



REPUBLIC OF KENYA



KENYA LAW
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**EW v Republic (Criminal Appeal 67 of 2019)
[2023] KEHC 21444 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 67 OF 2019
HM NYAGA, J
JULY 27, 2023**

BETWEEN

EW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the lower court of Kenya at Nakuru Court dated 1st November, 2019 by Hon. Y. I. Khatambi (SRM) in Lower Court Criminal Case No. 106 of 2018)

JUDGMENT

1. The Appellant EW was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#). The particulars were on the diverse dates between 2017 and January 28, 2018 in Njoro Sub County within Nakuru County, he unlawfully and intentionally committed an act by inserting a male genital organ (Penis) into a female genital organ(Vagina) of R. W. a child aged 12 years which caused Penetration.
2. He 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 were on the diverse dates between 2017 and January 28, 2018 in Njoro Sub County within Nakuru County, he unlawfully and intentionally committed an indecent act to a child namely R. W. a child aged 12 years by touching her genital organ namely vagina with his genital organ namely penis.
3. The accused pleaded not guilty. The case went to full trial and on November 8, 2019, the appellant was convicted on the main charge and sentenced to serve thirty (30) years imprisonment.
4. Being dissatisfied with the said conviction and sentence, the appellant lodged an appeal raising the following grounds: -



1. That the Learned Magistrate erred in Law and in fact by not considering the defense and mitigation of the Appellant.
 2. That the Learned Magistrate erred in Law and in fact by not giving the Appellant time to prepare his defense.
 3. That the Learned Magistrate erred in Law and in fact by refusing to call crucial witnesses for further re-examination that is PW1 and PW2.
 4. That the Learned Magistrate erred in Law and in fact by failing to give out PRC forms which is crucial.
 5. That the Learned Magistrate erred in Law and in fact in showing interest in the case she was hearing.
5. He thus prayed for the conviction to be quashed, sentence to be set aside and to be set at liberty.
 6. On July 19, 2023, a week to the delivery of the judgment the appellant filed amended grounds of appeal, in which he appeared to address the issue of the sentence only. I gave him time to make up his mind on which grounds he wanted to rely on and he abandoned the amended grounds of appeal.
 7. The Appeal was canvassed through written submissions, which I have summarized as hereunder.

Appellant's Submissions

8. The Appellant cited the case of *Charles Wamukoya Karani vs Republic*, Criminal Appeal No. 72 of 2013 that highlighted on the ingredients of defilement as the age of the complainant, proof of penetration and positive identification of the assailant.
9. On penetration, the Appellant argued that the it was uncertain when the complainant was defiled. That she stated she was defiled in 2017 while PW2 and PW4 stated that she was defiled on June 6, 2018 and June 5, 2018 respectively. He submitted that the trial magistrate erred on relying fully on the evidence of PW3 to conclude that penetration happened because she failed to note that the witness stated that the hymen was not freshly broken and there was no discharge, and that his findings was not supported by any examination. He also submitted that PW'3 evidence could not establish penetration after a lapse of six months. To bolster his submissions, he relied on the case of the case of *Arthur Mshila Manga vs Republic* [2016] eKLR.
10. The appellant submitted that the prosecution case was full of contradiction and inconsistencies. Precisely, he stated that PW1 stated that she was defiled in 2017 and in 2018 and that she reported the incident immediately to her grandmother, PW2 stated that he received the report on June 6, 2018 while PW3 stated that that the complainant had been defiled 6 months' prior to the examination.
11. He also contended that PW1 told court that he defiled her in his house and that he lives alone a fact that was corroborated by PW6 but contradicted by PW6 who stated that the he lived with his wife.
12. He argued that these contradictions are irreconcilable and should be resolved in his favour.
13. On sentence, the Appellant submitted that that he was awarded a mandatory sentence and that the court did not exercise its discretion while meting out the same and failed to consider the provisions of Sections 216 and 329 of the *Criminal Procedure Code*.
14. The Appellant argued that he was entitled to right to a fair trial and to benefit from the least prescribed sentence as guaranteed under Article 50(2) (P) of the *Constitution*.



15. He submitted that recent law developments have clearly shown that courts can divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act*. To support this proposition the Appellant relied on the *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR; *Philip Mukeke Maingi vs Republic* [2017] eKLR; *S vs Malgas* 2001 (2) SA 1222 SCA 1235; *Yawa Nyale vs Republic* [2018] eKLR; *Joshua Gichuki Mwangi vs Republic* Criminal Appeal No 84 of 2015; & *Reagan Otieno Okello vs Republic* [2016] eKLR

Respondent's Submissions

16. The state counsel in opposing the appeal submitted that age of the complainant was proved by the birth certificate that showed the complainant was born on December 11, 2006. It was submitted that the offence occurred in 2018 and at that time the complainant was 11 years old.
17. On the issue of penetration, the respondent submitted that penetration was proved to the required standards through the testimony of PW1 and PW3.
18. On the identity of the perpetrator, the respondent submitted that the appellant was well known to PW1 and they lived together. That the appellant was rightly found guilty and that his disappearance after the incident for 5 months pointed to his guilt.
19. It was submitted that the Appellant defence was duly considered and he was granted sufficient time to prepare for his defence.
20. On sentence, the respondent submitted that the same was lawful.

Analysis and Determination

21. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). 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 finding and conclusion; 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, see *Peters v. Sunday Post* [1958] E.A 424.”

22. Similarly, in *Kamau Njoroge vs Republic* [1987] eKLR, the Court of Appeal stated:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions



though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”

23. The issues that arise for determination in this appeal are;
 1. Whether the prosecution proved the ingredients of defilement were proven beyond reasonable doubt;
 2. Whether the appellant was proved to be the person who defiled PW1;
 3. Whether the sentence meted on the Appellant was unlawful and excessive.
24. 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*.
25. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
 - 1) Age of the complainant;
 - 2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - 3) Positive identification of the assailant.
26. This Court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law and beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.
27. These ingredients were restated in the case of *Dominic Kibet Mwareng vs Republic* Criminal Appeal No 155 of 2011, the learned judge noted that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant”
28. In the case of *Charles Wamukoya Karani vs Republic*, Criminal Appeal No. 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
29. I note that the Appellant herein did not challenge the age of the complainant and his identification but has only challenged the second ingredient of penetration.
30. 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.”
31. In the case of *Mark Oiruri Mose vs R* [2013] eKLR the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa



be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”

32. Further, the same court, differently constituted, in the case of *Erick Onyango Ondeng vs Republic* (2014) eKLR in this respect noted: -
- “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. “
33. In light thereof, I will now consider whether the trial magistrate erred in holding that there was penetration.
34. According to the Appellant the trial magistrate erred in relying fully on the evidence of PW3 to find that there was penetration. That this witness evidence was not backed by any examination. He also contended that the complainant was examined 6 months after the incident and there were no fresh injuries and discharge noted.
35. Mutta K. Muideny testified as PW3. He was a clinical officer from Njoro Sub County Hospital. He confirmed the complainant was examined and it was established that she was defiled 6 months prior to coming to the Hospital. He said that no bad injuries were noted and that injury was caused by male penile shaft. He also stated that the complainant's hymen was broken. He produced Complainant's outpatient card, P3 Form and the Post Rape Care Form (PRC Form) in evidence. The P3 confirms that there was old broken hymen and that the same was caused by male penile shaft. It is true the incident was reported late, but that does not rule out penetration. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur and I so hold.
36. In the premises therefore, I opine that the prosecution proved that ingredient of the charge of defilement beyond reasonable doubt.

Issue No.2

37. PW1 testified that she lived with her grandmother and the Appellant. She said the Appellant was his uncle. She stated that that while at home washing the utensils the Appellant came and tied her mouth with a piece of cloth and took her to his house which was near their house. He then removed her panty and he lay her on his bed facing up. Thereafter he removed his trouser and inner wear and he lay on her. She told court that “he inserted his thing for urinating and put it in my place for urinating”. She said she felt pain and that after the Appellant finished defiling her, he chased her from his house. Later her grandmother came and she noticed she was walking in a peculiar way. On inquiry, she told her that the Appellant had defiled her. She was taken to the hospital where she was examined and confirmed that she had been defiled. She said when the Appellant knew the case had been reported at the police station he took off but he was later arrested. It was her testimony that that was not the first time the Appellant defiled her. He first defiled her in 2017 and she only informed her teacher about it. The second time it happened, she told her grandmother.
38. Francis Wangai testified as PW2. He was the Complainant's father and a brother of the Appellant. It was his testimony that he received a report from the Complainant's head teacher that the Appellant had defiled PW1. He took PW1 to the Hospital and later reported the incident at the Police Station. He stated that the complainant confirmed that the Appellant defiled her. He was not aware about the first incident. He stated that the Appellant disappeared for one week after the incident but he later came back and he was arrested.



39. PW4 was the complainant's class teacher. It was her testimony that on 5th June, 2018 she was in class marking. PW1 came and stood next to her and she realized that she emitted a foul smell. She enquired about it and PW1 told her that she was on her periods and that something had happened to her. She summoned her grandmother to school and PW1 told them that the Appellant had defiled her. She said they summoned the Appellant to school and he came in company of his brother and father and they all went to the Deputy Head teacher's office, while there PW1 was told to identify the person who defiled her and she pointed at the Appellant. She stated that on inquiring from the Appellant about the same, the Appellant said that he did not defile PW1 recently.
40. PW5 was Charles Kinywa. She confirmed that PW4 apprised her about the incident herein and PW1, PW4, PW1's grandmother and uncles went to her office where PW1 singled out the Appellant as the person who defiled her.
41. PW6 was RW. A mother and grandmother of the Appellant and PW1 respectively. She confirmed she was staying with PW1 and that the Appellant lived in his house in her compound. She confirmed that in June 2018 she was summoned to school by PW4 and PW1 stated in their presence that the Appellant had defiled her. That the Appellant was summoned to school and he came with PW2 and when PW1 was told to repeat what she had told them, she stated that the Appellant defiled her.
42. PW7 was the police officer stationed at Njoro Police Station. She confirmed on 14th June, 2018 a defilement case was reported at their station. On 16th June, 2018 she interrogated PW1 and PW2 and recorded their statements. She stated that the report that the Appellant had disappeared after PW6 was informed about the incident had been made on 9th June, 2018. She said on 14th June 2018 the appellant was arrested after PW2 informed them that he was back home. She said PW2 wanted the matter to be resolved out of court but she declined since it was a sexual offence. She produced the Complainant's birth certificate that indicated that she was born on 11th December 2006 in evidence. She further stated that prior to the incident no grudge existed between PW1 and the Appellant.
43. PW8, Weru Wenyola, was also a police officer from Njoro Police Station. He said in June 2018 PW1 reported that the Appellant had defiled her. He visited the scene and found the Appellant's wife. She said the Appellant took off but was later arrested. He confirmed the Appellant lived in the same compound with PW1 and PW6.
44. The Appellant in his defence stated that in June 2018 he wanted to plough the land and PW2 prevented him from doing so. He would later learn that a teacher had leased the land and was cultivating it. He said he was arrested at home and denied committing the offence.
45. What is clear from the above evidence is that all prosecution witnesses confirmed PW1 told them that the Appellant had defiled her. There was no grudge between Appellant and the Complainant and as such I find no reason why the Complainant would lie that the Appellant had defiled her.
46. The Appellant defence was merely an afterthought as he never cross examined PW2 regarding the land issue he raised in his defence.
47. In the premises therefore, in my view, PW1 told the truth and I accept her evidence against the Appellant and find that he was the one who defiled her.



Issue No.3

48. The principles guiding interference with sentencing by the appellate Court were set out in *S vs Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was 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”

49. Similarly, in *Mokela vs 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.”

50. The Court of Appeal in the case of *Ogolla s/o Owuor vs Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

51. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs Republic* [2002] eKLR restated 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.”

52. The Appellant contended that the mandatory life sentence imposed on him was excessive. He argued that the trial magistrate did not exercise her discretion on sentencing and that under Article 50(2) (p) of the *Constitution* he was entitled to benefit from the least prescribed sentence.

53. The appellant was convicted under the *Sexual Offences Act*. Section 8(3) of *the Act* provides: -

“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 child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

54. The trial court while sentencing the Appellant stated as follows;

“I have carefully considered the offence committed, mitigation by the accused and contents of the presentence report. I note the offence is rampant in this court’s area of jurisdiction. There is need for a deterrent sentence. Accused is hereby sentenced to imprisonment for a term of 30 years”

55. Flowing from above, it is clear the trial court considered the Appellant’s mitigation. It was of the view that the offence is serious. It opted for a deterrent sentence.

56. There is no evidence that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

57. However, going by the recent trend by other superior courts, the sentence imposed, without any aggravating circumstances, may appear harsh or excessive.

58. In my view the 20 years’ imprisonment set out by the law was sufficient to express outrage by the court, if that is what intended to do.

59. In the upshot, I find the evidence adduced by the prosecution against the appellant was overwhelming and there is no good ground to interfere with the conviction.

60. As for the sentence, I am inclined to substitute the same with a sentence of 20 years imprisonment and I do so. The sentence to be deemed as having commenced on 18th June 2018, when the Appellant was first remanded in custody. This is in compliance with Section 333(2) of the [Criminal Procedure Code](#). Right of Appeal explained.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 27TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

Murunga for state

C/A Jeniffer

Appellant present

