



**Runji v Republic (Criminal Appeal E054 of 2022)
[2023] KEHC 2492 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E054 OF 2022
LM NJUGUNA, J
MARCH 22, 2023**

BETWEEN

SIMON MACHARIA RUNJI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence
of Hon. W. Ngumi P.M. and delivered on 08.02.2022)*

JUDGMENT

1. This appeal arises from the judgment of the learned trial magistrate aforementioned. The appeal by the appellant challenges the said determination on the grounds set out on the face of his petition of appeal.
2. The case against the appellant is one of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, 2006. The particulars of the main charge being that on 07.12.2019 in Mbeere South Sub County within Embu County he defiled WGM a child aged 14 years.
3. He was also charged with 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 with particulars being that on 07.12.2019 in Mbeere South Sub County within Embu County committed an indecent act with a child aged 14 years by touching her breasts.
4. At the conclusion of the trial, the trial magistrate convicted the appellant in the main charge of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*, 2006 and sentenced him to serve 20 years imprisonment, as provided under the *Act*.
5. It is the said conviction and sentence that forms the basis of the instant appeal.
6. The court directed that the appeal be canvassed by way of written submissions which direction the parties complied with.



7. The appellant argued that the case was not proved beyond any reasonable doubt in that, the complainant did not link him to the alleged offence. That the hearing on 09.12.2022 was more probable than that of December 28, 2022 as the later was an afterthought. He argued that the prosecution was guilty of coaching the complainant to testify in a manner that led to his rights being infringed and contrary to the tenets of a fair hearing as provided for by the constitution. He contested that the complainant did not engage in any sexual activity and as such, the evidence by the investigating officer and the doctor were not reliable.
8. He argued that the sentence did not regard his dignity and further that, his defence was not regarded in meting out the sentence which went against the tenets of a fair hearing. Further that, the sentence did not take into account the circumstances under which the offence was allegedly committed. He thus prayed that the conviction be quashed and the sentence set aside.
9. The respondent submitted that upon the evaluation of the evidence of the prosecution witnesses, the trial court convicted the appellant of the main charge of defilement and sentenced him to serve twenty years imprisonment, a determination it fully supported. The prosecution submitted that the ingredients of the charge were proved. That on penetration, there was penetrative sexual intercourse as was submitted by PW1 who vividly gave details on how the appellant defiled her on her way from the shop. That PW4 who examined the complainant and the P3 and PRC Forms that were produced before the court showed that there was a broken hymen, forceful broken hymenal flap and presence of pus and visible epithelial cells. That all this proved that indeed, the complainant was penetrated. In regards to the age of the complainant, it was submitted that the complainant stated that she was 15 years old; PW2 later confirmed that the complainant was aged 14 years. That a birth certificate produced before the court captured the date of birth of the complainant as December 5, 2005 and as such, the complainant was aged 14 years at the time of the offence. Reliance was placed on the case of Faustine Mchanga v Republic [2012] eKLR.
10. On identification, it was submitted that PW1 testified that the appellant was the person who sexually assaulted her and the same was perpetrated during the day. It was the prosecution's contention that identification was by way of recognition and therefore, there was no chance of mistaken identity.
11. On sentence, it was its case that the appellant was convicted under section 8(3) of the Sexual Offences Act which stipulates a minimum and mandatory sentence of not less than twenty years imprisonment. In the end. It was stated that the grounds of appeal raised herein are not merited.
12. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
13. The elements of the offence of defilement 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.
14. 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 (*Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013).
 15. On the age of the complainant, the *Sexual Offences Act* defines “Child” within the meaning of the *Children’s Act* No. 8 of 2001 which defines a “Child” as “.....any human being under the age of eighteen years.”
 16. In the case of *Martin Okello Alogo v Republic* [2018] eKLR the court stated that:-

“On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See *Alfayo Gombe Okello v Republic* Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated:-

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1).....”
 17. The complainant in her testimony stated that she was 15 years old while PW2, who is her mother stated that the complainant was born on 05.12.2005. PW3 produced the complainant’s birth certificate which this court has perused and notes that the complainant was born on 05.12.2005 while the offence herein was committed on 07.12.2019. As such, the complainant was aged 14 years at the time when she was defiled. I am therefore convinced that the age of the complainant was determined appropriately.
 18. On penetration, the *Sexual Offences Act* defines “penetration” as
 3. the partial or complete insertion of the genital organs of a person into the genital organs of another person.
 19. Further, the Court of Appeal, in the case of *Sahali Omar v Republic* [2017] eKLR, noted that:

“.....penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*.”
 20. In the case herein, the complainant testified how the appellant forced her to have sex with him. That on the fateful day, the appellant removed her pant and skirt and thereafter proceeded to insert his penis into her vagina. That as he did so, he was holding her with his legs as he penetrated her vagina with his penis. In the same breadth, PW4 who examined the complainant also testified that the complainant’s hymen was broken and on HVS, there were epithelial cells 2 ++, the urine had pus cells and visible epithelial cells. It is therefore clear that the evidence adduced by the prosecution clearly showed that there was penetration.



21. On identification, the complainant stated that the appellant herein was a person known to her prior to the alleged incident. In the same breadth, PW2 also stated that the appellant was known to them for the reason that she had bought land from the appellant's father; of importance to note is the fact that the same was not controverted by the appellant. [See Lord Widgery, CJ comments in the case of *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552]. Further, the evidence of PW 1 shows that the incident took place during the day and even assuming that the complainant did not know the appellant, she could not have mistaken him as it was during the day.
22. It is my finding that the appellant was properly and positively identified by recognition based on the testimony of the prosecution witnesses including the appellant who confirmed that indeed the complainant knew him because PW2 had bought land from his father and additionally, that they were living at the same place until after the incident when PW2 decided to move to Ishiara.
23. Generally, the appellant's grounds of appeal lean towards the sentence by the trial court which he challenges as being excessive and harsh. But of importance to note is the fact that 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* 2006 which provides that upon conviction the offender shall be sentenced to imprisonment for a term of not less than twenty years.
24. The appellant urged this court to consider sections 216 and 329 of the *CPC* and mete out an appropriate and fair sentence. Against that backdrop, this court considered the same in light of *Phillip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General*, Odunga J (as he then was) and wherein it was stated that:

It is clear that minimum mandatory sentences prima facie do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances.
25. Further, the Kenya Judiciary Sentencing Policy Guidelines wherein it is appreciated that: whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for first offenders.
26. In light of the above, this court is alive to the fact that mandatory sentences are not unconstitutional in the sense that they may still be imposed but in deciding what sentences to impose, the courts must ensure that whatever sentence is imposed, the spirit of the *constitution* and the surrounding circumstances ought to be taken into consideration. [See the Court of Appeal in the case of *Dismas Wafula v Republic* [2019] eKLR]
27. Having in mind all the above, it is trite that a decision arrived at by a court of law should be justifiable taking into account the circumstances of the case. I say so for the reason that indeed, sentence discretion is a vital element of our law on sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts and merits. [See *Edwin Wachira and 9 Others v Republic* Constitutional Petition No. 97 of 2021].
28. In the case herein, 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* 2006 which provides that upon conviction the offender shall be liable upon conviction to imprisonment for a term of not less than twenty years.
29. The court notes the age of the appellant vis-à-vis that of the complainant. The appellant was aged 35 years when he committed the offence while the complainant was only 14 years. The appellant deserves



no mercy from this Honourable court. I find the sentence reasonable considering the age and the circumstances of this case. I find no reason to interfere with both the conviction and the sentence.

30. The appeal is hereby dismissed.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

