



**Mohamud v Republic (Criminal Appeal E016 of 2021)  
[2023] KEHC 20325 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E016 OF 2021**

**JN ONYIEGO, J**

**JULY 7, 2023**

**BETWEEN**

**OSMAN ABDI MOHAMUD ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon  
Mugendi Nyaga (S.R.M.) and delivered on 30.04.2021.)*

**JUDGMENT**

1. The appellant herein, Osman Abdi Mohamud was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act, 2006](#). The particulars of the main charge being that the appellant on September 16, 2020 at Handaki Location in Wajir South Sub County Wajir County in the Republic of Kenya intentionally caused his penis to penetrate the vagina of HSS, a child aged 7 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act, 2006](#) whose particulars were that on September 16, 2020 at Handaki Location in Wajir South Sub County Wajir County in the Republic of Kenya intentionally touched the vagina of HSS, a child aged 7 years with his penis.
3. 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(2) of the [Sexual Offences Act, 2006](#) and sentenced him to forty (40) years imprisonment.
4. The appellant in an undated petition of appeal filed on May 19, 2021 set out the following grounds:
  - i. The learned magistrate erred in law and fact by convicting the appellant while the prosecution witnesses and evidence was riddled with contradictions.



- ii. The learned magistrate erred in law and fact by convicting the appellant despite the prosecution failing to produce the complainant's soiled under pants.
  - iii. The learned magistrate erred in law and fact by convicting the appellant on PW1's contradicting testimony,
  - iv. The learned magistrate erred in law and fact by convicting the appellant without adequate evidence.
  - v. The learned magistrate erred in law and fact by convicting the appellant yet the prosecution had not discharged its duty of proving the case beyond any reasonable doubt.
5. It is the said conviction and sentence that formed the basis of the instant appeal.
  6. The court directed that the appeal be canvassed by way of written submissions which order the parties complied with.

### **The Appellant's submissions**

7. The appellant in his oral submission before the court categorically stated that he wished to abandon his submissions filed in November, 2022 and instead relied on the submissions filed in December, 2021. He thus submitted that the prosecution did not prove the case beyond any reasonable doubt and further, that the said prosecution evidence was riddled with contradictions.
8. It was argued that the evidence by the prosecution in regards to the soiled underpants of the complainants which was not produced before the court impacted greatly on the prosecution's evidence thus diminishing the proof of the case herein. Further, the appellant decried the fact that the trial court allegedly shifted the burden to him to prove his defence. In the end, the appellant urged this court to quash the conviction herein and set aside the sentence as meted out by the trial court.

### **The Respondent's Submissions**

9. The respondent submitted that upon evaluation of the eight witnesses, the trial court convicted the appellant herein of the main charge of defilement and sentenced him to serve forty years' imprisonment, a determination it fully supported. That the appeal herein is devoid of any merit. It was submitted that the evidence of PW2, who testified that she was aged six and further, PW4, a senior clinical officer who testified that the complainant was aged 7 while PW6 after having carried out an age assessment on the complainant approximating that the age of the minor was between 6 and 7 years was sufficient proof of age. Reliance was placed on the cases of *Hudson Ali Mwachongo v Republic* [2016] eKLR where the importance of proof of age was emphasized and Francis Omuroni v Uganda Criminal Appeal No 2 of 2000 where the Ugandan Court of Appeal held that in defilement cases, medical evidence is paramount in determining the age of the victim. That apart from medical evidence, age may also be proved by a birth certificate, the victims/ parents of guardian and or by observation and common sense.
10. On penetration, the respondent submitted that; PW2 testified that the appellant injured her on the leg area while pointing at her private parts; PW1 testified that the complainant bled from her private parts and further, the pant of the complainant was soiled with blood stains; PW4, a senior clinical officer equally testified that he examined the complainant wherein he confirmed that the complainant had been sexually assaulted and further produced the P3 and the Post Rape Care Forms which exhibited the injuries that the complainant had suffered to wit a vaginal tear, broken hymen with minimal bleeding and a cut of about 3 cm to the lower vagina.



11. On identification, it was submitted that the complainant clearly stated that the appellant herein is a person well known to her given that he was her neighbor and further, the incident allegedly happened during the day. That the same was corroborated by PW5 and PW1 who testified that the appellant was a person well known to them. In the end, this court was urged to dismiss the appeal herein for want of merit.

### **Analysis and determination**

12. I have considered the record of appeal, appellant's grounds of appeal, his submissions and those by the prosecution. Issues that arise for determination are; whether there was proof beyond reasonable doubt on the followings aspects; whether age of the complainant was ascertained; whether there was penetration; whether there was positive identification of the perpetrator.

13. 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.”

14. The specific elements of the offence of defilement arising from Section 8 (1) of the Sexual Offences Act which the prosecution must prove beyond reasonable doubt are: Age of the complainant; Proof of penetration in accordance with section 2(1) of the Sexual Offences Act; and Positive identification of the assailant. These position was succinctly laid out in the case of 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 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. PW6 also testified that the estimated age of the complainant after looking at the eruption of the primary teeth and further, a dental age assessment report, the same showed that the



complainant's age was between 6 and 7 years. In the same breadth, PW8, the investigating officer in his testimony stated that, he relied on the information provided by the complainant's parents to determine that the complainant was aged 7 years. The same notwithstanding, the P3 and Post Rape Care Forms also noted that the complainant was aged 7 years and therefore, the pieces of evidence presented herein were credible enough to ascertain that the age of the complainant herein was indeed 7 years. As such, I am therefore convinced that the age of the complainant was appropriately determined.

18. On penetration, the *Sexual Offences Act* defines "penetration" as  
"the partial or complete insertion of the genital organs of a person into the genital organs of another person"
19. The Court of Appeal, in the case of *Sabali 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 instant case, PW1 testified that on the material day, she was at home when PW5 Yussuf informed her that the appellant had taken the complainant. That on receipt of the information, she went up to the scene where she found the complainant lying down on her back and that she had been injured in her private parts as lots of blood was coming from her private parts. In the same breadth, the complainant also testified that the appellant had wronged her in the bushes. PW3, the complainant's mother also testified that upon being informed by PW1, she responded. That she found the complainant bleeding from her private parts.
21. PW4, the medical officer also testified that upon examining the complainant, he found that there was a forceful penetration on the vagina of the complainant and further formed the view that the probable weapon used was a physical violence in a process of defilement as alleged by the complainant. He thus produced the P3 and Post Rape Care Forms as Pex 3 and 4 respectively. From the evidence on record, I am satisfied that H.S.S was defiled and that there was improper, intentional and unlawful penetration of her vagina.
22. On positive identification, the complainant stated that the appellant herein had wronged her; PW5 also testified that the appellant slapped him on the face before carrying the complainant away. Further, the alleged offence herein happened during the day hence presence of sufficient light which aided visual identification. It was denied by the appellant and his witnesses that at the material time being between 8.00am to 2.00 p.m, together with his father, they had gone to graze goats. Further, the appellant's family and the complainant's family knew one another for quite some time. Having all these facts in mind that the offence was committed during the broad day light by a well-known person and a neighbor for that matter, it is unlikely that the complainant could have mistook the appellant for somebody else. Lord Widgery, CJ in the well-known case of *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552 had this to say on the aspect of recognition;  
"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."
23. It is my finding that the appellant in the instant case was properly and positively identified by recognition based on the testimony of the prosecution witness including HSS in that he was a person well known to the complainant. When Pw1 responded to the alarm, the complainant instantly told



her that she had been beaten by Osman. The court also did satisfy itself that the complainant and her brother pw5 were truthful despite having given unsworn testimony. Under Section 124 of the [Evidence Act](#), a court can convict based on the uncorroborated evidence of a single witness in sexual offences as long as the court is satisfied that the victim is truthful.

24. On grounds 2, 4 and 5 the appellant submitted that the prosecution did not prove its case beyond reasonable doubt. As indicated above, the trial magistrate in his judgment which I also agree with, the prosecution's evidence proved all the ingredients of the offence and further that, the defence did not raise or cast doubt on the prosecution evidence and as such, those grounds are hereby rejected.
25. On grounds 1 and 3, the appellant submitted that the prosecution evidence was riddled with contradictions. It is trite that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case.
26. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. The correct approach is to read the evidence tendered holistically.
27. In the case herein, the appellant submitted that PW1 upon finding the complainant, saw a man escape but did not see the man's face and therefore, it was contended that the assailant was not identified. Further, that the soiled panty that was allegedly worn by the complainant during the alleged incident was not produced before the court as evidence.
28. Upon examining the argument by the parties herein, I do hold the view that in as much as PW1's testimony was inconsistent, the same in my view did not go to the root cause of proof of the offence herein. I say so for the reason that what was required of the prosecution was to prove the essential elements of the charge herein of which in my view, the same were proved beyond any reasonable doubt.
29. The appellant did not submit on the sentence but that notwithstanding, I note that he asked this court to quash his conviction and thereafter set aside the sentence of 40 years' imprisonment. But of importance to note is the fact that the appellant herein was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act, 2006](#) which provides that upon conviction the offender shall be sentenced to life imprisonment.
30. It is trite that sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo v R, and [Wilson Waitegei v Republic](#) [2021] eKLR].
31. Further, the Court of Appeal for East Africa in the case of [Ogola S/O Owoura v Reginum](#) (1954) 21 270 as follows: -

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a



somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R*, (1950) 18 EACA 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky*, (1912) C.C.A. 28 T.L.R. 364."

32. In light of the above, this court notes that the trial court properly exercised its discretion given the circumstances of the case. However, given the extensive mitigation advanced by the appellant, I am persuaded to substitute the sentence of 40 years with 30 years' imprisonment to start running from the date of sentence. In so doing am guided by the holding in *Chigongo Dzuye vs Republic* CR.Appeal No 31 of 2022 Malindi where the court of Appeal reduced the sentence of life imprisonment with 30 years' imprisonment.
33. I therefore find no merit in the appeal herein against conviction which I hereby dismiss. As regards sentence, the same partially succeeds and partially fails to the extent stated herein above.

RoA 14 days

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**J. N. ONYIEGO**

**JUDGE**

