



**Lowoi v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 8803 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E039 OF 2023
RN NYAKUNDI, J
JULY 22, 2024**

BETWEEN

JACOB KAILE LOWOI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. N. Wairimu in Eldoret cr. SO. NO. 121 of 2017)

JUDGMENT

1. J. K. L. 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 21st June, 2017 at Kapsony village in Eldoret Eat Sub-County within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (Vagina) of FJK a girl aged 5 years.
2. The appellant equally faced an alternative charge of committing an indecent act with a child contrary to section 11(1) *Sexual Offences Act*. No. 3 of 2006. The particulars of the offence were more less the same.
3. The appellant was convicted on the main charge and sentenced to 24 years' imprisonment.
4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
 - i. That the learned trial magistrate erred in both law and fact by not considering that the prosecution evidence was contradictory, questionable, doubtful and untrustworthy to warrant conviction.



- ii. That the learned trial magistrate erred in both law and facts by admitting and basing its judgment on medical evidence that was not conclusive and unreliable document.
 - iii. That the trial magistrate erred in both law and fact by failing to find that the identification of that assailant under the prevailing circumstance at the scene of the crime was not free from possibility of error.
 - iv. That the trial magistrate erred in law and facts by failing to evaluate and analyze the evidence on record and arriving at the erroneous conclusion that the appellant committed the offence.
5. The Appellant filed submission in support of the grounds of appeal.

Appellant's Submissions

6. The Appellant filed written submissions and couched two issues for determination on the basis that he did not have the advantage to peruse through the proceedings and a copy of the judgment. The appellant identified two issues for determination;
- a. Whether the appellant constitutional rights under Art. 48, 49(f)(i)(ii) of *the Constitution* were infringed.
 - b. Whether the prosecution witnesses evidence was marred with contradictions and could not be relied in court of law to secure a safe conviction.
7. On the first issue, it was the Appellant's submissions that his rights under Art. 49(f) were violated since he was not presented before court within the timelines stipulated in the said provision. That he was arrested on 21st June, 2017 and arraigned in court on 28th June, 2017 as testified by PW3, PW4, PW5 and PW7. He submitted that the provisions of Section 36(A)(1)(2) and (3) were not complied with. In support of that argument he cited the decisions in *Albanus Mwasia Mutua Vs Rep Cr. App. No. 120 of 2024*.
8. On the second issue, it was the appellant's submission that the prosecution evidence was marred with contradictions. That the victim never referred to him as the accused before court and as such there was no proper identification. The appellant further submitted in the entire testimony of PW2 the complainant herein, the element of penetration was not demonstrated. Rather according to him the victim only stated that he undressed her and told her to be quiet. That the evidence that does not clearly disclose an act of penetration. On this he relied on the case of *Richard Adera Vs Rep* (1981) CA 945 and the decision in the case of *Elizabeth Waitbiegeni Gatimu Vs REP* (2015).
9. The Appellant on the strength of his submission urged the court to re-evaluate the evidence of the trial court and draw its own conclusions. He prayed that his appeal may be found favorable and allowed. He however did not submit on the issue of sentence. Neither did he raise it as a ground on appeal.

ANALYSIS AND DETERMINATION

10. I have had occasion to peruse through the grounds of appeal, the submissions by the Appellant and the record in general. As a first appellate court, this court is obligated 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 *Peter M. Kariuki -vs- Attorney General* [2014] eKLR The issues that arise for determination in this appeal are;



- i. Whether the prosecution evidence was marred with contradictions or whether the prosecution proved its case to the desired threshold;
 - ii. Whether the sentence meted upon the appellant was appropriate.
11. 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.”
12. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (see *George Opondo Olunga vs. Republic* [2016] eKLR.
13. What does the evidence portend?
14. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
15. “... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”
16. 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) 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.
17. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
18. PW1 in his testimony produced the minor’s Health Card which indicated the date of birth as 10.5.2012. The Appellant did not challenge the issue of age but rather paid much more attention to the question of identification. I believe the health card is sufficient proof to establish the age of the minor. The trial court rightly found that the complainant was five years and one month old at the time.
19. I find the age of the victim was 5 years and 1 month old.
20. The second element is 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.”
21. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.
22. PW2 the victim who was 6 years old at the time told the court that she met the accused when she was going home for lunch and he told her to go and buy and buy “Kangumu”. The witness testified that the accused removed her panty and did bad manners to her.



23. The witness described what the accused was wearing at the time of the incident and stated that the accused then put back her panty halfway and run away after he wore his trousers. The witness stated that she met the appellant who told her he was going to buy her “Kangumu” but instead he took her to the shamba belonging to mama Titus and did bad manners to her.
24. PW4 stated that the accused is known to her because he buys snacks from her kiosk and she sees him going to his casual jobs around the village.
25. The witness told the trial court that on the 21.6.2017 at 1:30PM, she was weeding her garden when she heard a child crying. The witness stated that she noticed the child had been left by her friends and saw the accused running away.
26. The witness further stated that she questioned the child who told her that someone had done bad things to her and when she lifted the child’s dress, she noticed that her biker was pulled down.
27. PW8 a Clinician stated he was based at the Moiben Health Centre on the 21.6.2017 when the accused was presented at the Hospital with history of having allegedly defiled a child at 2pm.
28. The witness stated that the complaint was irritable, her outer genitalia appeared normal, her vagina was hyperemic and bleeding. The witness stated that HVS revealed there was semen and HIV test was negative.
29. The witness stated that the child’s dress was torn on the right side of the waist, her sweater was torn and her face had dried tears. The witness stated that the incident had occurred 2 hours prior to the time the incident was reported and the injuries were forced penetration in the genitalia. The witness further stated that the child had lacerations which resulted in bleeding and the nature of the injury was accessed as defilement.
30. Having considered and analyzed the evidence of the witnesses above, I come to the conclusion that there is ample evidence that penetration did occur. The medical evidence produced supports penetration of the minor.
31. The last ingredient is identification. PW3 the victim’s father stated that the accused is known to him since he does casual jobs around their home area and his home is not far. Additionally, PW4 stated that the accused is known to her because he buys snacks from her kiosk and she sees him going to his casual jobs around the village. The victim was able to also identify the appellant and describe what the accused was wearing at the time of the incident and stated that the accused then put back her panty halfway and run away after he wore his trousers. PW5 told the court that she saw the appellant pass near her home at about 1PM and did not see him return.
32. At the trial court, the accused did not deny the fact that the complainant, her parents and neighbors knew him well and even confirmed that the complainants mother was indeed his neighbor. With this background, the trial court safely concluded that indeed the complainant knows the appellant well.
33. In the cases of *R vs Turbull and Others* (1976) 3 ALL ER 549. Lord Widgery C.J had this to say: -

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine



closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation” At what distance” In what light” was the observation impeded in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before” How often” if only occasionally, had he any special reason for remembering the accused” How long elapsed between original observation and the reason for remembering the accused” How long elapsed between original observation and the subsequent identification to the police” was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.”

34. The evidence by the prosecution leaves no doubt that the appellant is the one who 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.
35. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. 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

36. The appellant prayed that the sentence meted be set aside. Section 8 (2) of the [Sexual Offences Act](#) to convict provides as follows:

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.”

37. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-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-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

38. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
- 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
- 8) Reintegration: To facilitate the re-entry of the offender into the society.

39. The trial court while sentencing the appellant, took into account the accused mitigation and the fact that he had spent three years in custody. In this respect, the sentence so complained of by the Appellant even on Appeal has been tested within the underpinned principles of proportionality, Equality/Uniformity/Parity /Consistency/Impartiality, Accountability and Transparency, Inclusiveness, Totality of the Sentence, Respect for Human Rights and Fundamental freedoms.

To this end an Appeal's Court has to be guided by the Principles in the following cases: In *Shadrack Kipkoech Kige -vs- Eldoret* Criminal Appeal No 253 of 2003 the Court of Appeal stated thus: "...sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka -vs- R.* (1989 KLR 306))"

The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

40. Pinning the objectives and principles of sentencing, the gravity of the offence, mitigation offered by the Appellant, and the provisions of Section 333(2) of the *CPC*, the appropriateness of the custodial sentence cannot be challenged.
41. The whole of the circumstances of the particular case must be considered. The mitigating circumstances must be considered against a background of matters such as the gravity of the offence and the need for deterrence in determining whether the convict deserves a long custodial sentence within the prescription of life imprisonment by the legislature. The circumstances in the instant case attract life imprisonment given that the age of the minor is considered as an aggravating factor.
42. For this reason, I am of the considered view that the sentenced imposed was fair enough and the trial court took into account the objectives of sentencing in totality. The end result is that the decision of



the trial court on both conviction and sentence is upheld and as such the appeal fails. The appellant shall serve the sentenced imposed till completion.

DATED AND SIGNED AT ELDORET THIS 22ND DAY OF JULY, 2024

R. NYAKUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

