



REPUBLIC OF KENYA



**KENYA LAW**  
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**King'endo v Republic (Criminal Appeal E033 of 2023)  
[2024] KEHC 982 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 982 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E033 OF 2023  
LM NJUGUNA, J  
FEBRUARY 7, 2024**

**BETWEEN**

**STANLEY MUCHIRA KING'ENDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the Judgment of Hon. J.M. Gichimu at Senior Principal Magistrate's Court at Runyenjes Criminal Case no. E020 of 2022 delivered on 18th October 2023)*

**JUDGMENT**

1. The appellant has filed a petition of appeal dated 31<sup>st</sup> October 2023, seeking that the appeal be allowed, the conviction be quashed, sentence be set aside and he be set at liberty. The grounds of appeal are as follows:
  - a. That the learned trial magistrate erred in both law and fact by convicting the appellant on charges that were not proved beyond reasonable doubt;
  - b. That the learned trial magistrate erred in both law and fact by disregarding the appellant's defense without giving cogent reasons;
  - c. That the learned trial magistrate erred in both law and fact by sentencing the appellant to 40 years imprisonment without considering that the same is harsh, excessive and unconstitutional; and
  - d. That the learned trial magistrate erred in both law and fact by convicting the appellant on a case that was full of grudge and vendetta.
2. The appellant was charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge are that on diverse dates between January to September 2022 at [Particulars Withheld] village in Embu County,



- the appellant caused his penis to penetrate the vagina of one YWS a child aged 15 years. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of 2006, whose particulars are that on diverse dates between January to September 2022 at [Particulars Withheld] village in Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of one YWS a child aged 15 years.
3. When he was arraigned in court, the appellant pleaded not guilty and the plea was duly entered. The prosecution called 6 witnesses in support of its case.
  4. PW1, the victim, stated that the appellant had defiled her on several occasions between January and September 2022. That the first time it happened, she was sleeping in their parents' room with all her siblings when the appellant told her that he wanted to defile her because she was not his daughter and that he wanted to treat her as his wife. That on the several occasions when he defiled her, her mother knew about it and when she confronted him about it, he threatened to kill them. That in August 2022, she realized that she was pregnant and she delivered a premature baby on 01<sup>st</sup> November 2022. That on 26<sup>th</sup> September 2022, the appellant defiled her and she ran away to her grandfather's home and the appellant told her to lie that she had been raped in the forest. That her grandfather took her to Karurumo Police Station and the accused was arrested. That she was then taken to Runyenjes Level 4 Hospital for treatment.
  5. PW2, Dennis Mwenda, a clinician at Embu Level 5 Hospital stated that the victim was presented after being discharged from Runyenjes Level 4 Hospital. That she was 33 weeks pregnant and was anemic and so she was admitted on 28<sup>th</sup> September 2022 and discharged on 05<sup>th</sup> October 2022. He observed that the victim had been penetrated vaginally and anally and that there were lacerations and open wounds on her anal area. That the hymen was perforated and had a healed margin. That she was treated and sent home for pre-natal clinic. He produced the victim's treatment notes, the prenatal care booklet and discharge summary. On cross-examination, he stated that from his examination, he noted that the victim had been having sex over a period of time and that the injuries on the anal area were recent and consistent with the patient's history.
  6. PW3, RWN, mother of PW1, stated that PW1 was born on 24<sup>th</sup> October 2006 and she had to drop out of school following the offence. That the appellant is not the biological father of PW1. That sometime between January and September 2022, she realized that PW1 was unwell but was not getting better and when she took her to hospital, it was discovered that she was pregnant. That PW1 revealed that the appellant was responsible and when they confronted him about the issue, he accepted responsibility but threatened to behead her and PW1 if they told anyone about the matter. That PW1 ran away to her grandfather's home and they reported the matter to the police and the appellant was arrested. On cross-examination, she stated that it was the doctor who informed her that PW1 was pregnant and the appellant accepted responsibility for the pregnancy. That the appellant defiled PW1 while she (PW3) was away from home doing casual jobs.
  7. PW4, Espon Njue, grandfather of PW1 and the father of PW3 stated that PW1 went to his home on 24<sup>th</sup> August 2022 and she was walking with difficulty. That PW1 told them that she was pregnant and that the appellant was responsible for the pregnancy. That he reported the matter at Karurumo Police Post and the appellant was arrested for the offence. That PW1 was taken to hospital the following day.
  8. PW5 was PC Elsie Mugambi of Karurumo Police Post who stated that on 27<sup>th</sup> September 2022, she was informed about the reported case. That she recorded PW1's statement and then escorted her to Runyenjes Police Station and later to Runyenjes Level 4 Hospital. That the accused was arrested at his home and was identified by PW1 and PW4. That DNA analysis was carried out. On cross-examination, she stated that she did not inquire about the sleeping arrangements in the appellant's house.



9. PW6 was Nelly Pape of government chemist Nairobi who stated that her office received a request to examine paternity and determine if the appellant was the biological father of PW1's child. That from the DNA profiles generated, the results were that the appellant was the biological father of PW1's child and that the appellant was not the biological father of PW1.
10. This marked the end of the prosecution's case and the court found that the appellant had a case to answer. He was placed on his defense.
11. DW1, the appellant stated that his wife, PW3 had been pestering him to pay dowry for her since she was his 3<sup>rd</sup> wife, or else she would do something bad to him. That PW1 and PW3 argued with each other all the time and sometimes PW3 would send PW1 away from home. The even though their house had 5 bedrooms, when PW1 returned after being sent away by her mother, she was instructed to sleep on his bed. That on that day, he went home drunk and found PW1 sleeping on his bed. That himself, PW3 and PW1 slept on the same bed and he had sex with PW1 severally thinking that she was PW3. That the next morning, he saw PW1 and PW3 laughing about it and when he asked his wife why they were laughing, she told him that she would discuss the matter when PW1 becomes pregnant. That he did not commit the offence deliberately and blamed the offence on his drunkenness.
12. The trial magistrate considered the evidence before him and convicted the appellant of the main count of defilement. The appellant presented his mitigation and the same was considered before the court sentenced him to 40 years imprisonment.
13. This appeal was canvassed by way of written submissions.
14. The appellant submitted that the evidence of PW1 was not accurate and should not have been relied upon. He denied that PW1 was treated for recent injuries on her anus yet she had been discharged from another hospital. That the evidence was full of inconsistencies and he relied on the case of *John Barasa Manguya v Republic* (2018) eKLR and section 150 of the *Criminal Procedure Code*. That it is suspect that PW3 knew about the defilement since the first time it happened but did not raise alarm. He urged the court to allow the appeal based on the flaws in the prosecution's evidence.
15. From the foregoing, the issues for determination are as follows:
  - a. Whether or not the elements of the offence of defilement were proved beyond reasonable doubt; and
  - b. Whether the sentence meted out to the appellant was harsh, excessive and unconstitutional.
16. The role of the appellate court is to re-examine the evidence and reach its own conclusion. In the case of *David Njuguna Wairimu v Republic* [2010] eKLR the Court of Appeal stated as follows:-

“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 decision.”



17. On the issue of whether the offence was proved beyond reasonable doubt, I shall refer to Sections 8(1) and (3) of the [Sexual Offences Act](#) which provide thus:
- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) .....
- (3) 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.
- (4) .....”
18. For a conviction to be sustained under section 8(1) and (3) of the [Sexual Offences Act](#), the prosecution bears the burden of proving the following beyond reasonable doubt:
- The age of the complainant- that the complainant was a child;
  - There was penetration as defined under section 2(1) of the [Sexual Offences Act](#);
  - The perpetrator was positively identified.
19. The victim was confirmed to be a child under the meaning set out in section 2 of the [Children's Act](#) No 8 of 2001 through her birth certificate produced as PEX6 which shows that she was born on 24<sup>th</sup> October 2005 while the dates of the offence are recorded as between the months of January to September 2022, thereby proving that the victim was 15 years old when the offence was committed.
20. On the question of penetration, PW2 testified that PW1 had been penetrated vaginally and anally. He stated that the hymen was torn and had healed while there were recent lacerations and open wounds on the anal area, consistent with the patient's history. Moreover, he stated that PW1 was 33 weeks pregnant at the time of examination. This is sufficient proof of penetration and it corroborates the testimony of PW1. DW1 also confirmed that indeed he had sex with PW1 thinking that she was his wife. With all these, I have no doubt that indeed there was penetration.
21. The issue of identification of the perpetrator is not in question because PW1, PW3 and PW4 confirmed that the appellant is PW1's step-father. The appellant's defense also did not do much by way of refuting his identity as the perpetrator. I am therefore persuaded that the identity of the perpetrator was proved beyond reasonable doubt.
22. To that end, I am satisfied that the elements of the offence were all proved beyond reasonable doubt and I do not find a reason to interfere with the findings of the trial court on conviction. I stand guided by the case of *Mbogo & another v Shab*, [1968] EA, p.15 where the court held that;
- “An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
23. On the issue of whether the sentence imposed on the appellant was harsh, excessive and unconstitutional, Section 8(3) of the [Sexual Offences Act](#) prescribes a minimum sentence of 20 years imprisonment for this offence. The trial magistrate applied his discretion on the matter and sentenced



the appellant to 40 years imprisonment. The minimum prescribed sentence means that the law does not permit the court to sentence the appellant to less than 20 years imprisonment but is also does not prescribe the maximum. Therefore, the sentence imposed on the appellant is not unconstitutional nor is it harsh or excessive.

- 24. In the premises, I find no merit in this appeal and hereby dismiss the same.
- 25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 07<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

..... for the State

