



**Jackson Pailan alias Pastor Kanyari v Republic (Criminal Appeal  
E001 of 2021) [2022] KEHC 12110 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 12110 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E001 OF 2021  
GWN MACHARIA, J  
MAY 26, 2022**

**BETWEEN**

**JACKSON PAILAN ALIAS PASTOR KANYARI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in the  
Senior Principal Magistrate's Court at Engineer in Criminal Case No.  
50 of 2017 delivered by Hon. M. Mutua (RM) on 22nd August 2019)*

**JUDGMENT**

1. The appellant, Jackson Pailan Alias Pastor Kanyari, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 6<sup>th</sup> day of December, 2017 in Naivasha sub-county within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of PO, a girl aged 4 years and 6 months.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 6<sup>th</sup> day of December, 2017 at Kenya Cooperative Creameries estate in Naivasha sub-county within Nakuru county, intentionally and unlawfully caused his penis to come into contact with the vagina of PO (PO), a girl aged 4 years and 6 months
3. He pleaded not guilty to both charges. Upon trial, he was convicted of the offence of defilement and sentenced to serve life imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.



## Grounds of Appeal

4. The Appeal is based on the following four (4) grounds contained in his Amended Grounds of Appeal filed alongside his written submissions on November 29, 2021.
  1. Thathe pleaded not guilty.
  2. Thathis constitutional rights to a fair trial were violated by the trial court.
  3. Thatcrucial witnesses were not summoned by the prosecution to testify.
  4. Thatthe case for the prosecution was not proved to the required standard.

## Summary of Evidence\*\* \_\_

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. ( See *Okeno v Republic* (1972) EA 32).
6. The prosecution’s case can be summarized as follows: On December 6, 2017, the complainant PW3, PO was playing with other children when the appellant who was known to her as “Pastor Kanyari” called her to his house. He told her to remove her skirt which she did. Thereafter, the appellant removed his own clothes and inserted his penis into her vagina. She cried due to the pain she felt. After finishing, the appellant told her to go outside and play with her friends but she went straight to their house.
7. PW3’s mother PW1, IN returned home later that day and found her seated at the door. A neighbour known as Monica passed by and informed PW1 that PW3 was walking abnormally. As such, PW1 took PW3 to the house and demanded to know why whereupon PW3 told her that “Pastor Kanyari” had defiled her. PW1 examined PW3’s private parts and saw dried semen on the outer part. She immediately reported the matter to their village elder known as Mataka. The village elder informed her that the said “Pastor Kanyari” was well known to him and advised her to take PW3 to hospital for examination and treatment while he worked on causing his arrest. The appellant was arrested at around 6.00am on December 7, 2017 and PW3 was able to identify him as the “Pastor Kanyari” who defiled her. He was then escorted to Naivasha Police station where PW1 reported the incident. Thereafter, PW1 was issued with a P3 form which she took to Naivasha District hospital for filling.
8. The matter was investigated by PW4, No. 61396 Corporal Otuke formerly stationed at Naivasha Police Station. He recorded statements after interrogations and visited the scene of crime. He also conducted inquiries around the village and ascertained that the appellant was also known as ‘Pastor’ or ‘Kanyari’. During trial, he produced PW3’s birth notification which shows that she was born on May 17, 2013.
9. Further, PW2, Benjamin Kuria, a Clinical Officer from Naivasha County Referral hospital testified on behalf of his colleague Faith Wanjiku who had examined PW3 but was away on leave. He stated that on genital examination, PW3 had blood oozing from her vagina and her hymen was broken. He also stated that the examining medical officer concluded that PW3 had been defiled in view of the aforesaid revelation. He produced PW3’s Post Rape Care form and P3 form filled on December 7, 2017.
10. The appellant gave a sworn testimony in his defence. He testified that on December 6, 2017, he was in his house the entire day. The following day at 6.00am, he heard people asking whether he was in the house. He went outside and met two men who escorted him to the village elder’s office. On their way there, he was assaulted by members of the public. He was then arrested and taken to the police station where he was charged with the subject offences.



## Analysis and Determination

11. The Appeal was canvassed by both written and oral submissions which this court has duly considered. The only issues for determination are:
- i. Whether the Appellant's constitutional rights were contravened during trial?
  - ii. Whether the prosecution proved its case beyond a reasonable doubt?

### Whether the Appellant's constitutional rights were contravened during trial.

12. The appellant submitted that his constitutional right to a fair trial was violated. In this regard, he faulted the trial magistrate for failing to inform him of his right to legal representation at the state's expense under article 50 of *the Constitution*. Further, he complained that the prosecution furnished him with a charge sheet and statements prepared in the English language but the trial court did not bother to find out whether he understood the language well enough to enable him put up his defence and/or challenge the evidence.
13. On the other hand, Learned State Counsel for the Respondent submitted that the Appellant was promptly supplied with all the relevant statements and documents that the prosecution relied on and did not at any point inform the trial court that he had a problem comprehending the case against him. Counsel also asserted that the Appellant never raised the issue of legal representation before the trial court and appeared well versed with the case.
14. Legal representation is a constitutional right envisaged under Article 50 (2) (g) and (h) of *the Constitution* which provides as follows:
- “Every accused person has the right to a fair trial, which includes the right-
- g) to choose, and be represented by an advocate and be informed of this right promptly;
  - h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly....”
15. It is also provided for under the *Legal Aid Act*, 2016. Section 43 (1) (a) of the Act requires that an unrepresented accused be promptly informed of his or her right to legal representation. Further, section 43(1)(b) of the Act provides that where substantial injustice is likely to result, an unrepresented accused person should be promptly informed of the right to have an advocate assigned to him or her.
16. I have carefully perused the trial court's record. At no point during the trial did the learned magistrate inform the Appellant of his legal rights outlined above. Was this fatal to the trial? I do not think so. This is because section 43 (6) of the *Legal Aid Act*, 2016 clearly stipulates that lack of legal representation cannot bar the continuation of proceedings against a person unless substantial injustice is likely to occur. (See also *Republic v Karisa Chengo & 2 others* [2017] eKLR).
17. The question as to whether substantial injustice may occur depends on the circumstances of each case. In determining this, Section 43 (1A) of the *Legal Aid Act*, 2016 requires the court to take the following into consideration:
- (a) The severity of the charge and sentence;
  - (b) The complexity of the case; and



- (c) The capacity of the accused to defend themselves.
18. In the present case, there is no doubt that the offence with which the Appellant was charged is a serious one and carries a mandatory sentence of life imprisonment. Notably however, it is clear that he was able to properly conduct the trial on his own and defend himself against the prosecution's case. He participated in the proceedings before the trial court without raising the issue of legal representation. In the premises, I am not persuaded that his right to legal representation was violated.
19. The same applies to his allegation that the trial court did not bother to find out whether he understood the language used in the witness statements and charge sheet. The record clearly shows that at the time plea was taken, the language used was Kiswahili which the Appellant clearly understood and denied the offences thus resulting into pleas of not guilty being entered. Further, most of the prosecution witnesses testified in Kiswahili language and he cross examined them extensively in the same language and where necessary, an interpreter was available to help. He was also able to give his defence in the same language and did not raise any objection at any stage of the proceedings on the language used. I am therefore not persuaded that there was any language hitch or that he was prejudiced in any way.

**Whether the prosecution proved its case beyond a reasonable doubt.**

20. Section 8 (1) of the [Sexual Offences Act](#) provides as follows regarding the offence of defilement:
- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
21. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard: penetration, age of the victim and the positive identification of the Appellant as the perpetrator of the offence.
22. As regards the age of the victim, PW4 produced in evidence a birth notification which shows that PW3's was born on May 17, 2013. It was therefore undoubtedly proven that PW3 was aged 4 years and 6 months at the time of the alleged offence. She was thus a child as per section 2 of the [Children Act](#) cap 141 of the Laws of Kenya.
23. As regards the element of penetration, the Appellant submitted that the medical evidence tendered by PW2 was mere hearsay since PW2 did not state his qualifications or that of Faith Wanjiku who prepared the P3 and Post Rape Care forms. Further, he argued that PW2 did not tender good reasons for the said Faith's failure to attend court and this unjustly denied him an opportunity to cross examine her on the medical evidence. According to the prosecution however, penetration was conclusively proved.
24. In my view, PW3's account of the alleged defilement was well corroborated by the medical evidence tendered by PW2 which shows that a she had blood oozing from her vagina on examination of her genitalia and her hymen was broken which led the examining doctor to conclude that she had been defiled as it was unusual for a person of her age. Further, I note that during trial, the appellant did not raise the complaints he is purporting to raise now about the medical evidence and neither did he object to the production of the same in evidence. I am therefore satisfied that the prosecution established the element of penetration to the required standard.
25. As regards the identification of the appellant, there is no doubt that PW3 was the victim and the only eye witness to the offence as is the case in most sexual offences. In her evidence before the trial court, PW3 gave a detailed and consistent account of what the appellant did to him when he called her to his house. She also stated that the Appellant was known to her as “Pastor Kanyari” since she had heard other children whom she used to play with call him so. Further, I note that PW1 stated that upon



- the appellant's arrest by the village elder Mataka the next morning after the incident, PW3 was able to identify him as the "Pastor Kanyari" who defiled her. She was able to recognize the appellant in court during trial.
26. I also note that the trial magistrate had the advantage of observing PW3 and her demeanor first hand as she testified and found her truthful. There is therefore no reason to interfere with that finding which means that there is no doubt that the appellant was the perpetrator.
  27. Further, it was the appellant's submission that the prosecution failed to call crucial witnesses to testify in court. These were: PW1's husband Jackson, her neighbour Monica, elder Mataka, Esther who was playing with PW3 on the day of the incident and the Nyumba Kumi elders who arrested the appellant. In his view, the prosecution failed to call these witnesses because their evidence would have been adverse to the prosecution's case.
  28. It is well settled that the prosecution reserves the right to determine the number of witnesses it deems sufficient to prove a fact. I have carefully perused the evidence on record and I am unable to see the benefit that the evidence of the aforesaid witnesses would have added since the four witnesses called by the prosecution sufficiently established the case for the prosecution.
  29. In the upshot, I find that the prosecution proved its case against the appellant beyond any reasonable doubt. His conviction was therefore well founded and is accordingly upheld.

**Whether the sentence imposed was legal and proper.**

30. Lastly, the Appellant questioned why he was sentenced to life imprisonment despite having pleaded not guilty and maintained the plea throughout trial.
31. In defilement cases, the length of the sentence is determined by the age of the child. In this case, it has been established that the Appellant defiled PW3 who was aged 4 years and 6 months at the time of the offence. Section 8(2) of the *Sexual Offences Act* prescribes a minimum mandatory sentence of life imprisonment for a person convicted of defiling a child of this age.
32. In the recently decided case of *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & anor*: Machakos HC Petition No. E017 of 2021, Odunga J. found that minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent that they deny trial courts the discretion to consider the peculiar circumstances of each case so as to arrive at an appropriate sentence informed by those circumstances. However, the learned judge held that courts are liberty to impose sentences prescribed under the Act so long as they are not deemed to be the mandatory minimum sentences. This decision carries similar reasoning as in the renown Supreme Court decision of *Kariokor Muruatetu & another v Republic* (2017) e KLR.
33. In the present case, the record shows that the appellant was given an opportunity before the trial court to tender mitigation wherein he stated that he was 50 years old, married with children and that his family was suffering. The trial court on the other noted it had considered the appellant's mitigation and the Supreme Court decision of *Francis Karioko Muruatetu & another v Republic* (*supra*) but took into account that the offence was heinous and should be punished to deter would be offenders.
34. On the part of this court, I cannot add more save to emphasize that the court is unable to fathom how a 50-year old man in the person of the appellant could have the audacity to defile a 4-year old child. This is beastly. The injuries inflicted on this child shall remain a sour memory for the rest of her life. They have totally ruined her life. The least that courts should do to such persons is completely remove them from the society so as to cushion helpless children from such beastly attacks.



35. For this reason, I cannot fault the learned trial magistrate's exercise of his discretion to impose a life imprisonment.

36. This means that the Appellant's sentence was proper and is accordingly affirmed.

### **Conclusion**

37. Accordingly, the Appeal lacks merit and is hereby dismissed in entirety. It is so ordered.

**DATED AND DELIVERED IN NAIVASHA THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

In the presence of:

Appellant in person.

Ms. Serling for the Respondent.

