



**Masika v Republic (Criminal Appeal 104 of 2020)  
[2025] KEHC 5191 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 104 OF 2020  
MS SHARIFF, J  
APRIL 8, 2025**

**BETWEEN**

**TOBIAS MUKHEBI MASIKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon. J. Kingori Chief Magistrate who sentenced him to twenty (20) years imprisonment.

**Appeal**

2. Being dissatisfied with the said Judgement, on 10<sup>th</sup> October 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was of undated. He later filed amended grounds of appeal dated 14<sup>th</sup> August 2024, as follows:
  - a. That the trial Magistrate erred in law by failure to inform him of his right to representation by an Advocate leading to insubstantial injustice occasioned hence prejudiced as the Principles of a fair trial was not observed.
  - b. That the pundit magistrate erred in law and fact by convicting and sentencing him to the mandatory minimum sentence notwithstanding that it was manifestly harsh and excessive hence bad in law as was coached and dictorial sentence that deprives the Magistrate's judicial



power to discretion for shorter term sentence as per Article 50(2) of the Constitution of Kenya 2010 and Section 26(2) of the Penal Code.

- c. That, the pundit Magistrate misdirected herself by failure to or to overlook the period spent in custody as prescribed in Section 333(2) of the Criminal Procedure Code and under Act 7 of 2007.
- d. That the trial magistrate erred in law and fact by failure to prove the ingredients of defilement.
- e. That the trial Magistrate erred in law and fact as he was convicted based on evidence full of inconsistencies and contradictions thus occasioned miscarriage of justice.
- f. That the trial Magistrate failed to consider his defence.

### **Analysis and determination**

3. The appellant filed his written submissions were dated 14<sup>th</sup> August 2024, while those of the Respondent were dated 7<sup>th</sup> February 2025. The Judgment herein is based on the said written Submissions which both parties relied upon in their entirety.
4. It is settled law 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.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the Court therein held that the appellate Court was not bound by the findings of fact of the trial Court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
6. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this Court that the issues that had been placed before it for determination were as follows :-
  - A. Whether or not the Appellant's right to fair trial was infringed upon;
  - B. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - C. Whether the Prosecution witnesses' evidence was marred with inconsistencies and contradictions.
  - D. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.
7. The Court will analyze the said issues under the following distinct and separate heads.

#### **A. Fair Trial-Legal Representation**

8. The Appellant submitted that an Accused person must be permitted to defend himself in Court in person or by a legal representative of his own choice and to be informed of the said right promptly. He relied on the case of *Lima and Another vs Republic* (Criminal Appeal No. 110 of 1991). He insisted that at the pre-trial proceedings he was not informed of his right to legal representation by an Advocate hence begged for all benefits of doubt to be in his favour.
9. The Respondent made no submissions on this issue.



10. Notably, Article 50(2)(h) of the Constitution of Kenya states that:-

“Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly”.

11. As can be seen hereinabove, the Appellant herein was charged with the offence of sexual assault and an alternative charge of committing an indecent act with a child. A perusal of the proceedings does not show that he requested the Trial Court to be accorded time to seek legal representation and his request was declined and/or demonstrate that he was likely to suffer substantial injustice if the trial proceeded without legal representation. As this issue was not raised during trial when the Trial Court was expected to have pronounced itself on the same, it could now not be raised and considered on appeal.

12. Be that as it may, this court found it necessary to pronounce itself on the duty of a trial court to inform an appellant of his or her right to legal representation. There was no indication that the Trial Court informed of his right his right to be represented by counsel. This was a great omission on part of the Trial Court as the obligation to have informed him was mandated by Article 50(2)(h) of the Constitution of Kenya.

13. Having said so, it is not always that such omission must cause an accused person injustice. This is because injustice can be remedied through re-call of witnesses when an accused person subsequently becomes represented by counsel or by way of a re-trial on appeal if is demonstrated that such accused person’s right to fair trial had been infringed upon and/or breached and/or if he had suffered prejudice due to such omission by the trial court.

14. Going further, the right to legal representation at the State’s expense under Article 50(2)(h) of the Constitution of Kenya is limited to certain categories. The said Article 50(2)(h) of the Constitution of Kenya stipulates as follows:-

“Every accused person has the right to a fair trial, which includes the right 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. Legal representation at the State’s expense was currently being given to accused persons who had been charged with capital offences where the sentence was death. This is a progressive right and the same cannot apply to all accused persons due to scarcity of state resources. In any event it would be a misnomer for the state to fund the legal representation of sexual offenders.

16. Premised on the reasons stated hereinabove this Court comes to the firm conclusion that the Appellant’s constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform him of his right of legal representation under Article 50(2)(h) of the Constitution of Kenya or that he was not given legal representation at the State’s expense as provided in Article 50(2)(g) of the Constitution of Kenya.

## **B. Proof of Prosecution’s Case**

17. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this Court considered the ingredients of the offence of defilement.

18. It is now settled in the case of George Opondo Olunga vs Republic [2016] eKLR that the ingredients of the offence of defilement are as follows:-



- a. Proof of complainant's age,
- b. Proof of penetration
- c. Positive identification of the perpetrator.

19. This Court dealt with the same under the following distinct and separate heads.

**a. Age**

20. The Appellant submitted that there was no proof of this element as the child was either 13 or 14 years and that name in the birth certificate was in variance with the one mentioned by PW1.
21. The Respondent on the other hand, relying on the case of Richard Wahome Chege vs Republic Criminal Appeal no. 61 of 2014, submitted that PW1 was very clear in her evidence as to the age of the victim, which was 13 years old. This evidence was corroborated by the evidence of PW5 who produced the certificate of birth as (PEXH1) which indicated the date of birth of the victim as 13<sup>th</sup> May 2005. PW1/victim testified that she was 14 years old as at the time of trial. PW3 her mother testified before the Court that PW1 was 13 years old at the time of the incident.
22. The incident occurred on 21<sup>st</sup> September 2018, and as per PEXH1 PW1 was born on 13<sup>th</sup> May 2005. This means that on 21<sup>st</sup> September 2018, PW1 was aged 13 years 4 months 8 days which simply means that she was still 13 years old.
23. As the Appellant did not controvert and/or rebut the evidence of age of the victim, by availing contrary evidence, this Court finds and holds that her age had been proven and that for all purposes and intent, she was a child aged thirteen (13) years at the material time of the incident.

**b. Penetration**

24. The Appellant submitted that this ingredient was not well proved by the prosecution.
25. While relying on Section 2 of the Sexual Offences Act and the cases of Mark Oiruri Mose vs Republic (2013) eKLR and Erick Onyango Odeng vs Republic (2014) eKLR, the Respondent submitted that the findings on the P3 form, PEXH4, and the PRC form, PEXH5, as availed by PW2 proved penetration. Further that PW2 testified that the PW1 vagina was torn and was producing blood clots. In his prognosis PW2 noted that there was presence of blood in the victim's urine and that there was no hymen, concluding that PW1 had been penetrated.
26. During his defence, the Appellant did not address this issue rather maintained his stand as per his testimony that he was being framed. Upon analysis of the testimony of the survivor vis a vis the medical evidence, I do find that there was prove of penetration wherefore I cannot fault the trial magistrate for making that finding.

**c. Identification**

27. The Appellant submitted that the incident occurred at 6.30 p.m. or 8.30 p.m. which is night time and that there was no source of light thus making positive identification difficult.
28. The Respondent, while relying on the case of Ogeto vs Republic (2004) KLR 19 submitted that the Appellant was no stranger to the victim as she had engaged him to ride her home and she ordinarily used to see him at Kanduyi stage. The victim told the Court that she saw the Appellant at the stage and had enough time to see and identify him as it was early evening with enough daylight. The Respondent



thus submitted that there was no possibility of error in the identification of the appellant as this was a case of recognition.

29. In his unsworn evidence, the appellant did not tender any evidence in rebuttal, save to state that the charge was a fabrication of the chairmen of their Boda Boda Association.
30. It was evident that victim recognized the Appellant and he was well known to her and there was ample sunset at 1830 hours, that enable clear sighting and recognition of the appellant. I do find that identification was proven by way of recognition.

### **C. Inconsistencies and contradictions**

31. The Appellant relying on the case of CMN vs Rep (2012) eKLR Criminal No. 87 of 2011 submitted that the evidence of PW1, PW2 and other witnesses was based on speculation and was materially contradictory and fraught of discrepancies that negated the inference of the Appellant's guilt. According to him, PW2 the victim had not given the names of the perpetrators and that there was no description of bodily features of the assailant; height, body mark nor any mode of attire provided or even his motor bike registration details.
32. The Respondent did not submit on this issue.
33. It is trite criminal jurisprudence that unless satisfactorily explained, inconsistencies in the testimonies of the prosecution witnesses would usually but not necessarily result in the evidence of a witness being rejected. (See *Uganda v Rutaro* {1976} HCB; *Uganda vs George W. Yiga* {1979} HCB 217). This begs the question whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), *Adamu JA*; *Ngolika JA*; *Orji-Abadua JA*; & *Abiru JA* wherein the court pronounced itself as hereunder:

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

34. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. (See *Osetola vs State* {2012} 17 NWLR (Pt1329) 251). It is not every trifling inconsistency in the evidence of the Prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial Court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.
35. Applying the above tests to this case, I find no contradictions in the evidence of PW1 and even if there are any, they are not substantial to the extent of affecting the conviction. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of the charge. Further, the evidence in question is to be considered



together with the rest of the evidence including the defense. Accordingly, the argument that PW1's evidence was tainted by inconsistencies and contradictions fails.

#### **D. Sentence**

36. On sentence, the Appellant relying on the decision of Petition No. E017 of 2021 (2022) eKLR K.EH.C 13/18 (KSR) Philip Main Mueke vs The Director of Public Prosecution and Another (2022) submitted that mandatory minimum sentences deprive the trial Magistrate's judicial inherent powers thus violating Section 216 Section 329 of the Criminal Procedure Code.

37. The Appellant further submitted that he was apprehended on 22<sup>nd</sup> September 2018 and was in custody up to the day of his conviction namely 15<sup>th</sup> October 2020. He insists that the non-consideration of the 2 years he spent in custody by the lower Court defeated the dints of Section 333 (2) of the Criminal Procedure Code. He placed reliance on the case of Samuel Macharia Kimani vs Republic (2019) eKLR.

38. The Respondent relying on the dints of Section 8 (1) as read with Section 8(3) of the Sexual Offences Act and the cases of Francis Omironi vs Uganda -Criminal Appeal No. 2 of 2000, the Supreme Court of Kenya PET. E 018/2023 R vs Joshua Gichui Mwangi and Initiative for Strategic Litigation in Africa and Others, the Respondent submitted that the lower Court properly exercised its discretion within the ambit of the Sexual Offences Act. The Respondent maintained that the sentence meted out by the lower Court was within the law and that it ought not to be interfered with.

39. As pointed hereinabove, the Appellant herein was charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Section 8(3) of the Sexual Offences Act provides that:-

“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.”

40. In this instance, the Appellant who is an adult took advantage of a 13-year-old school going girl. The implications of the offence on the minor are not only physically traumatizing but have a long lasting adverse psychological impact that can never be rectified. I find the sentence of twenty (20) years imprisonment that was meted herein is proper and lawful. This court is by virtue of the provisions of article 163(7) of the Constitution of Kenya 2010 bound by the decision of the Supreme Court of Kenya in the case of R vs Joshua Gichuhi Mwangi Supreme Court Petition No 18 of 2023, wherein the court categorically held that statutory prescribed mandatory minimum sentences under the sexual Offences Act No 3 of 2006 are valid and lawful.

41. Notably, the Appellant herein was convicted on 14<sup>th</sup> September 2020. He had been in custody since his apprehension on 22<sup>nd</sup> September 2018. He was in custody for two (2) years and eight (8) days in custody while the trial was going on.

42. Section 333(2) of the Criminal Procedure Code which provides that:-

“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.”



43. It was evident from the proceedings that the Trial Court did not consider the period the Appellant spent while his trial was ongoing. He was therefore entitled to deduction of the said period from his sentence as provided in Section 333(2) of the Criminal Procedure Code.

### **Conclusion**

44. For the foregoing reasons, the upshot of this Court's decision is that the Appellant's Petition of Appeal that was filed on 10<sup>th</sup> October 2020 was not merited on both conviction and sentence. The same be and is hereby dismissed.
45. It is hereby ordered that the pre-conviction period that the Appellant spent in custody being the days between 22<sup>nd</sup> September 2018 and 14<sup>th</sup> September 2020, be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 8<sup>TH</sup> DAY OF APRIL 2025.**

**M.S.SHARIFF**

**JUDGE**

In the presence of:

Appellant; Virtually in Kisumu Maximum Prison

MS Kibet for Respondent

Diana Court Assistant

