



REPUBLIC OF KENYA



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**Otieno v Republic (Criminal Appeal E046 of 2023)
[2024] KEHC 9852 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E046 OF 2023
RE ABURILI, J
AUGUST 7, 2024**

BETWEEN

JACKSON PHILEMON OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence by the Hon. E.A. Obina on the 30.8.2023 in the Chief Magistrate's Court at Kisumu in Kisumu CM Sexual Offences Case No. E35 of 2021)

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 23rd October 2021 in Kisumu Central sub-county within Kisumu County intentionally caused his penis to penetrate the vagina of V.A. a child aged 5 years.
2. The trial court after considering and weighing the evidence adduced found the appellant guilty of the offence and taking into account the mitigation by the appellant, proceeded to sentence the appellant to serve 40 years imprisonment.
3. Aggrieved by the conviction and the sentence, the appellant filed a petition of appeal on the 14th September 2023 raising the following grounds of appeal:
 - i. That the trial court erred in law and in fact in relying on inconclusive evidence of identification.
 - ii. That the trial court erred in law in relying on evidence of dock identification that was not preceded by a properly conducted identification parade.



- iii. That the trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed prosecution case.
 - iv. That the trial learned magistrate erred in both law and fact by inevitably failing to medically and forensically proving the content of P3 or; and the absence of DNA report and results.
 - v. That the trial learned magistrate erred in both law and in fact by resting the burden of proof to the appellant contrary to section 107 (1) of the Evidence Act.
 - vi. That the trial learned magistrate erred in both law and fact by failing to consider the mitigating and aggravating factors that were cogent and sound.
 - vii. That the trial court erred in law in not making a finding that the prosecution did not prove their case beyond reasonable doubt.
 - viii. That the case is marred with contradictions and inconsistencies that rendered the prosecution case untenable.
4. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

5. It was submitted that the complainant's age was not established and that despite the charge sheet, and the complainant's mother stating that she was 5 years old but later stated that she was in class 2 which under the CBC system of education is unlikely as the same is attended by children aged 9-year-old. It was thus submitted that an age assessment report would have been key evidence in the absence of any other documentary evidence to corroborate the age of the victim.
6. The appellant further submitted that the trial magistrate failed to consider the sentencing principles, emerging case law on mandatory sentences as well as taking into account the fact that the appellant was remorseful and a first offender and as such rendered a sentence of 40 years which this court ought to substitute with a reduced prison sentence of 25 years to 30 years. Counsel for the appellant relied on several cases including Owino v Republic [2024] eKLR; Phillip Mueke & 5 others v Republic [2022]eKLR; Evans Nyamari Ayako v Republic [CRA 22 of 2018]; Dahir Hussein v Republic [2015]eKLR; The 2016 Kenya Judiciary Sentencing Guidelines and Bernard Kimani Gacheru v Republic [2002] eKLR all cases making pronouncements on sentencing and urging this court to reduce the sentence imposed to between 25 and 30 years imprisonment.

The Respondent's Submissions

7. The state through the prosecution opposed the appeal in its entirety submitting that the trial magistrate was right in convicting the appellant.
8. It was submitted that the prosecution proved that it was the accused who committed the offence through a DNA report which matched the male profile of the accused and the testimony of the complainant. Further, that the doctor's report corroborated the complainant's evidence of penetration.
9. Regarding the complainant's age, it was submitted that the same was proved to be 5 years through the testimony of the mother and a birth certificate was not necessarily needed to be produced as was held in the case of Kisii Criminal Appeal Case No 22 of 2015 and Musyoki Makavi v Republic Criminal Appeal No 172 of 2012 that recognized the victim's parents or guardian's observation or common sense as evidence of age.



10. On sentencing, it was submitted that the sentence meted out on the appellant was lenient and that the same ought to be enhanced to life imprisonment as per the law bearing in mind that the victim was only 5 years old.

Analysis and Determination

11. I have considered the appellant's grounds of appeal and the submissions for and against the appeal. As a first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) E.A, 32.
12. I find the following broad issues for determination.
- i. Whether the prosecution proved their case beyond reasonable doubt; and
 - ii. Whether the sentence was manifestly harsh and excessive
13. On the first issue, 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.”
14. 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:
- i. Age of the complainant;
 - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - iii. Positive identification of the assailant.
15. On these elements: “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.” See the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013.
16. The appellant faulted the trial court's holding that the complainant's age had been proved beyond reasonable doubt as 5 years old stating that the testimony of the complainant's mother was that the minor was in class 2 and thus 9 years old.
17. I must reiterate that 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 been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
18. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
19. PW1, the complainant's mother testified that the complainant was 5 years old at the time of the incident having been born on the 4.2.2016.



20. The complainant on her part gave an unsworn statement and actually during her testimony did not testify on her age. She had testified in her *voire doire* that she was in class 2.
21. PW5 who produced the P3 form filled on behalf of the complainant testified that it was noted during examination that the minor was 5 years old.
22. On this question of age, I am content to cite the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR where it was held that:
- Conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”
23. On the basis of the evidence adduced, I find that the age of the victim was proved to be 5 years. The trial court which saw and heard the complainant did observe and was persuaded beyond doubt that the child was of that age. He observed as follows and I have no reason to depart from his findings on the age of the complainant:
- “The P3 form says the child is 5 years old. The mother testified and gave the exact date of birth, 4th February, 2016. She could not have imagined and manufactured that date. I also had the opportunity of seeing the child in court when she testified. She looked like a five-year-old. A birth certificate or any other document may not have been produced in court but I am convinced that age has been proved. The child is 5 years.”
24. More so, the medical officer who examined her and filled her P3 form was also persuaded that she was five years of age. This fact was not challenged by any contrary evidence.
25. As regards 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.”
26. On this see the case of *Mark Oiruri Mose v R* [2013] eKLR.
27. The complainant gave unsworn testimony that the appellant inserted his penis into her vagina while they were in his house and that after defiling her the appellant gave her tea and githeri.
28. The law relating to unsworn statements is well expressed by Emukule, J in the case of *Mercy Kajuju & 4 others v Republic* [2009] eKLR where he stated as follows:
- “I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence....”
29. In *Amber May v The Republic* [1999] KLR 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the *Criminal Procedure Code*. On



Appeal against that decision and reported as *May v The Republic* [1981] KLR. 129, the Court of Appeal held, inter alia held that:

- “1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.
 2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the *Criminal Procedure Code* (Cap 75, Laws of Kenya).”
30. It is clear from the trial court record that the trial magistrate undertook a detailed voire dire examination of the complainant, and formed the opinion that she did not appreciate the nature or solemnity of an oath and he therefore proceeded to allow her to give unsworn testimony.
31. The evidence of a child under the age of 14 may be received even if it is not on oath, provided that the court is satisfied, after conducting a voire dire examination, that the child possesses sufficient intelligence and understands the duty to tell the truth. In the present case the child was seven years old. Such a child is defined in Section 2 of the *Children’s Act* as a child of tender years, that is, a child under the age of ten years.
32. In *Oloo v R* (2009) KLR, the Court of Appeal held that:
- “In our view, corroboration of evidence of a child of tender years is only necessary where such a gives child unsworn evidence. (See *Johnson Muiruri v Republic* (1983) KLR)...in law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it”. (Emphasis supplied)
33. In the instant appeal, it is clear from the evidence adduced before the trial court that the complainant’s evidence was adequately corroborated by the evidence adduced by the other prosecution witnesses.
34. The entries in the P3 form and PRC form produced and the testimony of the clinical officer PW5 who examined the child and filled the P3 form clearly evidenced penetration noting that “she had a broken hymen, was in pain when urinating and itchiness around the vagina and that she had a brown vaginal discharge.”
35. Further to the above, the report of the Government analyst as was produced by PW4 as exhibit 3 concluded that the DNA profile generated from the complainant’s vaginal swab matched the appellant’s DNA profile.
36. The testimonies and evidence above thus proved beyond reasonable doubt that there was penetration.
37. As to whether it was the appellant who defiled the complainant, contrary to the appellant’s allegation that his conviction was based on dock identification, the testimony of the minor was that she knew the appellant and even referred to him as “Jadolo”. The complainant’s mother also testified that the appellant was brought to the police station while they were there with the complainant and the complainant was able to point him out.



38. It bears repeating that the Appellant was a person well known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Jadolo- she knew the accused as such.
39. The evidence by the prosecution leaves no doubt that the appellant is the person who caused penetration of the complainant's genitalia.
40. The appellant further pleaded that the trial magistrate failed to note the inconsistencies and contradiction among the prosecution witnesses. I have perused the evidence on record as a whole. It is my view that contrary to the appellant's averments in his petition of appeal and submissions of contradictions and inconsistencies that could not warrant the upholding of a positive judgment, my evaluation of the evidence presented by the prosecution in the trial court is firstly I do not see any contradictions and inconsistencies in the prosecution witness and secondly, if any, the same are not sufficient to warrant the overturning of the trial court's judgement. No such This court agrees with the holding in *Philip Nzaka Watu v Republic* [2016] eKLR thus:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elai Nsamba Shapwata & another v The Republic*, Cr App. No 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

41. In any case, the Court of Appeal of Kenya addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR where it stated inter alia that only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
42. Accordingly, it is my opinion that there were no contradictions and inconsistencies sufficient to create doubt in the trial court's mind as to the appellant's guilt. Consequently, it is my opinion that this ground fails.
43. In the end, I find that the prosecution proved beyond reasonable doubt that the appellant penetrated the complainant, PW2, a child aged 5 years.
44. accordingly, I find that the conviction of the appellant was sound and proper. I find no reason to fault the appellant's conviction which is hereby sustained.
45. On sentence, Sentence, the *Sexual Offences Act* stipulates that the sentence for defilement is determined by the age of the victim involved in the sexual assault. While the Act does not explicitly outline this, the



structure of the penalties indicates that a younger victim results in a harsher sentence. Consequently, it is evident that the age of the victim in sexual offence cases serves as an aggravating factor that the court should consistently take into account, among other considerations, during sentencing.

46. In this particular case, the complainant was just 5 years old at the time of the offence. Therefore, the relevant penalty provision is found in Section 8(2) of the Act, which provides that:

“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.”

47. The appellant herein was sentenced to serve 40 years in prison and which the appellant impugned citing emerging case law on mandatory minimums as well as the alleged trial court’s ignorance of his mitigation and the circumstances of the case.

48. The respondent in submissions urged the court to enhance the sentence to life imprisonment considering the age of the child. However, no Notice of enhancement of sentence was issued to the appellant to enable him respond substantially. I shall therefore not consider that plea by the prosecution.

49. Having said that, the role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in *Wanjema v Republic* [1971] EA 494 that:

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case”

50. The sentence provided for under section 8 (2) of the [Sexual Offences Act](#) is life imprisonment upon conviction. The sentence is mandatory if a child is aged eleven years or less, and in this case, the child was found to be a five-year-old child.

51. Before sentencing the appellant, the trial magistrate heard and considered his mitigation, that he was a first offender, sickly and a victim of police brutality with burns all over his body. It is thus clear that the appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated.

52. The sentencing objectives in Kenya have been captured in the cited 2016 [Judiciary Sentencing Policy Guidelines](#) at page 15 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.



53. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - d) Protection of the community: - where the offender is likely to pose a threat to the community.
 - e) Offender's responsibility to third parties: - where there are people depending on the offender.
 - f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
54. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced petitioner/convicts for different offences, including sexual offences.
55. In the cases of defilement, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake v 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.
56. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another v Republic (Supra) was applicable to re-sentencing in murder cases only, courts have since stopped re-sentencing applicants in sexual offences.
57. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
58. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
59. In the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* (supra) 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.
60. However, the aforementioned decision was overturned by the Supreme Court on the 12th July 2024, just barely a month ago, in Petition No E018 of 2023 *Republic v Joshua Gichuki Mwangi* wherein the court faulted the Court of Appeal's decision to reduce the sentence meted out on the appellant from



20 years to 15 years on the grounds of unconstitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act. The Supreme Court noted that:

“The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.”

61. The Supreme Court in setting aside the Court of Appeal decision in Joshua Gichuki Mwangi supra went on to find and hold that the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid.
62. In the circumstances, the appellant has not demonstrated before this court that the sentence rendered by the trial court was illegal or that it was arrived at by a wrong exercise of jurisdiction and in the circumstances, I find no reason to interfere with the same.
63. The upshot of the above is that this appeal against conviction and sentence lacks merit and I thus proceed to dismiss it in its entirety.
64. This file is closed and the lower court file and copy of judgment to be send to the trial magistrate.
65. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

