



**Kiambamba v Republic (Criminal Appeal E008 of 2024)
[2024] KEHC 13628 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E008 OF 2024
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

KENNETH MATIBA KIAMBAMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. R. G. Mundia, PM in the Chief Magistrate's Court at Embu Sexual Offence No. E022 of 2023 delivered on 10th January 2023)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with 8(3) of the *Sexual Offences Act* No. 3 of 2006. Particulars are that on diverse dates between 13th May 2023 and 20th May 2023 at [particulars withheld] village in Mbeti North location within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DMN, a child aged 13 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on diverse dates between 13th May 2023 and 20th May 2023 at [particulars withheld] village in Mbeti North location within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of DMN a child aged 13 years.
2. The appellant pleaded 'not guilty' to the charge and after hearing, he was subsequently convicted and sentenced to 20 years imprisonment.
3. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 26th January 2024, seeking orders that the appeal be allowed, conviction quashed and the sentence of 20 years imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:



- a. The learned trial magistrate erred in both law and fact by failing to consider that the appellant, being a first offender was entitled to and qualified for the benefit of the law as stipulated under articles 25(c), 27(1)&(2) and 28 of the *Constitution*;
 - b. The learned trial magistrate erred in both law and fact by failing to consider the provisions of sections 216 and 329 of the Criminal Procedure Code before sentencing in order to mete out a fair sentence;
 - c. The learned trial magistrate erred in both law and fact by failing to consider that failure to apply sections 216 and 329 of the Criminal Procedure Code amounted to discrimination, thus an unfair sentence; and
 - d. The learned trial magistrate erred in both law and fact by failing to consider that the imposed sentence is harsh and excessive as it ruins the remaining parts of the appellant's life, given his age and background;
4. A summary of the evidence adduced at the trial is as follows: PW1 was Dr. Godfrey Njuki Njiru of Embu Level 5 Hospital who stated that upon examination, there were no fresh injuries but there was evidence of penetration and the hymen was perforated. He produced the P3 and PRC forms as evidence. On cross examination, she stated that the victim told her that she had been defiled at the perpetrator's house.
 5. PW2 was the victim who testified after voire dire was conducted. She stated that she was born in 2010 and she produced her birth certificate as evidence. It was her testimony that on 13/05/2023 she met the appellant and his friend after school and he invited her to his house where he was going to charge his phone. That when they arrived at the appellant's home, he told her to remove her shoes and sit on the bed, then his friend left. That the appellant removed her trouser and his trouser and then he inserted his penis into her vagina.
 6. That she stayed at the appellant's house from 2.00 p.m. until 6.00 p.m when she returned home and that the appellant told her to be passing by his house on her way home from school.
 7. That on the 20/05/2023 at around 1400 hours she was again coming from school when she found the appellant sitted with a friend. He called her and asked her whether she had a phone and asked her, her name. That she went home and kept her school bag and went to the poultry coup and found two eggs, and she went to the farm.
 8. That as she was leaving the farm headed to the house, the accused called her and told him to accompany her and his friend whom he was with, to his house so that he could charge his phone. That the three of them went to his house and after his friend had left, the appellant asked her to sit on the bed. That the appellant also left but came back a short while later and locked the door and started caressing her on the breasts after which she went home but she did not tell anyone.
 9. At home, her father asked her where she had been and she told him that she was attending a birthday party and her father insisted that she takes him where the party was and she took him to the appellant's home but the appellant was not there. Her father started canning her with a stick and then took her to Embu Level (5) Hospital for pregnancy test. She was then placed on medication and he later took her to the police station.
 10. PW3 was LGN, the victim's father. He stated that he arrived home but found that his daughter was not at home. That he went to the farm which is about 400M away but his son told him that PW2 had not yet gotten home. That PW2 got home at around 6PM and said that she had gone to a birthday party and she showed him the venue but said that she had been warned that if she told anyone what



- had happened, she would be killed. That they went to the appellant's house but there was nobody in the house and he called the area chief who advised that he takes her to the hospital.
11. He stated that he took her to Embu Level 5 Hospital and then called her cousin to join them there. That he later went to the appellant's landlord who told him that there was no birthday party at the appellant's house. That he reported the matter to the authorities but by the time the police were going to apprehend the appellant the next day, they discovered that he had moved at night. That members of the public worked with the police to bring the appellant to book.
 12. PW4 was TNN, PW3' niece who also works at Embu Level 5 Hospital. She stated she was on duty when PW3 asked her to meet him at the outpatient department. That she met PW2 and PW3 and when she asked PW2 what had happened, she told her that she had gone to a birthday party where the appellant had done "tabia mbaya" to her. That the appellant had threatened to kill her if she told anyone about that day. That she was present when PW1 examined PW2 and later they reported the matter at Itabua Police Station.
 13. PW5 was PC Nancy Njeri of Itabua Police Station who was the investigating officer. She stated that a defilement case had been reported and on the same day, they were informed of a mob injustice incident. That they went to the scene where they found the man who had been reported as having defiled someone, was the one being beaten by a mob and he had sustained multiple injuries on the face and legs. That the man who had been assaulted was arrested and taken to Embu Level 5 Hospital. That she interviewed the victim and her father and recorded their statements. The appellant was charged with defilement after confirming the age of the victim from her birth certificate.
 14. At the close of the prosecution's case, the trial court found that the appellant had a case to answer and so he was placed on his defense.
 15. DW1 was the appellant, who stated that the allegations made against him are false and that the matter should be thoroughly investigated. On cross-examination, he stated that he knew the victim prior to the case and that he did not call her to his house at any point in time. That the victim does not know his name and that her father assaulted him.
 16. The trial court analyzed the evidence adduced and found that the elements of the offence of defilement had been proved beyond reasonable doubt and the appellant was convicted. He was sentenced to 20 years imprisonment, being the minimum sentence prescribed under section 8(3) of the *Sexual Offences Act*.
 17. The appeal was canvassed by way of written submissions.
 18. In his submissions, the appellant controverted the prosecution's evidence and demanded that the matter be thoroughly investigated since the evidence is based on falsehoods. He urged the court to consider the gaps in the prosecution's evidence and allow the appeal.
 19. The respondent submitted that the elements of the offence had been proved beyond reasonable doubt through the evidence adduced. It relied on the cases of *AML v. Republic (2012) eKLR*, *Faustine Mchanga v. Republic (2012) eKLR* and *Edwin Nyambogo Onsongo v. Republic (2016) eKLR*, where the courts held that sexual offences are proved through oral and circumstantial evidence and not medical evidence alone. It urged that the sentence meted out to the appellant was not excessive as the same is prescribed in statute.
 20. The issues for determination are as follows:
 - a. Whether the offence was proved beyond reasonable doubt; and



- b. Whether the sentence meted out to the appellant was excessive.
21. In the case of Peter Kifue Kiilu & another v. Republic [2005] KECA 335 (KLR), the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

22. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (3) of the [sexual Offences Act](#) provides as follows:

- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) 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.”

The elements of the offence are:

- a. The age of the complainant- that the complainant was a child;
- b. Penetration as defined under section 2(1) of the [Sexual Offences Act](#) happened to the child;
- c. The perpetrator was positively identified.
1. The victim’s age was established through her birth certificate which indicates that she was born in 2010 and at the time of the incident, she was 13 years old. The element of penetration was proved through the testimony of PW2, the victim, who stated that the appellant inserted his penis into her vagina. PW1 testified that upon examination, there was penetration without recent injuries but the hymen was broken.
 2. On the identity of the assailant, the victim stated that before the incident, she did not know the appellant and she knew him as Kevin. She stated that he started talking to her when she was on her way home from school and he told her to meet him at the bodaboda stand after dropping her schoolbag at home. That she told her to escort him to his house and that is where he defiled her. When it comes to identification of an assailant in sexual offences, section 124 of the [Evidence Act](#) provides that the testimony of the victim does not need to be corroborated where the court believes that the victim is telling the truth. In this case, the court believed the testimony of the victim, who was not a minor of tender age. In my view, this is sufficient evidence to identify the appellant as the assailant.
 3. The appellant, in his defense, stated that he did not know the victim prior to this case and he denied calling her. His testimony did not in any way place reasonable doubt



before the court. The evidence being wholesomely considered, it is my view that the offence was proved beyond reasonable doubt.

4. The final issue is whether the 20 years imprisonment sentence meted out to the appellant is should be set aside. The sentence is prescribed under section 8(3) of the *Sexual Offences Act* and the trial court applied it as such, considering the mitigating factors. The Supreme Court in the case of *Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain undisturbed/constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

“(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious.”

27. Bearing this in mind, there is no basis for reviewing the sentence imposed by the trial court.
28. For the foregoing reasons, the appeal herein lacks merit and the same is hereby dismissed.
29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

.....for the Respondent

