



REPUBLIC OF KENYA



**Ooga v Republic (Criminal Appeal E045 of 2022)  
[2023] KEHC 20754 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20754 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E045 OF 2022  
MS SHARIFF, J  
JULY 27, 2023**

**BETWEEN**

**JOHN OUKO OOGA ALIAS BLACKY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the conviction and sentence by Hon C.N.C Oruo  
(S.R.M) in original Winam SPMC S.O No. 60/2019 delivered on 9/09/2022)*

**JUDGMENT**

**A. Case background**

1. The appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the [Sexual Offences Act](#), No 3 of 2006. The particulars were that on diverse dates between the 2<sup>nd</sup> to the 11<sup>th</sup> day of November, 2019 in Kisumu Sub County, he intentionally caused his penis to penetrate the vagina of SAO, a child aged 15 years. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. Upon being called to plead, the appellant denied the charges and the matter proceeded to hearing.

**B. Evidence**

3. PW-1 was the victim and her evidence was that she was in the appellant's shop on November 2, 2019 wherein the appellant ordered marble juice and cake for her and she stayed with him from 4 pm up to about 8 pm. That she feared going back home since her father was harsh. She stayed with the appellant till November 11, 2019 when the appellant was arrested by her father. Upon the appellant's arrest, she escaped to a neighbour's home where she was picked by her brothers.



4. She stated that during the period, they had un protected sexual intercourse with the appellant twice. That she was taken to hospital for examination and a P3 filled. She stated that she knew the appellant as her boyfriend.
5. PW-2, EA, PW-1's step-mother informed court that the victim took bath on November 2, 2019 and went out of the compound and did not return on that day. On November 7, 2019 she made a report of a missing person with the police at Gita Chief's camp. On November 10, 2019, a son to her brother in-law informed her that he had heard the victim's voice from the appellant's that was appurtenant to the shop.
6. The witness informed PW-1's father about the same and the father kept watch over the shop overnight. At about 5 am, the father saw the appellant and the victim leave the house. He then arrested the appellant and the victim escaped. She was later arrested at a neighbour's house. They took the victim to hospital.
7. PW-3 DO stated that he was informed on November 2, 2019 by PW-2 that her daughter was missing. On November 7, 2019, he advised PW-2 to lodge a report to the police of the missing girl. On November 9, 2019, PW-2 informed him that she heard rumours that the victim's voice was heard emanating from the appellant's house.
8. He subsequently commenced his own investigations and on November 11, 2019, he arrested the appellant while in the company of the victim at about 5 am in morning while they were leaving the appellant's house. The victim escaped but was later apprehended at a neighbour's house. He stated that the minor was then taken to hospital for medical examination.
9. PW-4 Philip Otieno helped PW-3 arrest the appellant at about 5 am on November 11, 2029. He was awakened by some commotion outside his house.
10. PW-5 Collins Omondi stated that he was called by PW-2 asking him to help PW-3 arrest the appellant.
11. PW-6 Corporal Martin Kimutai stated that a report was made at Gita Police station by PW-1 of her missing daughter and on November 10, 2019, PW-3 informed him that he had information of where the victim was. He advised him to confirm the information and on November 11, 2019 at about 5 am, PW-3 and other neighbors brought in the appellant. The victim was also brought to the station before being taken to hospital. He visited the scene and recovered a dress and sandals. He later charged the appellant.
12. PW-7 Dr Ombok testified that victim was examined on November 11, 2019 and the physical examination showed normal external genitalia and a missing hymen.
13. Subsequently, the appellant was put on his defence and elected to give sworn testimony which was to the effect that on November 11, 2019, he took a client by his motorcycle to Mamboleo slaughter house. On the way at Kibuye, he met another client whom he took to Gita where he was stopped by somebody and held him and the neighbours responded. That he was then taken to Gita police station where he was rearrested. He denied committing the offence.

### **C. Appeal**

14. The trial magistrate after evaluating the evidence convicted and sentenced him to 20 years imprisonment. The appellant was aggrieved and moved this court by petition of appeal dated September 12, 2022 in which he raises the following grounds;
  - a. The court be pleased to reduce the sentence to a proportionate one.



- b. The court be pleased to consider he was first time offender who came into conflict with the law for the very first time.
  - c. The court consider that there was no intricate planning for the offence.
  - d. The trial court did not consider the circumstances that surrounded the veracity of the offence.
  - e. The trial court failed to consider his defence which was cogent and reasonable.
  - f. The trial court failed to consider the animus of the witnesses and their credibility.
15. The appellant also filed his supplementary grounds of appeal raising the following grounds;
- a. The trial court erred in convicting relying on the evidence that were obtained in a manner that was detrimental to justice (hostile witness, unlawful search) hence rejection of such evidence pursuant to Article 5(4) of the *Constitution*.
  - b. The complainant's age was not proved beyond reasonable doubt.
  - c. The mandatory nature of the sentence under Section 8(3) of the *Sexual Offences Act, 2006* is unconstitutional and not warranted on plea and the sentence is excusable upon consideration of the circumstance of the case.

#### **D. Submissions**

16. This court ordered the disposal of the appeal by way of written submissions. The parties complied.

#### **Appellant's submissions**

17. The appellant in his submissions submitted on the issue of hostility and the unlawful nature of the search that in the first instance, the victim stated that she had nothing against the appellant and in the second instance, she turned around and contradicted her fist evidence. That this turn around introduced a doubt on her evidence and should not be relied on by the court in convicting. The case of *Shiguye V Republic* (1975) EA 191 has been cited.
18. That the recovery of the dress and sandals in his house was done in a manner not acceptable in law for the reason that he did not accompany the investigating officer to his house or the landlord called to confirm the house belonged to him. He cites the decision in *Erick Otieno V republic* (2006) eKLR.
19. On the issue of the victim's age, he submits that the victim was born on March 20, 2004 and the incident happened on November 2, 2019 which means that at the time of the incident, the victim was 15 years, 8 months hence approximately 16 years and the sentence thus meted out on him is disproportionate considering that he was just 19 years. He relies on the authority in *Eliud Waweru Wambui Vs Republic* (2019) eKLR.
20. On the issue of the mandatory nature of the sentence handed down, he urges this court to reduce the sentence in case the appeal is dismissed to the equivalent of the prison term served or a non-custodial sentence. He relies on the authority in Edwin Wachira & 9 others, petition No 97 of 2021 and *Evans Wanjala Sibi V Republic* (2019) eKLR.

#### **Respondent's submissions**

21. The respondent on its part submits on the issue of age that the evidence that the victim was born on March 20, 2004 was corroborated by PW-1 that he was aged 15 years at the time of the offence.



22. On penetration, it is submitted that the same was proved by medical evidence and corroborated by the victim as was stated in *Charles Wamukoya V Republic* Criminal Appeal No 72 of 2013.
23. On the perpetrator's identity, it is submitted that the victim stated the appellant was their neighbour and the same was corroborated by PW-2, PW-3, PW-4, PW-5 and PW-6 who confirmed that the appellant's house was across the road from the victim's.
24. On the issue of sentence, the respondent submit that this court should be alive to the seriousness of the offence and the circumstances therein. That the sentence handed down is the minimum under the section charged. The authorities in *Maingi & 5 others V Director of Public Prosecutions & another*, Petition No E017 of 2021, *Joshua Gichuki Mwangi V R*, Nyeri Criminal Appeal No 84 of 2015, (unreported) and *Athanas Lijodi V Republic* (2021) eKLR have been cited.

#### **E. Analysis and determination.**

25. The instant appeal raises both issue of conviction and sentence handed down by the trial court in a charge of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act, 2006*. Section 8(3) provides;

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

26. The appellant in this appeal challenges the trial court's finding on the minor's age that the same was not conclusively proved. Going by the record, a birth certificate was produced showing that the minor was born on March 20, 2004 and this means that at the time of the offence in November 2, 2019, the minor was aged approximately 15 years 8 months.
27. Accordingly, Section 8(3) applies to minors aged between 12 and 15 years. The charge sheet indicates that the minor as at the time of the offence was 15 years.
28. Having considered the provision of the section and the evidence available, I am convinced that the minor's age was proved satisfactorily.
29. On the element of penetration, the minor testified that during her period of her stay in the appellant's home, they engaged in unprotected sexual intercourse 2 times as captured in the PRC that the penetration occurred on November 6, 2019 and on November 9, 2019. The medical evidence on the other hand showed the minor had normal external genitalia and a missing hymen.
30. It has been stated severally that penetration is normally proved by the victim's own evidence and corroborated by medical evidence. In the instant case, the medical evidence other than the missing hymen did not conclusively show that penetration did occur.
31. In *PMG v Republic* [2022] eKLR, it was held that;

Whereas proof of penetration is a requirement in proving a sexual offence, the same need not necessarily be proved by way of medical evidence alone. Penetration can be proved by other methods of evidence among them circumstantial evidence e.g when an accused person is caught red handed in a compromising situation like being found performing the actual act and for some reason medical evidence is tempered with by say improper preservation or prolonged period before examination.



32. The victim herein was examined by PW-7 on November 11, 2019, approximately 2 days after the last penetration.
33. In the circumstances, I find that the minor's evidence was categorical that the appellant defiled her notwithstanding the fact the medical evidence tendered did not conclusively prove that the victim was vaginally penetrated.
34. The next issue is the appellant's identity. On this, the minor stated that she was at 'Blacky's' shop from about 4 pm until 8 pm after the said Blacky bought her juice and cake. When she feared going back home, she spent the night at his house. she also stated that Blacky was her boyfriend and therefore knew each other well as the shop was across the road from the victim's home.
35. Another fact to be considered is the manner in which the appellant was arrested. In this case, PW-2 passed information to PW-3 that the minor could be in the appellant's home. PW-3 upon keeping watch over the appellant's home overnight managed to arrest him in the victim's company early in the morning. He was assisted in the arrest by PW-4 and PW-5.
36. The evidence above stated leaves no room for doubt that the appellant was positively identified.
37. This court has also considered the appellant's defence which was to the effect that he was arrested while dropping a passenger at Gita. He did not mention the passenger's name or that he was dropping the victim at the said place, given the presence of the victim in his company at the time of his arrest. After considering that the defence, the trial court made a finding that the same was a mere denial and did not shake evidence tendered by the prosecution.
38. Similarly, having perused the record, I come to the irresistible logical conclusion that the defence as tendered was an afterthought and did not controvert evidence tendered by the respondent . The appellant's contention that his defence was not considered is not true.
39. On the sentence handed down, the Section under which the appellant was charged provides for a minimum 20 years prison term which was handed down in this case.
40. In *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, the court of appeal stated;  

“ As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”
41. In the instant case, after conviction, the trial court called the appellant to tender in his mitigation. He indeed tendered in his mitigation which was to the effect that he was an orphan taking care of his siblings. This was considered by the court before handing down the sentence.
42. As stated above, sentencing is essentially an exercise of discretion and the appellate court cannot interfere with the same unless it can be shown that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.
43. In this case, the appellant has not established any of the grounds stated and therefore no basis for such interference has been established.



44. The appellant raised issue in the manner the exhibits were recovered. These items were the victim's dress (Pexh 4b) and sandals (Pexh 4b) allegedly recovered from the appellant's house.
45. According to the record, PW-6 was taken to the appellant's home by the victim from where the items were recovered. At the time of production of the items, the appellant did not contest and or object to their production.
46. In the circumstances, I find no merit on this line of argument and proceed to reject the appellant's contention on the same.

**F. Conclusion.**

47. Premised upon the above reasons the conclusion cannot be escaped that the appeal herein lacks in merit and is thus dismissed.

**DELIVERED, DATED AND SIGNED AT KISUMU THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**MWANAISHA. S. SHARIFF**

**JUDGE**

In the presence of:-

Appellant

Mr Sean Ogutu for the Respondent.

