



REPUBLIC OF KENYA



**Laboso v Republic (Criminal Appeal E006 of 2023)  
[2024] KEHC 15561 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15561 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
CRIMINAL APPEAL E006 OF 2023  
F GIKONYO, J  
DECEMBER 4, 2024**

**BETWEEN**

**WILSON CHERUIYOT LABOSO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence of Hon. M.I.G. Moranga  
(S.P.M) in Kilgoris CM SOA No. E012 of 2021 on 19.04.2023)*

**JUDGMENT**

1. The trial court convicted the appellant and sentenced him to serve 18 years imprisonment for the defilement of a 13-year-old girl.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide a memorandum of appeal dated 04/05/2023. The appellant filed grounds of appeal as follows;
  - i. That the learned magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt.
  - ii. That the learned magistrate erred in law and fact in finding sufficient proof of penetration.
  - iii. That the learned magistrate erred in law and in fact in relying on uncorroborated evidence of the complainant.
  - iv. That the learned magistrate erred in law and in fact in disregarding the whole evidence of the defence.



### **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 March 2021 and 16/05/2021 in Transmara West Sub County within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DK a child aged 13years.
5. On the alternative charge of indecent act with a child, the particulars were that on diverse dates between March 2021 and 16/05/2021 in Transmara West Sub County within Narok County intentionally and unlawfully touched the buttocks, breast, and vagina of DK a child aged 13 years with his penis.
6. The appellant was tried and convicted on the main charge. The appellant was sentenced to 18 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 the trial court did not accord him a fair trial since he was not represented by an advocate given the seriousness of the offence. The appellant relied on Article 50(2) of the *Constitution*.
9. The appellant submitted that a DNA test was not conducted to confirm the paternity of the unborn child. The appellant relied on section 36(1) of the *Sexual Offences Act*, Robert Murunga Mumbi Vs Republic Criminal Appeal No. 52 Of 2014, Boniface Kyalo Mwololo V Republic Court of Appeal at Nairobi Criminal Application No. 1 Of 2006, and Ramkrishina Denkray Pandya V Rep Appeal No. 06 of 1190 EACA 93,
10. The appellant submitted that the sentence meted upon him was too harsh and excessive and not comparable to decisions rendered in respect of comparable offences. The appellant relied On S Vs Magsa [2001] (2) SCA) 1235, Fredrick Otieno Odero V Republic [2021] eKLR, Alister Antony Pereira V State of Maharashtra, Eliud Waweru Wambui V Republic [2009] eKLR Appeal No. 102 Of 2016, Gillick Vs West Norfolk And Wisbech Health Authority (1985) 3 All ER 402, Petition No. E017 of 2021 Maingi & Others Vs Republic.

### **The respondent's submissions.**

11. The respondent submitted that the minor's testimony as to her age supported by that of PW2, her mother, and the certificate of birth prove that the complaint was aged 13 at the time of the offence. The respondent relied on a certificate of birth (P Exh5), evidence of PW1 and PW2, and Francis Omuroni Versus Uganda, Court of Appeal No. 2 of 2000.
12. The respondent submitted that the medical evidence corroborates the complainant's testimony that she was indeed defiled. 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 had intimate knowledge of the appellant and there is no chance that she may have mistaken him for someone else as the person who defiled her. The respondent relied on the evidence of PW1.
14. The respondent submitted that the trial court duly considered the evidence presented during the appellant's defense but found that it did not shake the prosecution case. Therefore, the trial court considered and weighed the appellant's defense.

### **Analysis and Determination.**

#### **Court's duty**

15. AS first appellate court, will re-evaluate the evidence and make own conclusions except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 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 is a child-Age of the complainant;
  - 2) Penetration 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 of the child.
19. See the case of *Charles Wamukoya Karani Vs: Republic*, Criminal Appeal No. 72 of 2013.
20. PW1 testified that she was 13 years old and in class 5.
21. PW2, the complainant's mother confirmed that the complainant was in class 5 and was born in 2008.
22. PW4, the investigating officer stated that the complainant was 13 years old. He produced a certificate of birth as P Exh 5.
23. Based on the evidence adduced, the age of the victim was 13 years at the time of the defilement.



24. PW1 in her evidence during the trial was that she went to the appellant's house where they had sex. She returned home the next day. As a result, she was pregnant.
25. PW3- the clinical officer stated that the complainant was approximately 9 weeks pregnant as of 20/05/2021 per the ultrasound test. Her hymen was broken. She concluded that she had been defiled and she had conceived as a result. She produced the P3 form, treatment notes, PRC form, and ultrasound image as P Exh 1,2,3, and 4 respectively.
26. The medical evidence supports that there was a penetration of the child. The analysis of the evidence in totality yields the conclusion that the prosecution proved that penetration did occur of DK.
27. But by whom?
28. PW1 testified that the appellant was her boyfriend since March 2021. On 15/05/2021 she agreed to marry him and the complainant went to the home of one Michael and Ole Masai where they slept together and had sexual intercourse. The next day she returned home. She stated that the appellant impregnated her.
29. Medical evidence corroborates the evidence by PW1 in material and particular respects; that she was pregnant and the pregnancy was 9 weeks old as at 20.5.2021.
30. PW2 testified that on the morning of 17/05/2021, she did not find PW1. At 3 p.m. a certain mzee brought her home accompanied by 2 elders. She learned that her daughter had been found at the appellant's home.
31. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled DK. 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. There was no mistaken identity whatsoever of the appellant as the person with whom she had sex. Thus, who defiled her.
32. Based on the evidence adduced, the appellant caused the penetration of DK.
33. 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.
34. In the upshot, the appeal on conviction is dismissed.

**On sentence.**

35. 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”.
36. The trial court called for a pre-sentence report. She noted that the report had positive reports, however, the law is clear on such offences where minors do not have the capacity to consent to any sexual relationships and even marriage. Thus, a deterrent sentence is necessary. The trial court also noted the time the appellant had spent in custody.
37. The court has also considered that the offence is serious. The victim was a child- she was 13 years old. 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. In addition, the fact that the



prevalence of the offence justifies 18 years imprisonment in this case. Therefore, a deterrent sentence is necessary.

38. 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 Vs Joshua Gichuki Meangi And Initiative For Strategic Litigation in Africa (ISLA) And 3 Others Supreme Court Petition No. E018 of 2023.
39. 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’.
40. 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 touches on the dress.
41. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences are important objects of punishment, a sentence 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
42. In the circumstances, the 18-year imprisonment sentence is upheld.

### **Conclusion and orders**

43. The appeal on conviction and sentence is dismissed.
44. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. The appellant in person
2. Okeyo for DPP-respondent
3. Nyangaresi C/A

