



**Owiti v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 22849 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E025 OF 2022
RE ABURILI, J
SEPTEMBER 28, 2023**

BETWEEN

BARACK OMONDI OWITI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Winam Senior Principal Magistrate's Court Sexual Offences Case No. 65 of 2020 delivered on 23rd June 2022 by Hon. F. Rashid (PM))

JUDGMENT

1. The Appellant Barack Omondi Owiti alias 'Rena' was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11 of the [Sexual Offences Act](#).
2. The child complainant was JAM aged 7 years. The offence is stated to have taken place on 19th July 2020 in Kisumu Central Sub county within Kisumu County.
3. When the Appellant who was arrested on 19th July 2020 the same date of offence appeared in court for plea before Hon. J. Mitey SRM at Winam Law courts on 20th July 2020, he pleaded guilty to the charge. However, after facts were read out to him and the case deferred for further facts to be read, on the subsequent date of 22nd July 2020, he changed the plea saying that initially, he was confused as he had never been to court before.
4. Consequently, a fresh plea was taken and he pleaded not guilty to the charges. The case proceeded to hearing with the prosecution calling six (6) witnesses. The Appellant testified on oath saying on the alleged date, he went to the stage hawking when he was arrested by 5 people.



5. After considering the prosecution and the defence case, the trial magistrate found the appellant herein guilty of the main charge of defilement, convicted him and after hearing his mitigations, sentenced him to serve twenty (20) years imprisonment. this was on 23rd June 2022.
6. Aggrieved by the conviction and sentence, the Appellant filed this appeal on 30th June 2022 setting out the following grounds of appeal:
 - i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and 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 investigation 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 the 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.
7. The appeal was admitted to hearing on 21st December 2022 and directions given on the hearing and disposal of the appeal by way of written submissions.
8. The appellant and the ODPP were accordingly served with a complete record of the trial court proceedings and judgment.
9. Both the Appellant and the ODPP filed their respective written submissions on 13th June 2013 and 13th June 2023 respectively. In the submissions filed by the Appellant on 13th June 2023 dated 3rd February 2023 but received late in court, the Appellant stated as follows in the introductory paragraph:

“Having received and perused the certified true copy of proceedings, I hereby align the amended grounds of petition earlier lodged from dissatisfaction and grievances on both conviction and sentence to a requisite mitigating factors and pleadings solely based on (prayers and requests) pursuant to the consonants of Section 350 of the Criminal Procedure Code Cap 75 Laws of Kenya.
10. In the submissions that follow that introductory statement, the Appellant states as follows:-
 - i. That this humble submission does not entail grievances and dissatisfaction.
 - ii. That I was a first offender who came into conflict with the law for the first time.
 - iii. That the element of a statutory premeditation was satisfied in this case thus pleading for revision to appropriate one.
 - iv. That there was no intricate planning of the offence in question.
 - v. That there was a number of wanting circumstances by the conduct of the proceedings that ought to lower the degree of blame.
 - vi. That the Honourable Court be pleased to adhere by the provisions of Articles 50(2) of the Constitution of Kenya, 2010.



- vii. That the Honourable Court be pleased to consider the status of my family that consists of a wife and a daughter who were left with no option to fend for themselves regarding basic need, amongst other necessities as per the child's right.
 - viii. That this Honourable Court be pleased to consider that my family's future would be ruined by the long incarceration thus pleading for a second chance vide mitigating factors.
 - ix. That I was a young man aged 20 years old during arrest which culminated to 23 years to date whose efforts to the family were productive in terms of ascertaining their needs.
 - x. That the Honourable Court be pleased to grant orders on the sentence revision without prejudice.
 - xi. That I was involved in an accident that left my right leg fractured, thus unable to ascertain the continual incarceration substantial part of the sentence imposed.
 - xii. That the court be please to grant any aspect that shall not prejudice me regarding pleadings and mitigating factors above.
11. When the appeal came up for mention on 14th June 2023 before me, the Appellant sought leave and was granted permission to withdraw his appeal against conviction. He urged the court to consider sentence alone, as he was satisfied with the conviction.
 12. Accordingly, the Appellant having withdrawn his challenge of the conviction for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, I shall not delve into the merits of the appeal against conviction.
 13. The conviction of the Appellant is therefore sustained and upheld by this court.
 14. On sentence, the Appellant argues that he was a first offender, aged twenty (20) years, he was in custody for 3 years, he has a wife and a daughter who depended on him and are suffering, that he did not intend to defile the child and that the court should consider mitigating circumstances from the proceedings and Article 50(2) p of the *Constitution* and revise the long sentence imposed on him.
 15. In his mitigation, the Appellant also pleaded for leniency saying he had a family and that he was sorry for what he did. That he was sick, he had no parents and sought for a non custodial sentence.
 16. In the submissions dated 12th June 2023, the Prosecution submitted that the 20 years' imprisonment imposed was lenient as Section 8(2) of the *Sexual Offences Act*, the penalty section provides for life imprisonment, upon conviction where the child victim is under the age of 11 years. Counsel for ODPP submitted that the trial court considered the appellant's mitigation and the seriousness of the offence. She urged the court to dismiss the plea on sentence which is lawful and uphold the same.

Determination

17. I have considered the Appellant's appeal against sentence, his submissions and the submissions by the ODPP on behalf of the state.
18. The Appellant was charged, tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which latter provides as follows:
 - “(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”



19. In the instant case, the complainant child was aged 7 years according to her birth certificate No. B519041 issued on 7th May 2019 produced as P. Exhibit 1 showing that the complainant was born on 1st December 2012. She was a child of tender age.
20. The circumstances of the offence are that the appellant had previously defiled the child complainant before that date hence it was a follow up when at 9.00am the child had been sent to bring containers for water and on her way, she met the appellant who beckoned her and directed her to go to the nearby bathroom. He followed her, directed her to remove her clothes, lie on the floor, he removed his trouser, covered her mouth so that she does not scream and inserted his penis into her vagina thereby defiling her.
21. The appellant was well known to the complainant. The child testified how the appellant had previously defiled her at a motorcycle stage and that he used to defile her every morning during corona period. He could then give her Kshs.5 each time he defiled her.
22. While he was still defiling the child on the material day, PW 4 Enos Orenge Owil knocked the door of the common bathroom and that is when the appellant dressed up quickly and ran out. PW 4 screamed and members of the public went to the scene and arrested the Appellant and took him to the police.
23. The child also testified how the Appellant had told her that if she told anyone about the acts of defiling her, he would kill her. Those are the surrounding circumstances.
24. The Appellant knew that what he was doing to the little 7 years old girl was wrong. He threatened to kill her if she revealed what he was doing to her. He cannot plead ignorance on age. If he had a family, a wife and daughter, did he expect someone to do to them what he was doing to this little child? Did he expect his own wife and child to be protected from harm? If so, then the same applied to this child. The right to the protection of that little child was violated by the Appellant.
25. That notwithstanding, the trial magistrate exercised extreme discretion and leniency and sentenced the appellant to serve twenty (20) years imprisonment instead of life imprisonment.
26. The prosecution did not apply for sentence enhancement. I shall therefore say no more on that save that the trial court was too lenient and there is no other sentence which this court can impose on the appellant. I find no reason to interfere with the lenient sentence imposed. I decline to interfere with the sentence of 20 years imprisonment imposed on the appellant by the trial court and dismiss this appeal against sentence. I uphold the conviction and sentence imposed by the trial court.
27. However, as there is no evidence that the Appellant posted the bail/bond terms granted to him by the trial court, I invoke Section 333(2) of the *Criminal Procedure Code* and order that the twenty (20) years imprisonment imposed on the Appellant shall be calculated from 19th July 2020, the date of his arrest.
28. I so order.
29. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER, 2023

R. E. ABURILI

JUDGE

