



**Tirop v Republic (Criminal Appeal E045 of 2021)  
[2023] KEHC 682 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E045 OF 2021  
JWW MONG'ARE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**KIMUTAI TIROP ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the conviction and sentence of Hon. D Milimu in Eldoret  
Chief Magistrate's Criminal Case No. E045 of 2021 delivered on 9th July 2021)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on the 14<sup>th</sup> day of December, 2018 in Turbo Sub County within Uasin Gishu County, he intentionally caused his genital organ (penis) to penetrate the anus of SK, a child aged 17 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 *Sexual Offences*.
2. The Appellant pleaded not guilty and the matter proceeded to full trial. Upon considering the testimony of the witnesses and the evidence adduced in court, the trial court convicted the Appellant on the main count and sentenced him to 20 years imprisonment.
3. Being aggrieved with the conviction and sentence the Appellant instituted the present appeal vide a petition dated 22<sup>nd</sup> July, 2021. The appeal is premised on the following grounds;
  - 1) That (I) am aggrieved the trial court erred in law and in fact as it failed to hold that the charge sheet was fatally defective.
  - 2) That the trial court erred in law and in fact as it failed to observe that the witness evidence was inconsistent and uncorroborated.



- 3) That (I) am aggrieved the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.
- 4) That, the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution back to the Appellant when the evidence failed to link him to the offence.
- 5) That other grounds will be raised during the hearing.

The parties filed submissions on the appeal.

### **Appellant's Case**

4. The Appellant submitted that the prosecution failed to prove the case to the required standard. It was his case that PW2, the complainant, reported the incident as having taken place on 24<sup>th</sup> December, 2018 whereas he had already been arrested by that date. Further, that PW5 stated that he had been arrested on 20<sup>th</sup> December, 2018 before the report had even been made, questioning where the police received news of the allegation from. He maintained that the case was shambolic as he was arrested before the report had been made. He urged the court to find that the medical evidence against him was weak and should not be admitted in evidence. He further submitted that the complaint was using revenge to implicate him because of a debt of Kshs. 45,000/- which he owed to the complainant.
5. The Appellant further submitted that his rights under article 50 of the *Constitution* were violated. It was his submissions that the court failed to apply or consider the time spent in remand during the hearing of the case, being two years and seven months, during sentencing. He urged the court to reduce his sentence or set the same aside.

### **Respondent's Case**

6. Learned counsel for the Respondent opposed the appeal and submitted that the charge sheet was not defective since it spelled out the statement of the offence as well as the particulars making it possible for the Appellant to understand the allegations against him well enough to plead to the same and put forth a defence. Further, that the Appellant failed to demonstrate how the charge sheet was defective.
7. Learned counsel further stated that the evidence put forth by the Prosecution was consistent and corroborated. She submitted that the ingredients for the offence of defilement to be proved, being identification, age and penetration were proved beyond reasonable doubt. Counsel argued that the sentence meted out by the trial court was commensurate to the offence and urged the court to uphold both the conviction and the sentence.

### **Analysis And Determination**

8. It is the duty of this court as a first appellate court is to re-examine the evidence (facts and exhibits) presented before the trial court and re-evaluate the same in order to determine whether the trial court erred in law and fact in the extent raised in the petition of appeal. (See *Okeno v Republic* [1972] EA 32), *Kiilu & Another v Republic* [2005]1 KLR 174) and *David Njuguna Wairimu v Republic* [2010] eKLR).
9. Upon consideration of the appeal and the submissions of the parties, the following issues emerge for determination;
  - 1) Whether the charge sheet was defective
  - 2) Whether the prosecution proved its case to the required standard



### Whether the charge sheet was defective

10. Section 134 of the [Criminal Procedure Code](#) provides;

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.

11. I have perused the record of the court and the charge sheet clearly stated the offence and the particulars of the offence. I find that the charge sheet had no defects as it contained the details necessary to enable the Appellant have reasonable information as to the nature of the offence charged.

### Whether the prosecution proved its case to the required standard

12. Section 8(1) as read with section 8(4) 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.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

It follows that the ingredients required to prove the offence are;  
AgePenetrationIdentification

13. From the court record I note that several witnesses were called to confirm and corroborate the evidence on the age of the complainant. The age of the complainant was proved by testimony of the complainant, the doctor who examined him and his father, and corroborated by the age assessment report. The clinical officer who testified as PW4 produced the P3 form as evidence in court and testified that the complainant had discharge in the anal area. The same was corroborated by the evidence of the complainant which was taken after the court conducted a voir dire examination of the minor by the court to confirm that the complainant being a minor was being truthful in his testimony. Clearly, from the evidence on record and the findings of the trial court I am satisfied that the medical findings were consistent with sodomy. The offence took place during the day and the complainant who was well known to the Appellant was able to identify him. Therefore it is clear that identification of the Appellant was by recognition and was uncontroverted. I note that the three important elements of the offence of defilement being penetration, identification and age of the minor were established by evidence and I am satisfied that the prosecution proved its case to the required standard and therefore find no reason to disturb the conviction.

14. The accused raised the issue of the dates when the matter was reported to the police. He alleged that the same was done while he had already been arrested and charged with the offence and wondered how the police connected him to the allegations. I have perused the record of the court and the testimonies of the witnesses and it emerges that the Appellant was arrested on 20<sup>th</sup> December, 2018 whereas the offence was committed on 14<sup>th</sup> December, 2018. Therefore, it is clear that the incident was reported well after the offence had been committed and not as alleged at all by the Appellant.

15. On sentencing, the term provided upon conviction by The [Sexual Offences Act](#) is of 15 years imprisonment as a mandatory minimum for the offence committed by the Appellant. I am alive to the emerging jurisprudence on mandatory sentences in sexual offences, specifically the findings in [Maingi](#)



5 others v Director of Public Prosecutions & another Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

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. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (Emphasis mine)

16. Upon consideration of the grounds of appeal and the circumstances of the case I find that the sentence meted out by the trial magistrate was commensurate with the offence and find no reason to disturb the same.
17. In the circumstance, the appeal is hereby dismissed. The Appellant will serve the sentence as meted out by the trial court.

**DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

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**J.W.W.MONGARE**

**JUDGE**

**Judgment delivered virtually in the presence of;**

1. Appellant present
2. Ms. Okok- Prosecution Counsel
3. Loayanae- Court Assistant

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**J.W.W.MONGARE**

**JUDGE**

