



REPUBLIC OF KENYA



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**Okoth v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 1106 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E025 OF 2022
RE ABURILI, J
FEBRUARY 22, 2023**

BETWEEN

EMMANUEL SAMSON OKOTH APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment by the Honourable Principal Magistrate J. P. Nandi on the 03.08.2022 & subsequent sentence passed on the same date in the Principal Magistrate's Court in Bondo in Sexual Offence Case Number E064 of 2021)

JUDGMENT

Introduction

1. The Appellant herein ESO was on November 4, 2021 charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on November 3, 2021 at around 2200hr at [Particulars Withheld] village in [Particulars Withheld] Sub county within Siaya county, the Appellant wilfully and unlawfully caused his penis to penetrate the anus of SHO, a child aged 4 years.
2. The Appellant also faced an alternative charge of committing an indecent act to a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars of this charge is that on the November 3, 2021 at about 2200h at [Particulars Withheld]village in [Particulars Withheld] subcounty within Siaya county, the Appellant wilfully and unlawfully intentionally caused his penis to touch the anus of SHO, a child aged 4 years.
3. The Appellant pleaded not guilty to the charge and the case proceeded to trial where the prosecution called 7 witnesses to prove their case. Placed on his defence, he gave sworn testimony.



4. In his judgment, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt against the Appellant and he proceeded to convict the Appellant under section 215 of the Criminal Procedure Code. The Appellant was subsequently sentenced to life imprisonment starting from date of arrest.
5. Aggrieved and dissatisfied with the conviction and sentence, the Appellant filed this Petition of Appeal and raised the following grounds of appeal:
 - i. That the trial court failed to observe that the sentence imposed was manifestly harsh and disproportionate;
 - ii. That the court be pleased to consider that the ingredients forming the offence were not proved beyond reasonable doubt;
 - iii. That the court be pleased to consider that the investigation tendered was shoddy;
 - iv. That the trial court did not consider the circumstances that surround the veracity of the offence;
 - v. That the trial court failed to consider that the P3 Form was contradictive in the nature in terms of the dates the Complainant was taken to hospital;
 - vi. That the Appellant hereby beseeches the superior court to indulge into the same and/or be pleased to reduce the sentence proportionately as enshrined in Article 50 (2) (p) of the Constitution;
 - vii. That the trial court failed to consider the Appellant's defence statement which was cogent and reasonable;
 - viii. That I wish to be present at the hearing of this appeal or to be supplied with the trial record to enable me erect more grounds
6. The appeal was canvassed by way of written submissions.

The Appellant's submissions

7. It was the Appellant's submission that the prosecution had not established their case beyond reasonable doubt. That the evidence had many gaps such as the time of the commission of the alleged offence. That the charge sheet indicated 2200hrs whereas the evidence stated 9.30 p.m. and below. Further, that he was never properly or positively identified at the scene of the crime. The appellant had issues with PW2 giving testimony through PW1 and that PW1 stated that he did not know who had defiled him. In addition, the appellant submitted that PW2 could not recall him and that PW4 could also not recognise him as the offence happened at night.
8. The Appellant submitted that PW3 never mentioned that the offence was carried out in dog-style in her main examination. That there were questions on where the exact scene of the crime was as none of the Complainant's or the Appellant's clothes were in sight. That it was odd that he would stand and wait to be found out by PW1, PW3 and PW4.
9. It was the Appellant's further submission that PW3 and PW4 did not inform him of his charge when they arrested him; thus, contravening his right under Article 49 (1) (a) (i) of the Constitution of Kenya.
10. The Appellant submitted that the investigations carried out by PW5 was shoddy as they did not visit the scene of the crime nor did they collect any exhibits therefrom. He further submitted that PW7's evidence was contradictory as he stated that the accused's penis was not bruised. That PW 7 also stated



in his testimony that there were no blood stains as the lacerations were not bleeding and that there was no extensive damage. That the lab results also found that there were no blood stains, no pus cells seen and no organism seen. The Appellant submitted that on the day of the alleged offence, he was beaten up by the arresters and that is why he was bleeding.

11. It was his submission that he was arrested under suspicion and that suspicion developed upon suspicion must remain suspicion. He cited the case of *Mary Wanjiku versus Republic [1998] KLR* cited in the case of *Sawe versus Republic [2003] KLR*.
12. Lastly, the Appellant took issue with the sentence meted out by the trial court. He submitted that the trial court ought to have exercised discretion and imposed a lesser sentence or outlined a specific number of years of jailtime. The Appellant cited the case of *Philip Mwele Maingu & 6 others versus Republic*.
13. The Respondent did not file any submissions.

Analysis of the evidence before the trial court

14. I have considered the grounds of appeal and the submissions by the appellant acting pro se. In my view, the main issues for determination are whether the Appellant's conviction was sound and whether the sentence imposed was harsh and excessive.
15. This court being a first appellate court, is under a duty to revisit the evidence tendered before the trial court, analyse it afresh, evaluate it and arrive at its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and to give allowance for that. This is what was held in the case of *Okeno versus Republic [1977] EALR 32* and reiterated in *Mark Oiruri Mose versus Republic [2013] e KLR*.
16. Revisiting the evidence adduced before the trial court, PW1 the Complainant's mother; testified that on November 3, 2021 at 6 pm, she left work and went to her house. She testified that she did not find the Complainant child in the house and no one knew where he was. She searched for the complainant but when she could not find him, she headed back home where she was told by Mama S that S had informed her that she had seen a person calling the Complainant telling him that he would buy him sweets. The person was identified as being someone who works on Mama S's boat and the fishermen further identified him as S.
17. Later that night, the wife to the Uhanya Beaches' Chairman called PW1 and directed her to the home of Weda where she found the appellant outside as he rushed into the home of one of the witnesses and on getting into the house, she found the complainant child lying down and in different clothes. She carried the child and he told her that he had been defiled. They reported the matter at Uhanya Police post before proceeding to Got Agulu Hospital. She then recorded her statement at Usenge Police station.
18. On cross examination, PW1 stated that S is the one who saw the Appellant with the Complainant and that she found the Appellant naked at the time of his arrest. That she had also spoken to J where she found the Appellant having been arrested.
19. The Complainant child testified through PW1 as an intermediary. He stated that someone placed his dudu in his anus. That the person removed his 'dudu' from his trouser. He stated that the person found him at the house door and was a thief. However, he could not recall him.
20. PW3, JSO; testified that on November 3, 2021 at 9.30 pm, she was in her house when she heard a child crying outside in the bush. Using the torch on her phone, she went outside towards the cries and found



- a child naked and a naked man who was having sexual intercourse with the child. It was raining. When she started screaming that she would kill the man, he jumped away and stood behind a bush.
21. She took the child and reported the matter to the beach leader; one GA. They came back and found the accused still standing naked next to a wall. They arrested him and took him to Uhanya police base. She had never met the Appellant before but recognised him in the dock as the sexual offender, from the date of the incident.
 22. In cross examination, PW3 stated that when she got out of the house, she heard the Complainant crying. She testified that she found the Appellant in a dog style position over the Complainant. She stated that she found the Appellant in the act.
 23. GA testified as PW4 and recalled that on a rainy November 3, 2021 at 10 pm, he was in his house when J arrived with a child stating that the child had been sexually molested. After the rains, they went to the scene and found the Appellant was there naked. PW4 called the Beach management Unit (BMU) Chairman. The Chairman told him that he had received a report of a missing boy. The Chairman then came with the child's parent who identified the child as her son. They took the accused to Uhanya police post. PW4 stated that he did not previously know the Complainant or the Appellant.
 24. PW5 Number xxxx Sergeant Larian Omondi stationed at Uhanya Patrol Base testified that on November 3, 2021 at around 11.50 pm, a group of people went to the Patrol base in the company of the appellant and child complainant and alleged that the Appellant had sodomised the child Complainant. He re-arrested the Appellant and told the boy's parents to take the boy to Got Agulu Hospital. After informing the OCS of Usenge concerning the incident, he arranged for the child to be taken there.
 25. On cross examination, PW5 stated that the Appellant had been arrested by members of the public and taken to the patrol base when he was naked and with a blood-stained penis.
 26. PW6, No xxxx PC Carolyne Langat testified that she was the investigating officer in the case. She recalled that on November 4, 2021, she had received the Complainant and his parents. They described the facts of the case then she took the child to Got Agulu sub-county hospital where he was treated and a P3 Form filled. After finalising investigations, she charged the Appellant with the offence.
 27. Edwin Opiyo the clinical officer at Got Agulu hospital testified as PW7 and produced the P3 form, Lab report and treatment chit for the complainant. He stated that the Complainant had alleged to have been sodomised on November 4, 2021 at around 9 pm. He found lacerations on anus muscle walls and the lab examination revealed pus cells acid yeast cells. He found proof of forceful penetration and concluded that there was sodomy.
 28. Placed on his defence, the appellant testified on oath and stated that he was a fisherman from Alego Usonga. He maintained his innocence and stated that on November 3, 2021 he left Osieko at 8am after fishing and selling his fish then he went to take tea and at 10am he went to Uhanya Beach where he worked before, greeted him and told him that he would not go back there to fish again. That he then went to watch a movie for 30 minutes, went to bath and returned to the video place until 5.30 pm then he went to the video hall until 10pm before going to sleep. He heard sound on his way but he walked on and met 6 people who arrested him after beating him asking him why he was running away. Mr Achila was called and he was led to Uhanya Police station. That he did not know why he was arrested. He was then picked by police from Usenge and asked to record a statement. He was escorted to hospital and later charged with the offence that he had no idea of.



Determination

29. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial court, the Appellant's submissions as well as the evidence adduced before the trial court. The main issues for determination are:
- a. Whether the charge of defilement against the accused person was proved beyond reasonable doubt;
 - b. Whether the Appellant's sentence was excessive and harsh.
30. In addition to the aforementioned issues for consideration, I will answer the questions raised in the Appellant's Petition of Appeal and in his submissions.

Whether the prosecution proved its case beyond reasonable doubt

31. 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* No 3 of 2006. In the case of *Mwarome Munga Janji v Republic [2021] eKLR*, the Court of Appeal set out the key ingredients of the offence of defilement as 'proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. The question is whether those ingredients were established to the required standard.'
32. The prosecution was under a duty to prove all the ingredients of the offence of defilement beyond reasonable doubt. The onus never shifted to the Appellant neither was he under any duty to adduce or challenge the evidence adduced by the prosecution witnesses.
33. There was primarily, the requirement to positively identify the appellant as the perpetrator in this case as the offence took place at night, considering the age of the complainant. PW3 testified that it had been late in the evening and it was rainy on November 3, 2021 when she heard the sound of a child crying outside her house. Switching on the torch on her phone and investigating further, she encountered a naked person sodomising an equally naked Complainant child. When she started screaming and saying that she would kill the man, he jumped away and stood behind a bush. She went and reported the matter to the beach leader, one GA who accompanied her to the scene and they found the offender still standing naked next to a wall. PW4 corroborated the fact that the person whom both PW3 and PW4 identified to be the Appellant was still standing in the same position when he found him. They arrested him.
34. PW3 testified that she found the Appellant in the act of defiling the complainant child and in a dog like position. She had the opportunity to positively identify him as she had a torch on her phone on. In court, she also identified the Appellant as being the one she had caught on the day of the offence. The person whom PW3 caught in the act of defiling the child never ran away. He only jumped into a bush and stood there until PW3 went and brought PW4 who also came and found him still at the scene next to a wall before they arrested him and took him to Uhanya police base. These facts were corroborated by PW4 who testified that PW3 went to his house stating that she had found a child being defiled and that after it stopped raining, they went to the scene and the Appellant was still there naked.
35. I find that the Appellant was positively identified by PW3 who caught him in the act. She was able to identify the Appellant using her torch light and even when she rescued the child and went to inform PW4 and they returned to the scene, they found the same person standing next to a wall still naked. There was no evidence of any pre-existing grudge that would have motivated any witness to fabricate evidence against the Appellant.



36. I therefore find that the Appellant was positively identified beyond reasonable doubt by PW3 who had no reason to lie to court and by PW4 whom PW3 reported to and both went and found the appellant still naked at the scene.
37. Regarding his age, PW1 the Complainant's mother produced the Complainant's baptismal card which indicated that the Complainant was born on November 30, 2017. He was therefore 4 years old when the incident took place. I find the certificate of baptism conclusive evidence beyond reasonable doubt of the Complainant's age.
38. The next element to prove is that of penetration. 'Penetration is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'
39. The Complainant reported to his mother that he had been defiled. He stated that somebody placed his 'dudu' in his anus. That the person removed his 'dudu' from his trouser. He stated that the person found him at the house door though he could not recall him. It was the testimony of PW3 that she caught the Appellant in the act of having sexual intercourse with the child in a dog like position-sodomising him, the appellant was naked and over the naked child. Edwin Opiyo, the clinical officer at Got Agulu hospital testified that on examining the complainant, there were lacerations on the Complainant's anus muscle wall. He found that there was forceful penetration and concluded that there was sodomy. According to the clinical officer, the sodomy had happened 6 hours to the time of examination which fits the timeline of the occurrence of the events.
40. In his defence, the Appellant stated that on the November 3, 2021, he left Osieko at 8 am and went to take tea. He stated that at 10 am, he went to Uhanya beach, met his boss and informed him that he would not go fishing again. He stated that he was at the video hall till 10 pm and that on his way to sleep, 6 people stopped him and started beating him. He was then taken to Uhanya police post, but he did not know why he had been arrested.
- In other words, the appellant was saying he was not at the scene of crime. He raised an alibi defence. However, considering the evidence of PW3 and PW4 on how the appellant was arrested at the scene and how PW3 found him in the act of defiling the complainant and that he remained at the scene until PW3 went away with the child and returned in the company of PW4 and still found him naked that is when they arrested him, I find that the alibi defence was sufficiently displaced by the prosecution. PW3's testimony was corroborated by PW4 and PW5 and fits the storyline given by PW1.
41. On allegations that the investigations were not proper, I find that from the evidence adduced, the investigations carried out was satisfactory in proving that the Appellant was the perpetrator.
42. On alleged inconsistencies, the P3 Form indicated that the offence occurred on November 3, 2021 but the date the P3 Form was filled was November 4, 2021. I see no inconsistency there.
43. Taking all the above into consideration, I am satisfied that the prosecution proved its case against the Appellant beyond reasonable doubt on the charge of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act* No 3 of 2006. I find that the conviction of the Appellant was proper and safe. I uphold the conviction and dismiss his appeal against conviction.

Whether the Appellant's sentence was excessive and harsh

44. The Appellant complained that the sentence imposed on him was manifestly harsh theand disproportionate. He urged this Court to indulge into the same and/or be pleased to reduce the sentence proportionately as enshrined in Article 50 (2) (p) of *Constitution*.



45. Section 8 (2) of the *Sexual Offences Act* is clear that 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.
46. Article 50 (2) (p) of the *Constitution* provides that:
- ‘Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.’
47. On the unconstitutionality of this sentence, most appellants serving mandatory minimum sentences have cited the case of Philip Mueke Maingi & another versus Republic Petition E017 of 2021 at Machakos High Court where Odunga J held that minimum mandatory sentences issued over *Sexual Offences Act* No 3 of 2006 was unconstitutional.
48. In the above Maingi case, the Petitioners submitted that their grievance stemmed from the fact that the *Sexual Offences Act* prescribed minimum-maximum sentencing provisions which fetter the discretion of judges in imposing alternative sentences or order. This, it was pleaded, had resulted in teeming up of a large number of prisoners who were serving various minimum-maximum sentences under the Act. According to the Petitioners, the impact of such sentencing also offended the constitutional dictates of fair trial and the benefit of equal treatment in law.
49. The Petitioners further argued that the mandatory-minimum sentences ought to have been construed with such adaptation, qualifications and exceptions in order to be in line with the *Constitution* and the individual’s dignity. It was pleaded that such sentence offended section 216 of the Criminal Procedure Code that permitted the court, in passing sentence to receive such evidence as would inform itself as to the sentence to be passed.
50. The above arguments were in line with the Supreme Court’s decision in the case of *Francis Karioko Muruatetu & another v Republic [2017] eKLR* which declared section 204 of the *Penal Code* unconstitutional, although the apex Court was quick to point out that the holding did not disturb the validity of the death sentence as contemplated under Article 26(3) of *Constitution*. The Petitioners believed that the same finding could be attached to the minimum sentences in the *Sexual Offences Act*. However, the directions given on July 6, 2021 clarified that the 2017 case was in regard to the death penalty alone.
51. This is what Odunga J’s stated, briefly:
- [90] It is clear that minimum mandatory sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances
- [91] It is however my view that such reasoning may be taken to mean that there is lack of faith in the judicial system to mete appropriate sentences, a proposition that is dangerous in a system that believes in the rule of law. The fact that a trial court may err in imposition of sentences ought not to be a reason for taking away judicial discretion and handing it over to the legislature. The judicial system provides for appellate process where parties are dissatisfied with decisions of the lower court. To remove from the Courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter are not imposing ‘sensible sentences’ in my view amounts to judicial coup. All the tiers of the judiciary cannot be said to be wrong



and if they arrive at the same decision then everyone must live with that decision however unpalatable it might appear since according to the law, that is the right decision.

52. The learned Judge's argument is that the courts ought to have discretion when meting out sentences rather than being defined and locked in by the mandatory sentencing provisions in the *Sexual Offences Act*. He found that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution*. However, according to Odunga J, the Court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.

53. In *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the Supreme Court had a different approach to life sentences. They held that it was up to the legislature to revise the provisions on life sentences as it is the legislature that drafted them in the first place. This is what they had to say:

[89] In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the *Constitution*, which reads:

'51.

(1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

(3) Parliament shall enact legislation that—

(a) Provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) Takes into account the relevant international human rights instruments.'

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of *Jackson Maina Wangui & Another v Republic Criminal No 35 of 2012; [2014] eKLR* (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

'As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.

(76) As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve.'

[94] We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life



imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

54. The Constitutional Court of Uganda in *Susan Kigula & 416 Others v Attorney General, Const App No 6 of 2003* stated that:

' The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*.'

55. The principles underpinning sentencing are that the sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

56. Discretion to sentence thus lay with the trial court in the first instance. In *Bernard Kimani Gacheru V Republic [2002] eKLR*, the judges on appeal stated that:

'It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.'

57. In the circumstances of this case, where the child defiled was 4 years old, I find that the sentence that was pronounced by the trial court was appropriate. The trial court gave the appellant herein the opportunity to mitigate and considered the circumstances of the offence and age of the child who was four years before pronouncing sentence which I find lawful. Consequently, I am not inclined to interfere with the lawful sentence at all.

58. In the end, I find the appeal herein against conviction and sentence to be wholly unmerited and the same is hereby dismissed.

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

R.E. ABURILI

JUDGE

