



**Njurai v Republic (Criminal Appeal E168 of 2022)  
[2023] KEHC 21731 (KLR) (Crim) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21731 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E168 OF 2022  
LN MUTENDE, J  
AUGUST 10, 2023**

**BETWEEN**

**BENSON MUGO NJURAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 266 of 2019 at the Chief Magistrate's Court Makadara by Hon. M. Kivuti – SRM on 29th July 2022)*

**JUDGMENT**

1. Benson Mugo Njurai Mbuimwe, 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*. Particulars of the offence were that on the 22<sup>nd</sup> day of October, 2019 within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the anus of PMS a child aged 12 years.
2. In the alternative, he faced the charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars of the offence being that on the 22<sup>nd</sup> day of October, 2019 within Nairobi County, he intentionally touched the genital organ namely anus of PMS a boy aged 12 years with his penis.
3. Having been taken through full trial he was convicted for the offence of defilement and sentenced to serve twenty (20) years imprisonment.
4. Aggrieved, the appellant proffered this appeal on grounds, as amended, that: Identification of the appellant was not proper; the act of penetration was not proved; there were material contradictions, inconsistencies and incoherence that made the entire case deficient; and, that essential prosecution witnesses were not availed.



5. The appeal was disposed through written submissions. It is urged that the complainant stated in his evidence that he had never seen the appellant before the night of 22<sup>nd</sup> October, 2019 at 8.00 pm. He questioned the intensity of the light which were alleged to have been street lights. That the finding of the trial magistrate that the complainant and accused were known to each other prior to the incident was biased.
6. That the complainant did not mention the assailant to anybody in respect of his description or even in the first report. Reliance was placed on the case of *R. vs. Kabogo S/o Wagunju* 23(1) KLR 50.
7. Also cited was the case of *Akumu vs. Republic* (1954) 21 EACA where the Court of Appeal stated that:
 

“Evidence of first report often proves a good test of which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or deliberately made up case. Truthfulness will be in the first statement from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”
8. On the question of penetration of the complainant’s genitalia. It is argued that it was not conclusively proved. That sometimes children behave in a way that is beyond their age by consenting to sexual offences then deny having consented; and, may even make false accusations.
9. The Respondent/Republic through learned Prosecution Counsel Ms. Chege opposed the appeal. It submitted that the age of the victim was proved to be twelve (12) years. That penetration was through the anus which is a genital organ. That the complainant identified the appellant as the assailant, having seen him by aid of street lights and the appellant did argue that the complainant allowed him to have sex with him.
10. On the question of sentence, the respondent urged the court to be guided by the case of *Ogolla s/o Owuor Vs. Republic* (1954) EACA 270, where it was stated that:
 

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also In *Omuse - v- R* (Supra) while in the case of *Shadrack Kipkoech Kogo –vs- R., Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus:- “ sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so harsh and excessive and therefore an error of principle must be interfered (see also *Sayeka –vs- R.* (1989 KLR 306).”
11. Briefly, facts of the case were that PMS the complainant returned to his friend Makau a radio, at 6.00pm but did not find him at home. As he walked back home he saw a man burning rubbish at the bridge. Streetlights enabled him to see the individual who whistled and beckoned him. He saw three other people nearby arguing. The person engaged him in a conversation by asking his name, why the three persons were fighting, where he lived and what he was doing alone? He asked him to wait at the place and he complied. The individual went behind the huge heap of garbage and returned with crushed smokies that he offered him but he declined. The person requested him to keep him company and he stayed until a certain lady approached them and picked up a child. The individual told him that the lady was his wife and requested him to assist in burning the rubbish.



12. Subsequently, the individual convinced him that he could encounter robbers along the way if he left. He spread some gunny bags and told him to sleep. He did and drifted off to sleep. He woke up to find the individual removing his trouser. When he resisted the individual removed a knife from his pocket and ordered him to keep quiet. He removed his trouser and inserted his penis into his (complainant) anus. Upon finishing he told him to sleep inside a makeshift structure made of carton boxes and he complied. The individual then proceeded to remove his trousers and under wear, he inserted his penis into his anus for the second time and warned him not to divulge the information to anyone lest he killed him.
13. At dawn the individual ordered him to leave. He went to a nearby dispensary and sought help. PW2 JSM his mother was contacted. He was taken to Medecins Sans Frontieres (MSF) Hospital, examined and treated.
14. The matter was reported to the Police whereby PW4 No. 96764 P.C. Vivian Akinyi was assigned the case. Together with the complainant and two (2) other officers, they moved to the scene where they found the appellant who was identified by the complainant. He was arrested and taken to Kariobangi Police Station. Investigations were carried out that culminated into arraignment of the appellant.
15. Upon being placed on his defence the appellant denied having committed the offence. He alluded to having been arrested by the police who did not explain to him any reason for his arrest. But, at the Police Station he was informed that he had defiled a child. He argued that the complainant should not have been taken seriously. However, when given an opportunity to mitigate he stated that he had no idea that it was an offence to sleep with a child.
16. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 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. R* [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *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 courts’ 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 - See *Peters v. Sunday Post* [1958] EA 424”.
17. It is argued by the appellant that he did not molest the complainant. Ingredients of defilement are provided by Statute, Section 8(1) of the *Sexual Offences Act* that enact thus:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
18. In this respect the Prosecution was required to prove beyond reasonable doubt:
  - i. The age of the victim.
  - ii. Proof of the act of penetration.



- iii. Positive identification of the assailant (Also see the case of Fappyton Mutuku Ngui vs Republic, H.C.CR.A. No. 296 of 2010).
19. It is crucial to prove the age of the complainant in a case of defilement since a child is a young human being below the age of eighteen (18) years (Also see Section 2 of the *Children Act*).
20. To prove the age of the complainant the Prosecution adduced in evidence a birth certificate in the name of P.M. who was born at Pumwani Hospital on 5<sup>th</sup> December, 2007, evidence that was not challenged. PW2 his mother testified to his date of birth being on the 9<sup>th</sup> day of December, 2007. In the case of *Omuroni Francis vs. Uganda* Criminal Appeal No. 2 of 2000 the Court of Appeal held that:
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”
21. It was hence proved without a doubt that at the time of the incident, the complainant was twelve (12) years old.
22. As to the ingredient of penetration, the term “Penetration” is defined by Section 2 of the *Sexual Offences Act* thus:
- “The partial or complete insertion of the genital organs of a person into the genital organs of another person”
23. The complainant stated that the assailant inserted his genital organ (penis) into his anus. According to Section 2 of the *Sexual Offences Act*, a genital organ includes the whole or part of a male or female genital organ, an anus inclusive. The act was committed on the night of 22<sup>nd</sup> October, 2019. According to the Post Rape Care Form, the complainant was subjected to medical examination at the MSF Medical facility on the 23<sup>rd</sup> October, 2019. Following the examination conducted, he had a tear on the anus at the six O’clock on the anal ring extending to the anal skin overlying the perineum region. Subsequently a P3 Form was filed which confirmed the injury sustained. This was proof of penetration having occurred.
24. On the question of identification of the assailant, the complainant was alone with the perpetrator of the act hence evidence tendered was of a single witness. In the case of *Kibangeny Arap Korir vs. R* (1959) EA 92, the court held that a child under 14 years is a child of tender years.
25. Section 124 of the *Evidence Act* provides that:
- Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.



26. The complainant identified the appellant herein as the assailant. It is however contented that the identification was not positive as the prevailing circumstances did not favour correct identification.
27. In the case of *Wamunga vs. Republic* (1989) KLR 42 it was stated that:
- “Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
28. The complainant stated that there were street lights that enabled him to see the appellant properly. Besides, there was light from the burning fire. The evidence of the complainant of having slept with the appellant the whole night until dawn was supported by the fact of the appellant’s argument in his evidence before conviction that he had no idea that sleeping with a child was erroneous. This being the case the trial court was justified in believing the complainant who was consistent that he had been defiled by the appellant herein.
29. The complainant also contends that there were material contradictions which were not pointed out. Further, he also urged that crucial witnesses were not availed without expounding on the same.
30. On the sentence meted out, section 8(3) of the *Sexual Offences Act* provides that:
- 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.
31. In the case of *Ogola s/o Owuor vs. Reginum*, (1954) EA 270, it was held that:
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”
32. It is a basic principle of the law that sentence depends on the discretion of the trial court such that an appellate court would not interfere with it unless the sentence is excessive or based on wrong principles. (Also see, *Benard Kimani Gacheru Vs. Republic* (2002) eKLR.
33. In the case of *Joshua Gichuki Mwangi vs. Republic* Criminal Appeal No. 84 of 2015 where the appellant was stated to have contravened section 8(1) as read with section 8(3) of the *Sexual Offences Act*, the Court of Appeal was of the view that even though the mechanical nature of mandatory sentences may promise certainty of severity of sentences, it is often at the expense of proportionality and individualized approach to sentences which balances between deterrence and the rehabilitation of the accused. The court went on to state thus:
- “...This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Page 18 of 19 Constitution. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not



be limited. This was well articulated by this Court in *Dismas Wafula Kilwake vs. Republic* [2019] eKLR as follows;

“Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. For these reasons we allow this appeal and we set aside the 20- year sentence and substitute it with a 15-year sentence to run from the time the trial court imposed its sentence...”

34. Considering jurisprudence that has emerged in that respect, I set aside the sentence imposed of twenty (20) years imprisonment that I substitute with fifteen (15) years imprisonment. The sentence will be effective from the date of arrest, the 25<sup>th</sup> day of October, 2019.

35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 10<sup>TH</sup> DAY OF AUGUST, 2023.**

**L. N. MUTENDE**

**JUDGE**

**In the presence of:**

Appellant

Mr. Kiragu for ODPP

Court Assistant - Mutai

