



**Wabwire v Republic (Criminal Appeal E068 of 2022)
[2024] KEHC 15621 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E068 OF 2022**

DK KEMEL, J

DECEMBER 6, 2024

BETWEEN

BRAMWEL WANJALA WABWIRE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Bramwel Wanjala Wabwire, was charged before the Chief Magistrate's Court at Bungoma in Sexual Offences Case No. E083 of 2021 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. The particulars were that the Appellant, on diverse dates between 7th October 2021 and 20th October 202, while at [particulars withheld] estate, in Nyali area within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of INJ, a child aged Fifteen (15) years.
2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 The particulars were that the Appellant, on diverse dates between 7th October 2021 and 20th October 202, while at [particulars withheld] estate, in Nyali area within Mombasa County, intentionally and unlawfully caused his penis to come into contact with the vagina of INJ, a child aged Fifteen (15) years.
3. After a full trial, the learned trial magistrate found the Appellant guilty on the main count and sentenced him to serve an imprisonment of fifteen (15) years.
4. Being dissatisfied with both conviction and sentence, the Appellant lodged this appeal filed on 14th July 2022. In his petition of appeal, the Appellant raised the following ground of appeal: -
 - i. That the sentence meted out was harsh and excessive as per the circumstances.



5. Subsequently, while filing his written submissions the Appellant also adduced his supplementary grounds of appeal filed on 9th July 2024, which are as follows: -
 - i. That the learned trial magistrate erred in law and fact in not making a finding that the conviction of the Appellant was unsafe as per the circumstances of the case.
 - ii. That the learned trial magistrate erred in law and fact by failing to consider the conduct of the Complainant in this case.
 - iii. That the learned trial magistrate erred in law and fact in not making a finding that the minimum mandatory sentence under the Sexual Offences Act is unconstitutional.
6. The duty of a first appellate Court was stated by the Court of Appeal, in *Gabriel Kamau Njoroge vs. Republic (1987)* eKLR (Platt, Apaloo JJA and Masime Ag JA), in the following words:

“ ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”
7. The lower Court record indicates that the prosecution called five (5) witnesses in support of its case.
8. PW1 was DNW who testified that the Complainant herein is her daughter and that she was born on 26th April 2006. According to her, on her return from work on 7th October 2021 she did not find the Complainant at home and she was informed by her other children that the Complainant went to visit her grandmother. She reached out to her mother who informed her that the Complainant had been seen in the area but that she indicated that she was going to church and on inquiry on who she was last seen with she established that she had been seen with one Oscar, Brain and Geoffrey. She lodged a report at Mendirenu Police Post and that the three were apprehended. During that moment Oscar received a call from the Appellant herein who confirmed that the Complainant arrived safely and they proceeded to Bungoma Police Station to have the phone tracked. They established that the Appellant was in Nyali, Mombasa County and they proceeded to the home of the Appellant to request his parents to instruct him to return the Complainant. She resorted to proceed to Mombasa, where the Appellant was tracked and he was able to take them to where he was residing with the Complainant. Both were arrested and escorted back to Bungoma. According her, the Complainant is 15 years old. She produced in Court the birth certificate of the Complainant marked as PEXH 1
9. After a brief *voire dire* examination, the Court formed the view that the complainant had the intelligence and knew the importance of telling the truth. The court proceeded to allow her to give her evidence under oath.
10. Evidence was led that the Complainant is a student and that she knows one Geoffrey as he is a brother and neighbor. He confirmed to the Court that he knew the Appellant even before she went to Mombasa to see him. She told the Court that she travelled to Mombasa on 6th October 2021, and that she stayed with the Appellant from 7th October 2021 to 20th October 2021, and during those days they had coital relations. She identified the Appellant at the dock as the man she had sexual relations with. She told the Court that the police apprehended them of 20th October 2021. She confirmed that she was speaking to the Appellant via Geoffrey’s phone. She produced in Court her birth certificate marked as PEXH 1.



11. According to PW3, Elias Adoka, who testified that he is a clinical officer at Bungoma County Hospital, PW2 was seen on 22nd October 2021 and on examination it was established that she was on her monthly period. He stated that the Complainant had no tears on her genitalia and that her hymen was missing. Her lab tests indicated that she had a UTI. He concluded that the Complainant had been defiled. He produced the P3 form as PEXH 3; the complainant's treatment notes as PEXH 2 and the laboratory report as PEXH 5.
12. PW4 was No. 116608 PC Arnold Kiptoo, who testified that he is currently attached to Bungoma Police Station gender office. He recalled on 19th October 2021 in the company of his colleague they proceeded to Mombasa to apprehend the Appellant herein. The Appellant took them to his house where they found the complainant. They apprehended both of them and escorted them to Bungoma where the Appellant was charged with the offence.
13. PW5 was No. 81647 Corp. Irene Chepkonga who testified that she is currently attached to Bungoma Police Station and that she investigated this matter. She recalled on 8th October 2021, PW1 turned up at the station with the contact details of the person suspected to be with PW2. She did her investigations and tracked the phone to Nyalı Mombasa. She organized for the travel of PW4, his colleague and PW1 to Mombasa on 19th October 2021, where PW4 apprehended the Appellant and the complainant. When the complainant arrived in Bungoma, she took her to the hospital for examination and recorded her statement. She was able to establish that it was Geoffrey who briefed her on how to go to Mombasa and that on her arrival she had sexual intercourse with the Appellant. She told the Court that when Geoffrey heard about the arrest of the Appellant he went underground. She later organized to escort the complainant to hospital and then preferred the charge against the Appellant.
14. By a ruling dated 29th March 2022, the Appellant was found to have a case to answer after the Court found that the Prosecution had established a prima facie case and accordingly put him on his defence. He gave sworn evidence and in which he denied the charges against him. According to him, he received a call from a person on 18th October 2021, while he was at work telling him that he wanted them to do a business. He met up with the individual and that two people exited a saloon motor vehicle without a police uniform and apprehended him. According to him, he was arrested and taken to a plot which he did not know where they found a girl locked in a house. He told the Court that two police officers insisted that he knew the girl and they were both arrested. He told the Court that he does not know one Geoffrey.
15. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective written submissions.
16. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by both the Appellant and the Respondent and further upon careful consideration of the law, the following issues arise for determination: -
 - i. Whether in the final analysis the Respondent proved the case against the Appellant beyond any reasonable doubt.
 - ii. Whether the sentence meted out on the Appellant was excessive in the circumstances.
17. This being a first appellate Court and as is expected, is obliged to analyse and evaluate afresh all the evidence adduced before the trial Court and draw its conclusions while bearing in mind that it neither



saw nor heard any of the witnesses. (See *Okeno vs. Republic* [1972] EA 32) where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”

18. Similarly, in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

- “1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
- 2) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

19. Section 8 of the *Sexual Offences Act* provides as follows:

8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) 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.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
- (5) It is a defence to a charge under this section if –
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. the accused reasonably believed that the child was over the age of eighteen years.



- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
 - (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act.
 - (8) The provisions of subsection (5) shall not apply if the accused person is related to the such child within the prohibited degrees of blood or affinity.
20. As regards the first issue, the key ingredients for the offence of defilement are therefore, age of the victim, the fact of penetration and whether the appellant herein was properly and positively identified as the culprit. See the case of *Dominic Kibet Mwareng V Republic* [2013] eKLR in which the above ingredients were highlighted.

Proof of age of the Complainant.

21. It was the complainant's evidence that she was aged 15 years at the time of the alleged incident. PW1 availed in Court a copy of the complainant's birth certificate marked as PEXH 1 which indicated that she was born on 24th April 2006.
22. In the case of *Hilary Nyongesa Vs Republic Eldoret Criminal Appeal, No. 123 of 2009* the court stated that:
- “Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”
23. It is also worth noting that Rule 4 of the Sexual Offences Rules of Court Rules recognizes that:
- “When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”
24. It is therefore sufficient to say that the age of the minor was proved beyond any reasonable doubt.

Proof of penetration

25. It is the complainant's evidence that she was defiled by the Appellant. She stated that they engaged in sexual intercourse from 7th October 2021, to 20th October 2021.
26. PW3 stated that at the examination of the complainant, he noted a missing hymen, she was on her monthly period and that laboratory report concluded she had a UTI. They both concluded that she was defiled and as a result experienced a septic 3rd degree tear thus rectal vaginal fistula.
27. The Appellant denied having defiled the minor.
28. Section 2 of the *Sexual Offences Act* provides that: -
- “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;



29. In *George Owiti Raya Vs Republic* [2013] eKLR it was held that: -

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul-smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane.”

30. In the case of *Erick Onyango Ondeng V. Republic* (2014) eKLR the Court of Appeal held as follows on the aspect of penetration:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

31. In his Judgment in the present case, the trial court held that

“The complainant’s evidence was that she went to Mombasa to visit the accused. The accused received her at Mombasa and took her to his Place where they lived and had sexual intercourse. There was no third party who witnessed the sexual intercourse between the accused and the compliant.

However, when the complainant testified, I found her evidence clear and consistent as the investigation officer what had happened between her and the accused. Her evidence was not shaken on cross-examination and she never faltered in her response to questions put to her. I form the opinion that she was speaking the truth.”

32. From the above, it is clear that the minor had been engaged in sexual activity and that the clinical officer (PW3) confirmed the same. I am thus satisfied that penetration was proved by the Prosecution to the required standard.

33. As an appellate Court, I am satisfied that the conclusions reached by the learned trial magistrate on the question of penetration were sound, and i accordingly confirm the same.

Whether the Appellant was positivity identified by the minor as her assailant.

34. It was the complainant who witnessed the Appellant defile her and that makes her a sole eye witness and the victim of the sexual assault. This Court cautions itself on the danger of relying on the uncorroborated evidence of the complainant whilst relying on the dictates of Section 124 of the *Evidence Act*. Section 124 of the *Evidence Act* is on the following terms:

“124. Corroboration required in criminal cases

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.”

35. As noted in The Kenya Judiciary Criminal Procedure Bench book, *ibid* at paragraph 95 the exception to requirement for corroboration is circumscribed as follows:

“95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011*).”

36. There are reasons within the meaning of Section 124 Proviso of the *Evidence Act* for this Court to believe that the complainant was telling the truth in view of her being the sole eye witness to the heinous ordeal. The section is an exception to the rule for corroboration to evidence of children which, is based undoubtedly on the good sense and principle of best interests of the child and the usual occurrence of sexual offences in circumstances where there may be no witness other than the victim, but which must in the interest of fair trial of accused persons and to be used sparingly and only where the circumstances fit the situation contemplated in the law that there is no other evidence available but a sexual offence crime should not go unpunished for lack of corroboration of the victim's sole evidence. It is a cardinal principle of the law on corroboration that evidence which itself requires corroboration cannot corroborate other evidence. I find that the exceptional provision of Section 124 of the *Evidence Act* was properly invoked in this case. Hence, the finding on the identity of the Appellant as the perpetrator was properly arrived at. It is highly unlikely that the complainant could just wake up one morning and proceed to Mombasa just to see a stranger unknown to her.

37. On the ground that the learned trial magistrate did not consider the conduct of the complainant, as observed in Joseph Kariuki Ndungu & another vs Republic [2010] eKLR:

“...the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law.”

Whether the sentence imposed by the Hon. Magistrate was harsh and excessive.

38. In respect of this limb, it must be noted that the sentences provided in terms of Section 8(1) and (3) of the *Sexual Offences Act* provides that: -

8

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

8

(2)

8



- (3) 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.

39. In the instant case, the Appellant was sentenced to 15 years imprisonment. In mitigation, he stated that he was a bread winner to his aged parents and prayed for leniency. It is to be noted however, that the Appellant behaved irresponsibly and betrayed the trust the community had in him of protecting its young people, especially the girl child but went against the same and became a predator.

40. In *Wanjema v Republic* [1971] EA 493, the predecessor of this Court stated that: -

“The Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

41. In a recent decision by the Supreme Court in *Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi, Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ* overturning the Court of Appeal judgement granting Judges and Magistrates power to hand sex offenders lesser sentences, affirming mandatory sentences as provided in the [Sexual Offences Act](#). The Court held that:

- i. Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High Court while canvassing the minimum mandatory sentences question;
 - i. In departing from the decision on minimum mandatory sentences for sexual offences as stated in *Muruatetu & another v Republic* S.C Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)(*Muruatetu* directions) the learned judges of the Court of Appeal violated the principles of stare decisis and proceeded to determine that the ratio decidendi in the *Muruatetu* Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the [Sexual Offences Act](#);
 - ii. Mandatory minimum sentences do not deprive judicial officers of the power to exercise judicial discretion. However, minimum sentences set the floor rather than the ceiling when it comes to sentences with that which 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.
 - iii. That the Court of Appeal on the issue of the constitutionality or otherwise of minimum sentences under the [Sexual Offences Act](#) and discretion to mete out sentences under the said Act failed to identify with precision the provisions of the [Sexual Offences Act](#) it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. Thus, creating inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system.
 - iv. The Respondent who had been released should serve the remainder of his sentence from the date of conviction by the trial Court.

The erudite Judges reaffirmed 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. Thus,



striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law.”

42. In the instant case, 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* 2006 which provides that upon conviction the offender shall be sentenced to Twenty (20) years.
43. The victim of defilement was aged fifteen (15) years old at the time of the offence, hence the victim has been psychologically scarred for the better part of her life. Her innocence was stolen by a person who ought to be her protector. The sentence provided for under Section 8(3) of the *Sexual Offences Act* is 15 years imprisonment. I note that the Appellant’s sentence as meted out was not at per with the law. It is a requirement that the Appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the Prosecution filing a cross appeal in which it seeks enhancement of the sentence and that the cross appeal is served upon the Appellant in good time to enable him prepare for that eventuality. Despite the sentence meted to the Appellant being below the set threshold of 20 years, I cannot enhance the same, in this situation, as no formal application was submitted by the Respondent on the enhancement of sentence. Accordingly, i find no reason to interfere with the judicial discretion of the trial Court on sentence.
44. In the result, the appeal fails. The appeal against conviction and sentence lack merit and is dismissed.
It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Bramwel Wanjala Wabwire..... Appellant

M/s Kibet.....for Respondent

Kizito/Ogendo..... Court Assistant

