



**Njiru v Republic (Criminal Appeal E045 of 2021)  
[2022] KEHC 14464 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14464 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E045 OF 2021  
LM NJUGUNA, J  
OCTOBER 26, 2022**

**BETWEEN**

**CHARLES NJAGI NJIRU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Siakago SPM Sexual Offences Case No. 35 of 2020 delivered on 13.09.2021)*

**JUDGMENT**

1. The appellant herein filed the petition of appeal on November 6, 2021 wherein he has challenged the sentence by the trial court in Senior Principal Magistrate's Court at Siakago in Sexual Offence Case No 35 of 2020. The trial court convicted the appellant of the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual Offences Act* No 3 of 2006 and sentenced him to serve fifteen (15) years imprisonment. He faults the court for the sentence.
2. It is that sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as hereunder:
  - i. The trial magistrate erred in both matters of law and facts by imposing a harsh and excessive sentence without considering that the appellant was a first offender.
  - ii. The trial magistrate erred in both matters of law and facts by imposing a harsh and excessive sentence without considering the circumstances under which the offence was committed.
  - iii. The trial magistrate erred in both matters of law and facts by imposing a harsh and excessive sentence without considering the purpose for sentencing.



3. At the hearing of the appeal, the parties chose to rely on their written submissions to argue the appeal.
4. The appellant submitted that he was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the [Sexual Offences Act](#) and upon trial, was convicted and thereafter sentenced to 15 years imprisonment. That he is dissatisfied with the sentence imposed by the trial court. He denied being responsible for the offence herein and further submitted that the doctor's report only pointed out that the complainant possibly could have been defiled and the same according to him, was not conclusive. It was his case that he had been fixed and as such, urged this court to find so. In regards to sentencing, he submitted that the same was harsh and excessive and prayed that this court quashes the conviction and sets aside the sentence herein.
5. The appeal was opposed by Ms Gakuo, the learned prosecution counsel as she submitted that the same is devoid of merit and thus should be dismissed. The respondent submitted that all the ingredients of the offence of defilement were proved and further noted that the age bracket of the complainant did not fall within section 8(4) of the [Sexual Offences Act](#) while the proper legal provision ought to be 8(3) of the [Sexual Offences Act](#). That section 8(3) of the [Sexual Offences Act](#) stipulates a minimum and mandatory sentence of 20 years imprisonment whereas section 8(4) of the [Sexual Offences Act](#) stipulates a lesser sentence of 15 years, therefore, the court was right to invoke section 179 of the [Criminal Procedure Code](#) in convicting the appellant for a lesser offence. In reference to sentence, it was submitted that the sentence passed by the trial court was commensurate with the offence committed in that it was neither harsh nor excessive. The respondent relied on the case of [Ahmad Abolfadhi Mohammed & Another v Republic \[2018\] eKLR](#) and thereafter prayed that this appeal be dismissed given the aggravating factors under which the offence was committed.
6. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is on sentence wherein the appellant contends that his sentence was harsh and excessive.
7. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in [Okeno v Republic \[1972\] EA 32](#) and re-stated in [Kiilu and another v R \[2005\] 1 KLR 174](#) where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereafter, the court should draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with, unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See [Gunga Baya & another v Republic \[2015\] eKLR](#)).
8. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the sentence imposed by the trial court.
9. It must be appreciated that under section 107(1) of the [Evidence Act](#), the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of [Woolmington v DPP 1935 AC 462](#) and [Miller v Minister of Pensions 2 ALL 372-273](#).



10. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No 3 of 2006. In *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013,

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

11. The question therefore is whether the sentence is harsh and excessive.

12. It is not disputed that the complainant at the time of the commission of the offence, was 14 years old as the same could be ascertained from the evidence produced before the trial court (P. Exh. 1 - Birth Certificate).

13. In the case of *Edwin Nyambaso Onsongo v Republic (2002) eKLR*, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No 24 of 2015 (UR) the Court of Appeal held that:

...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof....

14. As such, this court is satisfied that the complainant was a minor which satisfies the legal requirement.

15. The appellant submitted that the trial court meted out a harsh and excessive sentence which was disproportionate to the charge. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/O Owoura v Reginum (1954) 21 270* as follows: -

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v R (1950) 18 EACA 147*:

“It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shersbewky, (1912) CCA 28 TLR 364.*”

16. The court is granted power to convict on a lesser charge where the evidence so discloses even if an accused was not charged with it. section 179 (2) of the Criminal Procedure Code states that: -

“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it”.

17. From the charge sheet, the appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act instead of section 8(3).

18. Having considered the circumstances surrounding this offence I find that the sentence was within the law. The learned trial magistrate exercised his discretion judiciously in meting out the sentence since he directed his mind to the circumstances under which the heinous offence was committed by the appellant. I find no reasons to interfere with the same.



19. In conclusion, I find the appeal to be wholly unmerited and the same is hereby dismissed.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

