



REPUBLIC OF KENYA



KENYA LAW
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**Nkurumwa v Republic (Criminal Appeal 45 of 2018)
[2023] KEHC 17474 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 45 OF 2018**

**F GIKONYO, J
MAY 17, 2023**

BETWEEN

JONATHAN TEPELA NKURUMWA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence by Hon. H. Ng'ang'a
(S.R.M) in Narok SOA No. 11 of 2018 on 18.12.2018)*

JUDGMENT

1. This appeal is against the appellant's conviction, and sentence of life imprisonment imposed on December 18, 2018 for the defilement of the complainant- a girl aged 7 years.
2. The undated Memorandum of Appeal received in court on December 24, 2018 cited the following grounds;
 - i. That he pleaded not guilty to the charge.
 - ii. That the learned trial magistrate erred in law and fact by awarding a conviction and sentence in a prosecution case where age of the victim was not proved.
 - iii. That the learned trial magistrate erred in law and in fact by holding that penetration of the victim's genital was no evidence to prove the same.
 - iv. That the learned trial magistrate erred in law when he held that the offence of defilement was conclusively proved against the standard of prove was not to the required standards he relied on probabilities which is wrong in law.
 - v. That the appellants defence was not considered alongside the prosecution's evidence.



Directions of the court

3. The appeal was canvassed by way of written submissions. Both parties filed their written submissions.

Appellant's submissions.

4. The appellant submitted that the age of the complainant was not proved. That the birth notification bears the names JSM. The court was given a birth notification bearing the initials JNM. Therefore, the two documents were produced purporting to refer to one person.
5. He urged further that the sentence of life sentence meted on him was harsh and excessive as it was imposed by the trial magistrate without exercise of discretion.
6. The appellant urged this court to take into consideration the time spent in custody prior to conviction.
7. The appellant relied on the following authorities;
 - i. Section 3(1) of the *interpretation and General Provisions Act*.
 - ii. Article 260 of *the Constitution*.
 - iii. *Mwangi v Republic* (criminal appeal 84 of 2015) [2022] KECA 1106(KLR)
 - iv. *Boyo v Republic* (criminal appeal E007 of 2021)[2022] KEHC 10225(KLR)

The respondent's submissions.

8. The respondent submitted that age of the victim/complainant was proved during trial and it was never disputed.
9. The respondent submitted that the issue of penetration was proven beyond reasonable doubt at trial.
10. The respondent also submitted that the prosecution did prove the identity of the appellant as the perpetrator of the offence beyond reasonable doubt and therefore this could not be a case of mistaken identity.
11. According to the respondent, the sentence given to the appellant was indeed within the law.
12. The respondent relied on the following authorities;
 - a. *George Opondo Olunga V Republic* [2016] eKLR.
 - b. *Nahayo Syprian v Republic* [2016] eKLR.
 - c. Sections 2, and 8(2) of the *Sexual Offences Act*.

Analysis and determination.

Court's duty

13. As a first appellate court, the court will re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] EA 32
14. I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination to be;



- i. Whether the prosecution proved its case beyond reasonable doubt.
- ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

15. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006.
16. It was alleged that on March 7, 2017 in Narok North Sub-County within Narok county unlawfully and intentionally caused his penis to penetrate the Vagina of JSM a child 7 years.
17. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006.
18. It was alleged that on March 7, 2017 in Narok North Sub-County within Narok county unlawfully and intentionally rubbed his penis against the vagina of SJM a child 7 years.

Elements of offence of defilement

19. Section 8 (1) of the [Sexual Offences Act](#) establishes the offence of defilement as follows:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
20. Arising from the law, the specific elements of the offence defilement which he prosecution must prove beyond reasonable doubt are:
 - 1) Age of the complainant;
 - 2) Proof of penetration in accordance with Section 2(1) of the [Sexual Offences Act](#); and
 - 3) Positive identification of the assailant.

Age of the complainant

21. The prosecution must prove the victim of defilement is a a child- a person below the age of 18 years ([Children Act](#)). Notably, age of the child is also used as an aggravating factor for purposes of sentencing; the younger the child the more severe the sentence. See penalty clauses in SOA.
22. Was the age of the victim proved?
23. The appellant stated that the age of the complainant was not proved as required in law. He alleges that two different documents were produced purportedly on the victim.
24. The prosecution submitted that the age of the complainant was conclusively proved.
25. What does the law state of proof of age?
26. Proof of age is not necessarily a certificate. Other evidence may be adduced to prove age ([Fappyton Mutuku Ngui v Republic](#) [2012] eKLR).
27. Similarly: -

“The age of the victim in sexual offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. It can also be proved by medical age



assessment; direct evidence of parents or guardian or by observation by the court.” (*Nahayo Syprian v Republic* [2017] eKLR).

28. What does the evidence unveil?
29. The trial court conducted a *voire dire* examination of PW2 and came to the conclusion that she was possessed with sufficient intelligence and understood the duty to speak the truth.
30. PW 2 told the court that she was in class one.
31. The charged sheet indicated the minor to be 7 years old.
32. PW3, the victim’s mother produced a child health card and a birth notification (PEXh 3 and 4) which confirmed that the victim was born on 7/09/2010.
33. A P3 form produced in court further indicated that the victim was aged 7 years at the time of the incident.
34. I have perused the trial court record and the two documents produced in court. I have established that the acknowledgement of birth notification was produced in respect of JSM. The date of birth therein is indicated as September 7, 2010.
35. The health clinic card indicates the name of the child as JSM.
36. From the record I do not find any contradictory in the said documents.
37. Calculation upon these pieces of evidence show that, she was 7 years old at the time of the commission of the offence.
38. On the basis of the oral as well as documentary evidence adduced before court, I am satisfied that her age was proved beyond reasonable doubt. I find the age of the victim was 7 years at the time of the offence.

Penetration

39. The next hurdle is; whether there was penetration.
40. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
41. Penetration need not be deep nor only provable by the presence of spermatozoa. See explanations provided by the Court of Appeal in the case of *Mark Oiruri Mose v R* [2013] eKLR that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”
42. The appellant in his submission has not challenged the issue of penetration.
43. The prosecution submitted that penetration was proved to the required standards.
44. PW2 testified that the appellant found her at their home while playing with her friends. He chased away her friends and took her to a forest nearby where he removed her trouser. The appellant did ‘tabia



mbaya' to her. She felt a lot of pain and but the appellant warned to cut off her neck if she ever reported the incidence.

45. PW3 in her testimony confirmed that when her child walked into the house at around 6.00 pm on the material day, her trouser had blood on it. PW2 was crying and said it was an injury from barbed wire. She also had blood on her private parts. She took her to the hospital where she was examined.
46. PW1, a clinical officer also testified that upon examination of the complainant, he found that her hymen was broken. PW2 also had injuries to the perineal muscle with visible injuries on both the labia majora and minora. There was blood oozing profusely from the vaginal walls. He produced a P3 form and PRC form as P Exh 1 and 2 respectively.
47. PW1 was very clear that penetration did occur.
48. From the analysis of the evidence, evidence by PW2 of penetration-which she explained as an act tabia mbaya- was corroborated fully by the evidence of PW3 and PW1. Medical evidence was, and PW1 confirmed this- that there was penetration of the genitalia of PW2.
49. I accordingly find that the prosecution proved beyond reasonable doubt that there was a penetration of PW2- a child. But by whom?

Was the appellant the perpetrator?

50. The prosecution submitted that the identification of the appellant was beyond reasonable doubt and there was no mistaken identity.
51. PW2 confirmed knowing the appellant as someone from her home area and who used to operate cut wheat using a machine and was from the Nkurumwa family. She knew him as Kapila.
52. PW3 corroborated this evidence. She stated that she knew the appellant as he used to cut wheat using a harvester owned by her uncle.
53. The appellant in his defence gave unsworn testimony. He confirmed that his name was Jonathan Kipila Nkurumwa. He used to work as a wheat harvester using the harvester machine in the company of PW2's father. It was his defence that he had been employed to herd sheep by the complainant's father. He alleged to have asked for flour and the complainant's father told him to choose flour or money. He needed flour to cook as he waited for his salary at the end month. The complainant's father told him he will no longer work. The appellant stated that he was framed for the offence due to a grudge between him and the complainant's father relating to provision of flour for food. He also stated that there was a plan to take his land.
54. The defense did not cross examine the mother of the complainant, PW3 of whether there was preexisting grudge.
55. The defence was hollow and only intended to inject confusion in the proceedings. It lacked in material respect. It was mere claim that there was a grudge between him and the father of the complainant.
56. The evidence adduced established penetration of PW2 and was by a person know to PW2 and PW3. The person identified as the perpetrator is the appellant. This was identification by recognition. And, from the evidence that was adduced there was no possibility of mistaken identity.
57. The appellant was also placed at the scene of the crime.



58. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant caused the penetration of the complainant.
59. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.
60. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On sentence

61. The appellant submitted that the learned trial magistrate convicted and sentenced him to life imprisonment without exercising discretion. Therein lie a claim that the section prescribes a mandatory sentence.
62. The trial court applied Section 8 (2) of the *Sexual Offences Act* to convict. The section provides:
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.
63. The court takes the view that discretion in sentencing pertains to fair trial, and any law that deprives the court discretion in sentencing is inconsistent with *the Constitution*. And, any person who suffer this kind of deprivation in sentencing is entitled to relief on appeal or through review of sentence.
64. Section 8(2) of the *Sexual Offences Act* seem to prescribe a mandatory sentence. Nevertheless, by the command of *the Constitution*, it being an existing law, shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution (section 7 of the Transitional Provisions in the Sixth Schedule of *the Constitution*-art 261). These are tools or techniques of construction of statute which were provided by *the Constitution* to remove the necessity of striking down a provision of existing law which could be easily reconciled to *the Constitution*. I do think it was also meant to avoid paralysis of the law caused by downright striking of such law, but also, giving Parliament time to remove the offending elements in the existing law.
65. I therefore construe section 8(2) of the *Sexual Offences Act* to prescribe the maximum sentence. The court should therefore exercise discretion under the section and impose a sentence appropriate to the circumstances of the case and the offender.
66. The appellant should however establish his claim that he suffered deprivation of court's discretion in sentencing him. Or, the record should show the trial court did not exercise discretion and so imposed an arbitrary sentence.
67. What does the record show?
68. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider as such in sentencing.
69. Of important consideration: first, the victim of the offence is a child aged 7 years. This is a child of tender age. Doubtless, the said child will forever live with the shame and great mental trauma caused to him by this savage act of sexual debauchery. The trial court considered all these things.



70. I do note also that, this is a serious offence of which societal extreme desire is to get rid of society of these wickedness and sexual perversion- this has been expressed publicly and formally through enactment of the *Sexual Offences Act*. See *James Okumu Wasike* (2020) eKLR.
71. In aggravation the appellant took unfair advantage of the child to secure and satisfy his sexual desires on the minor. Such is quite egregious offence as was committed against a minor by an adult member of society who has a social obligation to protect children from such attacks.
72. It bears repeating that the penalties enacted in the *SOA* reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.
73. The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful.
74. It appears from the judgment of the trial court that the trial magistrate after considering mitigating factors found the minimum sentence to be the appropriate sentence in the circumstances and imposed a sentence of life imprisonment. He stated, thus: -
- I have considered the mitigation. Accused person treated as a first offender. He has been found guilty as charged. The accused committed a heinous act. The complainant, a child of tender years will live with the physical and emotional trauma for years. The offence attracts a minimum mandatory sentence.
- I sentence the accused to serve life imprisonment.....
75. Although the trial court mentioned that the offence attracts a minimum mandatory sentence, his consideration of the aggravating as well as mitigating factors show that he imposed life sentence as the appropriate sentence to the case and the offence. There is nothing to show that the trial court was tied to the prescription of the Act. The trial magistrate exercised discretion in sentencing the appellant.
76. In any event, this court considers life sentence to be appropriate sentence herein given the tender age of the child- 7 years-the manner the offence was committed, the intrusion and physical injuries inflicted upon her, the threats to her which were intended to conceal the offence, the post effects on the child, the seriousness of the offence, the need for justice to the victim child and the need to impose a deterrent sentence on such heinous offences.
77. The appeal on sentence therefore fails.
78. Accordingly the appeal on both conviction and sentence is dismissed.
79. It is so ordered

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 17TH DAY OF MAY, 2023.

F. GIKONYO M.

JUDGE

In the Presence of :

Appellant

Mr. Kasaso- CA

Ms. Mwaniki for DPP

