



REPUBLIC OF KENYA



KENYA LAW
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**Sikawa aka Japhet v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 13807 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E008 OF 2023
F GIKONYO, J
NOVEMBER 5, 2024**

BETWEEN

EMMANUEL LETAYA SIKAWA AKA JAPHET APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. H.C. Maritim
(S.R.M) in Kilgoris CM SOA No. E033 of 2022 on 28.09.2022)*

JUDGMENT

1. The appellant is challenging conviction and 20 years' sentence imposed on him for the defilement of a 15-year-old girl.
2. He cited the following grounds of appeal in his petition of appeal dated 25/05/2023 and filed on 26/05/2023: -
 - i. The learned magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt against the appellant.
 - ii. The learned magistrate erred in law and fact in awarding the appellant an excessive sentence under the circumstances.
 - iii. The learned magistrate erred in law and fact by rejecting the defense by the appellant.
 - iv. The learned magistrate erred both in fact and law in analyzing the evidence before himself and hence arrived at a wrong finding.



Brief facts

3. The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006 and an alternative charge of indecent act with a child contrary to section 11(1) of the same act.
4. The particulars were that on diverse dates between January 2022 and 04/05/2022 in Transmara West Sub County within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LP a child aged 15 years.
5. On the alternative charge of indecent act with a child, the particulars were that on diverse dates between January 2022 and 04/05/2022 in Transmara West Sub County within Narok County intentionally and unlawfully touched the vagina of LP a child aged 15 years with his penis.
6. The appellant was tried and convicted on the main charge. The appellant was sentenced to 20 years imprisonment.

Directions of the Court.

7. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

8. The appellant submitted that he was 17 years old at the time of the incident and therefore should be given the benefit of doubt. The appellant relied on *Elizabeth Waithegeni Atimu v Rep* [2005] eKLR.
9. The appellant submitted that the trial court ought to have exercised discretion during sentencing considering the circumstances of the offence and the age of the appellant.
10. The appellant submitted that the trial court ought to have considered an alternative dispute resolution considering the circumstances of the offence.

The respondent's submissions.

11. The respondent submitted that the evidence of the age of the complainant remained uncontested. The respondent relied on a certificate of birth (P Exh1), evidence of PW1 and PW2, and *Francis Omuroni Versus Uganda*, Court of Appeal No. 2 of 2000.
12. The respondent submitted that the evidence produced during the trial proved the element of penetration beyond reasonable doubt. The prosecution relied on the evidence of PW1, PW3, and *Onzare Versus Republic* (Criminal Appeal 15 of 2023) (2024) KEHC 494(KLR) (25 January 2024)
13. The respondent submitted that the complainant knew the appellant well and for approximately 1 ½ years as her boyfriend eliminating any possibility of mistaken identity.
14. The respondent submitted that the trial court considered the conduct of the appellant in refusing to provide support to the complainant after conception despite intervention by the parents of both the complainant and the appellant. His mitigation was also taken into consideration. Therefore, there is no error in the sentencing. The respondent prayed that the sentence of 20 years be upheld.



Analysis And Determination.

Court's duty

15. First appellate court is obligated to 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
16. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
 - i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of defilement

17. 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](#) which provides:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) “A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years.”
18. 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:
 - 1) That the complainant was a child – was of age below 18 years;
 - 2) Penetration occurred of the complainant in accordance with Section 2(1) of the [Sexual Offences Act](#), see *Mark Oiruri Mose v R* [2013] eKLR; and
 - 3) The accused caused the penetration.
19. See the case of [Charles Wamukoya Karani v Republic](#), Criminal Appeal No. 72 of 2013.
20. PW1 testified that she was 15 years old and in form 1. She stated that she was born on 24/10/2007.
21. PW2, the complainant's mother confirmed that the complainant was to turn 16 that year.
22. PW4, the investigating officer stated that the complainant was 15 years old. He produced a certificate of birth as P Exh1.
23. Based on the evidence adduced, the age of the victim was 15 years at the time of the defilement.
24. PW1 in her evidence during the trial was that she knew the appellant in January 2021 and that it was the appellant who impregnated her. She was seven months pregnant. She stated that she had sexual intercourse with him.
25. PW3- the clinical officer did not see the need to conduct a vaginal examination since the girl was already pregnant.
26. Accordingly, the medical and other evidence support the claim that there was a penetration of the child.



27. The analysis of the evidence yields the conclusion that the prosecution proved to the required standard that penetration did occur of L.P.
28. But by whom?
29. PW1 testified that the appellant was her boyfriend and was responsible for her pregnancy. She used to visit the appellant at his house in [Particulars Withheld] estate and they would have sexual intercourse. The appellant was well known to her.
30. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled LP. The girl knew the appellant well and gave such a succinct account of the times and manner they had unprotected sex. This is a person she knew and trusted until she informed him that she had missed her periods. There was no mistaken identity whatsoever of the appellant as the person with whom she had sex.
31. Based on the evidence adduced, the appellant caused the penetration of LP.
32. The court, therefore, finds that the appellant was properly convicted on the charge of defilement based on evidence that proved the case against him beyond reasonable doubt.
33. In the upshot, the appeal on conviction is dismissed.

On sentence.

34. The relevant penalty clause under which the appellant was sentenced is Section 8 (3) of the [Sexual Offences Act](#) which section provides that:
 - 8(3) “A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years”.
35. The prosecution submitted that the sentence was within the law. And, the trial court duly exercised discretion in sentencing upon consideration of all relevant factors.
36. The appellant appears to argue that the trial court did not exercise discretion in sentencing due to the fetter placed by the minimum sentence prescribed in section 8(3) of the [Sexual Offences Act](#).

New Jurisprudence on Minimum Sentence

37. There is new jurisprudence from the Supreme Court; Minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. 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. [Republic v Joshua Gichuki Meangi And Initiative For Strategic Litigation in Africa \(ISLA\) And 3 Others](#) Supreme Court Petition No. E018 of 2023.
38. But, the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in ‘a proper case’, or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion towards ‘the ceiling’; whilst limiting the exercise of discretion below ‘the floor’ in sentencing; whether such an approach fits within the constitutional concept of least severe sentence; as well as what it means or entails that, ‘it is Parliament...that sets the parameters of sentencing for each crime in statute’; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and ‘legislative sentencing’.



39. The ‘proper case’ should not also be taken to mean that, there is no work that has been done on the subject of minimum or mandatory minimum sentences by courts, lawyers, and other multi-disciplinary eminent scholars and practitioners in Kenya. And, the wisdom in tapping into such a body of work as we craft the final hemming on the dress.

Was the Sentence Excessive?

40. Be that as it may, whereas a sentence should punish the offence as well as deter others from committing similar serious offences are important objects of punishment, it should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point of meaningful days of life

41. The trial court called for a pre-sentence report. She noted that the appellant was 22 years old and the complainant was 15 years old. At the time the relationship began the girl was 14 years. There is an age difference of about 7 years between the complainant and the appellant. The appellant had dropped out of school after circumcision. He has a history of a strained relationship with his father who was not his biological father. The girl had given birth. The boy's family had agreed to help her raise the child. The matter was discussed at the family level before it was reported to the police due to the appellant refusing to support the child.

42. The trial magistrate considered the gravity and the nature of the offence committed and found no reason to depart from the mandatory minimum sentence.

43. The court has also considered that the offence is serious. The victim was a child- she was 15 years old. She became pregnant as a consequence of this sexual predatory by the appellant; a deprivation of her innocence and plunging a child into motherhood status when not ready in age and mentally.

44. The manner the offence was committed was by taking advantage of a child. The child is likely to also suffer post-traumatic effects; from agonizing memories of the incident and rejection.

45. In addition, the prevalence of the offence of defilement justifies a deterrent sentence; 20 years’ imprisonment in this case serves the purpose. The sentence also offers the appellant an opportunity to be reformed and re-integrated back into society.

46. In the circumstances, the 20-year imprisonment sentence is upheld.

Conclusion and Orders

47. The appeal on conviction and sentence is dismissed.

48. It is so ordered.

49. Right of appeal explained.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 5TH DAY OF NOVEMBER, 2024.**

F. GIKONYO M.

JUDGE

In the Presence of:

1. CA – Nyangaresi



2. Appellant – present

3. Mr. Okeyo for DPP - present

