



REPUBLIC OF KENYA



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**Ogola v Republic (Criminal Appeal 17 of 2021)
[2024] KEHC 8723 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 17 OF 2021**

JN KAMAU, J

JULY 22, 2024

BETWEEN

ISAAC OGOLA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon D. Ogal (RM) delivered at Hamisi in
Principal Magistrate's Court in Criminal Case No 181 of 2017 on 29th September 2017)*

JUDGMENT

Introduction

1. The Appellant herein 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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. He was convicted by the Learned Trial Magistrate, Hon D. Ogal (RM), on the charge of defilement and sentenced to life imprisonment.
3. Being dissatisfied with the said Judgment, on 18th July 2018, he lodged the Appeal herein. His Petition of Appeal was dated 10th October 2017. He set out four (4) grounds of appeal.
4. His undated Written Submissions were filed on 12th March 2024. The Respondent did not file any Written Submissions despite having been given a chance to do so by the court. The Judgment herein is therefore based on the said Appellant's Written Submissions only.



Legal Analysis

5. This court noted from the Appellant's Written Submissions that he appealed to the High Court after being aggrieved by the Trial Court's decision. His Appeal was dismissed. He then appealed to the Court of Appeal. He did not indicate the Appeal numbers.
6. A perusal of the lower court file showed that his appeal at Kakamega was HCCRA No 95 of 2017. A search on the online Kenya Law Reports, indicated that HCCRA No 95 of 2017 had been consolidated with HCCRA No 96 and 97 of 2017. This was an appeal of a conviction on the offence of robbery with violence. This was not the same offence as the case herein.
7. As the Appellant was not represented by counsel during the trial herein, it was difficult to know if really an appeal against the decision of the lower court was really delivered. As there was no such record, this court found it prudent to determine the Appeal herein despite having referred to the same as an application for review of sentence in view of the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 which behove courts to administer justice without undue regard to procedural technicalities.
8. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
9. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
10. Having looked at the Appellant's Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the charge sheet was defective in the circumstances to prejudice the Appellant's case;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
11. Having said so, the court noted that the Appellant only submitted on the issue of sentence and left out his contention on conviction. It was not therefore not clear to this court whether or not he had abandoned his grounds of appeal that challenged his conviction. As he was a layman and so as to save the court's time and resources by pre-empting a further appeal on conviction, this court found it prudent to also consider whether his conviction was proper in the circumstances of the case herein.
12. The court dealt with the said issues under the following distinct and separate heads.

I. Charge Sheet

13. Ground of Appeal No (1) was dealt with under this head.
14. Although the Appellant had averred that the Charge Sheet was defective, he did not demonstrate how this was so.



15. Even so, a perusal of the Charge Sheet showed that it contained all the necessary information to inform him of the offence that he had been charged with. He pleaded “Not guilty” whereupon the case proceeded to full trial. He did not demonstrate any prejudice that he suffered as a result of the charges that were read out to him.
16. In the premises foregoing, Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

II. Proof of the Prosecution’s Case

17. Grounds of Appeal Nos (2), (3) and (4) were dealt with under this head.
18. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
19. It is now settled that the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR.
20. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

21. The Complainant (hereinafter referred to as “PW 2”) stated that she did not know her age. Her father, JI (hereinafter referred to as “PW 1”) told the Trial Court that her age was indicated in her Child Health Booklet. The said Booklet was not in the court file. In his decision, Trial Court had indicated that the Booklet showed that PW 2 was born on 19th February 2011. She was therefore six (6) years at the material time of the incident.
22. On his part, the Clinical Officer, Sammy Chelule (hereinafter referred to as “PW 3”) testified that PW 2 was nine (9) years old. He produced the Treatment Book indicating the same.
23. In the case of *Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010* (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim’s parents and/or guardians, observation or common sense as was held in the case of *Musyoki Mwakavi vs Republic* [2014] eKLR.
24. In this case, PW 2’s age could be discerned from the documentary evidence that was adduced during trial. The Appellant did not challenge the production of the aforesaid Health Booklet or Treatment Book and/or rebut the said evidence by adducing evidence to the contrary.
25. Consequently, this court was satisfied that the Prosecution had proved that PW 2 was between six (6) and nine (9) years old at the material time which range of age fell under Section 8(2) of the *Sexual Offences Act*.

B. Identification

26. PW 2 testified that it was the Appellant who defiled her. She identified him at the dock. She referred to him as Baba Joseph. PW 1 and Ephraim Mutigo (hereinafter referred to as “PW 4”) confirmed that Baba Joseph was the Appellant.
27. PW 4 stated that the Appellant was at their home on the material night. PW 4 insisted that the Appellant leave before they slept but the Appellant was reluctant on the ground that he was waiting for



PW 4's father. PW 4 said that they had lit a lantern lamp and it was bright enough to enable him see the Appellant. PW 1 also testified that he found the Appellant's documents in his house. The Appellant did not rebut this fact.

28. Notably, PW 1, PW 2, PW 4 and the Appellant were not strangers. They were neighbours and he used to hawk clothes. The lighting conditions were conducive for a positive identification of the Appellant herein. His documents were also found in PW 1's house. There was therefore no possibility of a mistaken identity.
29. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

30. According to PW 2, the Appellant took her down the stream, removed her clothes and defiled her. It was her further testimony that he took her home and left her outside their house. PW 1 and PW 4 also testified that PW 2 informed them that the Appellant defiled her.
31. On his part, PW 3 told the Trial Court that PW 2's hymen was freshly torn. It was reddish and tender. Her vagina walls had tears and lacerations. Her vagina was swollen and painful. Her perineum was torn up to her anus. He confirmed that the said region was bleeding. He concluded that PW 2 had been defiled. He produced Treatment book, Treatment Notes, Post Rape Care (PRC) Form and P3 Form as exhibits in support of the Prosecution's case.
32. Notably, the evidence of a child under the age of fourteen (14) years could be received even if it was not on oath, provided that after conducting a *voire dire* examination, the court was satisfied that the child possessed sufficient intelligence and understood the duty to tell the truth.
33. The law relating to unsworn statements was well expressed in the case of *Mercy Kajuju & 4 Others vs Republic* [2009] eKLR where they were found to have no probative or evidential value.
34. This court had due regard to the case of *Oloo vs R* (2009) KLR, where the Court of Appeal held that:-

“In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence.”
35. Notably, PW 2 gave an unsworn testimony. Having said so, the same was well corroborated by the oral evidence of PW 1, PW 4 and by the scientific evidence that was tendered by PW 3 which confirmed recent penetration.
36. Against this evidence, the Appellant's defence was simply a denial and did not outweigh the inference of guilt on his part as was depicted by the Prosecution. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 2 and that the Prosecution had proved its case against him beyond reasonable doubt.
37. In the premises foregoing, Grounds of Appeal Nos (2), (3) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

iii. Sentencing

38. The Appellant submitted that this court had the discretion on sentencing following the decision in *Joshua Gichuki Mwangi* [2022] KECA[KLR]. He contended that he was a first offender and a young man whose life was greatly affected by the imprisonment. He asserted that while in prison he had taken full advantage of the rehabilitative programmes offered in the correctional facility.



39. He contended that as much as his sentence of life imprisonment was lawful, it was not the only prescribed sentence by law for that offence. He asserted that recent development of the law had clearly shown that courts could divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act*.
40. In this regard, he placed reliance on the case of *Philip Mueke Maingi & 5 Others vs Director of Public Prosecutions & the Attorney General* (eKLR citation not given) where Odunga J cited with approval the cases of *S vs Malgas* 2001 (2) SA 1222 SCA 1235 and *Dismas Wafula Kilwake Vs Republic* [2019] eKLR among several other cases where the common thread was that courts could not be restrained by Section 8 to impose the provided sentences if the circumstances do not demand it.
41. He urged the court to consider his mitigation and grant him a lenient sentence, preferably fifteen (15) years imprisonment pursuant to Article 50(2)(p) and (q) of the *Constitution*. He pointed out that in the event the court imposed a custodial sentence then it should consider the period he spent in custody since the date of his arrest as per Section 333(2) of the *Criminal Procedure Code*.
42. He further placed reliance on the case of *Joshua Gichuki Mwangi vs Republic* (*Supra*) where it was held that courts have a duty to dispense justice not only to the complainant but also to the accused person. He further submitted that under policy directions 4.1 of the *Sentencing Guidelines Policy* 2015, the core objective of the custodial sentence was reformation and rehabilitation but that the sentence of life imprisonment did not support the said objectives.
43. He pointed out that with the knowledge, experience and information acquired in Adventist Chaplaincy Ministries and Discovery Bible School, he had been rehabilitated and was ready to be productive in nation building. In the premises, he sought that the court find that the time he had already served in prison was sufficient. He stated that he was remorseful and sought for another chance to support his extended family.
44. The Appellant herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The same 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.”
45. This court could not therefore fault the Trial Court for having sentenced him to life imprisonment as that was lawful.
46. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
47. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
48. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.



49. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the [Sexual Offences Act](#).
50. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant had since been released from prison.
51. Even so, this court had at the back of its mind the case of [Manyeso vs Republic \(Criminal Appeal 12 of 2021\)](#) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) where the appellant herein had been sentenced to life imprisonment under Section 8(2) of the [Sexual Offences Act](#). In its decision, the Court of Appeal rendered itself as follows:-
- “...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 the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 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.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We, therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”
52. Article 50 (p) of [the Constitution](#) of Kenya, 2010 provided that an accused person was entitled to the least severe punishment prescribed by the law. It states as follows:-
- “Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”
53. Further, Article 50(q) of [the Constitution](#) of Kenya stipulates that:-
- “Every accused person has a right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
54. According to Article 27(1) of [the Constitution](#) of Kenya:-
- “Every person is equal before the law and has the right to equal protection and equal benefit of the law.”
55. The Court of Appeal decision *Manyeso vs Republic* (Supra) was delivered way after the Appellant herein was convicted. Due to the hierarchical nature of our courts, this court was bound by the decision of the Court of Appeal.



56. The Appellant herein had a right to appeal to benefit from least severe punishment that was being meted out for the offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offence Act that attracts the sentence of life imprisonment.
57. He was entitled to equal benefit and protection of the law. Failure to accord him this benefit could amount to discrimination against him which is prohibited by Article 27(4) of *the Constitution* of Kenya that states that:-
- “The State shall not discriminate directly or indirectly against any person on any ground (emphasis court), including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”
58. This court struggled with the nature of sentence to mete out to the Appellant herein as it was bound both by the Supreme Court and the Court of Appeal decisions. However, in view of the fact that the Court of Appeal decision *Manyeso vs Republic* (Supra) regarding the constitutionality or otherwise of life imprisonment had not yet been overturned by the Supreme Court, this court was obligated to reduce the life sentence that was meted upon the Appellant herein to a determinate sentence.
59. In the mind of this court, this court took the view that a sentence thirty (30) years imprisonment was adequate to punish the Appellant for the offence that he committed and to deter him from committing similar offences. He committed a heinous crime against a six (6) year old and no number of years could ever erase the trauma that she and her family went through.
60. As the sentence was now determinate, this court could now consider his prayer that the period that he spent in prison while his trial be taken into account in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) which provides that:-
- “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 (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
61. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
62. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide that:-
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
63. The Charge Sheet indicated that the Appellant herein was arrested on 17th March 2017. He was convicted on 29th September 2017. A perusal of the proceedings of the lower court showed that



although he was granted bail/bond, he did not post the same and hence remained in custody during the entire trial.

64. Accordingly, the period between 17th March 2017 and 29th September 2017 when he was arrested and convicted respectively ought to be taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code.

Disposition

65. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 10th October 2017 and lodged on 18th July 2018 was partly merited. His conviction be and is hereby upheld as the same was safe.
66. However, the sentence of life imprisonment that was imposed on him be and is hereby set aside and/or vacated and replaced with an order that he is hereby sentenced to thirty (30) years to run from 29th July 2017. The period between 17th March 2017 and 29th September 2017 when he remained in custody while his trial was going on to be considered while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
67. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 22ND DAY OF JULY 2024

J. KAMAU

JUDGE

