



REPUBLIC OF KENYA



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**Charo v Republic (Criminal Appeal E017 of 2023)  
[2023] KEHC 24085 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E017 OF 2023  
AK NDUNG'U, J  
OCTOBER 26, 2023**

**BETWEEN**

**SAMMY MAINGI CHARO ALIAS ARON KALAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Kaloleni PM  
Sexual Offences Case No E011 of 2020– R. Amwayi, SRM)*

**JUDGMENT**

1. The Appellant in this appeal, Sammy Maingi Charo Alias Aron Kalama was convicted after trial of two counts of defilement contrary to section 8(1) as read with section 8 (4) (count I) and defilement contrary to section 8(1) as read with section 8(3) (count II) of the *Sexual Offences Act*, No 3 of 2006. On 15/08/2022, the Appellant was sentenced to ten (10) years imprisonment in count I and 15 years imprisonment in count II. The sentences were ordered to run consecutively.
2. The particulars for count I were that on diverse dates between the month of October 2019 and September 2020 at [Particulars withheld] village, [Particulars withheld] Location, [Particulars withheld] Sub-County in Kilifi County intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the vagina of SK a child aged 16 years.
3. The particulars for count II were that on the same dates and place, caused his penis to penetrate the vagina of LKM a child aged 14 years.
4. The Appellant appealed to this court challenging the convictions and the sentences vide an amended grounds of appeal filed on 09/08/2023. The convictions and the sentences are being challenged on the following grounds;
  - i. Whether *voir dire* was conducted according to the procedure.



- ii. Whether the mandatory nature of the sentence provided by section 8(4) and 8(3) of the Act allows the trial magistrate to consider the circumstances of the case and impose another sentence other than the one prescribed.
  - iii. Whether the circumstances of this case established charges of defilement.
  - iv. That the sentences be reduced.
5. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that *voir dire* was not conducted on the minor witnesses. The trial court did not record the questions asked to the minor witnesses but only made an observation that they were intelligent and they were aware that they were required to tell the truth and that they understood the meaning of the oath. No inquiry was made which was a gross omission.
  6. It is urged that the mandatory nature of the sentences deprived the court of its legitimate powers of discretion in violation of section 216 and 329 of the *Criminal Procedure Code*. That from the evidence of the complainants, the complainants had consented to the sexual act in accordance with section 42 of the *Sexual Offences Act* since the complainants had the freedom and capacity to make a choice. That the complainants were not coerced, they were not stupefied and there was no evidence that the Appellant used any kind of violence to force them to the act. They fully consented and even though they were below 18 years, they had reached the age of discretion. He prayed for his sentence to be reduced in line with the developing jurisprudence on mandatory sentences in sexual offences.
  7. The Respondent in support of the convictions and sentences submitted that all elements of the offence of defilement were proved beyond reasonable doubt and there were no discrepancies and irregularities in witnesses' evidence. That the evidence against the Appellant was cogent, consistent and corroborative and proved all elements of the offence. That the evidence on record supported the charges against the Appellant hence the trial court rightfully found the Appellant guilty of the charges and convicted him accordingly. That the trial court rightly considered the Appellant's defence in the judgment and that the Appellant's defence did not shake, dislodge or controvert the overwhelming evidence against him.
  8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
  9. In that regard considered the evidence as recorded by the trial court, the grounds of appeal, submissions filed and case law cited. In my re-evaluation of the evidence, I have factored that I never saw nor heard the witnesses testify and I have given due allowance for that.
  10. The Appellant in his submissions raised a preliminary point of law. He claimed that *voir dire* was not conducted according to the procedure as the trial magistrate failed to record the questions she asked the complainants to establish that they were intelligent and understood the meaning of the oath.
  11. From the trial court record, the trial magistrate recorded as follows during *voir dire* of PW1;
 

‘The minor is 16 years old. She is in class 7 in a primary school. She is intelligent and confident. She understands her environs being court. She is aware that she is here to testify. She is aware that she is required to be truthful while testifying. She understands the oath and she shall be sworn.’



For PW3, the court recorded as follows;

‘The minor is 14 years old. She is in class 5 and goes to school. She is aware of the environs being court. She is intelligent and not timid. She is aware that she is here to give testimony. She is aware that she is to tell the truth and promise to do so. She understands the oath. She shall be sworn.’

12. It is clear that the trial magistrate indeed did not record the questions she asked the complainants. She only recorded among others that the complainants were intelligent, that they were aware that they were required to be truthful and that they understood the meaning of the oath.
13. Section 19 (1) of the [Oaths and Statutory Declaration Act](#) is the provision under which *voir dire* examinations are underpinned to determine the child’s understanding of the nature of an oath. The provision states:

“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”

14. The question that begs therefore is whether failure to record the questions and answers of the minors is fatal to the prosecution case. This question is not novel. The Court of Appeal decision [D W M v Republic](#) [2016] eKLR expressed itself as follows on the issue;

“It is evident from the above that the learned trial magistrate did not reflect in the record the questions put to H.W. during the *voir dire* administration but reflected her responses to those questions. The need for the administration of *voir dire* on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 19 of the [Oaths and Statutory Declarations Act](#) Cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In *Sula v Uganda* [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter. In *Patrick Kathurima v Republic* Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:-

“It is best, though not mandatory, in our context that the questions put and the answers given by the child during *voir dire* examination be recorded verbatim as opined by the English Court of Appeal in *Regina v Compell (Times)* December 20, 1982 and *Republic v Lalkhan* [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.”



On account of the above observation this court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety. There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where *voir dire* procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

“It is best though not mandatory in our context that the question put and the answers given by the child during the *voir dire* examination be recorded...”

The trial magistrates' failure to reflect on the record the questions put to H.W. during the *voir dire* examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt. (emphasis added)

.....

In this appeal, in response to a question put to H.W. during the *voir dire* examination, she responded that she would answer all questions put to her correctly. She was five (5) years old. Her testimony was coherent. When the appellant stood to cross-examine her she at first broke down. She was stood down for a while. After she composed herself and then took the witness stand again, she was cross-examined at length by the appellant but never faltered in her responses to questions put to her by the appellant. She was coherent. All the answers she gave were sensible. This is a clear indication that H.W. was intelligent, she had a good grasp of the events that occurred during the defilement and was obviously truthful in what she was telling the court. Both courts below believed H.W. was truthful. We find no justification to interfere with that finding. The appellant's trial was therefore not vitiated by the learned trial magistrate's failure to conduct the *voir dire* examination of H.W. in a particular manner, as asserted by the appellant.”

15. It therefore follows that failure to record the questions was not fatal to the prosecution case. Furthermore, section 19 as quoted earlier talks about child of tender years but does not define who is a child of tender years. Our superior courts have in different occasions interpreted the above sections in a bid to set out who is a child of tender years. For example, in *George Kioko Nzioka v Republic* [2020] eKLR, the Court of Appeal was guided by the case of *Maripett Loonkomok v Republic* [2016] eKLR where in Maripett reviewed cases going back to *Kibageny Arap Kolil v Republic* [1959] EA 82 which held that:

“There is no definition in the Oaths and Statutory Declaration Ordinance of the expression ‘child of tender years’ for the purpose of Section 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years.” (Emphasis added)

16. In a more recent decision of the Court of Appeal in the case of *MK v Republic* [2015] eKLR, the Court termed as unnecessary *voir dire* examination conducted on a child aged 15 years by the trial court. It was held that *voir dire* examination is done where a child witness is a child of tender years. The Court of Appeal concluded by saying that;

“In In light of the above jurisprudential exposition by the Court itself, on the issue of who is a child of tender years for purposes of Section 19 of the *Oaths and Statutory Declaration*



Act. We find no reason to depart from the position taken by the Court in the above Warui & Maripett’s cases (supra), approving the stand taken by the Predecessor of the Court in the Kibageny case (supra), that for purposes of section 19 of the Oaths and Statutory Declarations Act, a child of tender years is one who is fourteen (14) years and below.”

17. PW1 was 16 years old and PW3 was 14.6 years at the time she testified. Applying the law that the complainants were not under 14 years, there was no legal requirement for them to undergo a *voir dire* examination.
18. As to whether the charges were proved to the required standard, it is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the Sexual Offences Act.
19. Having established the ingredients of the charges, the question that this court should therefore determine is whether those ingredients were proved to the required standard.
20. Proof of age is important in a sexual offence. In *Kaingu Kasomo v Republic*, Criminal Appeal No 504 of 2010 (UR), the Court of Appeal stated that:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
21. In the present appeal, it was not in dispute that the victims were minors aged 16 years for PW1 and 14 years for PW3 at the time. Their birth certificates were produced as Pexhibit1 for PW1 and Pexhibit5 for PW3 that indicated their date of birth as 09/08/2004 and 14/08/2006 respectively and this remained uncontroverted by the Appellant.
22. What is in dispute is identity and penetration. To prove their case, the prosecution called a total of seven witnesses.
23. PW1, one of the complainants testified that she knew the Appellant as pastor Aron Kalama. She came to know him when her sister was ailing and her mother sent her sister to the Appellant for prayers. After that day, she started going for prayers at the Appellant’s with other girls. She testified that in August, 2019, she went for prayers with her mother and after prayers, the Appellant asked her to sit next to him. He told her that there were witches who would defile her at night and to break the curse, he needed to have sex with her. She believed him. He told her and her sister to be going to his house for prayers and they went the same evening. There were other girls in the house and he would call them to his bedroom one by one.
24. He called PW1 to the bedroom and he told her that to break the curse, he had to sleep with her for he was a god. He was touching her breasts while he was saying this. He asked her to remove her clothes which she did and the Appellant removed his clothes as well. He then inserted his penis into her vagina and even confirmed that it was all in. This happened on a mattress on the floor. After finishing, he told her to dress and leave and warned her not to say what had happened and if she did, she will become dumb. She believed him as he was a pastor and a man of god.
25. In September, 2020, she was taken to hospital and it was confirmed that she was pregnant. They reported to the Chief who sent them to a Police Station. She took the police to the Appellant’s house



- where he was arrested. Other girls were found there. She identified her treatment notes, P3 Form and obstetric report. She stated that she gave birth on 18/01/2021.
26. On cross examination, she retaliated what she said in exam in chief and maintained that the Appellant threatened her with dumbness in case she reported. That she continued to go to his house even after defiling her for she believed that it was godly. That she would go to his house even when she was pregnant and he told her not to tell anyone what has been happening in his house. That he told her to implicate a person in Kadzisoni for the pregnancy.
  27. PW2 was PW1's mother. She testified that she knew the Appellant as a pastor and a neighbour. That he was praying for people and she went for prayers a few times but her daughters PW1 and Zawadi would go more often as Zawadi had an ailing leg. That the girls would go for prayers at about 2:00pm and the Appellant would tell them that there will be another service and they were free to sleep over at his house. She stated that PW1 informed her that when they slept over, the Appellant would call them one by one to his bedroom, apply oil and then have sex with them.
  28. She noticed some changes with PW1 and when she asked her what was wrong, she said nothing. Her husband advised her to take the complainant to hospital and it was confirmed that she was six months pregnant. She inquired who was responsible and she stated that it was the Appellant. They reported to the Chief who sent them to the Police Station where they reported. The police accompanied by the Chief and village elders arrested the Appellant. She stated that the police found a lot of girls in the Appellant's house.
  29. On cross examination, she testified that PW1 did not disclose to her what had been happening at Appellant's house but came to learn of the whole ordeal at the Police Station. That PW1 stated that she was instructed by the Appellant not to say anything.
  30. PW3, the second complainant testified that she knew PW1 who was a relative and that they would meet for prayers at the Appellant's house. She stated that she knew the Appellant as he used to conduct prayers in his three bed-roomed house. She stated that she started going for prayers in August 2019 and they would go for prayers at 2:00pm, go back home and then go back at night, pray and then sleep at the Appellant's house. She stated that after 8:00pm prayers, the Appellant would get into his bedroom and summon each of them to the bedroom, one by one.
  31. When it was her turn and while in his bedroom, the Appellant informed her that her generation was cursed and he needed to anoint her. He instructed her to remove her clothes, she complied. He had instructed her to lie on the mattress. He applied oil in her vagina and he then inserted his penis into her vagina and defiled her. She stated that this happened several times and it was after PW1 got pregnant that what had been happening was exposed. She testified that when the police went to the Appellant's house to arrest him, they were found at the Appellant's house. She was taken to hospital and identified her treatment notes, P3 Form and lab results.
  32. On cross examination, she testified that the other girls would remain in the sitting room and he would close the bedroom door and would tell her to keep quiet while defiling her. He warned her not to tell anyone. That when they were arrested, they lied to the police for the Appellant had prayed for them and gotten well but later changed their mind and told the truth upon realizing that they were still hurting. She testified on re-examination that the Appellant had instructed them not to say anything for he was following god's instructions.
  33. PW4 was the Clinical Officer. He testified that he examined PW1. His findings were that PW1 had no injuries on her private parts, no hymen, there was a whitish discharge and had a palpable mass of about 23 weeks. A scan was conducted which revealed that she was 25 weeks and 4 days pregnant. He



- produced PW1's birth certificate as Pexhibit1, treatment notes as Pexhibit2, scan report as Pexhibit3 and P3 Form as Pexhibit4.
34. He further testified that he examined PW3 on the same day. She had no injuries on her genitalia, no hymen, no discharge and all lab tests were negative. He stated that he filled the P3 Form and confirmed penetration. He produced PW3's birth certificate as Pexhibit5, treatment notes as Pexhibit6, P3 form as Pexhibit 7 and lab request form as Pexhibit8.
  35. PW5 was PW3's mother. She testified that in 2019, PW3 used to have headaches and she heard that there was a pastor called Aron who was close by. PW3 went to the said pastor for prayers and she got healed. PW3 informed her that the pastor had said that they need to sleep in his house so she started sleeping over at the Appellant's. When PW1 got pregnant, she inquired from PW3 but she did not disclose that she had been defiled too but when the Appellant was being arrested, PW3 was found there and she was taken to hospital. She recognised the Appellant as the pastor. On cross examination, she stated that she had gone to the Appellant's house but not for prayers.
  36. PW6 was the Government Analyst from the Government Chemist. He produced the DNA report as Pexhibit10. He testified they took samples of the Appellant, PW1 and her child and that according to the DNA test, the Appellant was the father to PW1's child. On cross examination, he testified that he conducted the tests himself and the results were accurate.
  37. PW7 was the Investigating Officer. She repeated what PW1 reported to her. She stated that when the complainant missed her periods, she informed the Appellant who told her not to say that he was responsible. She stated that they were led to the Appellant's house by Assistant Chief and they found about 10 girls at the Appellant's house.
  38. She stated on cross examination that PW1 stated that the defilement started in April 2020. That the Appellant's house had a sitting room and a bedroom which had a door to ensure privacy and it was possible what have been reported to have been happening at his house.
  39. The Appellant in his sworn defence testified that he knew both complainants, they were his neighbours where he was staying with his wife at his in-law's house. He denied being a pastor and that he was conducting prayers at the house where he was staying at. He stated that the house belonged to Mzee Michael Nyanje and he is the one who was a pastor and who was praying for people. He stated that Mzee Nyanje died in 2019. He denied having sex with the complainants and stated that he lived in the said house with his wife Grace and his mother-in-law. He denied interacting with the complainants at any given time. He disputed the DNA test and stated that he was not in agreement with the results.
  40. That was the totality of evidence before the trial court.
  41. As to identity, the Appellant himself did not dispute the fact that the complainants knew him. He testified that he knew the complainants, they were neighbours. The question that arise is whether the Appellant defiled the complainant.
  42. Complainants' evidence squarely placed the Appellant as the one who defiled them. PW1 and PW3 gave eloquent statements on what transpired, which the trial court believed and which, I must state, was alone sufficient to found a conviction upon. PW1 and PW3 corroborated each other's evidence. There were no contradictions nor inconsistency in their statements. They both testified how the Appellant would conduct prayers in his house, call each one of them to his bedroom, apply oil in their vagina and defile them. They both testified that all this happened on a mattress that was on the floor. They testified that he used superstitious lies to lure them to having sex with him. They believed him as he was a man of god doing the lord's work.



43. PW1 and PW3 evidence was also corroborated by the evidence of PW2 and PW5 evidence who confirmed that they sent their daughters to the Appellant, the pastor for prayers. They confirmed that the complainants would sleep over at the Appellant's house. They knew the Appellant as the pastor living in their neighbourhood.
44. Further, PW1's evidence was well corroborated by the medical evidence that revealed that she was 25 weeks pregnant. After giving birth, a DNA test was conducted that revealed that there was a 99.99+% that the Appellant was the father to the child. PW3 evidence was also corroborated by medical evidence as well. Though she had no injuries on her genitalia, her hymen was broken. Her oral evidence also supported the claim of defilement by the Appellant.
45. The Appellant contended that his defence was not considered by the trial court. I have read the judgment of the trial court and indeed the trial magistrate rightfully rejected his defence and termed it as an afterthought. This is so because he did not cross examine the witnesses on the fact that the late Mzee Nyanje was the pastor who was praying for the people and living in the said house. He did not cross examine on the fact that he lived in the said house together with his wife and his mother in law.
46. I have also considered the said defence and it is my view that the same was a sham. It was raised too late in the day and was not put to the witnesses when they testified. Such a defence ought to be put to the witnesses so that they can have an opportunity to address it in their testimony. In my finding, the defence evidence is a belated afterthought clearly crafted in an attempt to evade the consequences of the Appellant's acts.
47. Upon re-evaluation of the evidence, am satisfied that the prosecution proved beyond reasonable doubt that the Appellant defiled the complainants.
48. As to the sentences meted, the Appellant was sentenced to 10 years imprisonment in count I and 15 years imprisonment in count II. For count I, he was charged under section 8(4) of the Act which 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.”
49. For count II, he was charged under section 8(3) thus;
- “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.”
50. It therefore follows that the trial court while applying its discretion reduced the Appellant's sentences from the mandatory sentences provided by the law. This approach is not supported by law as the Muruatetu case is not applicable to the offences herein. That issue is yet to be litigated upon fully in our hierarchy of courts to ventilate the applicable legal principle. It is trite law that sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (*Ogolla S/o Owuor v R* {1954} EACA 270).
51. The Appellant did not demonstrate any of the above factors given the circumstances of this case.



52. The prosecution filed a notice of cross-appeal dated 29/08/2023 seeking enhancement of the sentences to what the law provides. The Court of Appeal in *J.J.W. v Republic* [2013] eKLR held as follows as to enhancement of the sentence by the High Court;

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

53. It is not clear from the record whether the Appellant was served with the cross-appeal by the prosecution. The Appellant was also not warned by this court on probability of enhancing his sentences. In order not to prejudice the Appellant who has had no chance to defend the cross appeal, I will be reluctant to interfere with the sentences meted save to say that the Appellant is lucky to escape the mandatory sentences that would have been applicable.

54. With the result that the appeal herein lacks merit and is dismissed in its entirety.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**A.K. NDUNG’U**

**JUDGE**

