Bwire v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 7159 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E010 OF 2024

WM MUSYOKA, J

MAY 23, 2025

BETWEEN

ABEDNEGO OJIAMBO BWIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CMCSOC No. E097 of 2021, of 8th February 2023)

JUDGMENT

1. The appellant, Abednego Ojiambo Bwire, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 21st June 2021, at Sirisia area, Bunyala Sub-County, within Busia County, he intentionally caused his penis to penetrate the vagina of FA, a child aged thirteen years. The appellant pleaded not guilty to the charge, on 25th June 2021. A trial was conducted, where six witnesses testified. He was convicted on 8th February 2022 and was sentenced, on the same date, to serve twenty years in prison.

2. He was aggrieved, and brought the instant appeal, against sentence. The sole ground of appeal revolves around the sentence of twenty years being a mandatory minimum, which denied him a fair hearing. He asks to be considered under section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. The rest of his alleged grounds amount to mitigation, on the basis that he is a first offender and an orphan, that he is remorseful, the sole breadwinner for his family and he is poor.

3. The appeal was canvassed by way of written submissions. Both sides have filed written submissions. .

4. In his written submissions, the appellant has gone beyond his grounds of appeal, and submits, in addition to minimum sentences, on penetration, the evidence being uncredible, the age of the complainant, crucial witnesses, errors by the trial court and alibi defence. I have read through his written submissions, and noted the arguments advanced, plus the supporting decisions that he has cited.

5. The respondent supports the findings and holdings of the trial court. I have equally gone through its written submissions, and noted the arguments made and the authorities cited.

6. The pleadings, in appeals, is the memorandum of appeal in civil appeals, and the petition of appeal in criminal appeals. It is trite that the parties are bound by their pleadings. Written submissions ought to be confined to the grounds stated in the pleadings, in this case, the petition of appeal. The appellant has not amended his petition of appeal to include the new issues that he has argued in his written submissions.

7. The charge against the appellant was founded on section 8(3) of the *Sexual Offences Act*, which covers child victims in the age bracket of twelve and fifteen. The defilement of minors in that bracket attracts a minimum sentence of twenty years. Upon conviction, the appellant herein was sentenced to twenty years imprisonment, which is the minimum allowed, under the provisions of the *Sexual Offences Act* under which he was charged.

8. The applicant, no doubt, hinges his appeal on Wachira & 12 others [2022] KEHC 12795 (KLR) (Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), on the unconstitutionality of the minimum sentences, prescribed by the *Sexual Offences Act*, where the High Court found and held that statutory minimum sentences are mandatory in a sense, for the trial court cannot consider alternative sentences, and it is limited or restrained in the custodial sentences it can impose, and then, based on that, declared the provisions, prescribing minimum sentences in the *Sexual Offences Act*, unconstitutional, opening the way for trial courts to exercise discretion, in terms of consideration of alternative sentences and imposition of custodial sentences lesser to what the minimums require.

9. Unfortunately for the appellant herein, Wachira & 12 others [2022] KEHC 12795 (KLR) (Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) have only held sway for a season, for they have since been declared bad law, by the Supreme Court, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), which has asserted that the sentences prescribed in the *Sexual Offences Act*, inclusive of the minimum sentences, are lawful and constitutional. The appellant, cannot, therefore, benefit from the discretion proposed in Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), as the trial court and this court have no discretion, as our hands are tied by the statutory provisions in the *Sexual Offences Act*.

10. I see that the appellant, in his written submissions, cites section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, and invites me to consider that provision, with regard to his sentence. That provision states that the duration of every sentence of imprisonment should be calculated or reckoned from the date the sentence is pronounced. It carries a proviso to effect that where the convict had spent some time in custody, prior to sentence, the period spent in custody should be considered. The provision is in mandatory terms, and a convict is entitled to benefit from it. It is not a matter of discretion by the court.

11. I note that when sentence was pronounced, on 8th February 2022, the trial court did not expressly refer to section 333(2) of the *Criminal Procedure Code*, but it directed that the time was to run from the date of plea. Plea was taken on 25th June 2021, the appellant having been arrested on 24th June 2021. The sentencing order made by the trial court was in keeping with section 333(2).

12. Is there any merit in the additional grounds? Let me look at that next.

13. On penetration, the complainant was said to be 13 years old and was at Standard 6 at the time. It happened in broad daylight. She described what happened. How the appellant lured her to his house, pulled up her school uniform and pulled down her underpants, and unzipped his pair of trousers. However, she did not state whether he penetrated her vagina with his penis. All she said was that "When he was done the accused left with his motorcycle." That was the closest that she came to talking about being penetrated. She made no allegation on penetration against the appellant in her testimony.

14. After the incident, she just left for her home/school and made a report to no one. It only became an issue after someone reported that he had seen her leave the compound of the appellant. It was after that that her relatives converged at her school, and joined forces with the teachers, to force her, through beatings, to confess. She was seen by a clinician, PW5, who detected no abnormality from his tests. The pregnancy test was negative; nothing came out of the urinalysis and no abnormality was detected from HVS. He noted that her genitalia was normal. It had no tears and no blood stains or bleeding. The only remarkable observation was that the hymen was missing. He did not testify on whether he determined whether it was freshly broken or not. The examination happened a day after the alleged incident.

15. The evidence on penetration was shaky. The victim herself did not claim at all that she had been penetrated. Her alleged confession was only made after coercion through beatings. The medical evidence was shaky. Other than the lost hymen, there was nothing. As reliance was being placed on the hymen, an effort should have been made to establish whether it had been lost recently. The mere fact that the hymen was found broken, at examination, did not mean that it was the alleged events of 21st June 2021 that were responsible. Some timeline should have been tied to that loss of the hymen. To my mind, penetration was not proved.

16. The ground on uncredible evidence is tied to that on penetration, and that the same had not been proved. The appellant argued that the case was overly founded on circumstantial evidence. Was it founded on circumstantial evidence? I do not think so. What circumstances? The matter of circumstantial evidence would only arise where there was no direct evidence connecting the appellant to the victim. She clearly testified that she and the appellant interacted at the material time. There was evidence which placed him at the scene. The victim testified that he removed her clothes but fell short of saying that he penetrated her.

17. On her age, he submits that the same was not adequately proved, for the complainant said she was thirteen, while her year of birth was invariably put at 2005, 2007 and 2008. He submits that the trial court took her age to be 16. PW1, herself, put her age at 13. PW2, her mother, said she was born in 2007, and produced a certificate of birth, where she was said to have been born on 22nd December 2005. The P3 form put her age at 13. The PRC form captured her date of birth as 22nd December 2008. The medical treatment notes recorded 13 years as her age.

18. The most authoritative document to establish age is the certificate of birth. One was produced, according to which the complainant was born on 22nd December 2005. That made her age to be 15 years and 6 months as at 21st June 2021. She had not yet turned 16 as at that date, hence she was still within the age bracket the subject of section 8(3). I am persuaded that her age was proved to the required standard.

19. On certain crucial witnesses not being called, the appellant refers to several persons whose names came up in the testimonies of those witnesses who testified. Persons who were stated to have had claimed to have had seen the complainant enter or leave the house of the appellant. Whether the complainant was in the house of the appellant is not really an issue. She testified that she was. The trial court believed her, and I have no reason to doubt that. That is not the critical issue. What is at the heart of the matter is penetration, and none of the individuals mentioned could provide any evidence on whether the penis of the appellant entered the vagina of the complainant. The other elements of et offence are the age of the complainant and the fact that penetration was by the appellant. The mother of the complainant testified. On the age of the complainant no one can give better evidence than her. On the penetration being by the appellant, the key witnesses were the complainant herself and the clinician. They both testified.

20. Those individuals who were mentioned, would only be peripheral witnesses, whose testimonies would only provide some mass to the evidence that was recorded, but adding little value to it. It is trite that the prosecution need not call every person, as a witness, who happened to know one thing or other about the matter. The obligation on the prosecution is to call such number of witnesses as would prove its case. The number of witnesses, by itself, does not matter; it is the quality of the evidence that they bring on board that is of value.

21. The argument that the trial court erred, is linked to the matter of circumstantial evidence. I have dealt with that at length above; I have nothing more to add on it.

22. On his alibi defence not being considered, I note, from the defence statement, that the appellant said that he was at his place of work at the time material to the commission of the offence. He mentioned names of individuals that he was allegedly with, but he did not call them as his witnesses. In any event, an alibi defence is of value only in circumstances where the prosecution is notified of it in advance, to enable it lead evidence, to displace it. I have not seen any evidence pointing to the prosecution having been given notice of an alibi defence.

23. If I were to limit myself to sentence, I would find no merit in the appeal, and I would dismiss it. However, as there are new grounds, which I have considered, I have found merit in one of them, that penetration was not proved. Penetration is the base for the offence of defilement. Without proof of it, there can be no conviction. Consequently, I do find and hold that the appeal herein is merited. I allow it. The conviction is quashed. The sentence is set aside. The appellant shall be freed from prison custody forthwith, unless he is otherwise lawfully held on a separate warrant. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Abednego Ojiambo Bwire, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.