



**NO v Republic (Criminal Appeal 49 of 2020)
[2023] KEHC 24394 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 49 OF 2020
PJO OTIENO, J
SEPTEMBER 29, 2023**

BETWEEN

NO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of
Hon. G. Ollimo RM in Butere S.O. Case No. 36 of 2018)*

JUDGMENT

1. The appellant was arraigned before the Resident Magistrate at Butere, in Sexual Offences Case No. 36 of 2018, charged with one count of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence are that on the 20th day of October 2018 in Mulwanda Location, Khwisero Sub-County within Kakamega County, the Accused person intentionally caused his penis to penetrate the vagina of MO a child aged 17 years.
2. In the alternative, the Accused was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence are that on the 20th day of October 2018 in Mulwanda Location, Khwisero Sub-County within Kakamega County, the accused person intentionally touched the vagina of MO a child aged 17 years.
3. The Appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses and the appellant when placed in his defence chose to give unsworn testimony.
4. PW1, the victim testified that she was 17 years old and that on 19/10/2018 her 4 siblings had gone to visit their mother who works in Luanda while she decided to stay behind to study since she was a class 8 candidate. She asked her cousin IV to spend the night with her and the next day IV left for her



sister's place. That day she left school at 5PM and proceeded home to prepare dinner at the kitchen which was detached from the main house. After cooking she went back to the main house and slept at the sitting room when she suddenly heard someone walking from the bedroom to where she was. He grabbed her and showed her a knife saying he would kill her. He defiled her three times and left at 3AM. When he was leaving he did not know how to unlock the door and so he lit his torch hence she was able to see him clearly and identify him as his father's cousin who had been pursuing before. After he left she heard his footsteps walking towards the house behind theirs. The next day she cleaned her uniform and went to her mother's house and was in severe pain and they took her to Maseno Hospital where she was admitted.

5. On cross-examination she stated that she was a virgin prior to the incident and that her private parts were bleeding and swollen and that she bled for one week. She further stated that the appellant lived behind their house.
6. PW2, MO and mother to the victim testified that on 21/10/2018 at about 8PM she received a phone call from her eldest daughter informing her that the complainant was in a bad state. She left work and went home at 11PM where she found the victim's private parts swollen and bleeding. She rushed her to Maseno Hospital for treatment and later reported the incident with the chief and the police after the victim narrated to her what had happened. She further stated that on their way to the hospital the Appellant would call her to ask if the victim had identified the perpetrator.
7. PW3, Samuel Otimo a clinician at Khwisero Health Centre testified that he examined the victim on 2/11/2018 two weeks after the incident and that her hymen was broken and there were no other injuries. On cross examination he stated that the victim went to the facility 14 days after the incident and had already been treated at Maseno Hospital.
8. PW4 No. 106049 PC Dorcas Chepchirchir of Eshibanga Police Patrol Base and who was the investigating officer gave evidence that on 22/10/2018 while attached at Khamsalaba Police Patrol Base, PW2 went to the station and reported that her daughter had been defiled by the Appellant on 20/10/2018 and that she had been admitted at Maseno Hospital. She summoned the Appellant and arrested him upon establishing through the production of a Birth Certificate produced as PEXH 3 that the victim was 17 years old. On cross-examination she stated that she physically visited the victim in hospital and she was bleeding profusely. On re-examination she stated that the complainant was discharged the same day after her visit.
9. The evidence of PW4 marked the close of the prosecution case after which the Court ruled that a prima facie case had been established and the accused person was placed on Defence.
10. In his Defence, the Appellant elected to give unsworn evidence and stated that on 2/11/2018 he left home for work as a driver and since it was his off day he handed over the vehicle and returned to home to plant trees. On his way he was informed by one Amunga that he had met the victim and she was lamenting that he was the perpetrator. He claimed that one month before the material date, the complainant's mother had insulted him, his mother and mother in law regarding a loan she had taken from KWFT and used her mother-in-law's cow as security without her knowledge. He further claimed that upon learning of the incident the Assistant Chief advised him over the phone to proceed to Khumsalaba Police Patrol Base which he did and was arrested upon recording his statement.
11. Judgment was subsequently delivered in which the Appellant was convicted and sentenced to serve twenty (20) years' imprisonment term. He was aggrieved with the decision of the trial court, hence lodged this appeal setting out five grounds. The summary of the grounds are that; the trial magistrate grossly erred by relying on contradictory, non-corroborative and unreliable evidence by the prosecution witness; considering facts which were irrelevant and leaving out facts which were



pertinent to the case imposing a sentence that was not only manifestly excessive but illegal; convicting the Appellant in total disregard to the law and in convicting the Appellant when there was no evidence and further not considering the Appellant's written Submissions to the offence.

12. Both sides have filed written Submissions from which the Court has benefited immensely.

Issues for Determination

13. Upon study of the Memorandum of Appeal, the proceedings recorded at trial, the Judgment appealed against and the Submissions filed, the Court isolates issues for determination to be:
 - a. Whether the prosecution proved beyond reasonable doubt the offence of defilement against the Appellant and
 - b. Whether the sentence meted on the Appellant was harsh and excessive.

Analysis

Whether the prosecution proved beyond reasonable doubt the offence of defilement against the Appellant

14. To establish the offence of defilement, there are established ingredients and/or elements that must be proved. The elements include the age of the victim, the act of penetration and proper identification of the perpetrator.
15. PW4 produced the victim's birth certificate which showed that she was 17 years of age hence the age of the victim is not in contention.
16. On the element of penetration, Penetration is defined by section 2 of the [Sexual Offences Act](#) to be the partial or complete insertion of the genital organ of a person into the genital organs of another person.
17. In law under section 124, [Evidence Act](#) the evidence of a victim on penetration is sufficient to support a conviction.
18. The victim testified as PW1 on how the Appellant accosted her in her sleep with a knife and defiled her three times on the night of the incident while threatening her never to inform any one. Her evidence appears coherent and it is thus my finding that though it was the evidence of PW3 that he examined the victim two weeks after the incident and her hymen was broken, the element of penetration was proved by the sole evidence of the complainant.
19. If more was to be required, PW2 testified that she examined the complainant's genitals and it was swollen with blood coming out. This evidence was confirmed by PW4 who visited the complainant in hospital and noticed that she was bleeding profusely. It is the Court's finding that the penetration was proved beyond reasonable doubt.
20. On the last element of proper identification of the perpetrator, it was the evidence of the complainant that though the incident happened at night, she was able to see the Appellant, her perpetrator, because he lit his torch. He was a person related and well known to her as a counsel to her father. The evidence presents a case of recognition rather than identification. The court finds that the complainant was able, with the aid of a torch shone by the Appellant. Having so found and having perused the record, no substantial contradiction or discrepancy is apparent on the evidence of the prosecution witness to merit interference with the conviction.



Whether the sentence meted was harsh and excessive

21. An appellate court should not lightly interfere with the judicial discretion a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some irrelevant factors, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case¹.
22. The complainant was 17 years of age at the time of the incident. The law prescribes a sentence of not less than fifteen (15) years where the victims aged between 16 and 18 years.
23. In the appeal before the court the trial court sentenced the appellant to 20 years' imprisonment. Though sentencing is at the discretion of the court, sentencing should be meted within the provisions of the law and a convict has the right to benefit from the least of severe sentence. That is the dictate of article 50(2)(p) of *the Constitution* of Kenya, 2010.
24. In meting out the sentence of 20 years, the trial court said: -

“ Accused has no mitigation. It is apparent that he is not remorseful. I have also considered the aggravating circumstances during commission of the offence. The complainant herein told court that the Accused threatened her with a knife if she dared to scream. I have further considered the emotional scar that the complainant has to live with for the rest of her life and the fact that the Accused person despite knowledge of the fact that the complainant’s family and his family had an ancestral relationship, he still went ahead and took advantage of the complainant’s vulnerability when she was all by herself in the house.”
25. The court discerns that the court in coming to the sentence it passed took into account only what it was to take into account. While I see no error in principle of sentencing or indeed consideration of an irrelevance and while it is a strong thing to interfere with a discretion, the court appreciates the burden placed on correctional facilities by high population and the need to give the Appellant a chance to reform and participate in nation building. On that account the sentence is reduced from twenty (20) to fifteen (15) years.
26. To that limited extent, the appeal on sentence succeeds but conviction is upheld.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29TH DAY OF SEPTEMBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of: -

The Appellant in person

Ms. Chala for the Respondent

¹ *Wanjama -vs- Republic* [1971] EA 493 at 494

