



REPUBLIC OF KENYA



KENYA LAW
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**Kioko v Republic (Criminal Appeal 13 of 2020)
[2024] KEHC 17072 (KLR) (Crim) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 17072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 13 OF 2020

AB MWAMUYE, J

DECEMBER 17, 2024

BETWEEN

RAPHAEL KIOKO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence of life imprisonment for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No 3 of 2006 at Milimani Law Court by Hon. Nanzushi (PM) delivered on 29th November 2019)

JUDGMENT

1. The Appellant was convicted in Sexual Offence Case No. 26 of 2018 at the Chief Magistrate's Court in Nairobi for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#), No. 3 of 2006. He was sentenced to life imprisonment.
2. Being aggrieved by both conviction and sentence, the Appellant lodged this appeal challenging the findings of the Trial Court. The appeal is premised on grounds inter alia that there were material contradictions in the prosecution evidence; that the Trial Court erred in assessing the credibility of witnesses; that the defence was not adequately considered; that the essential ingredients of defilement were not proved; and that the sentence was harsh and excessive.
3. The primary issue before this court is whether the prosecution proved the offence of defilement beyond reasonable doubt, specifically addressing the essential ingredients of defilement.
4. The offence of defilement is stipulated under Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. For a conviction of defilement to stand, the prosecution must establish the following key ingredients beyond reasonable doubt:



- a. The age of the complainant (victim).
 - b. Proof of penetration.
 - c. Identification of the perpetrator.
5. These ingredients were restated authoritatively in the landmark decision of Charles Wamukoya Karani v Republic [2015] eKLR, which held that each element must be conclusively demonstrated.

a. Proof of the Age of the Complainant

6. Proof of age is essential in defilement cases because punishment under Section 8 of the *Sexual Offences Act* is pegged on the age of the victim. In Francis Omuroni v Uganda [2000] EA 179, it was held that age must be proved by credible evidence such as a birth certificate or medical age assessment.
7. The Appellant contended that the prosecution failed to adequately establish the exact age of the complainant. Specifically, he challenged the reliability of the birth certificate tendered into evidence, submitting that it did not sufficiently meet the evidential threshold.
8. Conversely, the prosecution maintained that the age of the complainant was conclusively established through documentary evidence, particularly the birth certificate produced as evidence. They argued that the certificate was duly authenticated and legally sufficient.
9. In addressing proof of age, courts have consistently emphasized that age is fundamental to sentencing under the *Sexual Offences Act*. In Francis Omuroni v Uganda [2000] EA 179, a persuasive precedent often relied upon by Kenyan courts, it was established that the victim's age in defilement cases must be proven explicitly.
10. The Kenyan courts have affirmed this approach. In the Court of Appeal case of Kaingu Elias Kasomo v Republic [2010] eKLR, it was held that birth certificates or age assessment reports must clearly indicate the age of the complainant beyond reasonable doubt. It was further observed in Richard Wahome Chege v Republic [2014] eKLR, that any doubt regarding age must resolve in favor of the accused.
11. In the instant case, the birth certificate produced as an exhibit was authenticated and uncontested at trial stage. The Appellant raised no substantial objection or credible rebuttal evidence challenging the authenticity of the birth certificate beyond mere general assertions. Consequently, I find that the prosecution sufficiently proved the age of the complainant beyond reasonable doubt.

b. Proof of Penetration

12. The Appellant argued that the prosecution failed to conclusively establish penetration. He contested the medical evidence (P3 form) tendered by the prosecution, claiming it lacked specificity, was ambiguous, and insufficiently detailed to establish penetration conclusively.
 13. The respondent countered, asserting penetration was clearly demonstrated through direct testimony of the complainant, corroborated by the medical evidence tendered. The prosecution relied on the doctor's testimony, supported by the medical report, clearly indicating evidence consistent with sexual penetration.
- Proof of penetration is central to proving defilement. Section 2 of the *Sexual Offences Act* defines penetration as the "partial or complete insertion of the genital organs into the genital organs of another person."



14. In *Mark Oiruri Mose v Republic* [2013] eKLR, the Court of Appeal underscored that penetration can be conclusively proven through the credible testimony of the victim, supported by medical evidence. This principle was similarly adopted in *Erick Onyango Odeng v Republic* [2014] eKLR, highlighting the role of medical evidence as corroborative, though not mandatory if testimony is deemed credible.
15. The complainant's evidence was clear, coherent, and consistent, describing the manner of defilement explicitly. Moreover, the P3 form presented by the medical practitioner documented physical injuries consistent with sexual penetration. Such testimony was corroborative of the complainant's assertions.
16. Accordingly, the prosecution effectively established penetration beyond reasonable doubt.

b. Identification of the Perpetrator

17. The Appellant vehemently denied being the perpetrator of the offence, contending that he was wrongly identified due to poor lighting conditions and potential confusion or mistaken identity.
18. The prosecution submitted that identification was not in dispute. They argued that the complainant clearly identified the Appellant as a person known to her before the incident, thus ruling out any likelihood of mistaken identity.
19. Identification is crucial and must be free from error. The principles guiding identification evidence were firmly set out in *Cleophas Otieno Wamunga v Republic* [1989] KLR 424, which emphasized that evidence of identification must be examined with great care to eliminate the possibility of mistaken identity.
20. Further guidance was given by the Court of Appeal in *Anjononi & Others v Republic* [1980] KLR 59, where the court held that recognition of a familiar person is more reliable than identification of a stranger.
21. In this case, the complainant knew the Appellant before the incident. Her testimony during trial demonstrated certainty and consistency in identifying the Appellant, which substantially reduces any likelihood of mistaken identification. No credible evidence was produced to suggest an error or mistaken recognition.
22. Thus, the court finds that the identification was reliable, accurate, and satisfactorily proven beyond reasonable doubt. In *Wafrana Juma v Republic* [2014] eKLR, the Court held that where all ingredients of the offence are proved to the required standard, the conviction must stand.
23. The Appellant was sentenced to life imprisonment upon conviction for defilement under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. However, a closer examination of the complainant's age reveals that she did not fall within the bracket envisaged under Section 8(2), which applies only where the victim is aged eleven years or younger. From the evidence on record, the complainant's age was between twelve and fifteen years, thereby attracting punishment under Section 8(3), which provides for a minimum sentence of twenty years. Therefore, the trial magistrate misdirected himself in law by invoking Section 8(2) and imposing a life sentence, which was not only excessive but also legally untenable.
24. In addition to the statutory misapplication, the court failed to exercise judicial discretion in sentencing, which is a fundamental requirement under Kenyan jurisprudence. In the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal clarified that while minimum sentences under the *Sexual Offences Act* are constitutional, courts are not barred from considering mitigating and aggravating circumstances to determine an appropriate sentence above the minimum. Importantly, the Trial Court offered no justification or reasons to support the imposition of the maximum sentence. In



line with the sentencing principles espoused in *Francis Karioko Muruatetu v Republic* [2017] eKLR, even where minimum sentences are prescribed, the punishment imposed must be proportionate, individualized, and guided by the totality of the circumstances.

25. The record reveals that the Appellant was a first-time offender, and there was no indication of violence or aggravating conduct beyond the act of defilement itself. The principle of proportionality, which was reaffirmed in *Jackson Mwanzia Mutuku v Republic* [2019] eKLR, demands that punishment must be measured not only against the crime but also the offender's circumstances. In that case, the Court substituted a life sentence with a term of thirty years where the complainant was not under eleven years and no compelling reasons for maximum sentencing had been advanced. It is trite law that excessive punishment offends Article 50(2)(p) of *the Constitution*, which guarantees the right to the benefit of the least severe of the prescribed punishments.
26. Further, the sentencing court did not comply with Section 333(2) of the *Criminal Procedure Code*, which requires that where an accused person has been held in custody prior to sentencing, that period must be taken into account. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR emphasized that failure to consider the period spent in custody amounts to a violation of the accused's fair trial rights. In the present case, the Appellant had been in pre-trial custody throughout the trial, but no credit was given for that period during sentencing. It is the duty of the appellate court to remedy such omissions and ensure that justice is served both procedurally and substantively.
27. In view of the above considerations namely the complainant's age, the inappropriateness of the life sentence, the absence of aggravating factors, the Appellant's first-offender status, and the requirement to consider pre-trial custody under Section 333(2) of the CPC this Court finds it just and proportionate to interfere with the sentence. Accordingly, the sentence of life imprisonment is set aside and substituted with a term of thirty (30) years' imprisonment, to run from the date the Appellant was first taken into custody. This sentence meets the threshold of legality, proportionality, and procedural fairness.

Conclusion

28. Having carefully re-evaluated the evidence on record, considered the submissions by both the Appellant and the respondent, and applied the relevant legal principles and precedents, this Court is satisfied that the prosecution proved the offence of defilement against the Appellant beyond reasonable doubt. The complainant's age was sufficiently established through documentary evidence, the act of penetration was credibly testified to and medically corroborated, and the identification of the Appellant was based on recognition, thereby eliminating any possibility of mistaken identity.
29. However, the Trial Court erred in law by sentencing the Appellant to life imprisonment under Section 8(2) of the *Sexual Offences Act* without establishing that the complainant was eleven years or younger. The evidence placed the complainant within the age bracket envisaged under Section 8(3), and no exceptional circumstances were shown to warrant the maximum sentence. Further, the Trial Court failed to take into account the period the Appellant spent in custody prior to sentencing, contrary to the provisions of Section 333(2) of the *Criminal Procedure Code*.
30. It is trite that sentencing must be lawful, fair, and proportionate to both the offence and the offender. In the circumstances of this case, and guided by the applicable statutory framework and judicial authority, this Court finds it appropriate to interfere with the sentence imposed by the Trial Court. The ends of justice will be adequately served by substituting the life sentence with a custodial term that reflects both the seriousness of the offence and the mitigating factors in the Appellant's favour.



31. For the foregoing reasons; the upshot of this court's decision is that the Appellant appeal is partly merited. The conviction is upheld as the same was safe. However, the sentence of life imprisonment that was imposed on him, be and is hereby set aside and /or vacated and is substituted with an order that the Appellant be and is hereby sentenced to a term of thirty (30) years' imprisonment, to run from the date the Appellant was first taken into custody, in accordance with Section 333(2) of the [Criminal Procedure Code](#).

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH OF DECEMBER 2024.

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BAHATI MWAMUYE

JUDGE.

In the presence of:-

Appellant – present at Kamiti Maximum

Counsel for the Respondent: Mr. Mwandawiro

Court Assistant: Ms. Neema.

