



**Ngige v Republic (Criminal Appeal 25 of 2019)
[2022] KEHC 15623 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 25 OF 2019
RM MWONGO, J
NOVEMBER 23, 2022**

BETWEEN

JOHN MURIMI NGIGE APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in Baricho
SPM S.O. Case No.5 of 2018 by Hon. M. Kivuti SRM)*

JUDGMENT

1. The appellant was charged and convicted in the lower court for defilement of SW, a minor aged 9 years, contrary to section 8(1)(3) of the *Sexual Offences Act*, No 3 of 2006. He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, but the trial court made no finding on this charge. The appellant was sentenced to life imprisonment.
2. The brief facts are that on January 12, 2018 SW was at home alone when the appellant whom she only knew as Nyaga come and told her that they do should do Tabia Mbaya. She declined as it would have gone against what she had been told by her mother. The appellant took her by her hand and escorted her to the kitchen where he defiled her. She was in great pain as she was defiled.
3. SW was rescued by her aunt, PW2 who heard screams from the kitchen at about 1.00pm, and went to see what was happening. She caught the appellant red handed with his pants down and lying on top of SW. She knew him as Nyaga. He got up, swiftly pulling up his trousers and ran off into the farm. She told her mother who had just arrived what she had seen. Her mother, followed the appellant in the route he had taken through the farm, and came back and came back with the appellant and some other people.



4. Other corroborating evidence was given by PW3, the Clinical Officer of Baricho Health Centre who examined SW when she was taken for a check-up; PW4 the investigating officer; and SW's mother who testified as PW5.
5. At the close of the hearing, the appellant was convicted and sentenced to life imprisonment. The appellant's appeal does not challenge his conviction, but rather only the sentence meted upon him. The grounds are as follows:
 1. That, the learned trial magistrate erred in both law and fact to impose mandatory life sentence upon the appellant herein without considering that the same was declared unconstitutional by the supreme court of Kenya.
 2. That the learned magistrate erred in both law and fact by imposing harsh and excessive sentence upon the appellant without considering that being a first offender he was constitutionally qualified for the benefit of the law under article 27 (1) (2) and 50 (2) (p) of the Constitution Of Kenya.

Appellant's Submissions

6. With regard to the imposition of a harsh sentence the appellant submitted that the mandatory life sentence is harsh and excessive. He stated that it gives him no chance atone for the offence he had committed, that it has limited his ability to have future prospect of release in contravention with article 27 (1) (2), 28, 29 (f) and 50 (2) (p) of the Constitution in which his dignity is guaranteed.
7. He stated that he was a first offender and ignorant over the consequence of the offence had committed, therefore, qualified for the benefit of the least severe punishment as guaranteed in article 25 [c], 27 (1) (2) and 50 (2) (p) of the constitution and moved on to impose unconstitutional mandatory life sentence as implied in the supreme court judgment in petition no. 15 of 2015.
8. He stated that the learned sentencing magistrate's court failed to exercise its discretion in sentencing as held by the supreme court under article 163 (7) of the constitution by not taking into account the appellant's submission in mitigation, nor exercising its power under section 216, 329 of the CPC in order to inform itself as to the appropriate substitute sentence in conformity with the Court of Appeal's guidance in the case at Eldoret of Evans Wanjala Wanyonyi v Rep. [2018] eKLR
9. Further he submitted that the court ought not to let his dignity remain disenfranchised by the nature of the life sentence imposed upon him while considering that during the commission of the offence he was young and unaware of its consequence and following the experience and suffering that he had undergone in prison he had now become aware of the consequences of crime. He stated that he is remorseful for the offence and prays for a lenient jail term.

Prosecution's submissions

10. The prosecution's submissions endeavoured to demonstrate that they had discharged the burden of proof of the four elements necessary to prove cases of defilement, viz:
 - i) Penetration on the minor/complainant.
 - ii) Positive Identity of the perpetrator.
 - iii) Age of the minor.
11. The prosecution pointed out that it had availed key witnesses that proved all these elements beyond reasonable doubt.



12. As regards sentence, the prosecution pointed out the importance of the age of the minor, and noted that the minor's birth certificate indicated she was born on the November 30, 2008 whilst the offence was committed on the 27th of January 2018, meaning that SW was just over 9 years old at the time of the offence.
13. In light of the foregoing, he urged, section 8(1) (2) SOA dictated that any person who commits the offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The minor having been below the age of 11 years, the prosecution submitted that the appellant was properly imprisoned for life.

Analysis and Determination

14. It is trite that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of R v Okeno
15. For the avoidance of doubt, the court has re-evaluated the evidence on record herein. It is crystal clear from the evidence of PW1 and PW2 that the appellant was caught in the very act of defilement. He was a neighbor and his identity was not mistaken.
16. The evidence of PW5 took SW to Baricho health centre where PW3 examined her and found that her bruises were indicative of the facts that there was partial penetration on the minor as the hymen had not been broken. He produced the P3 Form that indicated there were bruises on the labia majora and labia minora even though the hymen was intact. This was a clear indication there was attempted penetration. He formed the opinion she was indeed defiled and even estimated the age of the injury.
17. There is no question that the conviction was properly founded, and that the offence was proved beyond reasonable doubt.

Whether the sentence imposed was harsh and excessive

18. The only issue arising herein is whether the sentence imposed was harsh and excessive. The appellant urges the court to substitute his sentence with one that is in line with article 50 (2) (p) of the constitution.
19. The Appellant was found guilty of contravening Section 8(1) as read with section (3) of the Sexual Offences Act No 3 of 2006. This is what the charge sheet reads. Upon being convicted, the trial court stated:
" I find the accused guilty of defilement as charged and convict him under section 215 of the CPC."
20. At the time of sentencing, the trial court noticed an error in the charge sheet. The trial magistrate stated:
The charge sheet indicates sec 8(3) of the SOA, but the complainant was under the age of 10 years. In accordance with section 8(2) of the SOA, accused is sentenced to life imprisonment"
21. Was the trial court entitled to make this change and sentence the accused under section 8(2) though the charge read section 8(3)?



22. The law appears to be rather liberal when dealing with changes to charges when that the court finds that the offence committed may differ from that charged in a small degree. For example, section 186 of the CPC deals with a charge of defilement of a girl under 14 years of age, and provides as follows:
- “When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”
23. In the present case, the only difference in the charge is not in the nature of the offence, but the age of the complainant. The accused was sentenced to serve life imprisonment, which is the sentence for an offence under section 8(2), whereas the offence in the charge sheet was under Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006 which provides for a sentence as follows:
- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) 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.”
24. In Francis Kabindi Mwaiba v Republic [2015] eKLR the Court of Appeal dealing with changes to convictions arising from charges to charges stated:
- “Could the learned Judge however have found solace in section 186 of the Criminal Procedure Code? That section provides inter alia:
- “When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it...”
- As it is apparent, for a court to resort to this provision, it must be satisfied on the evidence that the complainant was under the age of fourteen years.”
25. Whilst it is clear that the trial court did not expressly advert to this provision, the action it took is in tandem with section 186 CPC. Further, although these arguments were not specifically advanced by the appellant, they naturally arise from the fact of the appeal having been lodged questioning the length of the sentence.
26. Ultimately, the appellant was sentenced in accord with the charge he committed of defilement, and the age of the complainant was found to be less than ten (10), which brought the appellant into the scope of section 8(2) of the SOA.
27. Accordingly, he was lawfully sentenced with a term commensurate to his action and the proved age of the complainant.
28. I therefore see no basis for finding that the sentence was excessive, unlawful, cruel or in contravention of the Constitution.
29. The sentence is upheld, and the appeal is dismissed.
30. Orders accordingly.



DELIVERED AT KERUGOYA ON THIS 23RD DAY OF NOVEMBER, 2022

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RICHARD MWONGO

JUDGE

In the presence of:

1. Appellant in Person
2. Mr. Mamba for the state
3. Mr. Murage Court Assistant

