



**Ss v Republic (Criminal Appeal E013 of 2024)
[2024] KEHC 14336 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E013 OF 2024
RE ABURILI, J
NOVEMBER 12, 2024**

BETWEEN

AS APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment, conviction and sentence in Maseno SPM
SO Case No. E14 of 2021 delivered on 7/2/2024 by Hon. J.Kimetto, PM)*

JUDGMENT

1. The appellant herein Abdallah Salim was charged with the offence of defilement contrary to section 8 (1) (3) of the [Sexual Offences Act](#) No. 3 of 2006 the particulars being that on an unknown date in December 2020, at Kisumu West district of Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of H.H.A, a child aged 12 years old. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#).
2. The appellant pleaded not guilty to the charge and the prosecution called six (6) witnesses. Placed on his defence, the appellant gave an unsworn testimony.
3. In his judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was convicted and after the court considering mitigations tendered, as well as the victim impact report, the trial magistrate sentenced the appellant to serve 20 years imprisonment.
4. Aggrieved by the conviction and sentence imposed, the appellant filed this appeal on the 20th February 2024 raising the following grounds of appeal:



- a. That the trial magistrate erred in law and fact in conducting proceedings that violated the rights of I the appellant hence null and void.
 - b. That the trial magistrate erred in law and fact in arriving in a decision while relying on evidences that were full of contradictions and without analysing the same.
 - c. That the trial magistrate erred in law and fact in failing to put into consideration the defense alibi adduced by I, the appellant.
 - d. That the trial magistrate erred in law and fact in failing to appreciate that the prosecution case lacked value of independent witness.
 - e. That the trial magistrate erred in law and fact in considering extraneous factors in the decision making.
 - f. That the trial magistrate failed to appreciate that the minimum mandatory sentence under SOA No. 3 of 2006 has been declared unconstitutional, thus sentence of 20 years' imprisonment is harsh and excessive regarding the circumstances of this case.
5. The appellant filed supplementary grounds of appeal dated 20th August 2024 raising the following additional grounds:
- a. That the trial court erred in law and fact in not making a finding that penetration by the appellant was not proved beyond a reasonable doubt.
 - b. That the trial court erred in law and in fact in not making a finding that the age of the complainant was not proved beyond a reasonable doubt.
 - c. That the trial court erred in law and in fact in not making a finding that the appellant's sentence should run from the date of his arrest.
 - d. That the trial court erred in law and in fact in not making a finding that the mandatory nature of sentence under section 8 (3) of SOA No. 3 of 2006 is unconstitutional and not warranted on plea.
6. The appellant similarly filed written submissions dated 20th August 2024.

The Appellant's Submissions

7. It was submitted that the trial court erred in making a finding that penetration was proved beyond reasonable doubt as the complainant's oral evidence was not comparable to that of other prosecution witnesses. The appellant submitted that the evidence presented by the prosecution was contradictory, inconsistent and had discrepancies that could not stand the test of error.
8. It was further submitted that the convicting court did not see the evidence of the complainant and as such was not in a position to assess her demeanour.
9. The appellant submitted that the complainant's age was not proved as the birth certificate was produced unprocedurally thus denying him the right to object to its production as it was processed at the time of the offence thus the age therein was tampered with. The appellant thus submitted that this evidence was obtained in a manner that was tricky and in violation of his constitutional right pursuant to Article 50 (4).



10. It was submitted that the trial court failed to take into account the time spent in custody when sentencing him as he had been arrested on the 27.3.2021 with his bond being approved on the 13.5.2021 whereas he was sentenced on the 7.2.2024.
11. The appellant also submitted that the minimum mandatory nature of sentence under section 8 (3) of SOA was unconstitutional and not warranted on plea.
12. In court the appellant made oral submissions that he never wore a condom and neither did he commit the crime he had been convicted of. He reiterated that there was a dispute between himself and the complainant's father.

The Respondent's Submissions

13. Mr. Marete Principal Prosecution Counsel for the State made oral submissions opposing the appeal on conviction and sentence for reasons that the evidence was overwhelming that it was the appellant who defiled the complainant, who was his niece.
14. Mr. Marete further submitted that the appellant wore a condom and inserted his penis in the complainant's vagina and that her hymen was found not intact. He further submitted that the age of the complainant was proved to be 12 years old as per the birth certificate produced.
15. Mr. Marete submitted that the appellant's defence was considered and rightfully disregarded and further that the 20 years' imprisonment was lawful.

Analysis & Determination

16. The role of the first appellate court is now well settled as was stated in the case of *Okeno v R* [1977] E.A.L.R 32 and later in *Mark Oiruri Mose v R* [2013] eKLR among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
17. The evidence before the trial court was as follows: The complainant testified as PW1. It was her testimony that she was 13 years old. She testified that in January 2020, her mother left for Buoye leaving her with his father while her other siblings were taken to her grandmother. It was her testimony that her father came and went to the bedroom from where he called her and informed her that he wanted to have sex with her and that he would use protection.
18. She testified that her father started touching her breasts and vagina then stood and left for the bathroom. The complainant testified that she then ran to her grandmother's place but that she did not inform her grandmother what had happened. It was her testimony that her father followed her there and asked her why she had run away to which she responded by stating that she did not want to have sex with him. The complainant testified that her father told her to go shower and change her clothes.
19. The complainant further testified that in December 2020, her mother left her alone at home and at about 3pm, when she was mopping the bedroom, her father returned from work, pushed her on the bed, tied her mouth with a piece of cloth, went to the bathroom to put on a condom then came and raped her. She testified that her father told her not to report the incident or she would regret.
20. It was the complainant's testimony that while at school, she eventually informed the class teacher what had happened after which she was taken to Nyahera Hospital.



21. In cross-examination, the complainant stated that the appellant was the father that she had referred to in her testimony, that he was in essence her step father.
22. PW2, the complainant's mother testified that the appellant was her husband though not the complainant's biological father. She testified that she learnt of the incident at the complainant's school and that the complainant had informed her that she never wanted to report the incident for fear of being killed or chased away by the appellant. She produced the complainant's birth certificate as an exhibit. She testified that she had gone to the complainant's school to confront her about a love letter she found in her pocket when she was informed of the defilement.
23. PW3, the complainant's Scholl's Deputy Head Teacher testified that the complainant informed them about being defiled when she and her mother were confronting her over the love letter that the mother had found in her pocket. It was her testimony that the complainant informed them that she had been defiled more than twice. She reiterated her testimony in cross-examination.
24. PW4, the complainant's class teacher testified that during his C.R.E. class, he noticed the complainant suddenly turning gloomy and therefore, after the class, he interrogated her and she revealed and informed him that her father had been luring her into sexual act during the absence of the mother. He testified that he informed the complainant to inform the Deputy Head Teacher who was a lady.
25. PW5 Elizabeth Anyango Oketch, a Clinical Officer testified and produced the complainant's P3, Clinical Card and PRC forms. It was her testimony that she came up with the impression that the complainant had a history of sexual assault. She testified that she examined the complainant a week after the incident and she had changed her clothes but she noted that her hymen was not intact.
26. PW6, the investigating officer reiterated the complainant's testimony. She testified that she arrested the appellant who was identified to her by the complainant's mother.
27. Placed on his defense the appellant denied committing the offence. He testified that he and the complainant's mother had issues in their relationship and that she took advantage of that to major on the fact that she had been told of him defiling the complainant. In cross-examination, the appellant testified that his wife, the complainant's mother, had threatened his life and that the accusations of defilement brought against him were the manifestation of the said threat.
28. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:
 - a. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and
 - b. Whether the sentence imposed on the appellant was excessive and harsh or unconstitutional.
29. The appellant 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. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of *George Opondo Olunga v Republic* [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.



30. The appellant's identity is not in issue, he is the complainant's step father and had been living with the complainant for some time.
31. Regarding the complainant's age, she testified that she was 13 years old. Her mother, PW2, produced a birth certificate that showed that the complainant was born on the 19.4.2008 meaning that by the time of the offence the complainant was 12 years 8 months old.
32. The appellant impugned the said birth certificate on account that it was processed during the trial. However, a look at the said birth certificate that bears the serial number 109196 shows that the date of registration of the complainant's birth was on the 28.11.2014. In my view, this points to a very normal circumstance where many people have the births registered but some take time to collect the birth certificates. In any case, there was no evidence presented before the trial court and before this court to point at tampering of the said birth certificate.
33. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The complainant testified that she had sexual relations with the appellant sometime in December 2020 when the appellant forced himself on her.
34. On his part, the appellant denied committing the offence and in his submissions before this court he stated that the complainant's testimony was not corroborated by the evidence contained in the P3 form. The appellant further submitted that the prosecution evidence contained contradictions that should be interpreted in his favour.
35. Section 124 of the *Evidence Act* provides that:

'Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim 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 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.'
36. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW6-Elizabeth Anyango Oketch, the clinical officer as indicated in the P3 and PRC forms in which it was indicated that PW1's hymen had been broken. She however noted that the complainant was examined a week after the incident and had since changed the clothes worn on the date of defilement and cleaned up.
37. PW1, the complainant, was firm in her testimony that the appellant defiled her and subsequently threatened her not to say anything.
38. Despite the appellant's assertion that the convicting court erred in believing the evidence of the complainant though it did not have the privilege of seeing it and thus observing her demeanour, the convicting magistrate stated that he believed the testimony of the minor and her witnesses and stated that the narration was reliable and uncontroverted by the defence on cross examination.
39. This evidence adduced by the prosecution witnesses, compared with the defence by the appellant wherein he claimed that the complainant's mother, his wife, had fixed him because they had marital issues, I find that the appellant's defence is a mere denial and an afterthought. Furthermore, no issue



of a marital issue arose when PW2 was testifying and no question was put to her to suggest that she had marital issues with the appellant.

40. Further, I have considered evidence adduced by the witnesses for the prosecution as a whole and in my view, I find no material contradictions as alleged. PW2, PW3 and PW4 all testified that the complainant had written a love letter to a fellow student which was not in issue.

41. I therefore find no material contradiction in the evidence adduced by the prosecution witnesses. The Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR stated as follows on contradictions in evidence:

'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.'

42. Accordingly, in this case, I find that the assertions that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant. I therefore find that the prosecution proved the element of penetration beyond reasonable doubt.

43. On the allegation that the proceedings violated the appellant's right, I find no right to have been violated. On the whole, I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and that the conviction of the appellant for the said offence was sound.

44. As to whether the sentence was excessive, harsh or unconstitutional, the appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive in view of Article 50 (2) (p) of *the Constitution*.

45. Article 50 (2) (p) of *the Constitution*, 2010 provides that:

'Every accused person has the right to fair trial, which includes the right.

(p) To the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence.'

46. In *Alister Antony Pariera v State of Maharashtra*, as cited in the case of *Margrate Lima Tuje v Republic* [2016] eKLR the court held that:

'Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

47. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the



- Supreme Court Francis Karioko Muruatetu & Another v Republic [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with *the Constitution*.
48. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis. See Jared Injiri Koita v Republic [2019] eKLR.
 49. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of *the Constitution*. See Christopher Ochieng v Republic KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and Jared Koita Injiri v Republic, KSM CA Criminal Appe84567890al No 93 of 2014 [2019] eKLR.
 50. However, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated interalia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court.
 51. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8(3) of the *Sexual Offences Act* is lawful but not necessarily mandatory.
 52. Quite recently, in SCoK Petition No. E018 of 2023 – Republic v Joshua Gichuki Mwangi, the Supreme Court allowed the petition of appeal to the extent of setting aside the judgment by the Court of Appeal in Nyeri in which the Court of Appeal had declared [mandatory] minimum sentences for sexual offences unconstitutional in that they limit the discretion of the court. The Supreme Court also ordered that the Respondent convict should complete his 20-year sentence from the date of imposition by the trial court.
 53. The Supreme Court agreed with the submissions of the amicus curiae that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. The Court cited the amici's submissions on instances where courts have been influenced by myths, including that: attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability. The apex Court highlighted the comparative lessons from different jurisdictions as submitted by the amicus.
 54. Further, the Supreme Court held 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. The Supreme Court also distinguished between mandatory sentences and minimum sentences, where mandatory sentences leave no discretion for the judge to individualize punishment whereas minimum sentences set the floor rather than the ceiling.
 55. It held that although the term 'mandatory minimum' has been used in other jurisdictions, it is not applicable as a legally recognized term in Kenya. That a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different sets of meanings and circumstances.



56. Further, taking into consideration the circumstances of this case, the nature of how the appellant committed the offence I find no reason to interfere with the trial court's sentencing of the appellant.
57. The appellant also submitted that this court ought to look at the period spent in custody in computing the length of his sentence in line with Section 333 (2) of the Criminal Procedure Code. The charge sheet shows that the appellant was arrested on 27.3.2021 and granted bond on the 13.5.2021, it appears he was in custody for 1 month and 16 days.
58. In the circumstances, I find that in computing the sentence imposed on the appellant, the prison authorities shall consider the period spent in custody by the appellant from the date of arrest until the date of being released on bond which was 1 month and sixteen (16) days (46 days).
59. The upshot of the above is that the appeal herein against conviction is found to be devoid of merit and is dismissed. The appeal against sentence is equally dismissed. However, the sentence shall take into account the 46 days that the appellant spent in custody prior to his being released on bond.
60. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

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