



REPUBLIC OF KENYA



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**Waweru v Republic (Criminal Appeal E075 of 2021)
[2023] KEHC 3387 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E075 OF 2021
LN MUGAMBI, J
APRIL 20, 2023**

BETWEEN

SAMUEL GITAU WAWERU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence by Hon. C.N. Mugo-SRM, pursuant to the judgment delivered on 14th August, 2019 in the Magistrate's Court at Gatundu Sexual Offences Case (S.O) Number 9 of 2018)

JUDGMENT

1. This appeal is against the conviction and sentence to 25 years' imprisonment for defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. It was alleged that on 26th January 2018 at Gatundu North Sub-county within Kiambu County intentionally caused his penis to penetrate the vagina of ANM a child aged 13 years old.
2. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11(b) of the *Sexual Offences Act* No 3 of 2006. It was alleged that on 26th January 2018 at Gatundu North Sub-county with Kiambu County intentionally and unlawfully touched the breast and vagina of ANM a child aged 13 years old with his hands.
3. The prosecution called a total of four witnesses. The defence called three witnesses.
4. On 14/8/2019, the trial court convicted and sentenced the appellant to serve 25 years.
5. The appeal was on the following grounds;



- a. That the trial court erred in law by failing to give due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case, thereby reaching a wrong decision and resulting in a miscarriage of justice.
 - b. That the court failed to record the reasons for believing that the complainant was telling the truth contrary to the provisions of Section 124 of the *Evidence Act*.
 - c. That the learned trial magistrate misapprehended the facts, applied wrong legal principles and drew erroneous conclusions to my prejudice.
 - d. That the learned trial magistrate erred in law and fact in finding that the prosecution had proved its case to the required standard and thereby failed to give the benefit of doubt to him.
 - e. That the learned trial magistrate erred in law and fact by drawing inferences from evidence which did not flow logically and reasonably from that evidence.
 - f. That the trial magistrate erred in law by failing to note that the burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice.
6. He prayed that the aforesaid conviction on defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No 3 of 2006 be quashed and sentence of 25 years be set aside.
 7. Annexed to the appellant's written submissions were amended grounds of appeal as follows;
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.
 - b. That the learned trial magistrate erred in law and fact by failing to find that the elements of the offence of defilement (identification) was not proved beyond reasonable doubt as required by law.
 - c. That the learned trial magistrate erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the appellant defiled PW1.
 - d. That the learned trial magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify.
 - e. That the learned trial magistrate erred in law and by prescribing a sentence not prescribed by the said Section 8(3) of the *Sexual Offences Act* hence harsh and excessive.
 8. The hearing of this appeal was by way of written submissions.

Appellant's Submissions

9. The Appellant filed his submissions and submitted on the five grounds of appeal. On ground one, he submitted that the charge was defective contrary to Section 134 of the *Criminal Procedure Code* and ought to have read contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No 3 of 2006. He invited the court to be persuaded by the case of *Jason Akumu Yongo v Republic* (1983) eKLR where the court expressed itself on the circumstances that would render a charge defective as such:

“a charge is defective under section 214(1) of the *Criminal Procedure Code* where:



- a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
 - b. It does not, for such reasons, accord with the evidence given at the trial; or
 - c. it gives a misdescription of the alleged offence in its particulars.”
10. He submitted that age forms a crucial ingredient of the offence of defilement because each sub-section describes a different sentence in respect of the age of the victim. In the instant case, he was charged with a section that prescribes a sentence of life imprisonment for committing offence of defilement with a child aged eleven years or less while the victim was 13 years at the commission of the offence. He stated that such kind of defect goes to the root of the form of the offence making the accused to prepare for a defence that did not reflect the evidence in record. It was his fundamental right of fair trial under Article 50(2)(b) of the *Constitution* of Kenya 2010 to understand in a clear and unambiguous terms the offence which he was charged in order to plead to the charge and effectively prepare his defence.
 11. On ground two, he submitted that it must be conclusively proved that the victim was a minor, a penetration of the victim’s genital organ and finally and more importantly that it is the accused person who had caused the alleged penetration. He said that the prosecution did not conclusively prove that it was the appellant who caused the alleged penetration. He stated that it was a malicious plot that fell on the face and the moment it went to court, the learned magistrate turned a blind eye on the same allowing suspicion to inform her judgment.
 12. On ground three, the appellant submitted that the prosecution’s case was riddled with material contradictions, discrepancies and inconsistencies. He said that PW1 stated that she was not going to school while the investigating officer stated that she was going to school hence was defiled on her way to school. The credibility of PW1 was questionable and independent evidence was needed to cure the lacuna. He submitted that the credibility of a key witness is so important that the Court of Appeal in the case of *Ndungu Kimanyi v Republic* 1980 KLR 282 held as follows:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”
 13. On ground four, the appellant submitted that the failure to call the crucial witnesses meant that the prosecution failed to demonstrate that the appellant is the man who actually defiled the minor. It was not disclosed why those crucial witnesses were not called.
 14. On ground five, he said that the sentence was given without considering the appellant’s mitigating factors which included his health conditions hence violation of his right to fair trial provided under Article 50(2)(p) of the *Constitution* and Section 216 and 329 of the *Criminal Procedure Code*. The provision under which the appellant was charged provides for *prima facie* mandatory minimum sentence of 20-years imprisonment. He continued that to give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating doubt. A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient and the accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. He humbly submitted that the evidence adduced fell short of the standard required in



a trial of this magnitude and the circumstantial aspects relied upon were disjointed and incapable of sustaining a conviction. He prayed that this court finds that the appellant has served time in prison and hence be released on time served or given a non-custodial sentence to go take care of his elderly father.

Respondent's Submissions

15. The Respondent filed their submissions on 20th January 2023 and submitted that for a trial court to safely convict a person accused of the offence of defilement, it must satisfy itself that the prosecution has established the following ingredients beyond a reasonable doubt: age, penetration and identification of the accused at the scene. On age, it submitted that the prosecution established all the foregoing elements to the required standard of trial. It cited the decision in *Kaingu alias Kasomo v Republic C.A.* 504 of 2010 where it was held:

“Approved modes of proof of age is through medical evidence where this is professionally determined by a medical doctor. Further approved modes through a birth certificate, clinical card as well as oral testimonies of parents and guardians.”

16. It submitted that documentary evidence was adduced to prove the age of the complainant by way of a baptismal card which showed that she was born on 1st July 2006. At the time of the incident she was 13 years old. The baptismal card was produced as P. exhibit 1.
17. On penetration, it was submitted that penetration was established through medical evidence by PW4 in the form of P3 Form (P.exhibit 3) which confirmed that there had been penetration into the complainant's genital organs. This corroborated the complainant's assertion that the appellant had caused his penis to penetrate her vagina. On the identification of the accused, it contended that the record is replete with evidence that identification of the appellant as the perpetrator of the act of defilement was proper as he was a familiar and a known person to the complainant, complainant's mother and the community at large. The State urged the court to reject the grounds of appeal advanced by the appellant as the same do not in any way shake the credibility of the trial nor poke holes in the prosecution case which was consistent. It submitted that the conviction was safe and the sentence meted was legal in the circumstances.

Analysis and Determination

18. 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.”

19. The issues that come up for determination in this appeal are;
- a. Whether the charge sheet is defective;
 - b. Whether the prosecution proved its case beyond reasonable doubt;



- c. Whether the sentence was excessive?
20. In determining whether a charge sheet is defective or not, the Court of Appeal in *Sigilani v Republic* (2004) 2 KLR, 480 held as follows: -
- “...The principle of the law governing charge sheets 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. Section 134 of the *Criminal Procedure Code* provides for what the components/ingredients of the charge sheet constitute as follows: -
- “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”.
22. The Court of Appeal in the case of *Isaac Omambia v Republic* [1995] eKLR, considered the ingredients necessary in a charge sheet and stated as follows:
- “...In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: 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...”
23. In the present case, the appellant was charged under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provides as follows:
- 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- 8(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.”
24. There is no doubt that the victim in this case was aged 13 years old when the alleged defilement occurred and this was corroborated by the baptismal card which was produced as P. exhibit 1. It showed the date of birth as 1/7/2006. The provision under which the appellant herein was charged carries a sentence of life imprisonment and the victim of the offence of defilement has to be a child aged 11 years or less.
25. This does render the charge sheet defective. The age bracket is only material in so far as sentence is concerned.
- Under Section 8(1), defilement is committed where:
- “A person commits an act which causes penetration with a child”
26. The age of complainant that was proved was 13 years. If she was sexually penetrated, it was defilement.



27. As long as evidence establishes that a child below 18 years of age was sexually penetrated, the offence of defilement is complete; specified ages in various sub-sections only affect the sentence which may be applied in accordance with the proved age hence cannot render the charge fatal.
28. I am emboldened in making this finding by the Court of Appeal in *JMA v R* [2009] KLR 671 which held that not all defects in a charge sheet will render a conviction invalid. It referred to the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], which held that:-
- “Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”
29. Further the Court of Appeal in *Benard Ombuna v Republic* [2019] eKLR held as follows:
- “In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?”
30. I have looked at the trial court record and evidence from the plea taking to the sentencing and there is no doubt that the appellant was aware that he was being charged with the offence of defilement. The trial court in its sentencing of the appellant gave a sentence of 25 years as opposed to the sentence of life imprisonment which Section 8(2) of the *Sexual Offences Act* imposes. I do not find that the appellant was prejudiced by the defect in the statement of the offence. He demonstrated through the trial that he was aware of the defilement charge against him and he prepared an appropriate defence against the charge of defilement. This ground of appeal fails.
31. On the second issue, the appellant has faulted the prosecution for failing to prove their case beyond reasonable doubt especially on the issue of identification. He said that the eye witness, one Esther Wanjiru, was not presented in court to testify. He stated that the narrative that he was the perpetrator of the alleged offence was based on the evidence of the victim, PW1. In the trial court, PW1 identified the accused by stating that he knew him well as her sister’s neighbour. When put to cross examination, the victim’s evidence remained firm. The offence took place in broad-daylight and took time starting from the time the perpetrator sent her to the buy cakes to the point he pulled her and took her to the house where he defiled her. PW3, the investigating officer in his testimony also said that the victim gave the name of the appellant.
32. Besides, PW2 who said he was the Nyumba Kumi representative testified that the appellant was known to him since his childhood. Immediately after the incident, he disappeared only to resurface five months later. In answer to questions on cross-examination, he told the appellant:
- “...You disappeared from home from January until may...”
33. I find that from the evidence of the victim she correctly and unmistakably identified the perpetrator who was well known to her. The subsequent conduct of the appellant of escaping from the home area immediately after the commission of the said offence is circumstantially consistent with a guilt mind.



Failure to call Esther Wanjiru an eye witness to also testify which the appellant hyped was not in my view fatal to the Prosecution case as evidence adduced already was enough to establish his participation beyond reasonable doubt. Section 143 of the *Evidence Act* provides that ‘No particular number of witnesses shall, in absence of any provision to the contrary, be required for prove of any fact...’

34. Additionally, I would not fault the trial court for finding that the evidence of the complainant alone was credible and truthful and could be acted upon pursuant to section 124 as based it on her observation of the demeanour while she testified.
35. The appellant stated that the trial court placed reliance on contradictory and inconsistent evidence. He highlighted the evidence of PW1 and PW3 as to where the alleged defilement occurred as contradictory. PW1 stated as follows in her evidence in chief:

“He pulled me by my hand to his house and placed me on his bed. He removed my pant and slept on top of me, he had removed his lower clothes i.e. trouser and under pant, he then inserted his penis in my vagina.”

PW3 stated as follows:

“I was told that ANM who was 13 years old was found on her way to school in the morning by accused who waylaid her and defiled her..... At the station the minor told me on her way to school she met the accused who took her to a tea plantation and defiled her.”

36. Inconsistencies are material if they go the root of the prosecution case and where they do occur, they ought to be resolved in favour of the accused. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated as follows with regard to contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

37. The Court of Appeal of Tanzania in *Dickson Elia Nsamba Shapwata & another v The Republic*, (Criminal. Appeal. No 92 of 2007) addressed the same issue of discrepancies and stated;

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.

38. Further, the Court of Appeal of Uganda in *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, stated as follows in regard to discrepancies and contradictions;

With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

39. The trial court did not address the apparent discrepancy between the evidence of the investigating officer and the victim as to where the defilement happened. Was it at the appellant's house or at the tea plantation? Nevertheless, one fact is clear, from the medical evidence adduced, the vaginal swap confirmed presence of spermatozoa, hence penetration and proof that defilement of the complainant had occurred. The complainant was categorical that she was not in school as she was babysitting her sister's child as the parents searched for another school for her. She an eye-witness and also the victim of that crime. Her own statement to the police was not proved to be inconsistent with her descriptive account of the incident or the scene of the same.
40. On the other hand PW 3 the Investigating Officer said, PW 3 said he 'I was told that ANM who was 13 years was found on her way to school'. He did not disclose who told him. He certainly did not. From the evidence, the appellant was arrested by Nyumba Kumi community members and handed over to Gachege Administration Police Post who then referred them to Kamwangi Police Station. Distortion in reports could have occurred in between those changes. The truthful account therefore remains that which was given by the complainant regarding how and where the incident occurred.
41. The last issue is on whether the sentence is excessive. The appellant has said that the sentence meted out on him did not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by the circumstances of the particular case as the minimum sentence provision denied the court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. The appropriate charge under which the appellant should have been charged is Section 8(1) as read with 8(3) of the *Sexual Offences Act* where the sentence is a term of not less than twenty years. The appellant herein was sentenced to 25 years.
42. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:
- “A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”
43. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
44. During sentencing, the Prosecution informed the Court that the accused was a first offender. In his mitigation, the appellant informed the Court that he was HIV positive and was on medication. He prayed to be forgiven.



45. In passing the sentence, the Court pronounced the same as follows:

“...I have considered the mitigation of the accused and the fact that he is a 1st offender. The court has however considered the prevalence of this offence in this jurisdiction and believes a deterrent sentence is deserved. The court also notes that in this case the victim was a young girl aged 13 years old and there is no doubt the beastly act will impact her for the rest of her life. In mitigation, the accused alleged he is HIV positive and knowing this he all went ahead to defile a young girl endangering her life. I find his actions heinous to say the least and deserving a punitive sentence. In the premises the accused is sentenced to serve 25 years imprisonment...”

46. From a reading of the above sentence one finds some words that clearly illustrate that the Court became emotionally involved instead of being the neutral sober arbiter even as it passed the sentence on the appellant. Sentencing is a critical part of the trial process as the court is also expected to pass a befitting and a fair sentence to the accused. Using words such as ‘beastly act’, ‘his actions heinous’ against the appellant demonstrated a hostile approach towards the appellant at this critical moment of meting the punishment on him at a time he expected the court’s utmost sobriety of mind.

47. Moreover, the record indicates that from date of plea to the date when the trial was concluded, the Appellant had spent all that time in custody yet the trial court made no mention of this fact in passing the sentence, which means it did not even consider this factor. Under section 333 (2) of the *Criminal Procedure Code*, he is entitled to that consideration.

48. I am further persuaded by the submissions by the Appellant that the jurisprudence in regard to mandatory sentences in sexual offences has shifted in favour of restoring the discretion of the Court in passing sentence as was held in the recent decision of the Court of Appeal sitting in Nyeri in Criminal Appeal No 84 of 2015- *Joshua Gichubi Mwangi v Republic* where their Lordships stated:

“... We acknowledge the powers of legislature to enact laws as established in the *Constitution*. However, the imposition of mandatory sentences by legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what Constitutes appropriate sentence yet it does not adjudicate particular cases hence it cannot appreciate the intricacies faced by judges in their mandate to dispense justice...

This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the judiciary in Article 160 of the *Constitution*. Further, the Judiciary has a mandate under Article 159(2)(a) and (e) of the *Constitution* to exercise judicial authority in the manner that justice be done to all and protect the purpose and principles of the *Constitution*. This includes provision of Article 25 which provides that right to fair trial is among the Bill of Rights that shall not be limited...”

49. I believe the trial court’s choice of words during sentencing depict an emotional attitude which implicitly could have negatively influenced it in determining the length of sentence instead of objectively reviewing every circumstance soberly to the extent that it even omitted to consider the period of time the appellant had spent custody as part of mitigating the sentence.

50. Consequently, in view of the foregoing and noting that the Court is not encumbered by minimum statutory sentences in line with the emerging jurisprudence, and taking note of the period that the



appellant remained in custody from 28/5/18 to the time he was sentenced on 14/8/2019; I do set aside the sentence imposed by the trial court of 25 years imprisonment and substitute the same with a term of imprisonment for fifteen (15) years imprisonment to run from the date the sentence was passed by the trial court.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF APRIL 2023.

L.N MUGAMBI

JUDGE

In presence of:

Appellant-

State/Respondent- Mr. Gacharia

Court Assistant- Alice

Court

This Judgement be transmitted digitally by the Deputy Registrar.

L.N. MUGAMBI

JUDGE.

