



REPUBLIC OF KENYA



**Masibo v Republic (Criminal Appeal E069 of 2019)
[2024] KEHC 5170 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E069 OF 2019
RN NYAKUNDI, J
MAY 16, 2024**

BETWEEN

SIMON MASIBO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. 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* No 3 of 2006. The particulars of the offence were that on the 4th day of December, 2016 at [particulars withheld] in Wareng District within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (Penis) to penetrate the genital organ (Vagina) of GMS a child aged 7 years.
2. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were more less the same.
3. The appellant was convicted on the alternative charge and sentenced to 30 years imprisonment.
4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
 - i. That no proper evidence amounting to defilement.
 - ii. That the prosecution failed to prove the case beyond the required standard.
 - iii. That the case was a grudge driven allegation to implicate the accused secure illegal conviction.
 - iv. That the medical report lacks merit since the expert witness failed to shade light to court to whether penetration took place or not.



5. The appellant filed his submissions in support of the appeal whereas the Respondent filed none. I shall consider the said submissions and the evidence adduced by the Respondent at the trial court in making a fair determination.

Proceedings at the trial court

6. The Respondent at the trial court marshalled 5 witnesses. PW1, the complainant was unable to testify for reasons that she was afraid. PW2, a casual worker who lives with her daughter's children stated that on 4th December, 2016 at about 9PM the children were outside playing when she saw the complainant walking with a limp and when she asked her what had happened, the complainant told her that Simo and his brother who live in the same plot had poked her and she took the child to the accused's brother and she said the same thing. It then followed that they went round looking for the accused and arrested him while she was in the company of one Wanyonyi.
7. The witness testified that they found the accused walking on the road and they took him to Langas Police Station after which she took the child to Moi Teaching and referral, where they were given a P3 after which it was filled and she took it back to the station.
8. The appellant cross examined the witness and she stated that she noticed the child walking with a limp and the child told her that it was the accused who hurt her. The witness admitted that there are other neighbors in the plot and that she did not know what had happened since she was cooking. The witness further stated that she saw the appellant carrying a screwdriver but did not see him with any shopping from the supermarket.
9. The court questioned the witness and in response she testified that she did not know where the child's mother went since she was left in her care when she was one and half years old and she did not know how old the child is.
10. PW3, a minor aged 13 years testified in a sworn testimony that he is the complainant's neighbor and the accused whom they call Simo was also their neighbor when on 4th December, 2016 at 7PM he was seated selling charcoal when he saw the accused carrying a mango walking with the complainant and he went to check whether the mother who had gone away for a wedding had returned and when he came back he saw the complainant get out of the accused's house walking with her legs apart. The witness further stated that the complainant was wearing her clothes and she was not crying but she said that Simo had poked her with a stick and that he told the police what had happened.
11. Upon cross examination the witness stated that the accused was well known to him since he had been a neighbor for a longtime and that he saw the accused who does odd jobs working from the stage while carrying a mango. The witness stated that his house faces the same side as the accused's house and that his sister and brother were not home neither was his mother and that he had seen the accused holding the complainant's hand every day and denied that he had been told what to tell the court.
12. The Investigating officer testified as PW4 and told the court that on 5th December, 2016 he was at the station when a lady and a child went there and the lady reported that the child had been defiled and he recorded the matter in the occurrence book and he then took them to the gender office where he interviewed the child and she told him that while she was playing with other children Simon had taken her to his house and defiled then gave her Kshs. 10/= to go and buy Mandazi after he released her at 9PM and when the child got home, she was questioned by her grandmother. The witness stated that after he recorded a statement from the child's grandmother, he took the child to Moi Teaching and Referral Hospital where she was examined and the accused was later arrested and charged. The witness stated that age assessment was carried out and the child found to be 9 years and produced the report.



13. Upon cross examination, the witness stated that the accused was received at the station by other officers and his role was to investigate the case and, in his investigation, he found out that the accused's home is not far from that of the complainant and that the complainant was playing with other children when the accused took her to his house after enticing her and he gave her Sh. 10/= to buy Mandazi.
14. PW5 was a medical practitioner who testified that a P3 was filled for the complainant by her colleague with whom she had worked for two years. The witness stated that the P3 indicated that the child was 9 years old at the time of examination. The witness further stated that on physical examination the doctor found that the child had redness in the Labia Minora although she had no vaginal discharge and the doctor concluded that the child had been defiled owing to the redness on the Labia Minora and a P3 was filled on 6th December 2016. The witness further stated that an age assessment carried out indicated that the child was between 8 and 9 years old as at 5/4/2018.
15. Upon cross examination, the witness stated that the child's private parts were not meant to be red but pink and the redness was a sign of defilement and it would be difficult for the injuries to be caused by playing.
16. The appellant was placed on his defence and he gave a sworn testimony. He testified that he was surprised when he got to court and heard the charges against him because he was on his way from work when a lady with whom he had disagreed since July 2016 had him arrested at 7PM on 4th December, 2016 while he was at his door. The appellant stated that the complainant's grandmother who sells alcohol had threatened to fix him after he failed to pay her and that was the reason he was in court.
17. When questioned by the court, the appellant stated that the child who said she was defiled knows him and he also knows P3 who lives in the same plot with his sister. The appellant denied that the complainant was at his house on the date in question and stated that he was at the stage selling vegetables and was just getting home when he was accosted by members of public and he told them to take him to the station.

Analysis And Determination

18. I have considered the appeal and submissions by the appellant. I have also read the record of the trial court and its judgment. As a first appellate court, this court is mandated to revisit and re-evaluate the evidence afresh, assess the same 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 vs. Republic* [1972] E.A 32.
19. The issues that arise for determination in this appeal are;
 - i. Whether the prosecution proved its case to the required standard of beyond reasonable doubt;
 - ii. Whether the sentence meted upon the appellant was excessive, unreasonable or harsh.

Elements of offence of defilement

20. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
 - a. Age of the complainant;
 - b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - c. Positive identification of the assailant.



What does the evidence portend?

21. On the element of age, PW5 testified that an age assessment was carried out and the complainant was found to be between 8 and 9 years old. In defilement cases the element of age is significant for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
22. A child is defined as a person under the age of eighteen years. Is the victim herein a child? The age assessment report filed at the trial court revealed that the complainant was between 8 and 9 years and as such she was a minor.
23. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
24. The trial court on acquitting the Appellant on this charge indicated that PW5 did not testify as to the condition of the Complainant’s hymen as would be expected in a case where there was a suggestion of penetration. On that basis the court concluded that there was insufficient evidence to conclusively make a determination as to whether the complainant was defiled.
25. The appellant in his submissions maintained that there is a hidden agenda between the complainant’s guardian and the appellant. That he has been implicated by the police. He submitted that the police failed to finger dust the affected parts of the body which are claimed to be touched. I have scrutinized the evidence and I am inclined to agree with the trial court that penetration as an ingredient was not proved to the required standard.
26. There is no doubt that the appellant was well known to the complainant and as such it is not a case of mistaken identity.
27. Moving to the alternative charge, it was PW5’s testimony that the complainant had redness on the Labia Minora. The trial court noted that such could not be caused by the child playing. That the same coupled up with the fact that PW3 saw the complainant with the appellant and later saw her getting out of the appellant’s with her legs apart sustains the alternative charge.
28. Having read through the evidence and the record of the trial court, I am of the view that that through all the other elements discussed and the medical evidence, the prosecution proved beyond reasonable doubt that indeed the appellant committed an indecent act.

On sentence

29. The decision whether to impose a custodial, non-custodial or any other punishment prescribed by the legislature is now settled to be a matter of judicial discretion. Therefore, in determining an appropriate sentence becomes a balancing scale of competing interest of various factors within the realm of discretion to individualize a particular sentence to a specific offence. The tyranny of discretion being the power donated to the independent tribunals and courts is central in the decision making process of any session judge. The basic propositions on discretion is well articulated in the case of *House v The King* [1986] 161 CLR 513 518-19 the court went about to state as follows:

“Discretion signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard- what is just and equitable-



which calls for an overall assessment in the light of the factors mentioned in the statutory provision, each of which in turn calls for an assessment of circumstances. Because this assessment calls for value judgment in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts which its operation depends with a close eye on the characteristics of a discretionary order in the sense which we have outlined, if the questions involved lead themselves to differences of opinion which within a given range are legitimate and reasonable answers to the questions, it would be wrong to allow a court of Appeal to set aside a judgment at first instance merely because there exists just and such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision making, it would be wrong to determine the parties rights by reference to a mere preference for a different result over that favoured by the judge at first instance. In the absence of error on his part, According to our conception of the appellate process, the existence of an error whether of law or fact, on the part of the court at first instance is an in disposable condition of a successful appeal.

30. This is the discretion which is exercised during the sentencing process by various courts to determine a fair and proportionate sentence for the offence. In the very beginning of the *Sexual Offences Act*, the fulcrum had always been mandatory minimum sentences for the various offences provided for in the entire stream of the Act. The trial courts in sentencing the offenders were restricted from exercising any discretion to pass an alternative sentence than that of minimum sentence. The predominant sentence in this legislation is that of life imprisonment for class of offences like defilement or incest. It remained truly a unique sentence for the very reason that it was never clear whether it means the prisoner serving the sentence for the rest of his or her life. In the ordinary interpretation that is actually what it means until the last breathe of that human being unless during the period in detention his or her sentence has been a subject of review by the executive. This sentence of late has become a subject of debate within the corridors of justice as to its unconstitutionality This was the decision in *Joshua Gichuki Mwangi v Republic* Civil Appeal No 84 of 2015 in which the court of Appeal held inter-alia that imposition of mandatory minimum sentences under the *Sexual Offences Act* is unconstitutional. This concerns in the same context was addressed by the Australian Court in *Magamingi v The Queen* [2013] as reflected in the following extract. “In the ordinary course of events, normal sentencing principle would not require a sentence to be imposed as heavy as the mandatory penalties tht have been imposed by federal Parliament. However, Iam constrained by the legislation to impose the sentence. As the appellant rightly submitted, adjudging and punishing criminal guilt is an exclusively judicial function. In very many cases sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unbounded. Its exercised is always hedged about by both statutory requirement and applicable judge-made principles. Sentencing an offender must always be undertaken according to law.
31. It seems to me that the sentence of mandatory life imprisonment in Kenya is no longer constitutionally sustainable for it effectively amounts to be a threat to the right to freedoms from torture and cruel, inhuman, or degrading treatment or punishment in Article 25 of the *Constitution*. This is also the case on the right to equality and freedom from discrimination in Article 27 (4) of the *Constitution*. Similarly, it threatens infringement of the right to human dignity in Article 28 of the *Constitution*. In the sense that it is served without any eligibility for parole exposes the prisoners to a life of despair and hopelessness. The nagging question is whether the prisoner by being convicted to a life imprisonment remains a wrong contamination for life. Whatever the kind of discipline is expected to be served by mandatory life imprisonment is a matter which calls for intervention for that incarceration is punitive



and harsh likely to endanger the right to life in Article 26 of the Constitution. This being an appeal from the trial court the guiding principles to interfere with the sentence as set out in Shadrack Kogo v Republic CR. App No 253 of 2003.

32. In the Sexual Offences Act, “an indecent act” is defined as follows: -

“Indecent act” means an unlawful intentional act which causes-

- (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- (b) Exposure or display of any pornographic material to any person against his or her will.”

33. Section 11(1) of the Sexual Offence Act provides as follows: -

“ Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

34. Considering the said punishment, it is upon the trial court to exercise its discretion in sentencing an accused person. In doing so, the court ought to consider the unique circumstances of each case. In this case the trial court considered the circumstances of the case and sentenced the appellant to serve 30 years imprisonment.

35. I am conscious of the fact that this court ought not interfere with the trial court’s decision unless right principles were not applied or the trial magistrate acted on wrong principles. I have to point out that we are yet to achieve uniformity in sentencing in our criminal justice system. We are however making steps towards the same through the Judiciary Sentencing Policy Guidelines, which have suggested the factors to consider when sentencing.

36. The said guidelines proffer objectives such as Retribution, deterrence, Rehabilitation, Restorative justice, community protection, denunciation, reconciliation and integration. All these objectives considered in totality promote fairness in sentencing.

37. I have carefully considered the facts of this case the nature and severity of the offence, the principles of proportionality, any mitigation like the Appellant being the first offender, it is my view that life imprisonment is harsh and punitive for it emphasizes more of deterrence than rehabilitation. I accordingly review the life imprisonment sentence and have it substituted with a custodial sentence of 30 years.

38. In the upshot, the appeal partially succeeds on sentence whereas the order on conviction is affirmed.

DATED AND SIGNED AT ELDORET THIS 16TH DAY OF MAY, 2024

.....

R. NYAKUNDI

JUDGE

In the Presence of

Appellant in person.

