



REPUBLIC OF KENYA



**KENYA LAW**  
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**JOM v Republic (Criminal Appeal E023 of 2023)  
[2024] KEHC 16245 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16245 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E023 OF 2023  
JN KAMAU, J  
DECEMBER 16, 2024**

**BETWEEN**

**JOM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S. O. Ongeru (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 62 of 2019 on 29th June 2022)*

**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 was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was convicted by the Learned Trial Magistrate, Hon S. O. Ongeru (SPM), on the charge of defilement and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgment, on 14<sup>th</sup> August 2023, he lodged the Appeal herein. His Petition of Appeal was dated 2<sup>nd</sup> August 2022. He set out seven (7) grounds of appeal.
4. His Written Submissions were dated 3<sup>rd</sup> April 2024 and filed on 9<sup>th</sup> April 2024 while those of the Respondent were dated 22<sup>nd</sup> August 2024 and filed on 27<sup>th</sup> August 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.



## Legal Analysis

5. 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.
6. 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.
7. Having looked at the Appellant's Grounds of Appeal and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

### I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (2), (3), (4), (5) and (7) of the Petition of Appeal were dealt with under this head as they were all related.
10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
11. 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.
12. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

### A. Age

13. The Appellant did not submit on this issue. On its part, the Respondent only pointed out that it had proved its case beyond reasonable doubt by proving each of the three (3) ingredients of the offence of defilement.
14. Notably, the Complainant herein, SN (hereinafter referred to as "PW 1") testified that she was born on 25<sup>th</sup> August 2005 and that she was fourteen (14) years old at the time of the offence and fifteen (15) years old during the trial.
15. No 248292 PC Rebecca Cheruto (hereinafter referred to as "PW 3") testified on behalf of CPL Rael Ambasa who was the Investigating Officer but was away on training. She produced PW 1's Birth Certificate as exhibit in this case. The same showed that PW 1 was born on 28<sup>th</sup> May 2005.
16. This court took PW 1's birthdate to have been 28<sup>th</sup> May 2005 as that was what was indicated in the Birth Certificate and not 25<sup>th</sup> August 2005 as he had told the Trial Court. The offence herein was committed on 7<sup>th</sup> November 2019. She was therefore fourteen (14) years old at the time of the



incident. The Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut this evidence by adducing evidence to the contrary. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about fourteen (14) years old and was therefore a child at the material time.

## **B. Identification**

17. Both the and the Respondent did not submit on this issue. Notably, PW 1 testified that on the material date of 7<sup>th</sup> November 2019 at around 4.00 pm, she had gone to the house of her Aunt, one P who stayed at xxxxx . Her said aunt was to take her to another Aunt, one Jane Musimbi. She stated that she did not find P and she went to P 's neighbour, one Mama L and found one L who asked the Appellant if he could take PW 1 and he (the Appellant) agreed that that was his burden.
18. PW 1 further informed the Trial Court that she went with the Appellant up to his house at xxxx where they arrived at around 7.00p.m. She stated that she cooked and after eating, she slept in the sitting room while the Appellant slept in the bedroom. She testified that at night, the Appellant inserted her penis in her vagina and he covered her mouth. In the morning, he left at 5.00 am and left her Kshs 25/= to buy sugar.
19. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.
20. 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).”
21. Even so, a trial court was required to 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. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.
22. Although the incident took place at night, PW 1 and the Appellant knew each other as they were relatives. While PW 1 referred to him as uncle, the Appellant referred to her as aunt (to mean-niece). She stated that she was aware that the Appellant was married but that his wife was away that material night.
23. There could not therefore have been any possibility of a mistaken identity because both they were not strangers to each other. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.



## C. Penetration

24. The Appellant blamed the Trial Court for having disregarded his defence of alibi. He contended that the Prosecution ought to have called one Mama L as a witness to prove that she was with him on the material date and that she took PW 1 from her house.
25. The Clinical Officer, Michael Ochieng (hereinafter referred to as “PW 2”) confirmed that PW 1 was brought to him for examination with a history of being sexually assaulted by a person well-known to her. He observed that the vulva was swollen and had lacerations. There was presence of semen and her hymen was broken. He added that her vagina was reddish which was a sign of trauma. He opined that the probable weapon was human penis and there were signs of penetration.
26. He produced the Post Rape Care (PRC) Form, P3 Form and Treatment notes as exhibits in support of the Prosecution’s case. PW 3 reiterated the evidence of all the witnesses.
27. Section 108 of the *Evidence Act* Cap 80 (Laws of Kenya) states that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
28. Further, Section 109 of the *Evidence Act* stipulates that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
29. To rebut the Prosecution’s evidence, the Appellant was obligated to have called a witness to corroborate his alibi that he was on duty on the material day the burden of proof having shifted to him. His defence was simply a denial as he testified that he was on duty on the material date of 7<sup>th</sup> November 2019 without corroborating his alibi. His evidence was not watertight enough to displace the Prosecution’s inference of guilt on his part.
30. On the other hand, PW 1’s evidence was well corroborated by the oral evidence of PW 3 and by the scientific evidence that was tendered by PW 2 which confirmed recent penetration.
31. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt.
32. In the premises foregoing, Grounds of Appeal Nos (2), (3), (4), (5) and (7) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

## II. Sentencing

33. Grounds of Appeal Nos (1) and (6) of the Petition of Appeal were dealt with under this head.
34. The Appellant submitted that the Trial Court erred in not holding that the minimum mandatory sentence under Section 8(3) of the *Sexual Offences Act* was unconstitutional and unwarranted. In that regard, he placed reliance on several cases among them the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR without highlighting the holding he relied on therein.
35. He contended that if he was incarcerated without any possibility of his sentence being reviewed, there was risk that he could never atone for his offence. He urged the court to consider a least prescribed



sentence pursuant to Article 24(1)(e), 50(2)(p) of *the Constitution* of Kenya, 2010. He also urged the court to consider Article 25(c) of *the Constitution*.

36. He also cited Section 333(2) of the Criminal Procedure Code, Section 38(1) of the Penal Code and Clause 7.10 and 7.11 of the Judiciary Sentencing Guidelines and urged the court to consider that he was arrested on 9<sup>th</sup> November 2019 and had therefore been in custody for a period of two (2) years, five (5) months and twenty three (23) days before his sentencing.
37. On its part, the Respondent submitted that nothing barred the Trial Court from meting out the minimum mandatory sentence. It placed reliance on the case of Hillary Kipkirui Mutai vs Republic [2022] eKLR where in quoting the Supreme Court case of Francis Karioko Muruatetu & Another vs Republic Petition 15 of 2015 (eKLR citation not given), the court therein held that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.
38. It contended that the Trial Court considered the Appellant's mitigation before sentencing him. It urged the court to dismiss the his Appeal for lack of merit and uphold his sentence.
39. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

“ 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”
40. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.
41. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6<sup>th</sup> July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
42. Notably, 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 [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 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.
43. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.
44. However, in a decision that was delivered on 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.
45. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.



46. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
47. The said Section 333(2) of the Criminal Procedure Code stipulates 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).
48. Further, the Judiciary Sentencing Policy Guidelines 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.”
49. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
50. The Appellant was arrested on 9<sup>th</sup> November 2019. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 27<sup>th</sup> July 2022. He therefore spent two (2) years, seven (7) months and seven (7) days in custody before his sentence.
51. A perusal of the proceedings showed that the Trial Court did not consider the said period while sentencing the Appellant. This period therefore ought to be taken into consideration while computing his sentence.

### **Disposition**

52. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 2<sup>nd</sup> August 2022 and lodged on 14<sup>th</sup> August 2023 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.
53. It is hereby directed that the period between 9<sup>th</sup> November 2019 and 26<sup>th</sup> July 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
54. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 16<sup>TH</sup> DAY OF DECEMBER 2024**

**J. KAMAU**

**JUDGE**

