



**Amutete v Republic (Criminal Appeal E007 of 2022)
[2023] KEHC 22924 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E007 OF 2022
JN KAMAU, J
SEPTEMBER 26, 2023**

BETWEEN

ERASTUS AMUTETE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon J. A. Awiti (SRM) delivered at Vibiga
in Principal Magistrate's Court in SO Case No 14 of 2017 on 16th June 2022)*

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon J.A. Awiti, Senior Resident Magistrate. Hon S. O. Ongeri, Senior Resident Magistrate sentenced him to fifteen (15) years imprisonment.
2. Being dissatisfied with the said Judgment, on 17th August 2022, the Appellant lodged the Appeal herein dated 15th August 2022. He set out seven (7) grounds of appeal.
3. His Written Submissions were dated 2nd May 2022 and filed on 11th May 2022 while those of the Respondent were dated 6th June 2022 and filed on 12th June 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the trial court conducted a voir dire examination and if not, if the same rendered the trial a nullity;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.
7. The court dealt with the said issues under the following distinct and separate heads.

I. Voir Dire Examination

8. Grounds of Appeal Nos (1), (3) and (4) were dealt with under this head.
9. The Respondent did not submit on this issue. On the other hand, the Appellant submitted that the Trial Court convicted and sentenced him in contravention of the law. He asserted that the Charge Sheet and the P3 Form showed that MA (hereinafter referred to as "PW 1") was aged sixteen (16) years yet when she testified, she stated that she was born in 2006, which put her age at eleven (11) years old at the time. He argued that the Trial Court therefore ought to have established whether or not PW 1 understood the meaning of an oath or if she was possessed of sufficient intelligence to justify the reception of her evidence.
10. He placed reliance on Section 124 of the *Evidence Act*. He further argued that it was the responsibility of a trial court to comply with Section 19(1) of the *Oaths and Statutory Declarations Act* Cap 15 (Laws of Kenya) failing which it would render the trial a nullity. In this regard, he placed reliance on the case of *Johnson Muiruri vs Republic* (1983) KLR 448 but did not set out the holding he was relying upon.
11. Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 (Laws of Kenya) stipulates as follows:-

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in



accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”

12. In addressing what age would be appropriate for a trial court to conduct a voir dire examination, this court had due regard to the case of *Maripett Loonkomok v Republic* [2016] eKLR where the Court of Appeal found and held that children under the age of fourteen (14) ought to be taken through a voir dire examination. It rendered itself as follows:-

“...the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

“In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

13. Notably, the age at which a voir dire examination should be conducted depends on the circumstances of a particular case and is not cast in stone. Indeed, a court is obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a voir dire examination to determine if he or she should adduce sworn or unsworn evidence.
14. For instance, there may be need to conduct a voir dire examination where a child is seventeen (17) years lacks sufficient intelligence to comprehend the meaning of giving evidence under oath or telling the truth due to mental incapacity as a result of mental retardation, unsoundness of the mind or mental illness.
15. The ascertainment of whether such a witness understands the meaning of taking an oath cannot be taken lightly as an accused person can be convicted on the basis of sworn evidence of such a witness.
16. A perusal of the Charge Sheet showed PW 1’s age as having been sixteen (16) years at the material time of the incident on 8th May 2016. When she testified on 30th August 2017, she told the Trial Court that she was aged sixteen (16) years of age and was born in 2006. The Treatment Notes from Emuhaya Sub-County Hospital also indicated her age as sixteen (16) years. John Shigali (hereinafter referred to as “PW 3”), a Senior Medical Officer attached to Emuhaya Sub-County Hospital confirmed having filled a P3 Form for PW 1 who was aged sixteen (16) years of age.
17. It was correct as the Appellant pointed out that if she was born in 2006, then she must have been eleven (11) years of age at the time she was defiled. Having said so, bearing in mind the age that was given in the Charge Sheet and the P3 Form and that she testified about a year later, as at 30th August 2017 she then ought to have been seventeen (17) years and three (3) months and twenty two (22) days.
18. Notably, before the Trial Court could deliver its judgment, it noted that PW 1’s age was not well captured in the proceedings. It directed that PW 1 be referred for an Age Assessment. It was evident from the Judgment that the Age Assessment Report was never availed despite having been called for by the court.



19. The Trial Court determined that although PW 1's father was not called as a witness in this matter, when he took her to hospital, he gave her age at the hospital as sixteen (16) years. The Trial Court therefore adopted this as PW 1's age.
20. This court did not see any indication that it was PW 1's father who took her to hospital. In her evidence, she merely stated that she was taken to hospital. Be that as it may, in the absence of any other evidence to the contrary, this court also adopted her age as sixteen (16) years.
21. Notably, there was nothing that was presented before the Trial Court to suggest that PW 1 had mental retardation and/or incapacity for which the Trial Court ought to have conducted voir dire examination. The Trial Court observed that she stammered but could express herself. This court did not therefore find that the Trial Court erred for not having conducted a voir dire examination in this particular case.
22. Bearing the aforesaid in mind and the fact that PW 1 adduced sworn evidence and was cross-examined extensively by the Appellant herein, the Appellant could not be said to have suffered any prejudice. If he suffered such prejudice, he did not demonstrate the same to this court.
23. Going further, assuming that PW 1 was eleven (11) years as the Appellant seemed to suggest and a voir dire examination was not conducted, it is important to point out that it does not always follow that a convicted person will be acquitted merely because a voir dire examination has not been conducted or properly conducted. This is because an appellate court has the power to order that a matter be referred for re-trial. Even so, a re-trial is also not automatic.
24. This court declined to order a re-trial in the case of Alfred Mugendi vs Republic [2017] eKLR when it arrived at a conclusion that the conviction of the appellant therein was not solely based on the evidence of a single witness but there were other witnesses who testified and the Appellant's conviction was not merely based on PW 1's evidence. The Appellant's reliance on the case of Kazungu Charo vs Republic [2021] eKLR to the effect that the evidence of the complainant who was mentally challenged ought to have been corroborated thus fell by the wayside.
25. A re-trial should only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.
26. In this regard, this court fully associated itself with the holdings in the cases of Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481 and re-stated in Fatehaji Manji vs Republic [1966] E.A. 343 that Mutende and Thurania Jaden JJ cited in the case of Jackson Mutunga Matheka vs Republic [2015] eKLR where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”



27. While upholding the decision of this court in respect of Ezekiel Mjomba Katu vs Republic [2014] eKLR, the Court of Appeal cited with approval AAM vs R (2016) eKLR and held that in an appropriate case where a voir dire examination was not conducted but there was sufficient independent evidence to support the charge, the court could still be able to uphold the conviction.
28. In the premises foregoing, this court found and held that Grounds of Appeal Nos (1), (3) and (4) were not merited and the same be and are hereby dismissed.

II. Proof of Prosecution's Case

29. Grounds of Appeal Nos (2), (3), (5) and (6) were dealt with together under this head as they were all related.
30. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.
31. This court therefore considered if the Prosecution had proved its cases to the required standard, which in criminal cases is proof beyond reasonable doubt under the following distinct and separate heads.

A. Age

32. This court ascertained that PW 1 was aged sixteen (16) years old at the material time of the incident. As the Appellant did not controvert and/or rebut this evidence, this court found and held that PW 1's age had been proven and that for all purposes and intent, he was a child.

B. Identification

33. The Appellant did not submit on this issue. On its part, the Respondent averred that PW 1 was led to the Appellant's house by the School Chairman to ensure her safe return home, a fact that was confirmed by the School watchman, JC (hereinafter referred to as "PW 2").
34. The Trial Court determined that PW 1 positively identified the Appellant as her perpetrator as they were in each other's company from about 8.00 pm on the material date.
35. PW 1 was a student at [Particulars Withheld] School in Standard Six (6). She was sent home on 5th May 2016. However, she never went home out of fear as she had spent part of Kshs 1,000/= that she had been given. She spent two (2) nights in the classroom. When the Chairman found her in the classroom, he took her to the Accused person's place. The Accused person was a Village Elder.
36. As the Appellant and the said Chairman took her home, she escaped to a nearby home. The Appellant had told her not to go home. At about 7.00 pm, she returned to his home. While there, he physically assaulted her by slapping her and then had sexual intercourse with her without her consent. He then ordered her to cook which she did. After eating, he went and slept in his bedroom. She slept in the sitting room till morning.
37. She returned to the school the following morning and her father was called. On being interrogated, she narrated to them what had transpired at the Appellant's house. She was then escorted to Emuhaya Sub-County Hospital while the Appellant was arrested.
38. In his sworn evidence, the Appellant confirmed that PW 1 did come to his house on 8th May 2016 but that she escaped as he and PW 2 were escorting her home. He knew who her parents were after he was alerted of her disappearance. He was emphatic that she never went back to his house after disappearing.



39. As the Appellant admitted that Pw 1 did go to his house on 8th May 2026, the issue of recognition was not contested. Identification was by way of recognition. Whether he committed the offence that he had been charged with was a different matter altogether.

C. Penetration

40. The Appellant submitted that PW 1's hymen was patent, meaning that it was not broken. He was categorical that PW 3's evidence was not in tandem with the medical documents as they showed they were negative. He added that it was not clear if the breaking of the hymen was recent or that he was the one who broke her hymen.
41. In this regard, he placed reliance on the case of Alexander Siatikho Karoki vs Republic Kisumu Criminal Appeal No 519 of 2003 (eKLR citation not given) where it was held that the issue of penetration must be linked to the accused person so that the possibility of an earlier intercourse was eliminated and that the presence of whitish discharge in the vagina of a girl could not prove sexual intercourse more so if there was no evidence that the substance had come from the accused person.
42. On its part, the Respondent submitted that PW 3 examined PW 1 and he established that she had had sexual intercourse due to the presence of epithelial cells. He produced a P3 Form that confirmed that she had been defiled. It was its submission that the medical evidence corroborated PW 1's evidence that she was defiled.
43. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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(emphasis).”

44. This was a case of one person's word against the other. However, PW 3's evidence and documentary evidence corroborated PW 1's testimony that the Appellant actually defiled her on the material date.
45. According to PW 3, PW 1's hymen was broken. There were bruises in the vagina and she was discharging a whitish discharge from the vaginal walls. There were epithelial cells which was proof of sexual activity. Laboratory tests showed that she had an infection, the nature of which could not be ascertained. The Pregnancy test was negative. She was put on Pep- to prevent HIV/AIDS and painkillers due to bruises on the vaginal walls. The object of penetration was said to have been described as penile penetration.
46. There did not appear to be any contradiction between the entry in the Hospital Attendance Notes and PW 3's evidence regarding the breaking of PW 1's hymen. Indeed, a “hymen patent” is not the same thing as an “unbroken hymen.” According to google, “the central portion of the hymen is ordinarily patent (perforate), permitting egress of mucus and blood. If the hymen is imperforate, mucus and blood from endometrial sloughing accumulate.”



47. The fact that the hymen was broken did not mean that PW 1 had any sexual activity. However, the whitish discharge, epithelial cells and bruises suggested a recent sexual activity. In the absence of other proof, all scientific evidence showed that PW 1 was defiled.
48. The Prosecution has the liberty to call any number of relevant witnesses to prove any fact. Failure to call witnesses that will not assist its case does not deal a fatal blow to its case. This only happens if it fails to call a crucial witness to prove a particular fact. The Appellant's assertions that the Prosecution did not call the watchman, PW 1's father and teacher was therefore immaterial as the evidence that the Prosecution tendered was sufficient to prove that he indeed defiled PW 1.

Conclusion

49. This court did not find any inconsistencies, gaps, discrepancies or contradictions on the part of the Prosecution's case and if there were any, the same were immaterial and irrelevant and did not weaken the Prosecution's case.
50. This court did not find other co-existing circumstances to weaken the inference of guilt on the Appellant's part. His sworn defence was rebutted and did not outweigh the evidence the Prosecution tendered in court.
51. This court thus found and held that the Prosecution had proved its case against the Appellant herein to the required standard, which in criminal cases, is proof beyond reasonable doubt.
52. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (2), (3), (5) and (6) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

III. Sentence

53. Grounds of Appeal No (7) of the Petition of Appeal were dealt with under this head.
54. The Appellant submitted that the Trial Court meted upon him a sentence that was manifestly excessive. He pointed out that the record did not show that he was given an opportunity to mitigate which was a contravention of the law.
55. He argued that the Trial Court ought to have exercised its discretion and sentenced him to a lesser sentence and also considered the period that he had already served.
56. As pointed hereinabove, the Appellant herein was charged under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* because PW 1 was about sixteen (16) years of age at the material time of the incident.
57. Section 8(4) of the *Sexual Offences Act* states that:-

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
58. Having convicted the Appellant herein, the Learned Trial Magistrate did not therefore err when he sentenced him to fifty (15) years imprisonment as that is what was provided by the law.
59. The above notwithstanding, this court took cognisance of the fact that there is emerging jurisprudence that mandatory minimum sentences in defilement cases are unconstitutional and courts have a discretion to depart from such minimum mandatory sentences.



60. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
61. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing offences.
62. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
63. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK vs Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
64. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the [Sexual Offences Act](#) prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of [the Constitution](#) of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
65. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
66. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
67. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to lower than the fifteen (15) years imprisonment that has been prescribed in Section 8(4) of the [Sexual Offences Act](#).
68. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of ten (10) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.
69. Turning to Section 333(2) of the Criminal Procedure Code cap 75 (Laws of Kenya). The said section provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

70. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
71. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
72. A perusal of the proceedings of the lower court show that the Appellant was arrested on 9th May 2016. He was arraigned in court on 11th May 2016 when he was released on bail/bond. However, he jumped bail and did not attend court on 22nd February 2022 when the judgment was to be delivered. He was subsequently arrested and remanded in custody on 16th June 2022 when he was convicted. He was then sentenced on 3rd August 2022. The period between 16th June 2022 and 3rd August 2022 therefore ought to be considered while computing his sentence in line with Section 333(2) of the Criminal Procedure Code.
73. In the premises foregoing, while Ground of Appeal No (7) was not really merited because the Trial Court sentenced the Appellant to a lawful sentence under the *Sexual Offences Act*, this court nonetheless found that there was merit in setting aside the sentence of fifteen (15) years in view of the emerging jurisprudence.
74. Notably, the Appellant’s argument that he was not allowed to mitigate which was contrary to the law might not have assisted him as the sentence that faced him was a minimum mandatory sentence. In view of the fact that other Court of Appeal benches have determined that courts cannot exercise their discretion to give lesser sentences than those prescribed in Section 8 of the *Sexual Offences Act*, the Trial Court could not be faulted for not having given the Appellant the opportunity to mitigate because of the confusion that arose as a result of the case of *Francis Karioko Muruatetu and Another vs Republic* (Supra).

Disposition

75. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 15th August 2022 that was lodged on 17th August 2021 was partly merited and the same be and is hereby allowed. The Appellant’s conviction be and is hereby upheld as it was safe. However, his sentence of fifteen (15) years imprisonment that was imposed on him be and is hereby vacated and/or varied and/or set aside and reduced to ten (10) years imprisonment and the same to run from 3rd August 2022.
76. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 16th June 2022 and 3rd August 2022 when he was convicted and sentenced respectively be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).



77. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE

