



**SSM v Republic. (Criminal Appeal 43 of 2019)
[2024] KEHC 4633 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 43 OF 2019**

F GIKONYO, J

MAY 2, 2024

BETWEEN

SSM APPELLANT

AND

REPUBLIC. RESPONDENT

*(From the conviction and sentence of Hon. W. Juma(CM)
in Narok CM SOA No. 49 of 2018 on 22nd October 2019)*

JUDGMENT

1. The appeal is against conviction and sentence to 40 years’ imprisonment of the appellant for the defilement of a 10-year-old girl.
2. The appellant filed undated petition of appeal received in court on 14/11/2019. But, he filed amended grounds of appeal under section 350(2)(iv) of the Criminal Procedure Code which was received in court on 24/01/2024, as follows;
 - i. That the trial court erred in law and fact in convicting the appellant but failed to find that the charge sheet was defective.
 - ii. That the sentence is manifestly harsh and excessive.
 - iii. That the case was framed up.
 - iv. That the defence of the accused (appellant herein) was not considered by the trial court.
 - v. That crucial witnesses were not called in this matter
 - vi. That the magistrate who wrote and signed the judgment did not warn herself before writing the judgment.



vii. That penetration was not proved.

Reactions of the court.

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

Appellant's submissions.

4. The appellant submitted that the charge sheet was defective as it does not contain the key provision of the law on which the charge is preferred. He relied on Section 134 of the criminal procedure code, BWD V R [2017] e KLR, Sigilani V Republic [2004] 2 KLR, section 20(1) of the *Sexual Offences Act*, and MK V Republic [2015] eKLR.
5. The appellant submitted that the sentence imposed was awarded was manifestly excessive and did not meet the purpose of rehabilitation and reintegration back into society. The appellant relied on S Vs Nchunu & Another (AR 24/11) [2012] ZAKZPHC6, Baragoi Rotiken V Republic [2022] eKLR, article 27 and 50(2)(p) of *the constitution*
6. The appellant submitted further that the case was a frame-up. However, PW2 denied that they had differences which called for intervention by PW3.
7. The appellant submitted also that, the trial court did not consider his defence, only casually mentioned it. The appellant relied on the case of Nguku Vs Republic [1985] eKLR.
8. It was his submissions that crucial witnesses were not called to testify, among them, the chief who arrested the appellant and the other two people who were first in the house of the appellant. The appellant relied on the case of *Ogola V republic (criminal appeal 135 of 2017)* [2023] KECA 39(KLR) (3 February 2023) (judgment).
9. The appellant argued that the magistrate who wrote and signed the judgment did not warn herself before writing the judgment. He took issue with the fact that, the trial was conducted by three different magistrates. The magistrate did not see nor hear any witnesses. She did not warn herself that she did not see the demeanor of any witness. The appellant relied on section 200 of the Criminal Procedure Code.
10. The appellant submitted that penetration was not proved. That, the mother who was the first to examine the minor did not mention the issue of bleeding on the private parts noted blood-stained clothes or say she changed the clothes the kid was wearing. The appellant relied on the case of P.K.W. V Republic [2012] eKLR.

The respondent's submissions.

11. The respondent submitted that the age of the child was fully proved beyond doubt. The respondent relied on section 2 of the Children's Act the testimony of PW1 and the age assessment report.
12. The respondent submitted that proof of penetration was done beyond any reasonable doubt. The prosecution relied on the evidence of PW2, PW1, and PW4.
13. The respondent submitted that the prosecution proved its case that there was no mistake of identity as to who defiled the complainant. The appellant accompanied PW1 to the river and was well known to her as her father.
14. The respondent submitted that the trial magistrate did not error in conviction and sentence as the evidence adduced was solid. The respondent urged this court to dismiss the appeal in its entirety



Analysis and Determination.

Court's duty

15. First appellate court is obligated to re-evaluate the evidence and make its own conclusions, except 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
16. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
 - i. Whether the charge sheet was defective.
 - ii. Whether the magistrate who wrote and signed the judgment did not warn herself before writing the judgment.
 - iii. Whether the prosecution proved its case beyond a reasonable doubt.
 - iv. Whether the appellant's alibi defense was considered.
 - v. Whether the sentence was manifestly harsh and excessive

Of defective charge

17. The appellant claims that the charge was defective, thus, routing the conviction.
18. Of defective charge sheet, the Court of Appeal in *Peter Ngure Mwangi v Republic*[2014] e KLR, stated that there are two factors to be considered. One, whether or not the charge sheet is indeed defective, and two, whether or not even with such defect justice could still be met.
19. The substantive law on a defective charge sheet is section 134 of the Criminal Procedure Code.
20. As per the Court of Appeal in *Benard Ombuna v Republic*[2019] eKLR:-

“..., the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”
21. Section 382 gives guidance on whether even with such a defect, justice could still be met or whether the defect is curable. Section 382 of the Criminal Procedure Code provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission, or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.”



22. Applying the test above, the appellant participated in his trial in a manner suggesting that he understood the charge. He cross-examined the witnesses well and was able to put up an appropriate defence. This is also indicative that he also understood the particulars of the charge he faced.
23. Further, the appellant did not at the first instance raise an objection or allude that the charge sheet was defective.
24. In the circumstances, he cannot be said to have been prejudiced.
25. It is noteworthy that the appellant is a stepfather of the complainant and not her father as to fit in the description in section 20(1) of the [Sexual Offences Act](#) as it is being proposed by the appellant. The facts of this case support the charge under section 8(1) as read with 8(2) of the [sexual offences act](#). This ground therefore fails.

Whether the magistrate who wrote and signed the judgment did not warn herself before writing the judgment.

26. The magistrate who wrote the judgment noted that this case was tried by her colleagues. She further noted that the appellant chose that the judgment be delivered by any other officer because Hon. Nyogesa had ceased to undertake judicial duties. The appellant has not shown any violation of the law or any prejudice that he may suffer.
27. This ground therefore fails.

Elements of the offence of defilement

28. 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.”
29. The specific elements of the offence of defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:
 - 1) 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.
30. See the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013.
31. What does the evidence portend?
32. The trial court noted that TC understands the consequence of an oath. She therefore gave sworn evidence.
33. PW1 testified that she was in class Four and was 10 years old. She stated that she knew the appellant as her father.



34. PW1 testified that on 10/06/2018 her mother (PW2) sent her to fetch water in the river. She went alone and fetched water. The appellant found her at the river. He asked her to tie a donkey. She tied the donkey. He held her hand and took her to a bush near the river. He removed her clothes and her panty. He inserted his penis into her vagina. He was sleeping on her. She felt pain. He told her to go home after he was done. Her mother saw her crying. She told her what had happened. Her mother examined her. She went to sleep. She was later taken to the hospital and the police station. At the hospital, the doctor removed 'uchafu' from her.
35. PW2, the mother of the complainant (PW1) testified that the appellant was her husband. When he married her, she already had her two girls. The older one was the complainant who was aged 10 years old. According to her PW1, was born on 27/08/2008.
36. She recalled that on 10/06/2018, PW1 was sent by her father to fetch water. PW2 had given birth about two weeks prior. She sent PW1 to the river which was not so far at around 4 p.m. She came back at 5 p.m. She was carrying her boots. She told her that she was injured. She told her that her father had done 'tabia mbaya' to her. She examined her private parts. She was feeling pain in the ribs. She had 'dirt' on her private parts.
37. PW2 stated that the appellant had followed PW1 to the river. Neighbours were informed about the incident. They questioned him and he admitted and stated that he had agreed with the child. He was tied with ropes. They took him with the help of the chief of Enalbelbel to Narok police station.
38. PW2 stated that she could not frame the appellant and she did not have any grudge. She further stated that the appellant had a relationship with another woman but she did not accuse him of having a relationship with another woman.
39. PW3, the appellant's stepbrother. he recalled that on 10/06/2018 at 5 p.m. he was called by his brother who had a shop. He told him that the appellant had defiled his daughter. He went to the appellant's home and found him already tied up. He asked the appellant who admitted that he had defiled the girl but they had agreed with her. He called the chief and restrained the crowd. He took the appellant, the girl, and the matter and handed them over to the chief.
40. PW3 stated that PW2 was a wife to the appellant and she had been married with two children. He contended that they did not frame the appellant for the offence.
41. PW3 further stated that there was a day the appellant had called him because they had issues with PW2. He went and found another girl that he did not know and he reconciled them.
42. PW4, a clinical officer testified that he examined PW1. When PW1 was taken to the hospital she had changed clothes. On examination, he observed that the complainant had swollen labia majora and minor. The hymen was broken and fresh. The high vaginal swab was done and sperms were seen. Pregnancy, syphilis, hepatitis b, and HIV were negative.
43. PW4 also examined the appellant. Syphilis, HIV, and Hepatitis B were all negative.
44. PW4 testified that PW1 was taken for age assessment on 11/06/2018. She was found to be aged 10 years old. The complainant informed him that she knew the appellant well. He produced a P3 form, the appellant's lab results, and an age assessment report as P Exh 1,3 and 4 respectively. He established that the complainant had been established as she was bleeding after her hymen had been broken. He however did not know who defiled her or whose sperms were found during high vaginal swabs.
45. PW5, an investigating officer reiterated the testimony of the PW1, PW2, PW3, and PW4. His testimony was more of his findings and what he recorded from the witnesses.



46. DW1, the appellant herein testified that at the time of the arrest, he had a relationship with a girl called Julia Mbithe who had gone to his place. His wife got angry and threatened to report him to the village elder. The following day on 04/09/2017 she went to the village elder who happened to be his brother (PW3) and they sat down and talked. He told them the girl was previously his girlfriend although he was not ready to marry her. He was then taken to narok police station and eventually charged with the offence herein.
47. Based on the evidence adduced, the age of the victim was 10 years.
48. The inescapable conclusion from the analysis of the evidence of PW1, PW2, PW3 and PW4 is that the prosecution proved to the required standard that penetration did occur of SC.
49. The medical evidence proves beyond reasonable doubt that, SC, a child, suffered penetration. But by whom?
50. The appellant was well known to the complainant as she recognized him as her father. She gave a succinct account of what had happened to her and who had done it- the appellant- a person she knew too well. Her testimony was corroborated by PW2 and PW3. Based on the evidence adduced, the appellant caused the penetration of SC.
51. The appellant cross-examined the prosecution witnesses on the aspect of being framed based on the previous relationship with Mbithe. The evidence by PW3 was clear on the incident which happened sometimes back and of which he reconciled them. There is no feasible connection between the relationship with Mbithe and the charges as to make them trumped-up charges. The evidence by the prosecution places the appellant at the scene at the material time. And, proved it was him who defiled the girl. This court does not find any credibility in the alibi defense.
52. Thus, the court does not also find anything which shows any collusion between TC, PW3, and her mother to frame the appellant for the offence herein.
53. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled TC. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and his claim that he was framed for the offence by PW3 and PW2. The defense was a red herring and an afterthought. It is dismissed.
54. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.
55. In the upshot, the appeal on conviction is dismissed.

Of sentence.

56. 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."
57. The prosecution submitted that the sentence was within the law.



58. This appeal relates to section 8(2) of SOA which provides for a mandatory sentence, and in respect thereto, the court is content to cite the Court of Appeal in *Dismas Wafula Kilwake vs. 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.”

59. It appears from the judgment of the trial court that the trial magistrate was guided by the Supreme Court finding in the *Muruatetu* case in sentencing the appellant. She stated, thus: -

‘... Mitigation noted and from the offence, he may not be the best near children especially those related to him. They need protection against him more than protection from him.

The law provides for a sentence of life imprisonment. I take into account the guidance in the Supreme Court finding in the *Muruatetu* case.

I sentence him to serve 40 years imprisonment. Right of appeal 14 days.”

60. A perusal of the trial court record, it can be noted that the trial court exercised its discretion.

61. The court has considered the fact that the accused is a first offender, and is remorseful.

62. The court has also considered that the offence is serious. The victim was a child of tender age- she was 10 years old. The perpetrator was her stepfather- the very person she looked up to for care and protection. The manner the offence was committed was also brutality causing her injuries. The child is also likely to suffer post-traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, this kind of offences are prevalent. Borne of these, despite him being a first offender and remorseful, there is justification of a life sentence or long incarceration of the appellant as a way of punishing for the offence, yet, giving him an opportunity for re-integration back into the society. Therefore, a deterrent sentence is necessary. And, 40 years imprisonment achieves both these objects of punishment.

63. In the circumstances, the appeal on the sentence is found to be without merit and is dismissed.

Section 333(2) CPC.

64. Except, the court has perused the trial court record and found that the appellant was first arraigned in court on 12/06/2018. He remained in custody through the trial.

Conclusion and orders

65. The conviction and sentence of 40 years imprisonment imposed upon the appellant is upheld. The appeal is dismissed. save, the sentence will run from 12/06/2018 when he was first arraigned in court.



66. It is so ordered

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 2ND DAY OF MAY, 2024.**

.....

HON. F. GIKONYO M.

JUDGE

In the presence of: -

Ms. Rakama for DPP

Appellant

Mr. Otolu C/A

