R.* (1975) EA 57). It is not the function of a 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 draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
13. Upon considering the petition of appeal and the submissions of the parties, the following issue arise for determination;
 1. Whether the prosecution proved its case to the required standard
 2. Whether the sentence was unconstitutional, harsh and excessive

Whether the prosecution proved its case to the required standard

14. Section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) states;
 - (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.
15. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, as; identification or recognition of the offender, penetration and the age of the victim.
16. I note that during the trial, evidence was called to prove these ingredients to the required standard. The ages of the minors (victims) were proved by production of medical health cards in corroboration of the testimonies on the same by their mothers.



17. In addition to the oral testimonies of the two minors, the evidence of Penetration was proved by way of production of the P3 forms on both minors who were examined on 11th March, 2018 by a medical doctor from the facility where these two minors were taken after the act of defilement. The reports concluded that the minors had been defiled as the injuries they sustained were consistent with defilement.
18. The minors were pupils at the school where the accused taught. They knew well. The offence took place during the day. Identification was proved by recognition that the appellant being their teacher at their school, therefore he was known to the minors. It is my considered view that the prosecution proved its case to the required standard and therefore the conviction was proper in the circumstances.

Whether the sentence was unconstitutional, harsh and excessive

19. The sentence prescribed by the sexual offences act under section 8(2) is one of life imprisonment. Mandatory sentences have recently been held to be unconstitutional to the extent that they derive the court of its inherent discretionary power to consider each case on its merit and to be aware of the unique nature and circumstances of each case before the court during sentencing. In Mainigi & 5 others v Director of Public Prosecutions & another Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

20. I have considered the unique nature of this particular case and I am persuaded that despite the fact that the court passed a mandatory prescribed sentence of life imprisonment, the same was proper in the circumstances. I find that the trial court, using its discretion in sentencing the appellant to life imprisonment, was within the law. I have considered the circumstances of the case and I find no reason to interfere with the sentence. The victim's lives will forever be impacted by the actions of the appellant and therefore the sentence was commensurate to the offence.
21. The upshot of the above finding is that the appeal herein is dismissed forthwith. The accused will continue to serve the sentence as meted by the trial court. It is so ordered!

DELIVERED, DATED AND SIGNED ON THIS 22ND DAY OF FEBRUARY 2023

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J.W.W.MONGARE

JUDGE

Delivered virtually in the presence of

1. Appellant-absent
2. Mr. Rop holding brief for Ms. Okok for the Respondent
3. Brian Kimathi – court assistant

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J.W.W.MONGARE



JUDGE

