



**Kidodi v Republic (Criminal Appeal E085 of 2022)
[2024] KEHC 8767 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E085 OF 2022
RN NYAKUNDI, J
JULY 18, 2024**

BETWEEN

ERICK MWAVALI KIDODI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Kigen in Eldoret Law courts Cr. S.O No. E024 of 2019) Coram: Before Justice R. Nyakundi Mr. Mark Mugun for the State JUDGEMENT)

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 4th January, 2019 at Likuyani Sub County, within Kakamega county the appellant unlawfully and intentionally caused his genital organ (penis) to penetrate the vagina of AN a girl aged 11 years old.
2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the *sexual offences Act*. The particulars of the offences were more less the same.
3. The Appellant was found guilty as charged, convicted and sentenced to serve life imprisonment. He was aggrieved with both conviction and sentencing and as such filed the present appeal, relying on the following grounds:
 - i. That the learned trial magistrate erred in both law and facts convicting and sentencing the appellant to serve a mandatory life sentence but failed to note the provisions of Article 50(2)(p) and (q) of the *constitution*, the policy guidelines on sentencing 2016 and
 - ii. recent developments followed by superior courts on sentencing.



- iii. That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant in a prosecution case but failed to note that, the elements of the offence of defilement were not fully proved.
4. This being the first appellate court, this court is mandated to re-evaluate and analyse the evidence adduced in the trial court afresh for me to come up with an independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified. See *Okeno v. Republic* [1972] E.A 32.
5. The court conducted *voire dire* and the victim was confirmed unfit to give a sworn testimony. PW1 narrated the events leading to the unfortunate act. She told the court that on 4th January, 2019 she had been sent by her mother to buy tea leaves and a match box. She bought the items and, on her way, back home, she met the appellant who was standing next to a tree and he pulled her and took her where there were many trees where he undressed her and slept on him. That the appellant had a pipe and threatened to strangle her if she reported. She testified that the appellant took his penis and inserted it into her vagina. He then asked her to pick up her stuff and go.
6. When the victim got home, she shared with her sister that she was in pain, who in turn reported it to their mother. The mother asked their father to take the victim to the hospital and she was taken to Kongoni post where she was referred to matunda and was issued with a P3 form. Later on, she was taken to Moi Teaching and Referral Hospital.
7. The victim further stated that she knew the accused prior to the offence as he is their neighbour and she knows where he lives. She then pointed to the accused person who was present in court.
8. On cross examination, she stated that the road had been blocked. She reported the incident to her mother after 3 days. That it was at 3:00PM. She was in class 3 at that time.
9. PW2 was the victim's mother. She told the court that on the said date, she had gone to do casual jobs and on leaving sent the minor to buy match box and tea leaves. She then went to get maize strokes for firewood. On returning, she continued with her chores and she did not know that her child had been defiled.
10. She testified that on the 3rd day, the victim sent her sibling to tell her that she was in pain in the stomach and private parts. She asked her what had happened and the victim indicated that she had been raped by the appellant on the day she went to buy tea leaves.
11. The father took her to Kongoni health centre and he made a report to the assistant chief. They took the minor to Moi Teaching and Referral Hospital and the doctor confirmed that the minor had been defiled. The witness stated that she was present when the minor's private parts were being examined. She told the court that she knows the accused since he is their neighbour.
12. On cross examination, she stated that the minor did not go to school that day as she had not bought all the requirements. She testified that the minor was in fear and sat far from her. That she bathes herself.
13. PW3 – Dr. Irene Simiyu testified that she works at the Moi Teaching and Referral Hospital. She testified that she worked closely with Dr. Taban who has gone out for further studies. She told the court that a patient by the name Anne Simiyu was seen on 12th January, 2019 by Dr. Taban. The patient narrated the events leading to the incident and she was examined. The minor's private parts revealed healed hymenal tears at position 1.00 and 11.00 o'clock. The doctor concluded that there was an act of a blunt object and concluded that she had been defiled. The witness produced the P3 form as an exhibit no. 2.



14. PW4 – Suzzy Chepkemo Ndiema took the stand and told the court that she is a police officer No. 106831 and that she took over the matter from P.C Gladys Nyagah who is on maternity leave. She stated that she has worked with her for 2 years at Matunda Police station. She told the court of the instant incident and stated that the minor was brought to the police station by her father and thereafter taken to MTRH where she was examined and treated. She produced a dedication card evidencing that the minor was born on 13/10/2007.
15. On cross examination, she stated that she was not the investigating officer.
16. From the above prosecution evidence, the trial court concluded that the prosecution established a prima facie case and proceeded to put the Appellant on his defence.
17. The appellant gave unsworn evidence and denied committing the said offence and stated that he had taken milk to Kunguri primary school, when he met Irene Simiyu the complainant’s mother and she asked him to sell her the mil but he refused. He stated that he went back to his house and took breakfast. Her wife told him that Irene had threatened to punish him in a way that he would never forget. It was his evidence that the said aunty was not happy that he was working for the said Oloo and that the said aunt had threatened her.
18. The appellant filed his written submissions, which I have perused through and considered the same in coming up with a determination.
19. In sum, he made submissions on two main issues being the sentence imposed and that the elements of defilement were not fully proved. On the sentence imposed, it was the appellant’s case that recent law developments have clearly shown that courts can divert from mandatory minimum sentences enshrined in the *Sexual Offences Act*. In support of this, he cited the decision in Philip Mueke Maingi & 5 others v Director of Public Prosecutions & the Attorney General and several other authorities.
20. On the second issue, he submitted that all the ingredients of the offence of defilement were not established. For instance, he argued that if there were no spermatozoa or any suspicious emission in the minor’s vaginal canal, the broken hymen would be as a result of many other factors.

Findings and Determination.

21. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court. The issues for determination in this appeal are:
 - i. Whether the prosecution proved its case to the desired threshold;
 - ii. Whether or not the sentence was excessive.

Elements of offence of defilement

22. 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.”



23. 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.

24. In the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

25. What does the evidence portend?

Age of the complainant

26. The age of the complainant forms one of the essential ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.

27. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of *Hillary Nyongesa v Republic* (Eldoret Criminal Appeal No.123 of 2000) stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”

28. Therefore, in a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child, and ii) the 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.

29. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

30. PW4 testified that the minor was a minor as she was aged 11 years old as at the time and in this respect. He then produced PW1’s minor’s dedication card, indicating that the minor was 11 years old. The trial court rightly found that the complainant was 11 years old at the time the charges were being leveled against the accused person.

31. I find the age of the victim was 11 years old.

Penetration



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.”

32. In dealing with this issue, I shall be guided by the record. The complainant in her testimony took the court through the events leading to the incident. She stated that on the material day, her mother had sent her to the shop to buy tea leaves and a match box, when the accused who is her neighbour took her and defiled her. She narrated how the accused slept on top of her and inserted his penis to her.
33. The findings of the medical officer whose report was produced by PW3 support the complainant's testimony that she was defiled. On examination, she had revealed healed hymenal tears at position 1.00 and 11.00 o'clock. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

Was the appellant the perpetrator?

34. The Appellant was a person known to the complainant. She testified that the accused was her neighbour. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.
35. It is therefore the finding of this court that the appellant was rightly identified as the perpetrator.
36. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.
37. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.
38. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

39. What is the appropriate sentence? Section 8 (2) of the *Sexual Offences Act* to Convict provides as follows:

“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.”
40. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;
 - “(a) age of the offender;
 - “(b) being a first offender;
 - “(c) whether the offender pleaded guilty;
 - “(d) character and record of the offender;
 - “(e) commission of the offence in response to gender-based violence;



- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaption of the offender;
- (h) any other factor that the Court considers relevant.”

41. The objectives of sentencing should be considered in totality. In this regard, section 10 of the [Sexual Offences Act](#) gives room for the exercise of judicial discretion.
42. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
 - iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - v. Community protection: to protect the community by incapacitating the offender.
 - vi. Denunciation: to communicate the community’s condemnation of the criminal conduct.
 - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - viii. Reintegration: To facilitate the re-entry of the offender into the society.
43. The trial court while sentencing the appellant considered the appellant’s mitigation but still issued a minimum mandatory sentence. Mandatory sentences have now been outlawed. Judicial officers now have the discretion to sentence an accused person based on the circumstances of a case. Therefore, in considering the objectives of sentencing in their totality and the circumstances of the case,
44. The court of Appeal in the case of [Manyeso v Republic \(Criminal Appeal 12 of 2021\)](#) (2023) KECA 827 (KLR) “ We are of the view that the reasoning in [Francis Karioko Muruatetu & Another v Republic](#) (2017) eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentence are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the [constitution](#). In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by reasoning of the European court of Human rights in [Vinter and Others v The United Kingdom](#) (Application Nos 66069/13/10 and 3896/10 (2016) III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.



45. Given this background of the law, as articulated by various superior court on the foundation of mandatory sentences I join the conversation that judicial discretion on sentencing, be exercised in accordance with the guidelines in the *Francis Muruatetu case* (2017) eKLR Sentencing policy guidelines 2023 developed by the judiciary, the objectives and principles of sentencing to find a balance between the fair and proportionate sentence for the offence. It is also the case now in sentencing scheme that Section 333(2) of the *Criminal Procedure Code* be taken into account on pre-trial detention. The convict who was remanded in custody pending the hearing and determination of his or her trial is entitled to be given credit for that period in question.
46. For those reasons the mandatory life sentence duly imposed by the trial court be and is hereby interfered with and the same be substituted with a determinable term of 25 years imprisonment with a count down from the date of arrest in consonant with Section 333(2) of the CPC. As for the Appeal on conviction the same is re-affirmed as per the findings of the trial court.

DATED AND SIGNED AT ELDORET THIS 18TH DAY OF JULY, 2024

In the Presence of

Mr. Mugun for the State

Accused

R. NYAKUNDI

JUDGE

