



**Korir v Republic (Criminal Appeal 48 of 2021)
[2023] KEHC 22874 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 48 OF 2021
JN KAMAU, J
SEPTEMBER 25, 2023**

BETWEEN

BONFACE KAMWARA KORIR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon S. O. Ongeru (PM) delivered at Vihiga
in Principal Magistrate's Court in SO Case No 2 of 2018 on 27th April 2020)*

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon S.O. Ongeru, Principal Magistrate who sentenced him to twenty (20) years imprisonment.
2. Being dissatisfied with the said Judgement, on 10th February 2021, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal.
3. His undated Written Submissions were filed on 2nd March 2022 while those of the Respondent were dated 5th December 2022 and filed on 8th December 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the trial court conducted a voir dire examination and if not, if the same rendered the trial a nullity;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.
7. The court dealt with the said issues under the following distinct and separate heads.

I. Voir Dire Examination

8. The Appellant submitted that there was serious miscarriage of justice as the Learned Trial Magistrate did not conduct the voir dire examination to establish if IA (hereinafter referred to as "PW 1") appreciated the importance of telling the truth under oath. The Respondent did not address itself to this issue.
9. Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 (Laws of Kenya) stipulates as follows:-

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”
10. In addressing what age would be appropriate for a trial court to conduct a voir dire examination, this court had due regard to the case of *Maripett Loonkomok v Republic* [2016] eKLR where the Court of Appeal found and held that children under the age of fourteen (14) ought to be taken through a voir dire examination. It rendered itself as follows:-

“...the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency



to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that; "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

11. Notably, the age at which a voir dire examination should be conducted depends on the circumstances of a particular case and was not cast on stone. Indeed, a court is obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a voir dire examination to determine if he or she should adduce sworn or unsworn evidence.
12. The ascertainment of whether such a witness understands the meaning of taking an oath cannot be taken lightly as an accused person can be convicted on the basis of sworn evidence of such a witness.
13. Bearing the aforesaid holding in mind, this court was of the considered view that the Trial Court ought to have conducted a voir dire examination in respect of PW 1 who according to the P3 Form and Certificate of Birth was aged thirteen (13) years at the material time.
14. Having said so, it does not always follow that a convicted person will be acquitted merely because a voir dire examination has not been conducted or properly conducted. This is because an appellate court has the power to order that a matter be referred for re-trial. Even so, a re-trial is also not automatic.
15. A re-trial should only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.
16. In this regard, this court fully associated itself with the holdings in the cases of *Ahmedi Ali Dharamsi Sumar vs Republic* [1964] E.A. 481 and re-stated in *Fatehaji Manji vs Republic* [1966] E.A. 343 that *Mutende and Thurani Jaden JJ* cited in the case of *Jackson Mutunga Matheka vs Republic* [2015] eKLR where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”
17. Bearing the aforesaid in mind and the fact that PW 1 adduced sworn evidence and was cross-examined extensively by the Appellant herein, the Appellant could not be said to have suffered any prejudice. If he suffered such prejudice, he did not demonstrate the same to this court.
18. The above notwithstanding, this court nonetheless deemed it prudent to analyse the evidence that was adduced in the Trial Court with a view to establishing whether or not this matter would be suitable for a



Re-trial, if at all, due to failure by the Trial Court to conduct a voir dire examination. The analysis of this evidence was critical because there were other witnesses who testified and the Appellant's conviction was not merely based on PW 1's evidence. This very court arrived at a similar conclusion in the case of Alfred Mugendi vs Republic [2017] eKLR.

19. While upholding the decision of this very court in the case of Ezekiel Mjomba Katu vs Republic [2014] eKLR, the Court of Appeal cited with approval AAM vs R (2016) eKLR and held that in an appropriate case where a voir dire examination was not conducted but there was sufficient independent evidence to support the charge, the court could still be able to uphold the conviction.

II. Proof Of Prosecution's Case

20. Grounds of Appeal Nos (1) and (4) were dealt with together under this head as they were both related.
21. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.
22. This court therefore considered if the Prosecution had proved its cases to the required standard, which in criminal cases is proof beyond reasonable doubt of the aforementioned ingredients of the offence of defilement under the following distinct and separate heads.

A. Age

23. The Appellant did not submit on the issue of age. On its part, the Respondent submitted that PW 1 was thirteen (13) years old.
24. A perusal of the Certificate of Birth showed that PW 1 was born on 20th October 2005. The offence took place on 10th August 2018. He was therefore aged twelve (12) years and ten (10) months at the material time of the incident and thirteen (13) years old three (3) months at the time he testified on 9th January 2019.
25. As the Appellant did not controvert and/or rebut PW 1's age, this court found and held that his age had been proven and that for all purposes and intent, he was a child.

B. Identification

26. The Appellant submitted that the charges against him by fabricated. He argued that the Prosecution failed to call crucial witnesses such as guards who were on duty at the ODM offices as they were obliged to record names of persons who visited their offices and the good samaritans who were said to have rescued PW 1. He pointed out that he was arrested three (3) months after the First Report and hence PW 1 could not have been able to have recognised him. He lamented that he had just arrived from Baringo the previous day only to be arrested for an offence he did not commit. He was emphatic that one could not recognise a stranger and that this was a case of misidentification. It was regrettable that the Respondent did not address this issue yet it was a very critical ingredient when proving a case of defilement.
27. Be that as it may, this court perused the evidence that was adduced during trial and the Appellant's Written Submissions and noted that the Appellant was arrested three (3) months after the incident. According to Sylvester Tuti Mutiku (hereinafter referred to as "PW 4"), the Enforcement Officer with the County Government of Vihiga, he was on duty when Violet Anyingo Achieng (hereinafter referred to as "PW 3") and PW 1 approached him and gave him an Occurrence Number relating to the Appellant who had entered into a Video shop.



28. He proceeded to the said Video shop and upon PW 1 picking out the Appellant from a group of about twenty (20) people, he arrested the Appellant. PW 3 who was PW 1's mother testified that PW 1 told her that he could recognise his perpetrator.
29. PW 1 confirmed that he was the one who showed the police where the Appellant was. He told the Trial Court that the Appellant approached him at about 5.00 pm and they walked together until about 7.00 pm when he (the Appellant) pulled him into a thicket where he sodomised him until about 9.00 pm.
30. PW 1 picked out the Appellant from a group of twenty (20) people in a video shop. This was almost three (3) months after the incident. In his sworn evidence, the Appellant stated that he saw PW 1 for the first time in court and that he did not know him previously. It was evident that since both the Appellant and PW 1 were strangers to each other, there was no motive that was established to show malice aforethought on the part of PW 1 or any of the witnesses with a view to fabricating the charge against the Appellant herein.
31. The fact that PW 1 was able to pick him out of a group of twenty (20) people confirmed how much trauma PW 1 he suffered and it was enough for him to continue looking out for his perpetrator until he saw him entering into a video shop almost three (3) months after the incident.
32. It is instructive to note that both the Appellant and PW 1 spent a considerable amount of time together on the material date of 10th August 2018. The lighting conditions from 5.00 pm- 7.00 pm were favourable. It was not necessary for the Prosecution to have called the guards from the ODM offices to identify the Appellant as he had suggested because he and PW 1 never entered the said offices because he asked PW 1 to show him where Bunyore Girls was.
33. The Appellant did not call any witness to corroborate his alibi that on the material date, he was at Maaga where he was staying with his relative called Njuguna.
34. Notably, PW 1 was not of such tender age as to have confused the Appellant with another person or a twin as the Appellant had purported to insinuate when he cross-examined him. If there was a twin, then the Appellant should have called him as a witness which could then have created doubt in the mind of this court as to whether PW 1 positively identified him as his perpetrator.
35. Taking all the facts into consideration, this court came to the firm conclusion that PW 1 positively identified the Appellant as his perpetrator on the material date and it was not a case of mistaken identity as the Appellant had contended.

C. Penetration

36. The Appellant pointed out that the Clinical Officer, Evans Karaga (hereinafter referred to as "PW 2") examined PW 1 on 11th August 2018 and 6th November 2018 and that his two (2) medical examinations yielded different reports.
37. He was emphatic that there was no evidence of penetration and that PW 2 erred for having the re-examination results to fill out the P3 Form. He questioned why if PW 2 had conceded that the bathing of PW 1 would have interfered with the clinical finds, bathing could not then have interfered with the clinical findings three (3) months down the line.
38. He asserted that PW 2 contradicted himself because in his evidence, he stated that blood stains were seen while in the P3 Form, it was indicated that no blood stains were seen. It was his submission that spermatozoa would also have been visible. He asserted that no significant results were found on his penis which was a clear indication that he did not penetrate PW 1's anus.



39. He also expressed doubt about the serious injuries PW 1 was alleged to have sustained. He argued that if it was indeed true that PW 1 sustained the said injuries, then he ought to have been taken to health hospital first instead of being taken to a dispensary. He also cast aspersions on PW 1's allegations because the muddy clothes he was said to have worn on the material date were not adduced as evidence in court.
40. On its part, the Respondent submitted that PW 2 adduced in evidence the P3 Form, PRC Form and treatment notes and confirmed that PW 1 had bruises and pain in the anus which was proof of penetration. It asserted that the Trial Court correctly noted in his decision that PW 1 did not consent to having sexual intercourse with the Appellant herein.
41. In both his examination-in-chief and cross-examination, PW 1 was steadfast that the Appellant penetrated his anus in a thicket. He informed PW 3 of his ordeal immediately he got home at about 9.00 pm and he was taken to hospital the following day. He was issued with a P3 Form.
42. PW 2 confirmed having examined him and found that he had bruises and pain in his anus which was evidence of penetration and thus confirmed it as a case of sodomy. He re-examined him three (3) months later and noted a scar on the rectal ring. He filled the P3 Form and the Post Rape Care (PRC) Form at this time.
43. When he was cross-examined, he confirmed that there were blood stains due to the laceration. He was emphatic that other factors could cause penetration of PW 1's anus but that the same were unlikely as penetration by a stone would give a different picture while penetration by a knife would give two (2) cutting points.
44. Notably, the proviso of Section 124 of the *Evidence Act* states that:-
- “Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis).”
45. However, a trial court must exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.
46. PW 1 was the only single identifying witness in the case. PW 2's evidence was that PW 1 had bruises, lacerations and pain in his anus. This corroborated PW 1's testimony that the Appellant actually sodomised him on the material date.
47. The Appellant's assertions that the Prosecution did not tender in evidence the muddy clothes PW 1 was wearing on the material date or PW 1 had bathed or that PW 2 examined him twice or that the examination on him did not yield any significant results or that there were contradictions in PW 2's evidence about blood stains in PW 1's anus was neither here nor there. The uncontroverted evidence of PW 2 was that PW 1 had been sodomised and PW 1 having identified the Appellant as



his perpetrator, the Trial Court arrived at the correct conclusion in convicting the Appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.

Conclusion

48. This court did not find any inconsistencies, gaps, discrepancies or contradictions on the part of the Prosecution's case and if there were any, the same were immaterial and irrelevant and did not weaken the Prosecution's case.
49. The Appellant's assertions that his conviction was based on circumstantial evidence did not find favour with this court. In fact, this court did not find other co-existing circumstances to weaken the inference of guilt on his part. His sworn defence was rebutted and did not outweigh the evidence the Prosecution tendered in court.
50. This court was thus not persuaded that it should set aside the Appellant's conviction and sentence merely because the Trial Court erred by not having conducted a voir dire examination of PW1. This is because it found and held that the Prosecution had proved its case against the Appellant herein to the required standard, which in criminal cases, is proof beyond reasonable doubt.
51. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

III. Sentence

52. Grounds of Appeal Nos (2) and (3) of the Petition of Appeal were dealt with under this head.
53. The Appellant submitted that the Trial Court erred in having failed to exercise its discretion while sentencing him to twenty (20) years imprisonment since the mandatory minimum sentence was unconstitutional as was held in the case of Jared Koita Injiri vs Republic No 93 of 2014 (eKLR citation not given). He also faulted the Learned Trial Magistrate for having failed to consider the period he spent in remand during trial as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
54. As pointed hereinabove, the Appellant herein was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* because PW 1 was about thirteen (13) years of age at the material time of the incident.
55. Section 8(3) of the *Sexual Offences Act* provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
56. Having convicted the Appellant herein, the Trial Court did not therefore err when he sentenced him to twenty (20) years imprisonment as that is what was provided by the law.
57. The above notwithstanding, this court took cognisance of the fact that there is emerging jurisprudence that the mandatory minimum sentences in defilement cases is unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.
58. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.



59. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing offences.
60. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
61. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
62. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the [Sexual Offences Act](#) prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of [the Constitution](#) of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
63. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
64. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
65. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to lower than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the [Sexual Offences Act](#).
66. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.
67. Turning to Section 333(2) of the Criminal Procedure Code cap 75 (Laws of Kenya). The said section provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).



68. The requirement under with section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
69. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide that:-
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
70. A perusal of the proceedings of the lower court show that the Appellant was arrested on 7th November 2018. He was convicted and sentenced on 27th April 2020. There was no indication that he was released on bond/bail while the trial was ongoing. This court therefore agreed with him that the Trial Court erred for not having taking the period he spent in remand while the trial was going on at the time of sentencing him.
71. In the premises foregoing, while Grounds of Appeal Nos (2) and (3) were not really merited because the Trial Court sentenced the Appellant to a lawful sentence under the *Sexual Offences Act*, this court nonetheless found that there was merit in setting aside the sentence of twenty (20) years in view of the emerging jurisprudence and the fact that he did not pronounce himself on the period the Appellant stayed in remand while the case was ongoing.

Disposition

72. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 10th February 2021 was partly merited and the same be and is hereby allowed. The Appellant’s conviction be and is hereby upheld as it was safe. However, his sentence of twenty (20) years that was imposed on him be and is hereby vacated and/or varied and/or set aside and reduced to fifteen (15) years imprisonment and the same to run from 27th April 2020.
73. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 7th November 2018 and 27th April 2020 when he was arrested and sentenced respectively be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
74. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE

