



**Kabaiko v Republic (Criminal Appeal 131 of 2019)
[2023] KEHC 940 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 131 OF 2019
JWW MONG'ARE, J
FEBRUARY 15, 2023**

BETWEEN

DAVID NJUGUNA KABAIKO APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an Appeal from the conviction and sentence of Hon. D Milimu in Eldoret
Chief magistrates' Criminal Case No. 55 of 2019 delivered on 26th June 2019))*

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*. The particulars of the offence are that on the 16th day of February 2019 at Likuyani Sub County within Kakamega County, he unlawfully caused his genital organ (penis) to penetrate into the genital organ (anus) of VM, a child aged seven (7) years old. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *sexual offences act*.
2. The Appellant pleaded not guilty and the matter proceeded to full trial. The trial court, upon considering the evidence and the testimony presented in court, found the Appellant guilty of the main count and sentenced him to life imprisonment.
3. Being aggrieved with the decision of the trial court, the Appellant instituted this appeal vide a petition of appeal premised on the following grounds;
 1. That (my) constitutional rights under article 49 of the *constitution* were violated.
 2. That penetration was not proved.



3. That there was inconsistency and contradiction.
4. That the evidence was circumstantial.
5. That the medical evidence was a sham.
6. That the instant case herein was fiction.
7. That (my) defence was not considered.

The parties filed submissions on the appeal.

Appellant's Case

4. The Appellant's case is that he was prejudiced by the prosecutions' non-disclosure of expert evidence as he was not supplied with the P3 forms when he requested for them.
5. Further that there exists contradictory evidence that casts doubts on the proceedings in the trial court. He stated that the sentence was excessive and urged the court consider that he has tuberculosis, is aged and all his parents are dead. He sought to have the appeal allowed.

Respondent's Case

6. Learned counsel for the state submitted that the Appellant did not raise the issue of the P3 form after the mention of April 16, 2019. Further, that at the hearing of the matter on June 11, 2019 when the doctor came to court to testify, the Appellant did not object to the testimony of the doctor and neither did he state that he had not been supplied with the P3 form. He even proceeded to conduct a cross examination on the doctor, leaving no doubt that he understood the testimony of the medical officer and was able to interrogate it.
7. Learned counsel for the Respondent stated that the key ingredients of the offence, being proof of the age of the complainant, penetration and proof that the Appellant was the perpetrator of the offence, were proved to the required standard. Further, that there were no inconsistencies in the testimonies of the witnesses that could discredit the prosecution case.

Analysis and determination

8. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See *Okeno v Republic* [1973] EA 32; *Pandya v R* (1957) EA 336, *Ruwala v R* (1957) EA 570.
9. Upon considering the petition of appeal and the submissions of the parties, the following issues arise for determination;
 1. Whether the Appellant's right to a fair trial was violated
 2. Whether the offence was proved to the required standard
 3. Whether the sentence should be set aside

Whether the Appellant's right to a fair trial was violated

10. Article 50(2)(j) of the *Constitution of Kenya* provides;
Every accused person has a right to a fair trial, which includes the right:-



- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence
11. Despite the fact that the Appellant never brought up the issue of the P3 form after the matter being mentioned twice, it is not evident that he was supplied with the same. However, my understanding of the provisions of Article 50(2)(h) is that the evidence is to be provided to give the accused an understanding of the evidence of the prosecution against him. The fact that the appellant was able to cross-examine the doctor on the contents of the P3 form is proof that he understood the contents and the evidence against him. Therefore, the failure to supply him with the P3 form did not prejudice him at all.

Whether the offence was proved to the required standard.

12. The ingredients of defilement as set out in *George Opondo Olunga v Republic* [2016] eKLR are; Age of the Complainant Proof of penetration Identification of the accused person
13. The age of the complainant was proved by the production of a birth certificate and the testimony of PW2 corroborating his age.
14. Penetration was proved by way of medical evidence and corroborated by the testimony of PW3.
15. The identification of the Appellant was by recognition, as the Appellant was known to the complainant. Further, the incident took place at 9 o'clock in the morning and therefore the complainant was able to identify the Appellant.
16. Upon perusing the record of the court, I have found no contradictions in the testimony of the witnesses. The main contention that the minor was defiled on February 16, 2019 whereas PW2, the mother of the complainant, stated that she learnt of the defilement on February 17, 2019 is exclusive of the fact that PW2 learnt of the defilement at midnight on the day of the incident. Therefore, I find that there was no contradictory testimony.

In the premises, I hold that the offence of defilement was proved to the required standards.

Whether the sentence should be set aside

17. Section 8(1) as read with section 8(2) of the *Sexual Offences act* states;
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (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.
18. In light of the emerging jurisprudence on mandatory sentences, the court is obliged to consider the circumstances of the case when sentencing an accused person. In Mombasa High Court Constitutional Petition No 97 of 2021 – *Edwin Wachira and 9 others vs Republic* (2021) eKLR Hon Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual



circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.

19. Upon considering the circumstances of the case, the aggravating factors and the mitigation of the Appellant and I find that there is no reason to disturb the sentence by the trial court. I hereby dismiss the appeal for lack of merit.

DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 15th DAY OF FEBRUARY 2023.

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J.W.W. MONGARE

JUDGE

Judgment delivered virtually in the presence of;

1. Appellant is Present
2. Ms Sakari holding brief for Ms. Okok- Prosecution Counsel
- 3 Loyanae- Court Assistant

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J.W.W.MONGARE

JUDGE

