



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sitowe v Republic (Criminal Appeal E060 of 2023)  
[2024] KEHC 1550 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E060 OF 2023  
A. ONG'INJO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**PASCAL SITOWE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Original conviction and sentence by Hon. C.A. Ogweno at CM's Court Mombasa in defilement contrary to Section 8(1) as read with 8(2) in CR. Case No. S.O. 45 of 2020 delivered on 25/11/2021)*

**JUDGMENT**

**Background**

1. The Appellant PS was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006 in Mombasa Chief Magistrates Court Sexual Offence Case No. E045 OF 2020.
2. The particulars are that on 16<sup>th</sup> December 2020 in Mombasa Country the appellant intentionally and unlawfully caused his penis to penetrate the vagina of HK a child aged 5 years old.
3. The trial Magistrate considered the evidence of 5 prosecution witnesses and the Appellant guilty and he was sentence to serve life imprisonment. The Appellant was aggrieved by the conviction and sentence and he preferred appeal herein on the following amended grounds of appeal filed together with his submissions on 13<sup>th</sup> December 2023: -
  - i. That the record served upon him does not have a copy of charge sheet contrary to Section 62(2) (b) of the [Appellate Jurisdiction](#).
  - ii. That the trial court erred in law & fact by failing to allow him to submit on mitigation in contravention of Section 216 and 329 of the [Criminal Procedure Code](#).



- iii. That the trial court erred in law & fact by failing to see that medical evidence did not prove penetration defilement.
  - iv. That the trial court erred in law & fact by imposing the minimum mandatory sentence Life Imprisonment.
  - v. That the trial court erred in law & fact by misconstruing the relevant penal law Section 8(2) as a mandatory provision.
4. The Appellant pray that his appeal be allowed, conviction quashed and sentence set aside.

#### **Prosecution Case**

5. PW1, HK the complainant herein underwent voire dire examination and gave an unsworn statement that she was 5 years old and identified the accused in court as Uncle P. She said that the accused used to insert his dudu at her vagina and kissed her. She said that it happened at night and that he removed her clothes when her mother was outside. The complainant said that her mother saw what happened and she beat her, and that the accused defiled her severally.
6. PW2, the father of the complainant said that she was 5 years. He also said that he knew the accused who was his cousin and that they lived together. That on 16.12.2020 at around 7.00 pm, he got home and found the complainant's mother crying and she told him that his brother had defiled the complainant. That PW2 called the accused and asked him about the issue but the accused did not tell him anything. That PW2 reported the matter to Changamwe Police Station and took the accused to the police station together with his in-law and friends.
7. PW3, the mother of the complainant testified that the complainant was 5 years old. That on 16.12.2020 at around 11.00 am, she was giving the complainant a bath and she appeared to be in pain when PW3 washed her private parts. That she would push her hand away and hold her thighs together. That when PW3 applying jelly on her body, she realized her vagina was gaping and when she asked her, the complainant said the accused had inserted his penis and finger into her vagina and that he had also licked her vagina. That PW3 called her relatives who were around and her sister-in-law asked that the child be taken to hospital. That when the accused got back, he was interrogated and he asked for forgiveness. That the complainant's father reported the matter to Changamwe Police Station and the child was taken to Port Reitz Hospital for examination. That they were issued with treatment notes dated 17.12.2020 and they filled the P3 and PRC Forms.
8. PW4, John King'ori, the Clinical Officer at Port Reitz Hospital testified that he filled the P3 Form on 01.02.2021. He said that the child had changed her clothes, the child could not give any history but the mother said the child had been defiled. PW4 said that he observed that the vagina was hypo-vascularized with broken hymen and that this was a sign of trauma leading to flow of blood to the traumatized area. PW4 remarked that there was no obvious penetration and hypo-vascularization could also be caused by itchiness. He produced the P3 Form as ExP3. PW4 said that he observed the child two months after Mr. Said, another clinical Officer had observed the child on 17.12.2020 and noted a hypo-vascularized vagina with broken hymen. That the child was referred to the laboratory for further investigations. PW4 produced the treatment notes as ExP2 (a), the laboratory form as ExP2 (b) and the PRC Form as ExP4.
9. PW5, No. 23010 CPL Milga Noor attached at Changamwe Police Station stated that on 17.12.2020 at around 2.00 pm, she was assigned the case herein to investigate. She said that she referred the victim herein to Port Reitz Hospital for examination and treatment. She said that a PRC Form was filled showing that the child had been defiled and that the child identified Uncle as the man who had defiled



her. That P was arrested by the brother and the neighbours and that PW5 interrogated him and booked him. PW5 produced the original notification of birth as ExP1.

### Defence Case

10. The accused, PSK, gave sworn evidence that the complainant's mother is his sister-in-law and that she was at home all the time, therefore, the child could not have been defiled in her presence. The accused said that there was a dispute between him and the father of the complainant over the family business. He said that the father of the complainant was lazy and this was a ploy to let his family gain control of the family shop at Kongowea, and that the allegations herein were false.
11. Appeal was canvassed by way of written Appellants submissions.

### Appellant's Submissions

12. The appellant submitted that the record of appeal served on him did not have a charge sheet. He relied on Article 50 (2)(q) of the *Constitution* which provided that every accused person has the right to a fair trial, which includes the right, if convicted to appeal to or apply for review by a higher court as prescribed by law. That failure to include a copy of the charge sheet was fatal to the determination of the appeal.
13. The appellant argued that the clinical officer was categorical that there was no penetration. That the medical evidence in support of the case fell short of establishing the offence of defilement. The appellant cited the case of HCCR Misc. App. No. 345 of 2001, *Juma & Others v A.G.* where it was held as follows: -

“Always remember, that the purpose of a criminal prosecution is not to obtain a conviction: it is to lay before the court what the State considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing: his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.”

14. The appellant also relied on the case of *Maina v Republic* (1970) E.A. 370 which held as follows: -

“It has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth...”

15. The appellant further relied on the case of Criminal Appeal No. E067 of 2021, *MTG v Republic* (2022) KEHC 189 (KLR) where Mativo, J. held: -

“To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused



is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.”

16. The appellant contended that an accused person who is deprived of their right to submit on their mitigating factors is denied their right to fair trial. That according to Clause 23.4 and 23.5 of the [Sentencing Policy Guidelines](#), determining the most suitable sentence requires the court to take into account the aggravating and mitigating circumstances, and that convicted persons should be expressly provided with an opportunity to present submissions in mitigation. The appellant submitted that there is nothing in the record of appeal showing that he was given a chance to present his mitigating circumstances.
17. The appellant submitted that the trial court construed the relevant penal law to be a minimum mandatory provision which does not allow the court to impose any other sentence save for the one of life imprisonment. That the issue of minimum mandatory penal provisions of the Sexual Offences Act has been dealt with by Odunga, J. in Machakos High Court, [Philip Mueke Maingi & 5 Others v Rep.](#) Const. Pet. No. E017 of 2021 that courts are bestowed with the legitimate discretion to impose sentences that befit the offences committed.
18. The Respondent failed to file submissions

### **Analysis & Determination**

19. This being the first appellate court, it is guided by the principles in [David Njuguna Wairimu v Republic](#) [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze 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 decisions.”

20. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are: -
  - i. Whether the prosecution proved penetration beyond reasonable doubt.
  - ii. Whether the trial Magistrate failed to consider that a crucial witness was not summoned in court.
  - iii. Whether Appellants mitigation was considered
  - iv. Whether sentence was harsh & excessive

#### **i. Whether the prosecution proved penetration beyond reasonable doubt**

21. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proven beyond reasonable doubt.



22. The P3 Form shows that the vagina was reddened with broken hymen. PW4 produced the P3 Form - ExP3 which he filled on 1<sup>st</sup> February 2021. He also produced the PRC Form - ExP4 which was filled by Mr. Said, the Clinical Officer who attended to the child when she was taken for treatment as shown in ExP2(a) and 2(b). When the complainant was medically examined, it was found that she had a hypo-vascularized vagina with broken hymen. From the evidence on record, the reason for the hypo-vascularization of the complainant's vagina was by penetration by the appellant's genitals and not any other object.
23. The Appellant alleged that his cousin PW2 had a dispute with him over the family shop at Kongowea Market and that is why he was fabricated so that the Complainant's father could have control of the shop. He admitted the Complainant had no reason to lie against him. The Appellant did not cross examine PW2 and PW3 concerning the alleged dispute over the shop. The doctors could not have made positive findings of defilement if the child was not defiled.

**ii. Whether the trial Magistrate failed to consider that a crucial witness was not summoned in court**

24. In the appellant's initial grounds of appeal, he indicated that a crucial witness had not been called to testify. This ground of appeal was left out in the amended grounds of appeal and a reevaluation of the evidence on record does not reveal if there was any relevant witness that was left out in the prosecution's case.

**iii. Whether Appellants mitigation was considered**

25. The appellant in mitigation said he was seeking leniency because he was innocent. The trial magistrate indicated she had considered mitigation and sentenced the appellant to life imprisonment.

**iv. Whether sentence was harsh & excessive**

26. I find the trial Magistrate arrived at a proper conclusion based on evidence that the appellant defiled his niece. The conviction is upheld. Life sentence has since been declared unconstitutional by the Court of Appeal in the case of Julius Kitsao Manyeso vs Republic. The life sentence meted against the appellant is therefore set aside and substituted thereof with 30 years imprisonment to run from 21<sup>st</sup> December 2020 when the appellant was first arraigned in court. Right of appeal of 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel - Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

