



REPUBLIC OF KENYA



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**JCK v Republic (Criminal Appeal E011 of 2022)
[2024] KEHC 5653 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E011 OF 2022**

F GIKONYO, J

MAY 14, 2024

BETWEEN

JCK APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. A.N. Sisenda (S.R.M)
in Narok CM SOA No. 48 of 2019 on 17th November 2022)*

JUDGMENT

Life sentence

1. The appellant appealed against the conviction and sentence to serve life imprisonment for the defilement of a 10-year-old girl.
2. The Appellant filed an undated memorandum of appeal filed on 21/11/2022. And, later, amended grounds of appeal received in court on 15/04/2024 cited two areas;
 - i. Disproportionate Sentence.
 - ii. The effect of section 333(2) of the [Criminal Procedure Code](#).

Brief facts

3. On 9th July 2019 at Narok West sub-county within Narok county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.M. a child aged 10 years.
4. PW1 in her evidence during the trial was that she had gone to [Particulars Withheld] river bank to wash her school uniform. She went with her other cousins. They washed clothes. the appellant went and called her. He told her that her father had sent him and she should go give him food. She left her



cousins at the river and went with the appellant. On the way home he held her by the neck and dragged her into a bush. she screamed. He removed his pants only. He dropped his trousers to his mid-thigh and then proceeded to do tabia mbaya to her private parts. He used his part for urinating to do tabia mbaya. He did not touch her anywhere else.

5. She screamed and another woman nearby went. The appellant ran away. The lady took her to her home and covered her with a shuka then called a motorcycle. When tabia mbaya was done to her she did not feel pain but she bled from her private parts where she urinated from.
6. The motorcycle took her to Longisa Hospital with her grandmother.
7. The appellant was found guilty of the offence and was sentenced to serve life imprisonment.

Directions of the court.

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

Appellant's submissions.

9. The appellant submitted that the sentence is disproportionate. He argued that he lacks a prior criminal record which suggests that this offence may be an isolated incident rather than indicative of a pattern of criminal behavior. Secondly, international instruments and precedents from comparable jurisdictions emphasize the need for sentences to be proportionate to the gravity of the offence and to consider mitigating factors such as the appellant's circumstances and potential for rehabilitation. The appellant relied on *R v Johnson* [2014] QCA 79, *State V Brown* 46 N. J. 96 (1965), *R V White* [1998] 2 S. C. R. 72, *Gichuki Mwangi V Republic* (Criminal Appeal 84 of 2015) [2022] KECA 1106(KLR) (7 October 2022) (Judgement), *R V Childs* [2007] SASC 195; 98 SASR 111; 172 A Crim R 450, *Vinter and Others V United Kingdom* Application Nos. 66069/09, 130/10 and 3896/10, X V Jamaica, *Evans Nyamari Ayako* Criminal Appeal No. 22 of 2018, articles 27 and 28 of the *Constitution*, *Julius Kitsao Manyeso, R V Smith* [1959] 2QB 35, *State V Doe* 903 N. W. 2d 347, *People V Roe* 542 N. E. 2d 610(1989).
10. The appellant submitted that he was arraigned in court on 18/07/2019, he was in custody and never released on bond. He urged this court to find in awarding a sentence to commence from the date he took the plea. The appellant relied on section 333(2) of the *Criminal Procedure Code*, section 38 of the *Penal Code*, and policy direction 7:10 of the sentencing policy guidelines 2015.

The respondent's submissions.

11. The respondent submitted that the age of the child was conclusively proved. The respondent relied on a child health card, and *Mwalango Chichoro Mwanjembe V Republic* [2016] eKLR.
12. The respondent submitted that the evidence produced during the trial proved the element of penetration to the required standards. The prosecution relied on the evidence of PW1, PW2, PW3, PW7, and PW4, section 2 of the *Sexual Offences Act* and *Mark Oiruri Mose V Republic* [2013] eKLR.
13. The respondent submitted that from the evidence that was adduced during the trial, it is clear that the appellant is a person who defiled the victim and there was no possibility of mistaken identity, the appellant was well known to the victim. The respondent relied on evidence of PW1, PW2, PW3, PW4 and PW6.
14. The respondent submitted that the appellant was accorded ample time to prepare his defence. During the entire trial period, the appellant cross-examined all the prosecution witnesses and never raised any issue of not being given statements in time.



15. The respondent submitted that the trial court took into account the defense of the appellant which was unsworn and hence has no probative value as the same cannot be subjected to the rigours of cross-examination.
16. The respondent submitted that the sentence was legal, there were aggravating circumstances in that the victim was young and vulnerable, and therefore the sentence meted by the trial court was legal and appropriate in the circumstances. The court does not have discretion to give a finding outside what is stipulated in the law. the respondent relied on section 8(1)(2) of the [sexual offences act](#) and the case of [Abdalla Versus Republic](#) KECA 1054(KLR).

Analysis And Determination.

Court's duty

17. First 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 v. Republic](#) [1972] E.A 32.
18. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. Although the appellant amended his grounds of appeal, the respondent argued the entire case, making the broad issues for determination to be;
 - i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the sentence was disproportionate, manifestly harsh and excessive; and
 - iii. Time spent in custody.

Elements of the offence of defilement

19. 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.”
20. The prosecution must therefore prove beyond reasonable doubt:
 - 1) The victim was a Child-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.
21. See the case of [Charles Wamukoya Karani v: Republic](#), Criminal Appeal No. 72 of 2013.
22. The trial court noted that FPM did not understand the consequence of an oath. She therefore gave unsworn evidence.
23. PW1 testified that she was 9 years old and in class 2.
24. PW3, a father of PW1 testified that his child was aged 10 years. He produced her clinic card.



25. PW8, the investigating officer produced a clinic card which showed that PW1 was born on 16/09/2009. She therefore was 10 years old.
26. Based on the evidence adduced, the age of the victim was 10 years old, therefore, a child.
27. PW1 in her evidence during the trial was that she had gone to Olosusu river bank to wash her school uniform. She went with her other cousins. They washed clothes. The appellant went and called her. He told her that her father had sent him and she should go to give him food. She left her cousins at the river and went with the appellant. On their way home, the appellant held her by the neck and dragged her into a bush. She screamed. He removed his pants only. He dropped his trousers to his mid-thigh and then proceeded to do tabia mbaya to her private parts. He used his part for urinating to do tabia mbaya. He did not touch her anywhere else.
28. She screamed and another woman nearby responded and came for her rescue. The appellant ran away. The lady took her to her home and covered her with a shuka then called a motorcycle. When tabia mbaya was done to her she did not feel pain but she bled from her private parts where she urinated from.
29. The motorcycle took her to Longisa Hospital with her grandmother.
30. PW2, PW3, and PW4 testified that they all saw PW1 bleeding from her private parts.
31. PW7 a medical practitioner testified that upon examination of the minor, her hymen was freshly broken and had a tear, she had blood-stained clothes, and her labia minors and majora had bruises. He produced a P3 form, discharge summary, and PRC form as P Exh 1, 2a, and b and 3 respectively. He concluded that she had been defiled.
32. The analysis of the evidence yields the conclusion that the prosecution proved beyond reasonable doubt that penetration did occur of FPM.
33. Accordingly, the evidence including the medical evidence supports the claim that there was a penetration of the child. But by whom?
34. PW1, PW2, PW3, and PW4 confirmed that they knew the appellant as an uncle to PW1. The appellant did not dispute this fact. He confirmed this in his defence.
35. PW6 testified that on the material date, she was with PW1 at the river when the appellant called PW1. The appellant also confirmed in his defence that he was a herder and on the material date he was herding cattle near PW1's home. This places the appellant at the scene of the incident.
36. Based on the evidence adduced, the appellant caused the penetration of FPM.
37. The appellant gave unsworn testimony and did not call any witnesses. The appellant testified that he had fought with PW3, the father of the minor and as a result, he had chased away his wife which may have caused a grudge between them and made PW3 fix him with the matter.
38. The appellant did not cross-examine the prosecution witnesses on the aspect. Therefore, the defense by the appellant was an afterthought which did not dislodge the prosecution's case.
39. Of specific relevance, the issue that the appellant was framed did not arise during the cross-examination of PW3.
40. The court does not find anything that shows that there was a grudge between the complainant's father and the appellant.



41. Thus, the court does not also find anything which shows any collision between FPM, and PW3 to frame the appellant for the offence herein.
42. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled FPM. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by PW3. The defense was a red herring and an afterthought. It is dismissed.
43. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.
44. In the upshot, the appeal on conviction is dismissed.

On sentence.

45. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act* which section 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."
46. The appellant submitted that life sentence was disproportionate and unconstitutional.
47. The prosecution submitted that the sentence was lawful and within the law.
48. The penalty clause in focus is section 8(2) of *SOA*. which courts have construed to only prescribe imprisonment for life as the maximum sentence.
49. There is a general consensus in the interpretation and application of the penalties prescribed in the *Sexual Offences Act* was put into perspective by the Court of Appeal in *Dismas Wafula Kilwake v. Republic* [2018] eKLR that:-

"We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."
50. The language of the trial court in sentencing the appellant does not necessarily mean that the trial magistrate believed only one sentence is prescribed in law for the offence; i.e. imprisonment for life. Although she sentenced him to life sentence, it was because, it was the appropriate sentence in the circumstances of the case. See what the trial court stated, thus: -

' I have perused the pre-sentence report as well as the victim statement and noted the contents. I note the circumstances of the crime and severe injuries which the minor sustained. Section 8(2) of the *Sexual Offences Act* is clear on the sentence of an accused person who has been found guilty of the



offence. Considering the aggravating factors such as the age of the minor and severe injuries sustained the accused is sentenced to serve life imprisonment.”

51. That notwithstanding, the court always should exercise judicial discretion in sentencing, in order to impose appropriate sentence- which is proportionate to the offence as dictated by the circumstances and facts of the case.
52. The court has considered the fact that the accused is a first offender, and is remorseful.
53. The court has also considered that the offence is serious. The victim was a child of tender age- she was 10 years old. The manner the offence was committed was brutality causing her injuries. The child also suffers post-traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, this kind of offences leaves the victim with post-traumatic experiences. In addition, the prevalence of the offence, despite him being a first offender and remorseful, justifies a life sentence or long incarceration in this case. Accordingly, a deterrent sentence is necessary.
54. The appellant has cited cases where life sentence has been declared to be unconstitutional. However, opinion is divided on whether a life sentence is unconstitutional. The concern now seems to be about fixing the definite period representing a life sentence. Some benches impose 30 years, whilst others 40 years.
55. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences is important, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point. An indeterminate sentence, may not achieve this wholesome objective.
56. In the circumstances, the life sentence translates to 30 years. The appellant is sentenced to 30 years imprisonment.

Section 333(2) CPC.

57. The appellant asked the court to consider time spent in custody. The court has perused the trial court’s record and established that the appellant was first arraigned in court on 18/07/2019. He remained in custody through the trial. The sentence will run from the date he was first arraigned in court; i.e. 18/07/2019

Conclusion and orders

58. The appeal partially succeeds. The appeal on conviction is dismissed. The appeal on sentence succeeds to the extent that the appellant is hereby sentenced to 30 years’ imprisonment.
59. The sentence will run from 18/07/2019 when he was first arraigned in court.
60. It is so ordered.

Dated, Signed, and Delivered at Narok Through Microsoft Teams Online Application This 14th Day of May, 2024.

F. GIKONYO M.

JUDGE

In the presence of:



Appellant
Otolu C/A

