



**Kailikia v Director of Public Prosecutions (Criminal Appeal
E096 of 2023) [2024] KEHC 6254 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E096 OF 2023
TW CHERERE, J
MAY 23, 2024**

BETWEEN

SAMUEL KAILIKIA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal against conviction and sentence in Tigania Criminal
S. O No. E013 of 2021 by Hon. J.Macharia (SPM) on 05th July, 2023)*

JUDGMENT

1. Samuel Kailikia (Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The offence was allegedly committed on diverse dates between 2017 and 03rd February, 2021 against R.M a girl aged 14 years' old. He also faced an alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 by unlawfully touching R. M's vagina.
2. Appellant was tried, convicted on the main charge and subsequently sentenced to 20 years' imprisonment.

Appeal

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal mainly on two grounds:
 1. Medical evidence did not link him to the offence
 2. Crucial witnesses were not called
 3. He was not given the benefit of Section 333(2) of the [Criminal Procedure Code](#)



4. Ms. Rotich opposed the appeal on the grounds that complainant was found with a broken hymen which was evidence of penetration.

Analysis and determination

5. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See *Okeno v Republic* [1972 EA 32]).
6. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant. (See *C.W.K v Republic* [2015] eKLR).
7. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In *Kaingu Kasomo v Republic* Criminal Appeal No. 504 of 2010 the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

8. Complainant stated she was 14 years when she testified on 16th March, 2022 and an age assessment report dated 03rd February, 2021 shows that her age was assessed to be between 13 and 15 years. It therefore follows that complainant was less than 11 years when the offence was allegedly first committed in 2017 and Appellant benefitted by being charged under Section 8 (1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 instead of under 8 (1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006.

9. Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

10. Concerning medical evidence, the P3 form PEXH. 3 revealed that had an old hymenal scar when she was examined on 03rd February, 2021 from which she concluded that she had been defiled. Complainant explained that the acts of defilement by his father had been going on from 2017 to 2021 and that in my considered view explains the old hymenal scar. I therefore find as did the trial magistrate that penetration had been proved and Appellant identified as the perpetrator.
11. Concerning the Appellant’s contention that Prosecution failed to call crucial witnesses, the witnesses mentioned did not witness the commission of the offence and would not have added any value to the prosecution case. In any case, Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides:

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

12. Whereas Accused’s defence was that he was framed by the teacher PW2, it is worth noting that Appellant did not cross-examine the teacher concerning the said allegation. The allegation was only raised at the time Accused gave his defence thereby denying the teacher the opportunity to confirm or deny the allegation that she framed him. Having considered the defence, I find that it was an



afterthought that did not cast doubt on the evidence by the complainant that was corroborated by medical evidence and it was rightly rejected.

13. My perusal of the record confirms that the Appellant was given an opportunity to tender his mitigation, which counted for nothing in light of the mandatory sentence.
14. The jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* has found expression in cases such as *Maingi & 5 others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was). The rationale behind this is pegged to the fact that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out sentence.
15. From the foregoing, I find that there is need to interfere with the mandatory sentence meted out on the Appellant the same has been declared unconstitutional.
16. The record also reveals that the trial magistrate did not give Appellant the benefit of section 333 (2) of the *Criminal Procedure Code* which provides that:
 - 2) 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 has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
17. Appellant was remanded in custody from the date of arrest on 03rd February, 2021 until 05th July, 2023 when he was sentenced.
18. Taking all the foregoing factors into consideration, it is hereby ordered:
 1. Conviction is upheld
 2. The 20-year imprisonment term is set aside and substituted with a 10 years' imprisonment term which shall be computed from 03rd February, 2021.

DELIVERED AT MERU THIS 23rd DAY OF May 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

