



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwendwa v Republic (Criminal Appeal 027 of 2022)  
[2023] KEHC 1776 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1776 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL 027 OF 2022  
F WANGARI, J  
FEBRUARY 6, 2023**

**BETWEEN**

**ISAAC MUSYIMI MWENDWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. John  
Aringo (R.M) in Kyuso SOA case No. 9 of 2016)*

**Prescribed mandatory sentences in the Sexual Offences Act were unconstitutional as it limited the discretion of trial courts to impose appropriate sentences**

*The case reiterates the effect of prescribed minimum sentences in the Sexual Offences Act on the discretion of trial courts to impose sentences and also the constitutionality of said provisions.*

Reported by Moses Rotich

**Criminal Procedure** – charge sheet – contents of charge sheet– claim that dates of commission of alleged offence and witness statements were contradictory – where charge sheet gave reasonable information as to nature of offence accused had committed – whether charge sheet was defective - whether discrepancy in the dates of the commission of an alleged offence in a charge sheet prejudiced an appellant/accused to a point of accessioning miscarriage of justice – Criminal Procedure Code, section 134; Sexual Offences Act No of 2006, section 8.

**Criminal Law** – sexual offences – defilement – elements needed to be proved – what were the elements that a prosecution needed to prove in an offence of defilement- Sexual Offences Act No 3 of 2006, sections 2(1) and 8.

**Criminal Law** – offences – defilement – sentencing in defilement cases – provisions for sentencing in defilement cases – where the appellant was charged with defilement – where the appellant who was aged 19 had been convicted and sentenced to 20 years in prison pursuant to section 8 of the Sexual Offences Act – the appeal of the conviction and sentencing – Whether mandatory minimum sentences in the Sexual Offences Act were unconstitutional to the extent of prescribing minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence – Sexual Offences Act, No 3 of 2006, section 8; Constitution of Kenya, 2010, article 28.



## Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (the Act). Particulars of offence that on diverse dates between May 25, 2016 and June 30, 2016 at a sub-county within Kitui County, intentionally caused his penis to penetrate the vagina of SM a child aged 14 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the offence were that on diverse dates between May 25, 2016 and June 30, 2016 at a sub-county within Kitui County, intentionally touched the vagina of SM a child aged 14 years with his penis. The appellant was convicted in the main charge and was sentenced to serve imprisonment for a period of 20 years. Having been dissatisfied with the judgment, conviction and the sentence imposed, the appellant lodged the instant appeal. In the alternative, he sought for a revision of the sentence.

## Issues

- i. Whether discrepancy in the dates of the commission of an alleged offence in a charge sheet prejudiced an appellant/accused to a point of occasioning miscarriage of justice.
- ii. What were the elements that a prosecution needed to prove in an offence of defilement.
- iii. Whether mandatory minimum sentences in the Sexual Offences Act were unconstitutional to the extent of prescribing minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose.

## Held

1. There was no limitation on the part of the appellate court to review the evidence upon which the order appealed against was founded and to come to its own conclusion. The first appellate court could also review the trial court's conclusion with respect to both facts and law. It was the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons could set aside the decision appealed against or the entire proceedings if they were flawed. That included when the trial court had breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached the rules of procedure, or ignored crucial evidence or misread the material evidence or had ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused. The appellate court was competent to reverse the decision of the trial court depending on the materials in question.
2. The principle of the law governing the charge sheet was that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused could be able to plead to a specific charge that he could understand. It would also enable the accused to prepare his defence.
3. The main defect as alleged by the appellant was that the dates of the commission of the alleged offence as per the charge sheet contradicted the dates given by the witnesses. From the above, the question was whether the defence did prejudice the appellant's case to a point of occasioning a miscarriage of justice. The offence charged was that of defilement and the sections of the law disclosing the offence were stated in the charge sheet. The particulars of offence stated to whom the offence was committed against. Despite there being a discrepancy on the dates of the commission of the offence, the court found that the charge sheet gave reasonable information as to the nature of the offence that the accused was charged with. The difference in the dates as per the charge sheet and the evidence adduced did not amount to having the charge sheet being defective.
4. The essence of proof of age in defilement matters was in determination of the sentence to be given upon conviction, as the Act had different sentences based on the age of the victim. The appellant submitted that there was no proof of complainant's age. The complainant stated during the *voir dire* examination that she was born on March 10, 2020. The mother to the complainant availed the birth certificate which was produced as an exhibit.



5. The medical evidence through a doctor, birth certificate, victim's parents or guardians' evidence could be used to determine the age of the victim. A birth certificate was produced and indicated that the complainant was born on February 3, 2002. At the time of the alleged offence, the complainant was 14 years old. The prosecution did prove the age element.
6. Section 2(1) of the Act defined penetration as the partial or complete insertion of the genital organs of a person into the genital organ of another person. The clinical officer who treated the complainant produced the treatment notes and the P3 form. From the treatment notes dated June 5, 2016, it was noted that the hymen was broken but 'not recently'. There were no injuries noted in the genitalia. From the P3 form, it was indicated that there was a whitish discharge which was 'more of semen'. Though the trial court did not dwell on that, it was an indication that there was penetration. The presence of epithelial cells which was a suggestion of friction on vaginal canal was also another indicator of penetration. The element of penetration was proved.
7. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The complainant's evidence that it was the appellant who forced her to his home and defiled her for 2 days corroborated the identity of the perpetrator being known. There was no proof that there was an error in identification of the appellant. The element of identification was thus proved.
8. The appellant first raised the defence of alibi during the defence hearing. The burden of proof did not shift to the appellant to prove his alibi defence. The prosecution had the burden of disproving the alibi and proving its case against the accused person. Even though the defence of alibi was not challenged on cross examination or otherwise, the evidence adduced against the appellant on the offence of defilement was proved beyond reasonable doubt, and it put the accused at the scene of crime.
9. Section 8(3) of the Act provided that a person who committed an offence of defilement with a child between the age of twelve and fifteen years was liable upon conviction to imprisonment for a term of not less than twenty years. The above provision prescribed a mandatory minimum sentence of 20 years' imprisonment.
10. Mandatory minimum sentences in the Act were unconstitutional to the extent that the Act prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell foul of article 28 of the Constitution of Kenya, 2010. The court was therefore bound to re-examine the sentence in the light of the above.
11. The prosecution proved the elements of the offence of defilement and the appellant was therefore properly convicted and sentenced. The appeal on conviction thus failed.

*Appeal partly allowed.*

#### **Orders**

- i. *In respect to the sentence imposed, the trial magistrate was tied by the minimum sentence imposed in the Act. The same having been held to be unconstitutional, the application for revision of the sentence had to succeed.*
- ii. *The court was guided by the Sentencing Guidelines. At the time of commission of the offence, the appellant was 19 years old. Since he was arraigned in court on July 11, 2016, the appellant had been in custody ever since. The accused was still a youth. The time spent in custody had to have been a lesson learnt. He deserved a second chance to make good use of his life. Though it had not been disclosed the skills he had learnt while in prison, going by the various rehabilitation programs in the penal institutions, the appellant had to have been a beneficiary of the same.*
- iii. *The sentence of 20 years' imprisonment was therefore substituted with an imprisonment term of 10 years.*
- iv. *The time spent in custody should be deemed to form part of the sentence that was with effect from July 11, 2016.*

#### **Citations**

##### **Cases**

##### **Kenya**



1. *Kiilu & another v Republic* Criminal Appeal 113 of 2001; [2005] KECA 335 (KLR); [2005] 1 KLR 174 - (Explained)
2. *Mainigi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021; [2022] KEHC 13118 (KLR) - (Explained)
3. *Makau v Republic* Criminal Appeal E015 of 2021; [2022] KEHC 179 (KLR) - (Explained)
4. *Musyoki Mwakavi v Republic* Criminal Appeal 172 of 2012; [2014] KEHC 5681 (KLR) - (Explained)
5. *Sigilai, Kipkurui Arap & another v Republic* Criminal Appeal 7 & 8 of 2004; [2004] KEHC 2670 (KLR); [2004] 2 KLR 480 - (Explained)

### **India**

*Ganpat v State of Haryana* [2010] 12 SCC 59 - (Explained)

### **Regional Court**

*Okeno v Republic* [1972] EA 32 - (Explained)

### **Texts**

The Judiciary of Kenya (2016), *Sentencing Policy Guidelines* Nairobi; The Judiciary of Kenya

### **Statutes**

#### **Kenya**

1. Constitution of Kenya article 28 - (Interpreted)
2. Criminal Procedure Code (cap75) section 134- (Interpreted)
3. Sexual Offences Act (cap 63A) sections 2(1); 8(1)(3); 11(1)- (Interpreted)

### **Texts**

The Judiciary of Kenya (2016), *Sentencing Policy Guidelines* (Nairobi; The Judiciary of Kenya)

### **Advocates**

*Pauline Mwaniki* for the State

## **JUDGMENT**

### **Background**

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*<sup>1</sup>. Particulars of offence that on diverse dates between May 25, 2016 and June 30, 2016 at [Particulars Withheld] Subcounty within Kitui County, intentionally caused his penis to penetrate the vagina of SM a child aged 14 years.
2. 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*. Particulars of offence are that on diverse dates between 25 May 2016 and June 30, 2016 at [Particulars Withheld] Subcounty within Kitui County, intentionally touched the vagina of SM a child aged 14 years with his penis.
3. The appellant was convicted in the main charge and was sentenced to serve imprisonment period of 20 years. Having been dissatisfied with the judgment, conviction and the sentence imposed the appellant lodged this appeal. In the alternative, he sought for a revision of the sentence. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryana*<sup>2</sup>, as cited by Mativo J in *Makau v Republic*<sup>3</sup> as hereunder;

<sup>1</sup> Act No 3 of 2006

<sup>2</sup> *Ganpat v State of Haryana* (2010) 12 SCC 59



- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
  - b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
  - c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
  - d. When the trial court has breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
4. Also in Okeno v Republic<sup>4</sup> and Kiilu & another v Republic<sup>5</sup>, the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.

### Summary of Evidence

5. The complainant (PW 1), said she was going home from a prize giving ceremony in her school. On her way home the accused approached her from behind. He invited her to go to his home and she refused. That is when he forced her to his home by holding her hand. He threatened that he would kill her if she screamed. There was no one at the accused's home as his grandmother was away. The accused held her against her will for 2 days where he defiled her. She was released after 2 days and when she went home, she informed her parents what had happened. The teachers were also informed of the incidence. The accused person was later arrested.
6. KM (PW 2), the mother to the complainant gave evidence that her daughter had disappeared for two days. This is after she failed to return home from school. She had left for school on 28/6/2016. When she came back, she informed her that she was at the home of the accused, after the accused forced her to go with him. She reported the matter to her daughter's teacher. She availed the birth certificate of the complainant indicating that the complainant was born on 3/2/2002.
7. APC Geoffrey Kenyani (PW 3), an Administration Police officer was one of the arresting officers, after a complaint was lodged against the accused that he had defiled the complainant for 2 days. The accused was taken to Ngomani police station for further action.
8. PC Esther Wairimu (PW 4), a police officer formerly attached at Ngomeni police, station give evidence that on 3/7/2016, she received the accused person from the AP officers, where he had been arrested on allegations that he had defiled the complainant. She recorded their statements and took the complainant to hospital for examination.
9. Francis Saku (PW5) a clinical officer at Kyuso District Hospital produced the P3 form and treatment notes as exhibits. Upon examining the complainant on 5/7/2016, he observed an injury on the right

<sup>3</sup> Makau v Republic (Criminal Appeal E015 of 2021) [2022] KEHC 179 (KLR) (14 March 2022) (Judgment)

<sup>4</sup> Okeno v Republic (1972) EA 32

<sup>5</sup> Kiilu & ano v Republic (2005) 1 KLR 174



earlobe. There was no injury to the genitalia, but a white discharge was noted in the vagina. He also observed epithelial cells which suggests friction of the vagina canal.

10. Cpl Felix Niangua (PW6) the investigating officer gave evidence similar to that of PC Wairimu, PW 4. He also accompanied the complainant to hospital. He took charge of the matter as the investigating officer, and later charged the accused with his offence. He produced the birth certificate as an exhibit.
11. In his defense, the accused person who was 19 years old then, denied committing the offence. He said at the time of the alleged incident, he had injured his leg at work on 28/6/2026. He went to hospital on 29/6/2016 and returned home the following day. He was later arrested by two police officers and they informed him of the accusations against him. He was the subsequently charged with this offense.
12. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the main count and he sentenced him to serve a 20-year imprisonment term.

### **Grounds of Appeal**

13. Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on grounds as hereunder;
  - a. The trial magistrate erred in matters of law and fact by failing to analyze and evaluate the whole evidence and come to his own independent conclusion as required by the law.
  - b. The trial magistrate erred in matters of law and facts in convicting the appellant on the evidence which was so contradictory and dangerous to convict on such evidence.
  - c. The trial magistrate erred in matters of law and facts in failing to find that the charge was not proved beyond all reasonable doubt.
  - d. The trial magistrate erred in matters of law and facts in failing to find that essential elements in a case of defilement were not proved.
  - e. The trial magistrate erred in law and facts in failing to give reasons of dismissing the defence of alibi.
  - f. The trial magistrate erred in matters of law and facts in convicting the appellant on the evidence that fell below the required of law.

The parties were directed to put in their written submissions by 27/1/2023.

### **Appellant's Submissions**

14. In his submissions, the appellant stated that in the charge sheet he was charged that he committed the offence between May 25, 2016 and June 30, 2016, which is over one month. The evidence of the complainant and the rest of prosecution witnesses said the accused defiled the complainant for 2 days, which is a contradiction of the charge sheet. He submitted that such contradiction should make the charges against him and illegality.
15. Further, he submitted that the prosecution did not proof the offence of defilement. the age of the victim was not proved and there was contradicting evidence as to the age of the victim.

### **Respondent's Submissions**

16. The respondent was to file their submissions by 27/1/2023. At the time of writing this judgment, the submissions had not been received way past the deadline of filing. It is deemed that the respondent has got no intention of filing their submissions.



## Issues for Determination

17. The issues arising from this appeal are;
  - a. Whether the charge sheet was defective
  - b. Whether the elements of the offence of defilement were proved
  - c. Whether the defence of alibi was proved

## Whether the charge sheet was defective

18. The accused submitted that in the charge sheet, he was said to have defiled the complainant for a period of 5 weeks while the evidence of the prosecution witnesses is that he defiled the complainant for 2 days.
19. Section 134 of the *Criminal Procedure Code*<sup>6</sup> states,

‘Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged’.
20. In the case of *Sigilai v Republic*<sup>7</sup> it was held;

‘The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. it will also enable the accused to prepare his defence’.
21. The main defect as alleged by the appellant is that the dates of the commission of the alleged offence as per the charge sheet contradicted the dates given by the witnesses. From the above, the question is whether this defence did prejudice the appellant’s case to a point of occasioning a miscarriage of justice.
22. The offence charged was that of defilement and the sections of the law disclosing the offence were stated in the charge sheet. The particulars of offence stated to whom the offence was committed against. Despite there being a discrepancy on the dates of the commission of the offence, I find that the charge sheet gave reasonable information as to the nature of the offence that the accused was charged with. I find that the difference in the dates as per the charge sheet and the evidence adduced does not amount to having the charge sheet being defective.

## Whether the elements of the offence of defilement have been proved

23. The appellant was charged with the offence under section 8 (1) as read with section 8 (3) of the *SOA* the elements arising from the above are;

## Age of the Complainant

24. The essence of proof of age in a defilement matters is in determination of the sentence to be given upon conviction, as the S.O.A have different sentences based on the age of the victim. The appellant submitted that there was no proof of complainant’s age. The complainant said she was born on

<sup>6</sup> Chapter 75 Laws of Kenya

<sup>7</sup> *Sigilai v Republic* [2004] 2 KLR 480



10/3/2020 in voire dire examination. The mother to the complainant availed the birth certificate which was produced as an exhibit.

25. In *Musyoki Mwakavi v Republic*<sup>8</sup>, it was held that medical evidence through a doctor, birth certificate, victim's parents or guardians' evidence can be used to determine the age of the victim. In this case, a birth certificate was produced and indicated that the complainant was born on 3/2/2002. At the time of the alleged offence, the complainant was 14 years old. I find that the prosecution did proof the age element.

### **Proof of Penetration**

26. 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.”

27. The clinical officer who treated the complainant produced the treatment notes and the P3 form. From the treatment notes dated 5/7/16, it was noted that the hymen was broken but ‘not recently’. There were no injuries noted in the genitalia.
28. From the P3 form, it was indicated that there was a whitish discharge which was ‘more of semen’. Though the trial magistrate did not dwell on this, it is an indication that there was penetration. The presence of epithelial cells which was a suggestion of friction on vaginal canal was also another indicator of penetration. I find that the element of penetration was proved.

### **Identification of the Assailant**

29. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The complainant's evidence that it was the appellant who forced her to his home and defiled her for 2 days. I find no proof that there was an error in identification of the appellant. I find the element of identification was proved.

### **Whether the Defence of Alibi was Proved**

30. The appellant first raised the defence of alibi during the defence hearing. The burden of proof does not shift to the appellant to prove his alibi defence. The prosecution had the burden of disproving the alibi and proving its case against the accused person. Even though the defence of alibi, was not challenged on cross examination or otherwise, I find that the evidence adduced against the appellant on the offence of defilement was proved beyond reasonable doubt, and it put the accused at the scene of crime.

### **Revision of Sentence**

31. From the above, the appellant was properly convicted and sentenced to an imprisonment term of 20 years. In his submissions titled ‘Memorandum of Appeal’ filed on October 25, 2022, the appellant prayed that as an alternative to the appeal being allowed, conviction quashed and sentence set aside, the sentence be substituted with a lesser sentence.

<sup>8</sup> *Musyoki Makavi v Republic* (2014) eKLR.



32. Section 8 (3) of the SOA provides;

‘A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years’.

33. The above provision prescribes a mandatory minimum sentence of 20 years’ imprisonment. In Maingi & 5 others v DPP & another<sup>9</sup>, Odunga, J in holding that the mandatory minimum sentences in S.O.A are unconstitutional stated as hereunder;

‘To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution’.

34. The court is therefore bound to re-examine the sentence in the light of the above.

### **Conclusion**

35. I have re-evaluated the evidence on record and I am satisfied that the prosecution proved the elements of the offence of defilement. The appellant was therefore properly convicted and sentenced. The appeal on conviction therefore fails, and proceed to uphold the conviction by the trial court. In respect to the sentence imposed, the trial magistrate was tied by the minimum sentence imposed in the SOA. The same having been held to be unconstitutional, the application for revision of the sentence must succeed.

36. I am guided by the Sentencing Guidelines. At the time of commission of the offence, the appellant was 19 years old. Since he was arraigned in court on 11/7/2016, the appellant has been in custody ever since. The accused is still a youth. The time spent in custody must have been a lesson learnt. He deserves a second chance to make good use of his life. Though it has not been disclosed the skills he has learnt while in prison, going by the various rehabilitation programs in our penal institutions, the appellant must have been a beneficiary of the same.

37. The sentence of 20 years’ imprisonment is therefore substituted with an imprisonment term of 10 years. The time spent in custody shall be deemed to form part of the sentence, that is with effect from July 11, 2016. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**F. WANGARI**

**JUDGE**

***In the presence of;***

Pauline Mwaniki for State

Appellant present

**Court Assistant - Guyo**

<sup>9</sup> Maingi & 5 others v Director of Public Prosecutions & ano (Petition E017 of 2021) KEHC 13118 (KLR) (17 May 2022)

