



**Wambui v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 26159 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E010 OF 2022
CW GITHUA, J
NOVEMBER 28, 2023**

BETWEEN

SAMUEL MORUGAMI WAMBUI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the judgement of Hon. V. Ochanda (S.R.M) dated 6th day of April 2022 in the Chief Magistrate's Court Murang'a, Sexual Offence No. 13 of 2020)

JUDGMENT

1. The appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) (hereinafter the SOA).
2. The particulars of the offence were that on 20th April 2020 at around 2100 hours within Murang'a County, the appellant intentionally caused his penis to penetrate the vagina of ENK (name withheld), a child aged 14 years.
3. Upon conviction, the appellant was sentenced to serve 20 years imprisonment. Being dissatisfied with his conviction and sentence, he proffered the instant appeal.
4. In his amended grounds of appeal filed on 24th January 2023, the appellant principally complained that the learned trial magistrate erred in law and fact by: convicting him on the basis of evidence which was full of material contradictions and which did not prove the essential elements of the offence of defilement beyond reasonable doubt; failing to appreciate that the prosecution failed to call crucial witnesses and did not therefore prove its case beyond reasonable doubt. The appellant also faulted the trial court for imposing the minimum mandatory sentence of 20 years imprisonment which in his view was harsh and excessive.



5. The appellant prosecuted his appeal in person. At the hearing, both the appellant and the respondent chose to prosecute the appeal by way of written submissions which they duly filed. In his submissions filed on 24th January 2023, the appellant reiterated and expounded on his grounds of appeal and emphasized that he was wrongly convicted as the evidence adduced by the prosecution did not prove the essential elements of the offence of defilement beyond reasonable doubt; that failure by the prosecution to call as a witness the victim's cousin, one K, dealt a fatal blow to the prosecution's case.
6. The appellant further submitted that the material contradictions in the prosecution case amounted to evidence that the prosecution witnesses were not credible and the trial court erred by relying on their evidence instead of giving him the benefit of doubt and acquitting him as required by the law.
7. On the appeal against sentence, the appellant relied on several authorities including the Supreme Court's decision in *Francis Karioko Muruatetu & 5 others V Republic* [2017] eKLR and *Evans Wanjala Wanyonyi V Republic* [2019] eKLR to make the point that the mandatory minimum sentence imposed on him by the trial court was unconstitutional and ought to be reviewed if not set aside. He urged me to find merit in his appeal and allow it in its entirety.
8. The appeal is contested by the state. Learned prosecution counsel Ms. Muriu in her written submissions filed on 11th May 2023, supported the appellant's conviction and sentence. She denied his claim that the prosecution failed to prove its case against him beyond any reasonable doubt and contended that the five witnesses who testified in support of the prosecution case proved all the essential ingredients of the offence to the required legal standard. She invited me to find that the appellant was properly convicted and sentenced and dismiss the appeal for lack of merit.
9. This being the first appeal to High court, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which is to revisit and to exhaustively re-evaluate the evidence presented before the trial court to arrive at its own independent conclusion regarding the validity or otherwise of the appellant's conviction and sentence. In doing so, I should bear in mind that unlike the trial court, I did not see or hear the witnesses and give due allowance for that disadvantage.
See: *Okeno V Republic* [1972] EA 32; *Njoroge V Republic* [1987] KLR 99.
10. I have carefully considered the grounds of appeal, the parties rival written submissions, the authorities cited by both parties and all the evidence on record. I have also read the judgment of the trial court.
Having done so, I find that only two key issues present themselves for my determination which are:
 - i. Whether the charge of defilement was proved against the appellant beyond any reasonable doubt.
 - ii. Whether the sentence imposed by the trial court was either unlawful or harsh and excessive in the circumstances of this case.
11. Starting with the first issue, as correctly submitted by both parties, for the offence of defilement to be proved, the prosecution must prove beyond reasonable doubt the three key ingredients of the offence which are:
 - i. Age of the victim
 - ii. Penetration.
 - iii. Positive identification of the person accused as the perpetrator.



12. In the present case, according to the charge sheet, the victim was 14 years old at the time the offence was allegedly committed. This age was not disputed by the appellant. I therefore find that the victim was 14 years old at the time the offence was committed.

Having established the age of the victim, it is important to address the claim in the appellant's submissions that the victim had acted like an adult and had freely and willingly spent the night in his house and had not been coerced to engage in sex. The law is clear that a child, who is in law a person under the age of 18 years is incapable of consenting to sex. The conduct of a victim who is a minor unless it is used to mount a defence under Section 8(5) of the SOA is irrelevant and immaterial in a charge of defilement.

13. As correctly observed by Mwongo J. in Peter Charago V Republic [2019] eKLR;

“Unless there is proof that the complainant deceived the

appellant, any sexual act between the two is treated as non-consensual sex and therefore amounted to defilement, as the complainant was a child under the age of 18 years and incapable of giving consent in law. Even where a minor behaves like an adult, the law still recognises that person as a child.”

14. With regard to penetration, the appellant submitted that the victim's evidence was not corroborated by the medical evidence adduced by the Prosecution. The record shows that the victim who testified as PW1 narrated how the appellant, a person she knew before lured her to his house and gave graphic details of how the two spent the night together and how the appellant had sex with her. In the morning, she escaped through a window since the appellant had left after locking her in the house.

15. Although as a matter of law the minor's evidence did not require to be corroborated by any other evidence in order to form the basis for a conviction provided the trial court believed her evidence and gave reasons for doing so given the proviso to Section 124 of the Evidence Act, it is my finding that the victim's evidence was corroborated by the evidence of PW5, Mr. Joel Onyancha, a clinical officer at Muriranja's Sub-County Hospital.

16. According to PW5, his examination of PW1 revealed that she had cuts on her vagina which had some redness and was painful on touch. Her hymen was also broken.

It should be noted that according to his treatment notes produced as P exhibit 2, PW5 examined PW1 on 22nd April 2020, two days after the incident.

Taking into account PW1's evidence narrating how the appellant sexually assaulted her and the medical evidence adduced by PW5, I am unable to fault the trial magistrate's finding that the prosecution had proved penetration to the required standard.

17. The question that now remains to be answered is whether the prosecution proved beyond doubt that the appellant was the culprit responsible for PW1's defilement.

My analysis of the evidence on record particularly the testimony of PW1 reveals that she was clear and straightforward in her evidence that it was the appellant who lured her to his house telling her that he loved her. PW1 claimed that she knew the appellant before as he had at one time worked as her father's farmhand. She recalled that she was forced to spend the night with the appellant since it started raining and she was unable to go back home. She was categorical that in the course of the night, the appellant who lay next to her naked, defiled her. On the following morning, he took to her food before he left.



18. PW1's evidence on identification of the appellant as her assailant was not shaken by the appellant during cross-examination.

In fact, during cross – examination, PW1 described how she and the appellant were dressed on that day. She recalled that the appellant had a blue “T” shirt, blue jeans and a black jacket. She had been wearing a blouse, long T-shirt and stockings but as they were rained on, the appellant gave her a short to wear. These claims were not specifically disputed by the appellant in his defence.

19. From her judgement, it is clear that the learned trial magistrate accepted and believed PW1's evidence which she was entitled to do having had the advantage of seeing the witnesses as they testified.

On my part, I have no reason to doubt PW1's credibility given PW3's evidence that on the following morning, she had found PW1 in the neighbourhood where the appellant resided. On the same morning, when explaining to her mother (PW2) where she had spent the night, she gave the appellant's first name as the person who had defiled her. This in my view demonstrates certainty on the part of PW1 regarding the identity of her assailant.

20. Given the above evidence, I have no doubt in my mind that PW1 positively identified the appellant as her assailant. She had more than sufficient time and opportunity to see and interact with him when she spent the night with him and in the morning when he took to her food before he left. In any event, the appellant's claim in his submissions that the victim acted like an adult by going to his house voluntarily and spending the night there without coercion amounts to an admission that he had in fact spent the night with the victim as alleged.

21. The fact that he was not medically examined to ascertain whether or not he had an infection similar to the one noted on PW1 does not negate the fact that he was positively identified by the victim as her assailant.

22. Further, the appellant's unsworn statement in his defence amounted to a mere denial. His only defence was that the charges were a fabrication. He did not however disclose the person or people who had allegedly fabricated the charge against him. He did not claim that any of the prosecution witnesses including the victim were the people who had allegedly framed him with the offence or that any of them had any reason to give false evidence against him. In my view, the appellant's defence did not raise any doubt in the prosecution's case.

23. Contrary to the appellant's submissions, I did not come across any material contradictions in the prosecution's case. The slight discrepancy regarding whether or not the appellant was at one time engaged in their home as a farmhand was minor and did not go to the root of the prosecution case. I am thus satisfied that the appellant was properly convicted.

24. Consequently, I have come to the same conclusion as the learned trial magistrate that the prosecution in this case adduced evidence which was sufficient to prove the offence of defilement against the appellant beyond any reasonable doubt.

It is thus my finding that the appellant was properly convicted.

25. On the appeal against sentence, the appellant has submitted that the mandatory sentence imposed on him by the trial court was unconstitutional and was harsh and excessive.

Section 8 (3) of the [SOA](#) prescribes a minimum mandatory sentence of 20 years imprisonment for a person convicted of defiling a minor aged between 12 and 15 years old.

26. There is recent jurisprudence that has been developed by both the High Court and the Court of Appeal to the effect that minimum mandatory sentences prescribed in the [SOA](#) are unconstitutional to the



extent that they deprived the trial court of its discretion to impose appropriate sentences given the facts and circumstances of each case and the mitigation offered by an individual accused person. The courts have however emphasized the fact that the minimum mandatory sentences were lawful and ought to be imposed, if the court in the exercise of its discretion was satisfied after considering all the mitigating and aggravating factors that the circumstances of the case demanded it.

27. The Court of Appeal when rendering itself on the above position in *Joshua Gichuki Mwangi V Republic* Criminal Appeal no 84 of 2015 stated as follows:

“...We acknowledge the power of the Legislature to enact laws as enshrined in *the Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the Legislature cannot arrogate to itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.....

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 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.”

28. At the time the appellant was sentenced, the mandatory minimum sentence prescribed by Section 8(3) of the *SOA* was the only sentence provided for by the law for persons convicted of defilement of a minor like the victim in this case. But guided by the above authority and having considered that the appellant was a first offender, the circumstances under which he committed the offence and his apparent age (the appellant appears to be in his early twenties), I find that the sentence meted out by the trial court does not entirely meet the objectives of sentencing and the ends of justice. In the premises, I hereby set aside the sentence of twenty years imprisonment imposed by the trial court and substitute it with a sentence of five years imprisonment.

The period of about one week which the appellant had spent in lawful custody prior to his release on bond shall be computed as part of the sentence as required by Section 333(1) of the *Criminal Procedure Code*.



It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF NOVEMBER 2023.

C.W GITHUA

JUDGE

In the presence of :

The appellant

Ms. Muriu Prosecution Counsel

Mr. Quinteen Court Assistant

