



**Akumu v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 19491 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E015 OF 2022
RE ABURILI, J
JUNE 29, 2023**

BETWEEN

MORRIS ODHIAMBO AKUMU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction & sentence by the Hon. C.N. ORUO on the 23.3.2022 in the Senior Principal Magistrate's Court in Winam in Sexual Offence Case No. 18 of 2020)

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No3 of 2006. The particulars of the charge were that on the 19th January 2020 in Kisumu Central sub-county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of CAO, a child aged 9 years old. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called seven (7) witnesses. At the close of the prosecution's case, the accused was placed on his defence and he gave a sworn testimony denying the charges brought against him. In his judgement, now impugned, the trial magistrate found that the prosecution proved its case beyond reasonable doubt and sentenced the appellant to serve life imprisonment.
3. Aggrieved by the conviction and sentence, the appellant filed this appeal on the 30th March 2022 vide his petition of appeal dated 25th March 2022 raising the following grounds of appeal;
 - i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh/disproportionate.



- ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.
 - iii. That the court be pleased to consider that the investigations tendered was shoddy.
 - iv. That the court be pleased to consider any aspect or condition that shall not occasion prejudice.
 - v. 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.
 - vi. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.
4. The appeal was to be canvassed by way of written submissions as directed by the court and despite the appellant asserting that he had sent the said submissions, the same were not availed to court. Only the respondent filed submissions and this court has considered the same as well as the grounds of appeal and evidence adduced before the trial court.

The Respondent's Submissions

- 5. It was submitted that the age of the complainant at the time she was defiled was 9 years as per the Birth Certificate produced that indicated that she was born on the 11.10.2011 which evidence was corroborated by the complainant's own evidence and the medical evidence on record.
- 6. As for penetration, it was submitted that the same was proved by the medical evidence adduced by PW3 and PW4 and corroborated by the complainant's evidence. Reliance was placed on the case of Charles Wamukoya v Republic Criminal Appeal No 72 of 2013.
- 7. It was submitted that the appellant was properly identified by the complainant's father, PW2 and further by the minor after an identification parade was conducted by PW6.
- 8. On sentence meted out to the appellant, it was submitted that the sentence was provided for in section 8 (1) (3) of the Sexual Offences Act and that there was no reason why the court should interfere with the same as the appellant prowled on an innocent helpless child at night and kidnapped her only to defile her.

Role of the Court

- 9. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own independent conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. The said duty was stated by the Court of Appeal in the case of Mark Oiruri Mose v Republic [2013] eKLR, as follows:

“...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that...”

Evidence before the Trial Court

- 10. PW1 CA the complainant, gave an unsworn testimony after voire dire examination revealed that she did not understand the meaning of an oath and stated that on the night of 19/1/2020 a she was



- sleeping, someone took her from her bed and carried her to the field where she normally plays, placed her on the ground and removed her cloth, a legging and also removed his trouser.
11. It was her testimony that the person then took his dudu and did tabia mbaya on her dudu. The complainant explained that ‘dudu’ was what one uses to urinate. She testified that the field was next to a house and when her assailant heard the door opening, he ran away so she went to a neighbour’s door and cried till the door was opened.
 12. PW1 testified that the neighbour recognized her and she was taken home where her father took her to Russia Hospital. It was her testimony that there were security lights outside and she could see well so she was able to see the person who carried her away. She further testified that after the Hospital, they went to the police at Kondele and when they returned home she saw her assailant in the estate and pointed him out to her mother.
 13. PW2, SOO, the complainant’s father testified that on the 19.1.2020 at 3am, as he was sleeping and heard a forceful knock on the door and realized it was his neighbour J who queried him on the whereabouts of the complainant. PW2 insisted that the complainant was sleeping but upon checking the complainant’s bed, he did not find her. He testified that Juma informed him that the complainant had been raped so they left for J house where they found the complainant with J wife.
 14. PW2 testified that the complainant looked tired and had blood on her dress. It was his testimony that in the company of J, they took the complainant to hospital where he left the complainant with her mother and proceeded to report the incident at Kondele Police Station. PW2 testified that the complainant was 9 years old.
 15. In cross-examination, PW2 stated that he had known the appellant for some time as they were neighbours.
 16. PW3, Dr. Lucy Ombok who examined the complainant whom she said was 9 years old. PW3 testified that on examination of the complainant’s genitalia, she found that the outer lip was swollen, with stitches seen and a broken hymen. It was her testimony that there was a bloody discharge. She produced the P3 form as PEX2. In cross-examination, PW3 stated that she examined the complainant after some time had passed and did not find any disease or infection. She further stated that the appellant did not present himself for examination.
 17. PW4 Calvin Okoth Odhiambo, a clinical officer at JOOTRH who filled the complainant’s PRC form dated 19.1.2020 testified that on genitalia examination, he found that there was broken outer genitalia with a tear at 12 o’clock and that there was vaginal laceration and bleeding. He further testified that the hymen was absent and he produced the PRC form as PEX1.
 18. In cross-examination, PW4 stated that he was the first person to receive the victim and examined her on the date of the incident and that he gave the clothes the complainant wore to the police.
 19. PW5 JJA testified that on the 19.1.2020 at 3am he was awoken by the cries of a child outside his house and on checking, he and the wife found a child standing outside who told them she had been attacked by a thief. It was his testimony that on turning on the lights they saw the child bleeding from the vagina and that she wore a skin tight on one leg.
 20. PW5 testified that though his wife wanted to retain the child till morning, he went to the complainant’s father’s home and informed him of the incident after which they took the child to Russia Hospital and subsequently reported the matter at Kondele. In cross-examination PW5 admitted to knowing the appellant.



21. PW6 No 237462 Inspector Julius Areke testified that on the 12.2.2020 he was required by the Investigating Officer to conduct an Identification Parade in respect of the appellant who was alleged to have defiled a minor. He testified that he informed the suspect of the reasons for the ID parade and that the accused accepted to attend. It was his testimony that the complainant was able to identify the appellant from the parade.
22. PW6 testified that he paraded 8 members with similar features of the accused i.e. Height, Colour and Body Size. He further testified that he requested the appellant to choose where he wanted to stand and the appellant opted to stand between member 5 and 6. It was his testimony that the complainant was kept at the General Office and that they conducted the Identification Parade in Kondele Police Station cells.
23. PW6 testified that when the complainant picked out the appellant, the appellant reacted by saying, “Mtoto ananjua nakunywanga chagaa kwao.” He further testified that the appellant signed the ID Parade form. PW6 further testified that the appellant was identified by touching and he produced the Identification parade Form as PEX4.
24. PW7 No 233298 PC Christabel Onyango from Kondele Police Station testified that on the 19.1.2020 at 4.46am, she received a defilement report from SO who alleged that her daughter had been defiled. It was her testimony that she recorded statements of the minor and other witnesses, visited the scene and recovered a pant that was red with whitish line that the minor identified as hers. It was her testimony that the appellant was arrested by members of the public and brought to the police station.
25. PW7 produced the appellant’s Birth Certificate as PEX3, Red panty as PEX1 and the complainant’s Discharge Summary as PEX5(a).
26. Placed on his defence, the appellant testified that on the 19.1.2020 at 3am, he was asleep in his house with his wife and children and that he slept till morning. It was his testimony that he frequented the complainant’s parents’ house, who were his neighbours, to take alcohol. He further testified that the complainant’s father had differences with him in the past as he thought the appellant had an affair with his wife.

Analysis and Determination

27. I have considered the appellant’s grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal and submissions filed by the respondent. The issues for determination emanating therein are as follows
 - a. Whether the prosecution’s case was proved beyond reasonable doubt and
 - b. Whether the sentence imposed on the appellant was excessive and harsh.

Whether the prosecution proved its case beyond reasonable doubt

28. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* and an alternative charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
29. This being a case of defilement, it is trite law that the ingredients of an offence of defilement be proved, which are; identification or recognition of the offender, penetration and the age of the victim.
30. The age of the complainant was not in doubt. The complainant testified that she was 9 years old. This was corroborated by her father PW2 and also by the investigating officer PW7 who produced a



copy of the complainant's birth certificate as PEX3 that showed that the complainant was born on the 11.10.2011.

31. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.” See the case of *Mark Oiruri Mose v R* [2013] eKLR
32. PW1 testified that her assailant carried her out of the bed onto the field where she normally played where he placed her on the ground, removed her leggings then placed his dudu in her dudu and did tabia mbaya to her.
33. The complainant's testimony was corroborated by the medical evidence adduced by both PW3 and PW4 who filled the complainant's P3 form and PRC form respectively. PW4, testified that he examined the complainant after the incident occurred and noted that there was broken outer genitalia with a tear at 12o'clock on her vagina and further there was vaginal bleeding. PW4 also noted that the complainant had pain and difficulties in walking. It was his testimony that the complainant's hymen was absent.
34. PW3 further testified that on examination of the complainant's genitalia, she noted that the outer lip was swollen, stitches were seen and that she had a broken hymen.
35. I thus find that penetration was proved beyond reasonable doubt.
36. As to whether the appellant was properly identified as the one who committed the offence. The complainant testified that as there was light outside during her assault, she was able to see her attacker. PW6 who carried out the ID parade testified that the complainant was able to pick out the appellant from the parade that he had carried out.
37. PW6 went into detail of how he prepared the ID parade in accordance with the law and further how the appellant found not fault in the conduct of the ID Parade and further went on to sign off the ID Parade form.
38. In his defence, the appellant denied the charges and stated that on the said night he was at home asleep with his wife and children. I have considered the appellant's defence in its entirety and when weighed against the evidence adduced by the prosecution, I find the same to amount to a mere denial.
39. The complainant though a minor was very firm in her testimony, which testimony was corroborated by the testimony of other prosecution witnesses as required by section 124 of the *Evidence Act*.
40. The appellant has not challenged the ID parade process in any way although he admitted that the child knew him very well as he used to take changaa in her parents' house. I thus find that the prosecution proved beyond reasonable doubt the appellant's identity as the person who defiled the complainant herein.
41. The appellant alleged that the investigations carried out were shoddy to sustain his conviction but based on the evidence adduced herein I opine that the investigations were proper and that the evidence gathered sufficiently proved the prosecution's case and the guilt of the appellant beyond reasonable doubt.
42. I find no reason to interfere with the trial court's finding on conviction which I hereby uphold.

Whether the sentence imposed on the appellant was excessive and harsh, being mandatory minimum sentence



43. The punishment prescribed for the offence of defilement under section 8(2) of the *Sexual Offences Act* where the victim is aged between 11 years and below is a life imprisonment. The evidence in this case discloses that the victim was aged 9 years in that age bracket.
44. Though the charge sheet brought against the appellant indicated that the charge was brought pursuant to Section 8 (1) (3) of the *Sexual Offences Act* that deals with defilement of a child between the age of twelve and fifteen years, the child complainant was aged 9 years old hence the charge ought to have been brought under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. I find that the same is curable in pursuant to the provisions of Section 382 of the *Criminal Procedure Code* and did not occasion any miscarriage of justice on the appellant as the evidence was clear that the child was aged 9 years. The appellant was well aware of the charges brought against him and was able to marshal a formidable defence as evidenced by the rigour in his cross-examination of the prosecution witnesses.
45. In his mitigation, the appellant stated that he was the bread winner of his family. In considering the same, the trial magistrate noted the age of the minor and sentenced the appellant to life imprisonment.
46. It is trite that sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoeb Kogo v R.* and *Wilson Waitegei v Republic* [2021] eKLR).
47. In this instance, the effect of the offence on the minor are long lasting and the psychological effect is even worse.
48. The trial magistrate heard the mitigations and in the sentencing remarks observed that the child was 9 years old hence a minor, and proceeded to sentence the appellant to life imprisonment. The sentence is lawful, however, there is no indication that the trial court considered the mitigations and the fact that the appellant was a first offender. The sentence imposed was lawful, nonetheless, over time, courts have frowned over mandatory sentences even in cases of loss of murder where lives are lost and the mandatory minimum sentences have not escaped this criticism, notwithstanding the heinousness of the sexual offences. In the case of *Chigongo Dziye v Republic* CRA 31 of 2022 CoA at Malindi [2023] eKLR Gatembu, Lesiit and Odunga JJA judgment delivered on 14th April, 2023, where the trial magistrate stated in the sentencing remarks that the offence was serious and that the law prescribed a minimum sentence for the same, in the case where the minor was 9 years old and proceeded to sentence the accused to serve life imprisonment without considering his mitigation that he was first offender, the Court of Appeal set aside the life imprisonment imposed on the appellant and substituted it with a prison term of thirty (30) years.
49. I will, in the circumstances, interfere with the life imprisonment imposed on the appellant herein and set it aside and substitute it with a prison term of thirty (30) years to be calculated from 16/2/2019 the date of the arrest of the appellant as he was not on bond during the trial and section 333(2) of the Criminal Procedure Code mandates that such period spend in custody be considered in sentencing.
50. The upshot of the above is that the instant appeal against conviction is dismissed. The appeal against sentence succeeds to the extent stated herein.
51. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF JUNE, 2023

R.E. ABURILI



JUDGE

