



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Republic (Criminal Appeal E054 of 2022)
[2025] KEHC 5192 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E054 OF 2022**

RC RUTTO, J

APRIL 2, 2025

BETWEEN

DANSON CHEGE KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of attempted defilement contrary to Section 9(1) as read together with Section 9(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 29th December 2021 in Athi River Sub-County within Machakos County, he intentionally and unlawfully attempted to cause his male genital organ (penis) to penetrate the female genital organ (vagina) of one TWW a child aged 10 years.
2. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 29th December 2021 in Athi River Sub County within Machakos County, he intentionally and unlawfully committed an indecent act by touching the vagina of one TWW a child aged 10 years using his hands and penis.
3. The accused person took plea on 31st December, 2021 and pleaded not guilty. The trial commenced with the prosecution calling 5 witnesses and the defence calling 1 witness. The Trial court after hearing the witnesses delivered its judgment on 29th September 2022 wherein it found the accused person guilty of the main charge and sentenced him to serve 10 years imprisonment.
4. The Appellant was aggrieved by that decision and preferred an appeal on the following grounds that;
 - a. The Trial Magistrate erred in law and fact by failing to notice that the ingredients forming the offence of attempted defilement were not established by the prosecution against the appellant, and therefore the basis of his conviction is not supported by any existing law.



- b. The learned Trial Magistrate erred in law by sentencing the appellant by virtue of the minimum mandatory sentence provisions as stipulated in the [sexual offences Act](#).
- c. The Trial Magistrate erred in law and fact by not considering the period spent in remand custody as per section 333(2) of the [Criminal Procedure Code](#) before his conviction and subsequent sentencing on 3rd November 2022.

Evidence before the trial Court

5. The prosecution invited a total of five witnesses. PW1 stated that she was 10 years old. On 29 December 2021 while going to the washroom behind the plot Danson grabbed her, covered her mouth and forcefully took her to his house. While inside the house he pushed her to the bed and took a condom from under his mattress, she picked the condom and it was written love condom. Then Danson removed his belt, unzipped his trouser and removed it to below the knees. The inner wear was blue in color. Further that Danson removed her tight halfway but did not remove her panty. He then removed his thing which he uses to urinate and tried to squeeze it at her vagina. She was lying on her back and she pushed him using her legs and he fell down. That the appellant tried to kiss her and she knocked him at his thighs and he moved back.
6. PW1 further stated that the appellant took a kitchen knife and threatened her that he would kill her if she told her mother. She then managed to escape and later told her mother what had transpired. That her mother called the care taker and she explained what had happened. The appellant then came to the shop and inquired where he could buy unga and that is when the complainant mother asked where she was. The appellant denied knowing the complainant. That she then confirmed knowing the appellant and even knowing his house and then took the care taker and the appellant to the appellant's house. At the house she was able to retrieve the condom which was produced in court as prosecution exhibit 1 and was positively identified by PW1. PW1 also stated that she went to Athi River Police Station to report and later to Nairobi Women's Kitengela for medical examination.
7. PW2 JM the complainant's mother stated that PW1 was 10 years. That on 29/12/2021 at about 7pm PW1 told her she wanted to go to the washroom. She stayed for about 15 minutes, she inquired went to inquire from her friends if they had seen her, none had. That suddenly, PW1 came from the back door and she looked worried. Upon her inquiring, PW1 informed her that Danson had grabbed her and took her to his house. She testified that she then proceeded to call the care taker and informed him what had transpired. That after a few minutes the appellant went into the shop and inquired whether he could buy unga. At this point the care taker, PW1 and the appellant went to the appellant's house and the condoms were found. That she accompanied PW 1 to hospital where the doctor confirmed that she had not been defiled.
8. PW3 Amos Odera stated he is a care taker, that on 29/12/2021 at around 7pm he was called by PW2 who owns a shop. That PW2 explained to him what had transpired and that the girl managed to escape. That the appellant came to the shop when PW1 was narrating the story to him. That he accompanied PW1 to the appellant's house and she went straight to under the bed and retrieved the condom. The condom read love condom. He positively identified the appellant.
9. PW4 Dr. John Njunguna stated that PW1 was treated on 30/12/21 with a complaint of attempted defilement. She was under the escort of her mother. She was examined and there was no STI, HIV, HPB Syphilis were negative. Normal examination she did not have injuries on the labia majora and labia minora. A PRC form was issued and P3 Form filled.



10. PW5 PC Mbula the investigating officer stated that a report was made by PW2 on behalf of PW1 that a man known to the minor had tried to defile her. He reported that the appellant had told the minor that he does not have a wife and he wanted her. The appellant probed her to bed and tried and tried to get the condom and tried to open them. The minor reported that the accused tried to remove her clothes and pushed aside her pant and tried to insert his penis. She pushed the appellant with her legs he fell down. He then tried to kiss PW1., took a knife and threatened to kill her. PW1 managed to escape and reported the matter to her mother and caretaker. That the minor and the caretaker proceeded to the accused person's house and the condom was retrieved.
11. The trial court considered the evidence tendered by the prosecution witnesses and found that a prima facie case had been established and placed the appellant in his defence. The appellant chose to give sworn evidence.
12. The appellant DW1 stated that the charges were not true. That on 29/12/2021 he woke up and went to work and came back at 8.30 pm and went to his place of residence. That he went to charge his phone at the shop nearby. He also went to buy a charger at PW2 and had a small chat. He found PW2 beating her child and the caretaker was there. He asked what was happening and it was rudely told that he must move out.
13. DW1 stated that they had previously had an incident on 23/12/21 when the caretaker wanted him to move out since he had a client who wanted to take over the store. That the caretaker framed him to have defiled the girl. His witnesses was threatened and assaulted, he was tied and assaulted and found himself in the cells. The investigating officer demanded kshs.200,000/= , read out his name to the child in order to frame him. PW2 took her condom from her pocket and framed him, the care taker and PW2 did not go to his house, it was locked. That the evidence tendered was not true

The appeal

14. Upon the directions of this Court, the appeal was canvassed by way of written submissions. The appellant filed his undated submissions while the Respondent did not file any submissions. The appellant submitted on the three grounds of appeal. He contended that the ingredients of the offence were not proven, that at the time of the offence the minor had her pant on and penetration would not have sufficed. He placed reliance on the cases of David Aketch Ochieng vs R (2015) e KLR to urge that the conviction was unsafe in the circumstances since the prosecution failed to adduce sufficient evidence to the required standard to prove an attempted penetration. Also relied upon was the case of Benson Musumbi vs Republic (2019) where it was held that the prosecution must prove the mens rea which is the intention and actus reus which constitute the overt act. He urged that there is a difference between mere preparation to commit an offence and attempting to commit an offence.
15. Secondly, the Appellant while relying on the Court of Appeal in the case of Dismas Wafula Kilwake vs R (2018) eKLR, submitted that the mandatory minimum sentence provisions under section 8 of the Sexual Offences Act No 3 of 2006 were unconstitutional as they denied the court the discretion in sentencing. The Appellant urged the Court to exercise its discretion when sentencing him since he was sentenced by virtue of the minimum mandatory sentences as provided for in the Sexual Offences Act. That the trial court did not exercise discretion pursuant to section 216 of the Criminal Procedure Code, hence contravened Articles 25(c) and 28 of the Constitution. He urged the Court to consider the Judiciary Sentencing Policy Guidelines and resentence him.
16. Thirdly, he asked the Court to consider the time he spent in custody in accordance with section 333(2) of the Criminal Procedure Code. He placed reliance on the case of Ahamad Abolfathi Mohammed & Another vs Republic (2018) eKLR.



Determination

17. I have considered the trial court's record, the memorandum of appeal and the submissions on record and find that the issues for determination are:
- a. Whether it was proven beyond reasonable doubt that the Appellant committed the offence;
 - b. Whether the sentence should be reduced; and
 - c. Whether section 333(3) of the *Criminal Procedure Code* was taken into consideration.
18. This Court is guided on its duty as an appellate court by the finding of the Court of Appeal in the case *David Njuguna Wairimu v Republic* [2010] eKLR where the Court stated thus: -

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

19. Regarding the offence with which he appellant was charged with, section 9(1) of the *Sexual Offences Act* provides as follows;
1. A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
20. Section 388 of the *Penal Code* defines attempt as follows:
1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
 2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
 3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”
21. In the case of *Benson Musumbi vs. Republic* [2019] eKLR the ingredients of the offence of attempted defilement were outlined as follows:-

“The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration.” (Emphasis added.)



22. Looking at the first ingredient, the age of the complainant. It is noted that during voir dire examination, the victim (PW1) stated that she was 10 years old. This was corroborated by PW2, her mother who informed the court that PW1 was 10 years and would be turning 11 in November 2022. In addition, PW5, the investigation officer produced the birth certificate PEX3 that indicated that the victim was born on 12/04/2011. The Court of Appeal in *Malindi in Mwalengo Chichoro Mwajembe v Republic*, Msa. App. No. 24 of 2015 (UR) held as follows: -

“ ...the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.”

23. Consequently, guided by the above I find that the ingredient of age was proven beyond reasonable doubt by the production of the birth certificate.

24. The second ingredient is the identification of the assailant. From the evidence of PW1, she stated that Danson grabbed her, covered her mouth and forcefully took her to his house. She was also able to identify Danson when he went to the shop to inquire where he would buy unga. Further she was able to identify his house and took PW3 to the house. PW2 also stated that PW1 had informed her that Danson had grabbed her and took her to his house. PW2 told the court that the Appellant had visited her shop on two occasions. Going by the testimony of PW3, the Appellant was a tenant and PW2 had a shop just outside the plot. In addition, the Appellant in his statement confirmed that PW2 had a shop where he had a small chat as he went to buy a charger. That at the shop he found PW2 beating her child and the caretaker (PW3) was present.

25. This court I therefore find that the issue of identification was proven. The appellant, the complainant and witnesses knew each other. The victim was able to recognize the Appellant when he went to the shop and even took PW3 to his house where the condoms were retrieved. Evidently, the identification of the appellant was through recognition as he was a person well known to the victim.

26. The third element is proof of the steps taken by the assailant to execute the defilement which did not succeed. From the record, the victim stated as follows;

“ ... I was walking to the washroom behind the plot, while walking Danson grabbed me, covered my mouth and forcefully took me to his house. Danson told me while inside his house that he is not married and wants me to be his girlfriend. He pushed me to the bed and took a condom from under his mattress. I picked the condom and I saw it is written love condom. Danson removed his belt, unzipped his trouser and removed it to below his knees. The inner wear is blue in colour. Danson removed my tight halfway. He did not remove my pant. He remove his thing and tried to squeeze it at my vagina. I had my pantie on. This thing is the one he uses to urinate.

I was lying on my back I pushed and he fell down. I pushed and he fell down. I pushed him using my legs ...”

27. The trial court in arriving at its decision observed that the evidence of PW1 was corroborated by PW2 and PW3. The minor stated that when she was with PW3 and the accused, she was escorted to the accused person's house and she retrieved the condom. She described the condom as red and was called love condom. That PW2 and PW3 confirmed that indeed what PW1 told them was the truth, the



condoms were retrieved from the accused persons house under the bed. The condoms were produced as exhibit PEX1 and are indeed called 'love'. The trial court also noted that it had seen the exhibit and PW1 had identified the condom while testifying.

28. This Court notes that the complainant evidence paints a picture of what transpired. She was able to identify the condoms which were later retrieved from under the appellant's bed. The trial court also considered the appellant's defence that he had an issue over the rent deposit with PW3 as an afterthought and without any basis since PW3 was not the complainant, he just testified on behalf of the complainant since he was called by PW2 to hear the complainant story.
29. This Court also notes that the appellant defence that he was not present at the time of occurrence of the offence is without basis. The same has not been corroborated by any evidence to show that indeed he was not present. This court therefore finds that the appellant's action as explained by the complainant and corroborated by PW2 and PW2 leads to one possible and logical conclusion that the appellant attempted to defile the complainant. Thus, the trial court correctly analysed the evidence presented in arriving at its decision and held that "from the above narration, I have no doubt in my mind that the Appellant attempted to defile the minor but was unsuccessful."
30. Consequently, on the first ground of appeal, I find that the prosecution proved all the ingredients of the offence of attempted defilement and that ground has no merit.
31. As regards the sentence, Section 9 (2) of the [Sexual Offences Act](#) No. 3 of 2006 provides as follows;
 2. A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
32. The Appellant was sentenced to serve 10 years imprisonment. I have considered the Appellant's submissions in which he referred the Court to the Dismas Wafula Kilwake vs R (2018) e KLR. In that case, the Court of Appeal extended the reasoning of the Supreme Court in the Francis Muruatetu decision to mandatory minimum sentences provided under the [Sexual Offences Act](#) and held that Section 8 of the [Sexual Offences Act](#) must be interpreted in a way that does not take away the discretion of the Court in sentencing. However in a more recent case, the Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) has stated as follows:

"Returning to the issue of the constitutionality or otherwise of minimum sentences under the [Sexual Offences Act](#) and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the [Sexual Offences Act](#) it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

64. The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against [the Constitution](#) before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional.



The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing to refer even to the particular Section 8 that would have been relevant to the Respondent's case.

65. We also note that the Court of Appeal concluded its decision in this present matter by reducing the Respondent's sentence from the minimum of 20 years to 15 years. In doing so, the Court of Appeal did not clarify the considerations that went into its decision to reduce the sentence. The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.
 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in- depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”
33. Ultimately, the Supreme Court affirmed the mandatory sentence under section 8 of the Act holding that, “the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid.” As such, I find that the sentence of the trial court was within the law and the same was legally sound. The same is affirmed and this ground of appeal dismissed.
 34. On the last ground, I agree with the Appellant to the extent that Section 333(2) of the *Criminal Procedure Code* should be put into consideration at the time of sentencing. It provides thus;

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
 35. The Judiciary Sentencing Policy Guidelines state as follows in respect to Section 333 (2) of the *Criminal Procedure Code*:-
 1. The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.



2. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.
36. Upon perusal of the trial Court record, I note that the trial court in sentencing the accused to 10 years imprisonment, did not consider the time period spent in custody during trial. The Appellant was arrested on 30th December 2021 and had not been out on bail or bond during his trial. This time should be considered in the computation of his 10 years imprisonment sentence.
37. I therefore find and order as follows;
 - a. The appeal on conviction is dismissed and the conviction is upheld.
 - b. The appeal on sentence partly succeeds to the extent that the sentence meted out by the trial court is upheld, however the time spent in remand custody during trial shall be taken into consideration when computing the imprisonment term in accordance with Section 333 (2) of the *Criminal Procedure Code*.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF APRIL 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....the Appellant

.....ODPP

Sam Court Assistant

