



REPUBLIC OF KENYA



**Muriungi v Republic (Criminal Appeal E091 of 2022)
[2023] KEHC 512 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E091 OF 2022
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

JOSPHAT MURIUNGI APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from conviction and sentence in Isiolo Criminal Case
S. O No. 6 of 2019 by Hon.L.K. Mutai (CM) on 29th June, 2022)*

Interpretation of the phrases 'shall be liable to' and 'not less than' as used in provisions for the offence of sexual assault under section 5(2) of the Sexual Offences Act

The case concerned the appellant's conviction for sexual assault, with key legal issues being the presumption of innocence, burden of proof, and sentencing under the Sexual Offences Act. The court upheld the conviction, finding the prosecution proved the appellant's guilt beyond reasonable doubt. The court considered section 5(2) of the Sexual Offences Act, which mandated a minimum sentence of 10 years, with the possibility of life imprisonment. It found that the phrase "shall be liable to" was not mandatory, but rather suggested a maximum sentence, leaving room for judicial discretion. Thus, there was ambiguity in the statutory language in that provision as the phrases "shall be liable to" and "not less than" appeared contradictory. In line with criminal law principles, the court held that such ambiguity should benefit the accused, implying that the least severe penalty should be applied. The court also raised constitutional concerns about the mandatory minimum sentence, suggesting that such provisions violated the constitutional right to dignity under article 28, as they did not allow for judicial discretion in determining sentences.

Reported by Moses Rotich

Statutes – statutory interpretation – interpretation of sections 5(2) of the Sexual Offences Act, cap 63A– meaning of the phrases 'shall be liable to' and 'not less than' – where the appellant was charged under the provision, convicted, and sentenced to serve 10 years' imprisonment – whether the use of the words 'shall be liable' and 'not less than' in section 5(2) of the Sexual Offences Act created an ambiguous situation during sentencing for the offence of defilement - Sexual Offences Act, cap 63A, sections 5.



Constitutional Law – rights and fundamental freedoms – right to dignity – where the Sexual Offences Act prescribed minimum mandatory sentences – where a trial court had no discretion to impose appropriate sentence – whether the provisions of the Sexual offences Act that prescribed minimum mandatory sentences violated an accused/convicted person’s right to dignity as it did not provide discretion to a trial court to determine appropriate sentence to impose - Constitution of Kenya 2010, article 28.

Brief facts

The appellant was charged at the trial court with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, cap 63A (the Act). The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Act. After trial, the court the prosecution had proved a case of sexual assault contrary to section 5(1) of the Act and convicted the appellant. He was subsequently sentenced to serve 10 years’ imprisonment.

Aggrieved, the appellant lodged the instant appeal alleging that the prosecution was not proved and that the court did not consider the period he spent in custody.

Issues

- i. What were the ingredients to be proved in a charge of sexual assault under section 5 of the Sexual Offences Act?
- ii. Whether the use of the words ‘shall be liable’ and ‘not less than’ in section 5(2) of the Sexual Offences Act created an ambiguous situation during sentencing for the offence of defilement.
- iii. Whether the provisions of the Sexual Offences Act that prescribed minimum mandatory sentences violated an accused/convicted person’s right to dignity as it did not provide discretion to a trial court to determine the appropriate sentence to impose.

Relevant provisions of the Law

Sexual offences Act, cap 63A

Section 5 - Sexual assault

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—(i) any part of the body of another or that person; or (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body;

is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

Held

1. An accused was innocent until the prosecution proved its case beyond any reasonable doubt. To displace the presumption, the evidence of the prosecution ought to prove beyond reasonable doubt that the person accused was guilty of the offence charged.
2. The evidence on record revealed that appellant was not a stranger to the complainant. The offence was allegedly committed in broad day light and there was therefore no possibility that the appellant was confused for someone else. The minor’s evidence that the appellant inserted his fingers in her vagina was confirmed by the clinical officer who found her with bruises and a freshly broken home. Accordingly, the prosecution had proved a case of sexual assault contrary to section 5(1) of the Sexual Offences Act against the appellant.
3. With regard to the sentence meted, the appellant was treated as a first offender. The appellant was charged and convicted under section 5(2) of the Sexual Offences Act. A person convicted under that



- section was liable to imprisonment for a term of not less than ten years but which could be enhanced to life imprisonment.
4. The words “shall be liable to” did not ordinarily in their meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court. In other words, they were not mandatory but provided a maximum sentence only and while the liability existed, the court might not see fit to impose it.
 5. However, section 5(2) of the Sexual Offences Act used the phrases “shall be liable” and “not less than”. As a result, the suffered from the malady of poor legal draftsmanship since the two phrases implied, in legal terms, diametrically opposed positions. In criminal law, where there was an ambiguity in phraseology of sentencing the accused was entitled to the benefit of the least severe of the prescribed punishments for an offence.
 6. 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, it fell foul of article 28 of the Constitution which provided that every person had inherent dignity and the right to have that dignity respected and protected.

Appeal partly allowed.

Orders

Conviction of the trial court upheld. The 10 years’ sentence set aside and substituted with an imprisonment term of five (5) years which ought to commence from March 16, 2019 when the appellant was arrested.

Citations

Cases

Kenya

1. *DWM v Republic* Criminal Appeal 2 of 2016; [2019] KEHC 6260 (KLR) - (Explained)
2. *Gatimu, Elizabeth Waitibieni v Republic* Criminal Appeal 50 of 2012; [2015] KEHC 1136 (KLR) - (Explained)
3. *Kiilu & another v Republic* Criminal Appeal 113 of 2001; [2005] eKLR; [2005] 1 KLR 174 - (Mentioned)
4. *Masaku, Patrick Malombe v Republic* Criminal Appeal 45 of 2018; [2019] KEHC 11740 (KLR) - (Explained)

United Kingdom

1. *Miller v Minister of Pensions* [1947] 2 ALL ER 372 - (Explained)
2. *Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; (1936) 25 Cr App R 72 - (Explained)

Regional Court

1. *Kichanjele s/o Ndamungu v Republic* (1941) 8 EACA 64 - (Explained)
2. *Okeno v Republic* [1972] EA 32 - (Explained)
3. *Opoya v Uganda* [1967] EA 752 - (Explained)
4. *Pandya v Republic* [1957] EA 336 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya article 28 - (Interpreted)
2. Sexual Offences Act (cap 63A) sections 5(1)(2); 8(1)(2); 11(1) - (Interpreted)

Ms. Mwaniki Public Prosecution Counsel for the State



JUDGMENT

1. Josphat Muriungi (appellant) was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The offences were allegedly committed March 16, 2019 against PK a child aged 7 years.
2. Complainant stated that she was 9 years when he testified in 2022. She stated that appellant whom she referred to as Chris touched her vaginal area with his fingers causing her to bleed. Complainant's mother upon receiving complainant's report immediately escorted her to the police station where the complaint was booked and then to the hospital where complainant was examined.
3. A clinical officer examined complainant on March 22, 2019 and filled a P3 form with remarks that complainant had bruises on vaginal wall and freshly broken hymen. Subsequently, appellant was arrested and charged.
4. Appellant in his sworn defence denied the offence and stated that he was arrested after illicit brew was recovered from his house.
5. After considering both the prosecution and defence cases, the learned trial magistrate found the Prosecution had proved a case of sexual assault contrary to section 5(1) of the Act and on June 29, 2022 convicted and sentenced appellant to serve 10 years' imprisonment
6. Dissatisfied with both the conviction and sentence, appellant lodged the instant Appeal and raised 8 grounds which I have summarized into three grounds:
 - i. Prosecution case was not proved
 - ii. The period he spent in custody was not considered
7. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1957] EA 336 and *Kiilu & another v Republic* [2005]1 KLR 174.
8. An accused is innocent until the prosecution proves its case beyond any reasonable doubt. In the English case of *Woolmington v DPP* [1935] AC 462 in *Miller v Minister of Pensions* [1947] 2 All ER 372, the court held at page 373:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
9. The evidence on record reveals that appellant was not a stranger to the complainant. The offence was allegedly committed in board day light and there is therefore no possibility that appellant was confused for someone else.



10. The minor's evidence that appellant inserted his fingers in her vagina was confirmed by the clinical officer who found her with bruises and a freshly broken hymen.
11. From the foregoing, I find that the learned trial magistrate's finding that the prosecution had proved a case of sexual assault contrary to section 5(1) of the Act was well founded.
12. As regards the sentence, it is clear that the appellant was treated as a first offender. However, the court in sentencing the appellant was of the view that the offence carried a minimum prescribed sentence. In this case the appellant was charged convicted under section 5(2) of the *Sexual Offences Act* which states:
 - (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
13. Section 5(2) of the *Sexual Offences Act* applies the phrase is liable. Sir Henry Webb, CJ in *Kichanjele s/o Ndamungu v Republic* (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to":

"The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."
14. The predecessor of the court went further in *Opoya v Uganda* [1967] EA 752 at page 754 where Sir Clement DeLestang, VP picked up the conversation inter alia thus:

"It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."
15. A similar position was adopted in *DWM v Republic* (*supra*) where the court held that:

"As for the sentence the 1st appellate court properly addressed its mind to the operative words in section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."
16. In this case, however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. As a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, (See *Patrick Malombe Masaku v Republic* [2019] eKLR).



17. Mativo, J in *Elizabeth Waitibiegi Gatimu v Republic* [2015] eKLR stated as follows:

“The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.”

18. To extent that the *Sexual Offences Act* prescribes minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, falls foul of article 28 of the *Constitution* which provides that

“Every person has inherent dignity and the right to have that dignity respected and protected”.

19. In the end, I uphold the conviction. The 10 years’ sentence is however set aside and substituted with an imprisonment term of five (5) years which shall commence from March 16, 2019 when Appellant was arrested.

DELIVERED AT MERU THIS 2ND DAY OF FEBRUARY, 2023

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mwaniki (PPC)

