



**OL v Republic (Criminal Appeal 130 of 2017)
[2023] KEHC 25845 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 130 OF 2017
F GIKONYO, J
NOVEMBER 23, 2023**

BETWEEN

OL APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. W. Juma (C.M)
in Narok CMCR No. 451 of 2015 on 31st August 2017)*

JUDGMENT

1. This appeal is against the appellant’s conviction, and sentence of 20 years imprisonment imposed on 31.08.2017 for the defilement of the complainant- a girl aged 15 years.
2. The appellant filed an undated memorandum of appeal received in court on 04.10.2017. he thereafter filed amended grounds of appeal on 20.11.2023 setting out the following grounds;
 - i. That the age of the complainant was not conclusively proved.
 - ii. That the P3 is faulty.
 - iii. That the trial was unfair to the appellant as his defence was not considered.
 - iv. That the sentence is harsh and the mandatory minimum which did not take into account the discretion of the trial court.

Directions of the court

3. The appeal was canvassed by way of written submissions. Both parties have filed submissions.



Appellant's submissions.

4. The appellant submitted that the age of the victim was not conclusively proved by the prosecution witnesses. The appellant relied on the case of *Kaingu Elias Kasomo v R* Malindi Court of Appeal CR Appeal No. 504 Of 2010, *Francis Omuroni v Uganda* Cr. Appeal No. 2 Of 2000, *Thomas Mwambe Wengi vs Republic* [2017] eKLR And *Hadson Ali Mwachongo Vs Republic* [2016] eKLR.
5. The appellant submitted that OCS Narok police station requested for examination of the degree of injuries from the case of assault and what followed was the examination of a defilement case.
6. The appellant submitted that it was upon the prosecution to prove the case against the appellant beyond reasonable doubt and not the appellant. The appellant relied on the cases of *Joseph Ndungu Kagirir vs Republic* High Court Criminal Appeal No. 69 Of 2012, Nyeri., *Wilson Kipchirchir Koskei v Republic* [2019] eKLR.
7. The appellant submitted that the trial magistrate did not exercise her discretion in passing sentence upon the appellant. The appellant relied on the case of *Mwangi v Republic* (Criminal Appeal 84 Of 2015) [2022] KECA 1106(KLR)(7 October 2022) (Judgment) Neutral Citation : [2022] KECA 1106 (KLR)

The respondent's submissions.

8. The respondent submitted that section 8(3) *Sexual Offences Act* requires that the victim of the offence be aged between 12 years and 15 years. On 15.12.2015 the victim PW1 testified and stated that she was 15 years an age assessment was also carried out on the victim on 15.12.2015 and produced as P Exh.2 indicated that she was aged 15 years.
9. The respondent submitted that PW1 stated how the appellant who is her uncle had sexual intercourse with her at her grandmother's house and that out of that intercourse, she conceived and gave birth. The child that was born out of this sexual encounter, the victim, and the appellant were subjected to a DNA test which confirmed that the appellant is the biological father. The DNA report was produced as P Exh 4. That the evidence of the victim was corroborated by PW2 the mother to the appellant and the grandmother to the victim. In her evidence, she stated that they all used to sleep in the same house and that the appellant would sleep with the rest of the boys while she would sleep with the victim in the same bed. It was her evidence that on several occasions the appellant had picked the victim and taken her to the bush and that on three occasions she had found them having sex in the cattle Boma for calves. That PW2 the mother to the appellant did not have a motive to lie/frame the appellant. She stated that on several occasions she had warned the appellant to stop his amorous behavior towards the victim.
10. The respondent submitted that the identity of the perpetrator is not in question as he is an uncle to the victim. They both lived together at PW2 house who is the mother to the appellant and a grandmother to the victim.
11. The respondent submitted that the sentence passed by the trial court is commensurate with the crime of the appellant. The victim at the time of the sexual encounters in 2014 was aged about 14 years and was attending school at class 3. The victim became pregnant due to the defilement had to discontinue her studies and later became a victim- of early marriage. The appellant herein took advantage of the minor knowing fully well that she was his niece and proceeded to defile her leading to the victim bearing a child who in the future will suffer psychologically once the truth of her parentage is revealed to her that her father is also her grandfather.



12. The respondent submitted that the *Sexual Offences Act* was enacted with the appellant and those of his ilk in mind. The respondent *Sammy Abiyo Jiilo V Republic* [2021] eKLR, *R V Jeremiah Koilel* [2021] eKLR.
13. The respondent urged this court to affirm the conviction and sentence meted upon the appellant herein and dismiss his appeal in its entirety.

Analysis And Determination.

Court's duty

14. As a first appellate court, this court will re-evaluate the evidence and make its own conclusions. Except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32
15. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The main issues for determination are;
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

16. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.
17. It was alleged that on diverse dates between 13.05.2014 and 17.06.2014 at Olooltoto village in Narok North Sub-County within Narok county unlawfully and intentionally caused his penis to penetrate the Vagina of RRL a child 14 years.
18. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
19. It was alleged that on diverse dates between 13.05.2014 and 17.06.2014 at Olooltoto village in Narok North Sub-County within Narok county unlawfully and intentionally touched the vagina of RRL a child 14 years.

Elements of offence of defilement

20. Section 8 (1) of the *Sexual Offences Act* establishes the offence of defilement as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
21. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond a reasonable doubt are:
 - 1) Age of the complainant;
 - 2) Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and
 - 3) Positive identification of the assailant.



Age of the complainant

22. The age of the victim is an essential element of the offence of defilement because; i) defilement is a sexual offence committed against a child- a person below the age of 18 years (*Children Act*); and ii) the age of the child is an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. See penalty clauses in SOA.
23. Was the age of the victim proved?
24. The appellant urged that the age of the complainant was not proved as required in law. The prosecution submitted that the age of the complainant was conclusively proved. What does the evidence unveil?
25. PW1 testified that when she was taken for age assessment, and it was established that she was 15 years old (P Exh 2).
26. PW5 a clinical officer, testified that the girl's age was assessed on 15.12.2015 at 15 years by the head of the dental department at the Narok Referral Hospital.
27. Proof of age is not necessarily a certificate. Other evidence may be adduced to prove age (*Fappyton Mutuku Ngui vs. Republic* [2012] eKLR).
28. Based on evidence adduced by the prosecution, the age of the victim was proved to be 15 years at the time of the offence.

Penetration

29. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
30. Penetration was further explained by the Court of Appeal in the case of *Mark Oiruri Mose v R* [2013] eKLR thus:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”
31. PW1 testified that the appellant is her uncle, a brother to her father. She was living in her grandmother's house. There were two beds in the room, the appellant on one and the grandmother on another. She stated she conceived in May 2014 and went ahead to specify that it was on 02.06.2014. PW1 had agreed with the appellant that he was to go and sleep with her where she was sleeping. The appellant went to her and removed her clothes. He also removed his clothes and he had carnal knowledge of her. But, she did not feel pain. He then went back to his bed.
32. She stated that they had sex just once. In June she realized she was pregnant when she missed her periods. She moved to her uncle's home and informed wife to her uncle. She delivered a baby in February 2015.
33. PW2 a grandmother to PW1 testified that she shared a house with PW1 and the appellant. She was aware that the appellant used to defile PW1. She had caught them making love three times. At times in the cattle boma. She had warned the appellant but he persisted. According to her PW1 pregnancy was



God's doing to bring out evidence. She stated that the appellant could deny and accepted the pregnancy at different times.

34. PW3 father of PW1 confirmed that PW1 shared a house with the appellant and her grandmother.
35. PW5 a clinical officer Hillary Kiptoo testified on behalf of the clinical officer who examined the complainant and filled the P3 form on 18.02.2015.
36. PW6 an investigating officer testified that he escorted the appellant, the baby, and the complainant to hospital. Blood samples were taken for DNA. She wrote a memo and sent the samples to the government analyst. The analyst's report had positive results.
37. PW7, a government analyst testified that after analysis the appellant was found to be the biological father of the baby.
38. The evidence adduced was that the appellant had sex with the victim. The birth of a child only confirms the penetration of the PW1's. Accordingly, the prosecution proved beyond reasonable doubt that there was a penetration of the genitalia of PW1- a child. But by whom?

Was the appellant the perpetrator?

39. PW1 testified that she had known the appellant since 2011. The appellant agreed with her that he was to go sleep with her where she was. He went as agreed and they had sex.
40. PW2 testified had tried stopping the appellant from sexually attacking PW1 but he persisted. She stated that the pregnancy was God's way of revealing the truth.
41. PW1 stated that as a result of sexual intercourse with the appellant, she became pregnant and gave birth to a child. She, the baby, and the appellant were all taken to have their blood samples taken for DNA analysis. The appellant admitted that they went and gave samples. PW6 took care of the samples which were delivered and received by the government chemist.
42. PW7 found from the samples that the appellant fathered the baby.
43. There is not a reason to doubt the DNA evidence.
44. PW3 stated that the appellant had disappeared from home after the birth of the child. The appellant claimed that PW1 is married. DW2 supported him on that. DW3 was only told about the marriage. DW3 further stated that he had been informed that the appellant had impregnated PW1 Who was now married to someone else.
45. The appellant did not challenge the evidence of PW2 that PW1 was living with her grandmother where he had sex with her.
46. From the evidence that was adduced there was no possibility of mistaken identity. The appellant was well known to the complainant.
47. The defence is neither here nor there. The DNA results are conclusive that the appellant is the biological father of the child born of PW1. PW1 was 15 years at the time she conceived out of sexual abuse by the appellant. Evidence show the conception was as a result of physical sexual intercourse between the appellant and PW1. The medical evidence and the other evidence confirm that the appellant caused acts of penetration with PW1- a child aged 15 years.
48. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question.



49. In sum, it is this court's finding that the Appellant was positively identified by recognition as the person who caused penetration with the complainant- a child aged 15 years. DNA results confirmed penetration by the appellant of the complainant child.
50. Accordingly, on the basis of the evidence adduced, the prosecution proved their case beyond reasonable doubt. The trial court did not error in convicting the appellant for defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On sentence

51. The appellant submitted that the learned trial magistrate sentenced him to 20 years imprisonment without exercising discretion.
52. The trial court applied Section 8 (3) of the *Sexual Offences Act* to convict. The section provides:
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."

Of mandatory or mandatory minimum sentence

53. The court has always posed as food for thought; whether, except section 8(2) of the *Sexual Offences Act*, all the other penalty clauses in SOA which have adopted the use of phraseology 'liable upon conviction to imprisonment' prescribe a mandatory minimum sentence as it is widely-albeit erroneously- believed.
54. The view of the court has been that the erroneous belief arises from the incongruous use in one sentence of the phrase 'liable upon conviction to imprisonment' together with 'not less than...'
55. Other courts have also taken this view in construction of such penalty clauses. And, the provisions so couched are not meant to be mandatory, and do not prohibit judicial discretion.
56. From the sentencing ruling by the trial court, it is not necessarily that it believed only one sentence was prescribed in law. The trial court stated, thus: -

...accused is sentenced to serve 20 years imprisonment.
57. Nevertheless, the court has considered that the accused was a first offender. But the offence is serious and the manner and circumstances it was committed require a real deterrent sentence. First of all, the appellant was the uncle to the girl-he was expected to protect the girl. Instead, became the shameless, stealth and vicious sexual predator out to satisfy his sexual desires upon a defenseless niece. Second, the girl was in school- in class 3 and aged 15 years. Third, the girl became pregnant as a result of the sexual assault by the uncle- the appellant. Making her a child mother. Fifth, the life of the girl was totally demolished; any future prospect or potential to realize full potential and personal growth was taken away from her. Last but not least, memories of the sexual assault by the uncle is permanently engrained in her, and the child born out of the incest will be a crushing reminder of and will always rekindle the abuse.
58. In these circumstances, a sentence of 20 years was not excessive. It was lenient. Nonetheless, it is capable of acting as a deterrent measure on these debauchery sexual attacks on children, yet, giving him an opportunity to be reintegrated back into society and be a productive citizen. I therefore see nothing upon which I may interfere with the sentence imposed of 20 years' imprisonment. Accordingly, I dismiss the appeal on the sentence.



Of Section 333(2) CPC.

59. I have perused the trial court record and found that the appellant was first arraigned in court on 30.03.2015. He remained in custody till 17.11.2015 released on bond. His bond was cancelled and he was remanded in custody on 09.11.2016. He remained in custody till 31.08.2017 when he was convicted and sentenced. In this circumstance, the sentence shall run from 09.11. 2016. The date his bond was cancelled.

Conclusion and orders

60. The appeal on conviction and sentence is dismissed.
61. The sentence of 20 years imprisonment shall run from 09.11.2016.
62. It is so ordered.
63. Right of appeal explained

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF NOVEMBER, 2023.

.....

HON. F. GIKONYO M.

JUDGE

In the presence of:-

1. Mr. Muraguri - Court Assistant
2. Appellant
3. DPP

