



REPUBLIC OF KENYA



KENYA LAW
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**Bakari v Republic (Criminal Appeal 7 of 2017)
[2022] KEHC 17275 (KLR) (5 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 17275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL 7 OF 2017**

SM GITHINJI, J

APRIL 5, 2022

BETWEEN

JILLO BAKARI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and Sentence from the Original
Garsen Criminal Case No. 142 of 2015 in a Judgment delivered
on 7th February, 2017 by Hon. E Kadima - Resident Magistrate)*

JUDGMENT

1. The appellant was convicted and sentenced to 10 years imprisonment for the offence of defilement contrary to section 8(1) as read with subsection (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between March and November 2014, at Dumu sub-location, Tana Delta sub-county within Tana River County, the accused intentionally and unlawfully caused his penis to penetrate into the vagina of SJ a girl aged 17 years.
2. Aggrieved by the sentence, the appellant filed the present appeal on the basis of section 216 of the *Criminal Procedure Code* and on mitigation grounds that he was the sole bread winner of his family; that he was a first offender and very remorseful for the offence. The appellant urged this court to set him at liberty for having served two thirds of his sentence and 2 years in remand.
3. The respondent partially opposed the appeal. It submitted that this court should not disturb the conviction and sentence by the trial court but it could alter the sentence to run from April 27, 2016 when the appellant was taken into custody.
4. Notably, the charge sheet was defective. It is astounding that the trial court did not notice this. It was undisputed that the age of the victim was 17 years. The appellant was convicted and sentenced under section 8[3] of the *Sexual Offences Act* which prescribes punishment where the victim is aged between



the age of twelve and fifteen years. The correct provision in this case would have been subsection 4 which reads as follows:

"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."

5. The law on drafting a charge sheet is found under section 134 of the [Criminal Procedure Code](#) states as follows:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

6. The Court of Appeal in [Obedi Kilonzo Kevevo v Republic](#) [2015] eKLR laid out the test in determining a defective charge sheet and the effect of the appellant's conviction and held that: -

"The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of *JMA v Republic* (2009) KLR 671, it was held *inter alia* that:

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

7. In [B N D Versus Republic](#) [2017] eKLR the court held that: -

"29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective... There is no question in my mind that the accused person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him."

8. In the present case, the charges gave fair notice to the appellant to the charges he was facing, defilement, and the trial was fair in a substantive sense. No miscarriage of justice was occasioned by the error in the charge sheet. Besides such an error is in my view curable under section 382 of the [Criminal Procedure Code](#) which reads:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an



error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

9. The present appeal is on sentence. Section 354 (3) (b) of the *Criminal Procedure Code* provides as follows on the powers of the court on an appeal on sentence as follows: -

“In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence.”

10. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were well settled in the case of *Ogolla s/o Owour v Republic* (1954) EACA 270. In that case, the Court of Appeal stated that occasion when an appeal court can interfere with the sentence meted out by a trial court is fairly restricted. The appellate court will only interfere if the sentencing court acted upon wrong principles, overlooked some relevant material or if the sentence is manifestly excessive in the circumstances of the case.

11. The law is 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. Upon consideration of his mitigation and pre-sentence report, the appellant was sentenced to 10 years imprisonment. In his mitigation, the appellant stated:

“I am a father of two children who one is school going. I pray I be considered for a non-custodial sentence I pray for forgiveness.”

12. I have taken into account the appellant’s mitigation in this appeal, the nature and seriousness of the offence.

13. The offence carries a minimum sentence of 15 years imprisonment. The appellant got 10 years imprisonment. Ordinarily I would be inclined to increase the sentence to 15 years imprisonment in full compliance with the law. However, luck was on his side then and equally today that the sentence is left undisturbed. The appeal lacks merit and is hereby dismissed.

Judgment for Garsen read and signed at Malindi in the Open Court to parties who appears Virtually, who are; - The Appellant and Mr Mwangi for the State, this 5th day of April, 2022.

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S.M. GITHINJI

JUDGE

