



**Magharu v Republic (Criminal Appeal E064 of 2022)
[2024] KEHC 43 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 43 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E064 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

JACKSON MWANDOE MAGHARU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO. E059 of 2021 of the Chief Magistrate’s Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Jackson Mwandoe Magharu, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between November and December 2021, [sic] in the Migadini area, Changamwe sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of C.N, a child aged 14 years.
3. The appellant was sentenced to fifteen (15) years’ imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and fact by convicting the appellant without considering that the expert’s report did not prove the case of defilement beyond reasonable doubt.
 - b) That the learned trial magistrate erred in law and fact by failing to note that the prosecution case was full of contradictions and discrepancies.
 - c) That the learned trial magistrate erred in law and fact by failing to comply with section 329 of the CPC as mitigation is part of the trial process.



- d) That the learned trial magistrate erred in law and fact by failing to consider the defence evidence.
 - e) That the learned trial magistrate erred in law and fact by meting out a sentence that was harsh, excessive, unjust, unconstitutional inhumane, and degrading.
4. The appeal was opposed by the state through M/s. Biasha Khalifa learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards. She further argued that the sentence was proper.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
6. The date on the charge is erroneous. The appellant was arrested on the 23rd day of April 2021 and there is no possibility that the offence complained of was committed after his arrest. The evidence on record is about the events of December 2020. No prejudice was occasioned to the appellant due to this error. Section 382 of the [Criminal Procedure Code](#) provides:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

The error is, therefore, curable.

7. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
- a) Whether there was penetration;
 - b) Evidence must show that the accused is the perpetrator; and
 - c) The age of the victim must be below eighteen years.

In the case of [Fappyton Mutuku Nguu vs. Republic](#) [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they were proven.

8. C.N. (PW1) testified that the appellant defiled her twice as she went to bathe in a bathroom that was outside their house. Later in April 2021 was examined and found to be expectant. The appellant in



his defence conceded that he indeed had sexual intercourse with the complainant. He however said it was consensual.

9. A DNA report that was produced confirmed that the appellant was the father of the child who was born by the complainant herein in 2021. Coupled with the other evidence on record, the prosecution proved that the appellant defiled the complainant.
10. A copy of the birth certificate of C.N. was produced as an exhibit. It indicates that the complainant was born on the 5th day of May 2006. At the time of the offence, she was fourteen years old. Section 8 (3) of the *Sexual Offences Act* provides:

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.

The prosecution therefore proved the age of the complainant.

11. The appellant contended that the sentence was harsh. He could be right, given his age, assuming it was true. In cases where young people engage in consensual sexual intercourse, the prosecution ought to give to the court the actual age of an accused as opposed to the current practice of indicating the apparent age. This may guide the court to mete out an appropriate sentence where circumstances dictate. In this case, however, I do not have the basis to interfere with the sentence.
12. Section 333 (2) of the *Criminal Procedure Code* provides:

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.

The learned trial magistrate ought to have ordered the sentence to run on April 23rd, 2021 when he was arrested. I make an order that the sentence meted out by the learned trial magistrate to run from April 23rd, 2021.

13. Except when the sentence ought to run, the appeal is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

