Reson alias Tarbo v Republic (Criminal Appeal E007 of 2023)
[2025] KEHC 6423 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6423 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL E007 OF 2023

CM KARIUKI, J

MAY 19, 2025

BETWEEN

SAMMY RESON ALIAS TARBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D. Ngayo (R.M) in NAROK MCSOA No. E010 of 2022 delivered on 13/07/2023)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 40 years' imprisonment for the defilement of a 6-year-old girl.
2. Being dissatisfied with the said conviction and sentence, he preferred an appeal vide a petition of appeal filed on 27/07/2023. The appellant filed grounds of appeal as follows.
    i. That the trial magistrate erred in law and fact when he convicted the appellant in a prosecution case where age was not proved.
    ii. That the trial magistrate erred in law and fact when he convicted the appellant in a prosecution case where penetration was not proved.
    iii. That the trial magistrate erred in law and fact by convicting the appellant, but did not consider the appellant's defense of alibi.
    iv. That the learned trial magistrate erred in law by not considering the time spent in remand custody.
    v. That the learned trial magistrate erred in law and fact by sentencing the appellant to 40 years imprisonment, which is manifestly excessive.

3. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. No. 3 of 2006.

4. The particulars were that on 28/01/2022 in Narok East sub-county within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of RA a child aged 5 years.

5. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *sexual Offences Act*.

6. The appellant was tried and convicted. The appellant was sentenced to 40 years' imprisonment.

Directions of the court.

7. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

8. The appellant did not file submissions.

The respondent's submissions.

9. The respondent submitted that the age of the victim was proved during trial, and it was never disputed at all and there is no comparative difference between 5 and 6 years.

10. The respondent submitted that the issue of penetration was proven beyond reasonable doubt.

11. The respondent submitted that the appellant's alibi is an afterthought that has no basis at all.

12. The respondent submitted that the sentencing guidelines guided the trial magistrate in reaching and the gravity of the offence is commensurate with the sentence.

Analysis and Determination.

The court's duty

13. First, an appellate court is obligated to re-evaluate the evidence and make its own conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32.

14. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of defilement

15. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, which provides:

> " 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life."

16. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act*, which the prosecution must prove beyond reasonable doubt, are:

    1) Age of the complainant.

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, see Mark Oiruri Mose v R [2013] eKLR; and

    3) The accused was the assailant.

17. See the case of Charles Wamukoya Karani Vs: Republic, Criminal Appeal No. 72 of 2013.

18. PW1 testified that the complainant is her daughter is 6 years old.PW2 testified that she is aged 5 years and she does not go to school.PW3 testified that PW2 is her niece and she is 5 years old.PW7 produced an age assessment as P Exh 1. The age assessment showed that the victim was 6 years old. Based on the evidence adduced, the age of the victim was 6 years at the time of the defilement.

19. PW2 narrated that the appellant undressed her by removing her inner clothes, stockings, and the dress she had worn. The appellant also removed his rouser as well as his penis. as they lay on the mattress, the appellant used his penis to penetrate her vagina and he was on top of her.PW2 stated that she felt a lot of pain and she cried, but the appellant gagged her with his hand. She further stated that after the appellant was done, he dressed her and sent her outside and told her not to tell anyone.PW2 stated that she had started bleeding, and the appellant locked the door.

20. PW7 a clinical officer testified that PW2 was admitted to hospital for rectal vaginal fistula and was treated. The genitalia was torn, hymen broken and there was blood in PW2 vagina. He produced P3 form, treatment notes for the accused, treatment notes for the victim, discharge summary as P Exh 4, 8a& b, 2a & b, and 5.PW7 concluded that a penis was used for penetration causing harm which was classified as grievous harm.

21. The analysis of the evidence yields the inescapable conclusion that the prosecution proved to the required standard that penetration did occur of R.A. Accordingly, the medical evidence supports the claim that there was penetration of the child. But by whom? PW1 positively identified the appellant. According to PW2, the appellant was well known to her. She used to see him around where he lived. She knew him by the name 'Tarbo'.

22. The appellant in his defense testified that he was arrested and taken to the police station where his fingerprints were taken. He pleaded not guilty. The defense raised by the appellant does not shake the prosecution's case. The same is found to be an afterthought.

23. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled R.A. The girl knew the appellant well and gave such a succinct account of the times and manner he defiled her. This is a person she knew and trusted. There was no mistaken identity whatsoever of the appellant as the person who defiled her.

24. Based on the evidence adduced, the appellant caused the penetration of R.A. The court, therefore, finds that the appellant was properly convicted on the charge of defilement based on evidence that proved the case against him beyond reasonable doubt. In the upshot, the appeal on conviction is dismissed.

On sentence.

25. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act*, which provides that:

> " 8(2) A person who commits an offence of defilement with a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life."

26. The trial court considered the mitigation by the appellant, the probation officer's report, the children's officer's report, and the circumstances surrounding the offence, including the fact that the offence is becoming a menace.

27. The law is clear on such offences where minors do not have the capacity to consent to any sexual relationships. Thus, a deterrent sentence is necessary.

28. The victim was a child- she was 6 years old. The manner the offence was committed was by taking advantage of a child. The child is likely to also suffer post-traumatic effects from agonizing memories of the incident. In addition, the fact that the prevalence of the offence justifies 40 years imprisonment in this case. The cruelty with which the offence was committed, a life sentence should have been recommended. Therefore, a deterrent sentence is necessary.

29. There is new jurisprudence; Minimum sentences set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. 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. See the Supreme Court in Republic Vs Joshua Gichuki Mwangi And Initiative For Strategic Litigation in Africa (ISLA) And 3 Others Supreme Court Petition No. E018 of 2023.

30. Furthermore, the Supreme Court decision in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), emphasized the court's obligation not to interfere with mandatory minimum sentences prescribed under the *Sexual Offences Act*. In that case, the Supreme Court categorically held that the minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

31. The apex court held:

> " 56. Mandatory sentences leave the trial court with absolutely no discretion, such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however, set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues, including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

32. In the circumstances, the 40-year imprisonment sentence is upheld.

Conclusion and orders

i. The appeal on conviction and sentence is dismissed.

ii. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19TH DAY OF MAY, 2025.

.....

CHARLES KARIUKI

JUDGE