



**Tandara v Republic (Criminal Appeal E042 of 2022)  
[2024] KEHC 1013 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E042 OF 2022  
GMA DULU, J  
FEBRUARY 7, 2024**

**BETWEEN**

**JACKSON KIRIGHA TANDARA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case No. E015 of 2021 at Voi Law Courts delivered on 7th February 2022 by Hon. T. N. Sinkiyian (SRM))*

**JUDGMENT**

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence were that between 5<sup>th</sup> May 2021 and 25<sup>th</sup> May 2021 in Wundanyi Sub County within Taita Taveta County intentionally and unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of CB a girl aged 13 years. He denied the charge.
2. After a full trial, he was convicted of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#), and sentenced to twenty (20) years imprisonment from the date of sentence which was recorded as 2<sup>nd</sup> February 2022.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied upon the following grounds of appeal:-
  1. The learned Magistrate erred in convicting and sentencing him yet failed to find that the constitutional right to fair trial under Article 50(g) and (h) were violated.
  2. The learned Magistrate erred by failing to appreciate that penetration was not correctly proved.



3. The trial Magistrate erred by failing to appreciate that the provisions of Section 200 of the Criminal Procedure Code were not adhered to and as such the appellant suffered prejudice.
4. The sentence imposed was harsh and excessive since it was applied in mandatory terms as provided by the statute without considering the appellant's mitigation or the unique facts and circumstances of the case.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.
5. This is a first appeal. As a first appellate court I am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
6. In deciding this appeal, I have to bear in mind that the burden was on the prosecution to prove each of the elements of the offence beyond any reasonable doubt – see Section 107 of the Evidence Act (Cap.80). This being a criminal case, the standard of proof is beyond any reasonable doubt.
7. In proving their case, the prosecution called eight (8) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses.
8. The appellant has raised technical as well as substantive grounds of appeal. On the technical side he has complained that he was not provided with or informed of his right to be provided with an advocate by the State contrary to Article 50(2)(b)(g) and (h) of the Constitution and the preamble to the Legal Aid Act 2016.
9. Indeed, the trial court record does not show that the appellant was informed by the court of his right to legal representation. However, in my view since the appellant would still have to pay for his legal representation and the law presumes everyone to know the law, I find no fatal error committed by the trial court. I dismiss that ground.
10. The appellant has also claimed that Section 200 of the Criminal Procedure Code (Cap.75) was not complied with. This Section requires that when a succeeding Magistrate takes over a case partially heard by a previous Magistrate, then the accused person has to be informed of his right to ask for recall of witnesses who have already testified.
11. I note that in the present case, all the eight (8) prosecution witnesses testified before F. M. Nyakundi SRM, before the case was taken over by Hon. T. N. Sinkiyian SRM who heard the defence case.
12. In my view, though the record did not show that the provisions of Section 200 of the Criminal Procedure Code (Cap.75) were explained to the accused person, no prejudice was caused to him, as he even asked the succeeding Magistrate to await results of a DNA test on the expected baby, and such request was granted to him by the succeeding Magistrate, only for him to later change his mind and ask for the case to proceed without DNA tests.
13. I thus find that there was no violation of Section 200 of the Criminal Procedure Code. I dismiss that complaint.
14. I now turn to the substantive grounds of proof of the charge. On this, the appellant does not seem to challenge the age of the complainant, but proof of penetration.
15. On my part, having re-evaluated all the evidence on record, I find that the age of PW2 CBW was proved beyond reasonable doubt to be 13 years as at the time of the alleged offence as a birth certificate was relied upon and produced in court as an exhibit and the date of birth was 8<sup>th</sup> July 2007.



16. With regard to sexual penetration, the evidence on record on this element was that of PW2 the complainant who testified that she was penetrated sexually severally and became pregnant. The medical evidence tendered by PW7 Joto Nyawa of Moi Referral Hospital Voi was also to the effect that hymen was missing, and PW2 was 2 months and 4 days pregnant.
17. In my view, with the evidence on record, the prosecution proved beyond any reasonable doubt that sexual penetration on the complainant PW2 did occur.
18. With regard to the positive identity of the culprit, PW2 stated in her testimony that she knew the appellant well. On his part, the appellant in his sworn defence testimony, denied knowing the complainant, but stated that he knew the father of the complainant PM who was demanding payment from him for a plot bought by a relative of the appellant.
19. In my view, from the totality of the evidence of PW1 KW, PW2 the complainant, PW5 MM and PW6 MM, the appellant knew the complainant well, and the two engaged in an intimate relation, perhaps with the intention of marriage, though the appellant was already married. The defence of the appellant was not believable.
20. I thus find that the prosecution proved beyond any reasonable doubt that the appellant was the perpetrator.
21. I note that the appellant was charged under Section 8(1) as read with 8(4) of the *Sexual Offences Act* but convicted under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, as PW2 was 13 years old. In my view, the appellant was not prejudiced in any way in reference to the Section cited in the charge sheet, as the age of the victim was clearly stated to be 13 years, and that was what was proved by the prosecution. I will thus uphold the conviction.
22. With regard to sentence, I note that the appellant complains that the sentence was the minimum sentence. In my view, in the circumstances of this case where the evidence was that the appellant, who had a wife, took advantage of this young girl and defiled her severally making her pregnant, the sentence imposed was appropriate.
23. The only consideration that can be taken on sentence imposed in favour of the appellant is the time when the sentence starts to run. In view of the provisions of Section 333(2) of the *Criminal Procedure Code*, I order that the sentence of twenty (20) years imprisonment will run from 31<sup>st</sup> May 2021, when he was arrested, as he was in custody during trial.
24. I thus dismiss the appeal on conviction. I uphold the conviction of the trial court.
25. With regard to sentence, I order that the sentence of twenty (20) years imprisonment will be with effect from 31<sup>st</sup> May 2021 when the appellant was arrested. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED THIS 7<sup>TH</sup> DAY OF FEBRUARY 2024 AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistant

Appellant: present

Mr. Sirima for State present

