



**Owiti v Republic (Criminal Appeal E201 of 2022)  
[2024] KEHC 8759 (KLR) (Crim) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8759 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E201 OF 2022  
K KIMONDO, J  
JULY 18, 2024**

**BETWEEN**

**MIKE TYSON OWITI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act* (hereafter the Act). He was imprisoned for thirteen years.
2. The particulars were that on 4<sup>th</sup> June 2020 at [particulars withheld], within Nairobi county, he intentionally caused his penis to penetrate the vagina of GA [particulars withheld], a girl aged 11 years.
3. The petition of appeal was lodged with leave of court on 28<sup>th</sup> October 2022. It raised eight grounds but which can be compressed into five: Firstly, that the primary elements of the offence including penetration and age were not established. Secondly, that the appellant was not positively identified or connected with the offence, and, fourthly, that the entire evidence was riddled with untruths, contradictions and illegalities.
4. In a synopsis, the appellant contends that the Republic failed to discharge its legal and evidential burden; and, that consequently, the conviction and sentence should be set aside.
5. I must add that when the appellant filed his written submissions on 2<sup>nd</sup> April 2023, he introduced fresh grounds. Since no leave was sought or obtained as required by section 350 of the Criminal Procedure Code, the purported grounds are a nullity. This appeal will accordingly be considered on the original petition of appeal.
6. At the hearing of the appeal, the relied entirely on the written submissions aforementioned.



7. The appeal is contested by the State vide grounds of opposition as well as submissions all dated 16<sup>th</sup> May 2023. Learned Prosecution Counsel, Ms. Wafula, argued that the offence was proved beyond reasonable doubt and that the sentence handed down was well within the law. He implored the court to dismiss the entire appeal.
8. This is a first appeal to the High Court. I have examined the record; re-evaluated the facts and drawn independent conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32, *Felix Kanda v Republic*, Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.
9. I will commence with the age of the complainant (PW1). She testified that she was born on 8<sup>th</sup> October 2008. That is supported by the age assessment report dated 18<sup>th</sup> June 2020 (exhibit 4) made by Dr. Muriuki, a dental surgeon, who concluded that the complainant was aged between 11 and 12 years.
10. The argument by the appellant that age was not proved is thus unfounded. My view is that proof of age does not solely depend on a certificate of birth. The complainant testified on her age and there was a professional age assessment report above. I find support from the decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR. The learned judges delivered themselves as follows-

From the evidence, besides the evidence of PC Paul Mwangi, who we consider was incompetent to ascertain the child's age, all other evidence indicated that ZN was either 12, 13 or 15 years. When this is considered against the backdrop of the charge sheet which specified the complainant's age as 12 years, it is evident that the ages indicated, all fell within the age bracket specified under Section 8 (1) and (3) of the Act, and concerned the defilement of a child within the particular age bracket. As such, we find that, the charge and the sentence preferred were sound, and no prejudice could be held to have been suffered by the appellant. At any rate, we consider that the discrepancies are not material and curable under Section 382 of the Criminal Procedure Code. [underlining added].

11. The next important matter relates to the procedure of taking the evidence of PW1. On 7<sup>th</sup> October 2021, the trial court conducted a detailed *voire dire* examination. The learned trial magistrate formed the opinion that PW1 was intelligent and understood the duty to tell the truth. The minor thus gave sworn evidence.
12. I am accordingly satisfied that the trial court complied fully with the procedure of taking the evidence of a child of tender years. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.
13. I will next deal with identification. According to PW1, on 4<sup>th</sup> June 2020, her mother took her to her aunt's place [particulars withheld]. She knew the appellant as her uncle and he used to visit her aunt's residence. She would sleep on the floor with one of the children. The appellant would sleep in another place. The appellant in his defence did not contest these family relationships.
14. I thus readily find that the complainant and the appellant knew each other well. They were both placed at the locus in quo. The complainant said that this was the third time the appellant was defiling her. Although the incident took place at night in the house, I find that the appellant was positively identified. This was in fact evidence of recognition. *Wamunga v Republic* [1989] KLR 424.
15. I will then turn to penetration. In a criminal trial, the legal and evidential burden primarily rests on the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. The question is whether the prosecution proved beyond a reasonable doubt that the appellant penetrated the complainant.



16. Penetration is defined in section 2 of the Act as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
17. In this case, both the appellant and the complainant were in the house that night. The appellant tactfully waited until the complainant’s aunt was asleep. He then moved to where the complainant was sleeping, struggled with her and penetrated her. In the course of that struggle, her hand was burnt by a jiko stove on her right hand(exhibit 3). Those superficial burns are confirmed by the medical report (exhibit 3) which was produced by PW2, a clinical officer.
18. PW2 also produced the medical certificate and Post Rape Care Form (exhibits 1 & 2). The totality of the two reports is that the complainant’s vagina had no injuries save for a whitish non-smelly discharge. The hymen had an old tear at 3:00 and 9:00 o’clock positions. The anus was normal.
19. That is why the appellant argues that there was no proof of penetration. I disagree for the following four reasons. Firstly, PW1 was emphatic that she was penetrated. Secondly, the scars in the hymen were old because it was not the first time she was having sex. Thirdly, the appellant had penetrated her on previous occasions; and fourthly, PW1 reported the matter to the police that very morning and immediately examined at the hospital.
20. I should add that PW1 was the victim of a sexual offence. Under the proviso to section 124 of the *Evidence Act*, where the victim of a sexual offence is the complainant, corroboration is not mandatory if the court is satisfied that the witness was truthful. Granted all the circumstances of this case, I have no cause to doubt PW1. In any event, there was sufficient corroboration from exhibits 1, 2 and 3 above.
21. I have then studied the appellant’s defence. Its tenor is that he was framed-up. He claimed that back in 2018, his sister in law had visited them. He found her beating his mum. He intervened and beat her up. He thought the issue was resolved “but when [he] came to Nairobi, [he] thinks this issue is what led to them making these allegations”.
22. From my analysis of the evidence and the law, the defence tendered by the appellant was not only evasive but equally bogus. I thus readily find that all the elements of the offence were proved beyond reasonable doubt. It follows that the appeal against conviction is dismissed.
23. I will now turn to the sentence. Section 354 (3) of Criminal Procedure Code empowers this court to review the sentence. Under section 8 (3) of the *Sexual Offences Act*, the minimum sentence was 15 years. The trial court took into consideration that the accused was remorseful and a first offender. It also granted him credit for the period spent in custody of 2 years; hence the term of 13 years imprisonment.
24. However, the Court of Appeal has given guidance on minimum sentences under the Act in *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court [in Muruatetu’s case] was applied to this provision, it too should be considered unconstitutional on the same basis.
25. I have considered the appellant’s mitigation; that he is a first offender, and then aged 25 years. PW1 on the other hand had been sent by her mother to live with her aunt. The appellant took advantage of a disadvantaged and vulnerable child who had sought refuge in her aunt’s house. I accordingly find that the sentence handed down was appropriate and I decline to disturb it.
26. The upshot is that the entire appeal lacks merit and is hereby dismissed.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> JULY 2024.**

**KANYI KIMONDO**

**JUDGE**

Judgment read virtually on Microsoft Teams in the presence of-

The appellant.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

