



REPUBLIC OF KENYA



KENYA LAW
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**WOR v Republic (Criminal Appeal E017 of 2020)
[2022] KEHC 412 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E017 OF 2020
FA OCHIENG, J
APRIL 26, 2022**

BETWEEN

WOR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment and decision of the Principal
Magistrate's Court at Winam (Hon. J. MITEY (SRM) dated
the 22 nd July 2020 in Winam PMCCR S.O No. 12 of 2017)*

JUDGMENT

The Appellant, WOR, was convicted for the offence of Defilement contrary to section 8 (1) and 8 (3) of the Sexual Offences Act. For that offence, he was sentenced to 20 Years imprisonment.

1. He was also convicted for the offence of Deliberate Transmission of HIV contrary to section 26 (1) of the *Sexual Offences Act*. For that offence, the Appellant was sentenced to 15 Years imprisonment.
2. The learned trial magistrate ordered that the 2 sentences would run concurrently.
3. In his appeal, the Appellant faulted the trial court for failing to conduct a voire dire examination of the Complainant.
4. Secondly, the Appellant pointed out that although he was not caught in the act, there was allegedly only a single identifying witness.
5. Thirdly, the Appellant pointed out that there was a huge gap between the dates when the offence was allegedly committed, (which were said to be between February 7, 2017 and March 31, 2017); and the date when the Complainant was examined at the hospital, (which was on April 10, 2017).



6. In his considered opinion, the length of time between the date of commission of the offence; and the date of the medical examination of the Complainant, had literally affected the doctor's findings.
7. The fourth issue raised by the Appellant was that the date when the offence was first reported (on April 9, 2017), was not in tandem with the date when the offence was committed nor with the date when the Appellant was arrested (on April 11, 2017).
8. The fifth issue was about the discrepancies, "insufficiencies" and inconsistencies in the evidence tendered. In particular, the Appellant noted that after being arrested, he had been set free, before being re-arrested later.
9. I understand the Appellant to be saying that the sequence of those events was a pointer to the lack of corroboration of the evidence which the Complainant and PW3 had provided to the police.
10. The Appellant also complained that the trial court had failed to take into account the particulars of his defence. In his said defence he had asserted that the whole case was framed against him by the aunt of the Complainant, when he had demanded for his wages.
11. In any event, the Appellant viewed the investigations in the case as having been extremely shoddy and flimsy. His reason for that view was that no effort had been made to ascertain the scene of crime.
12. As regards the sentences, the Appellant submitted that the same were unconstitutional. The basis of that submission was two-fold;
 - a. That the prescribed sentence was a mandatory minimum sentence, which deprived the trial court of its discretion; and
 - b. That the trial court failed to consider the mitigating factors.
13. Finally, the Appellant urged this Court to take appropriate steps to ensure that the Prison authorities complied with the orders which require the two sentences to run concurrently. He said that the Prison authorities had, so far, failed to give effect to the order which was made by the trial court.
14. Being the first appellate court, I am enjoined to re-evaluate all the evidence on record. I will do so, whilst also taking into account the submissions made by both parties.
15. It is common ground that the Appellant was not a stranger to the Complainant. He confirmed that he lived within the same compound with her, and that he was an employee of PW3.
16. Therefore, as regards the identification of the Appellant, it is clear that this was a case of recognition, rather than that of "a single identifying witness."
17. Secondly, and in any event, the facts giving rise to the charges being preferred against the Appellant were not those of a single event that was brief or that was carried out either under the cover of darkness or by a person whose identity was camouflaged.
18. The first incident took place at 6p.m on February 7, 2017. On that occasion, the assailant pulled the Complainant into his house, as she was waiting outside his door, for him to give her the broom which the Complainant had come to borrow.
19. The next incident was at 5p.m on 28th February 2017. On that occasion, the Complainant had gone to collect clothes from the clothes-line which was next to the Appellant's house.
20. He pulled her into his house.



21. In those circumstances, there was absolutely nothing that hindered the Complainant from recognizing the Appellant.
22. In respect to the age of the Complainant, the prosecution produced her Birth Certificate which showed that the Complainant was born on September 16, 2001.
23. Therefore, as at the time when the offence was committed, the Complainant had not yet attained the age of 16. In effect, the Complainant was a minor.
24. As regards the ingredients of the offence, the Complainant gave graphic accounts about how the Appellant inserted his penis into her vagina. It was her testimony that the Appellant;

“ inserted his penis in my vagina and penetrated deep.”
25. When PW4 (who is a Clinical Officer) testified, she said that the Complainant’s vagina was inflamed, with foul smelling brownish per vaginal discharge.
26. The Clinical Officer went on to state as follows;

“ The inflammation of vagina was caused by abrasion by penis during sex.”
27. And it is noteworthy that the Appellant did not cross-examine PW4.
28. PW6, Dr. Lucy Ombok testified that the medical personnel carried out tests which revealed that the Complainant’s hymen was broken, and also that she was HIV Positive. Through the said tests, it was verified that the Complainant had been defiled.
29. From the testimony of the Complainant, which was verified through medical examination; and as was corroborated by PW3, there is no doubt at all that it is the Appellant who had defiled the Complainant.
30. The Appellant was also tested for HIV, and he was positive. If there had been any doubt of the nexus between the Complainant and the Appellant, the results of the HIV tests put them to rest.
31. The Appellant did not pin-point any discrepancies, “insufficiencies” or inconsistencies in the case put forward by the prosecution.
32. On my part, I found no discrepancies or inconsistencies. And, I also came to the conclusion that the evidence adduced was sufficient to prove all the ingredients of the offence of defilement.
33. The defence put forward by the Appellant was that the case was a set-up, in order to deprive him of the salary which he had worked for.
34. In my considered opinion, the said defence was not at all plausible. I so find because the HIV infection of the Complainant is real: it is not imaginary.
35. The loss of the Complainant’s hymen was also real.
36. The said facts were attributable to the actions of the Appellant.
37. Whether or not the Appellant had issues with the Complainant’s mother over some unpaid salary, the same cannot have transformed themselves into the physical manifestations on the body of the Complainant.
38. As regards the possible negative impact on the tests, due to the duration between the time when the offence was committed, and the time when the medical examinations were conducted, I note that the Clinical Officer (PW4) gave a detailed testimony.



39. The Appellant did not question her about his theory concerning the impact of the perceived delay in examining the Complainant.
40. I hold the view that the Appellant's current submissions; (that the delay literally affected the doctor's findings) is no more than a hypothetical assertion. If the Appellant had reason to believe that the doctor's findings could have been affected by the passage of time, the only way to ascertain that belief would have been through questioning the Clinical Officer and the Doctor.
41. As the Appellant failed to cross-examine the medical personnel on his opinion, this court has no basis upon which it can determine the efficacy of the Appellant's theory.
42. As regards the *voire dire* examination of the Complainant, it must be noted that the Complainant was 15 years old at the material time.
43. In the case of *Kibageny Arap Kolil vs Republic* [1959] E.A 82, the Court held that for the purpose of Section 19 of the *Oaths and Statutory Declarations Act*, the expression "Child of tender years";
- "..... in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years."
44. The position was reiterated in the more recent decision of the Court of Appeal, in *Maripett Loonkomok v Republic* [2016]eKLR, wherein the Court said;
- "It follows therefore that the time- honoured 14 years, remains the correct threshold for *voire dire* examination."
45. Accordingly, as the Complainant was not under the age of 14, she was not a child of tender years.
46. Therefore, the learned trial magistrate did not err, when she did not conduct the *voire dire* examination.

Sentence

47. The Appellant cited the following words from the decision of Odunga J. in *Kipkurui Kimoni v Republic* (2019)eKLR;
- "The Appellant's mitigating factors must be considered when it comes to sentencing"
48. In this case, the trial court allowed the Appellant time and opportunity for mitigation. The Court also called for a Pre-sentencing Report from the Probation Officer.
49. Upon receipt of the Report, the learned trial magistrate expressed herself thus;
- "I also realize that section 8 (1) and (3) of the Sexual Offences Act is couched in mandatory terms, and leaves no option for the court to decide otherwise."
50. Having received the mitigation from the Appellant, and the pre-sentencing report from the Probation Officer, the Court effectively decided that they counted for nothing.
51. Prior to the Supreme Court's decision in the case of *Francis Karioko Muruatetu & Another v Republic* [2017]eKLR, the courts construed mandatory sentences in a literal sense; just like the trial court herein.
52. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of Murder, was unconstitutional because it took away the Court's discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.



53. I am alive to the fact that the Supreme Court did issue Directions, subsequent to its judgment in the “Muruatetu Case”, clarifying that that decision was only in relation to murder cases.
54. However, I hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the Sexual Offences Act.
55. I am unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.
56. Accordingly, I do hereby set aside the sentences.
57. I now proceed to give due consideration to the mitigation, the Probation Officer’s report and the circumstances in which the offence was committed.
58. I note that whenever the Appellant defiled the Complainant, he celebrated that fact by describing it almost like a conquest.
59. PW3 cautioned the Appellant against committing the offence, but he told her that he did not care even if he were to be “caught”.
60. In effect, the Appellant committed the offence several times, without a care in the world.
61. I also note that when he was being cross-examined the Appellant told the trial court that he had known about his HIV status, earlier. That means that when he was defiling the Complainant, he also knew that he was deliberately exposing her to the possibility of infection.
62. In the circumstances I now hereby re-sentence the Appellant to 15 Years Imprisonment for the offence of Defilement; and another 15 Years Imprisonment for Deliberate Transmission of HIV. However, I direct that the sentences should run concurrently.
63. I further direct pursuant to Section 333 (2) of the Criminal Procedure, that when the Prison authorities will be computing the actual duration of the sentence, they will take into account the period of eleven (11) months and fifteen (15) days which the Appellant spent in remand custody during the trial.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 2022

FRED A. OCHIENG

JUDGE

