



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA HIGH COURT

CASE NUMBER: HCCRA/E065/2024

JACKSON KALAMA VS THE REPUBLIC

JUDGMENT

(Being an appeal from the Judgment that was delivered by Honourable Ithuku A.K (CM) on 28th August 2024 in Mombasa Cms' court in S.O number E065 of 2021)

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 of 2006. The particulars were that on diverse dates between 1st May 2020 and 6th May 2021 at Mtongwe area in Likoni Sub County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of **S.J** a girl child aged 14 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars were that on diverse dates between 1st May 2020 and 6th May 2021 at Mtongwe area in Likoni Sub County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of **S.J** a girl child aged 14 years.
3. The appellant was convicted on the main count and sentenced to 15 years' imprisonment.



4. The appellant was not satisfied with the judgement of Hon Ithuku A.K (CM) in the Magistrate Court at Mombasa S.O Case E065/2021 and thus sought this appeal.
5. The appellants' grounds of appeal are summarized as follows;
- a) **That the learned magistrate erred in law and fact in reaching a finding wholly unsupported by the evidence of record.**
 - b) **The learned magistrate erred in law and fact in failing to hold for the appellant.**
 - c) **The learned magistrate erred in law and in fact by awarding appellant to serve 15 years in prison for two counts.**
 - d) **The learned magistrate erred in law and fact in failing to appreciate the glaring inconsistencies as to the dates of arrest, commission of the offence, medical examination and the post rape care form (PRC).**
 - e) **The learned magistrate erred in law and fact in failing to find that the accused was never taken for medical which is cardinal requirement in such cases.**
 - f) **The learned magistrate erred in law and in fact in failing to appreciate the manifest contradicting evidence of the witnesses and therefore relied on unsafe evidence to convict the appellant.**
 - g) **The learned magistrate erred in law and fact in failing to find the truth evidence from a neutral people instead relied on fabricated statements.**
 - h) **The learned magistrate erred in law and fact in failing to appreciate the manifest contradicting evidence.**
6. The duty of this court as a first appellate court is well settled in the case of **Okeno v Republic [1972] EA 32 at 36** where the court held that: -

“...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 v Rep [1957] EA 336 and to the appellate court’s own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (Shentilal M. Ruwala v R [1957] E.A 570). It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support lower court’s findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s finding 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 witnesses, See Peters v Sunday [1958] E.A 424.”

Prosecution’s case



7. **PW1 S.J (minor)** the complainant herein testified that she is aged 14 years. She stays with her mother and 4 sisters. Jackson Kalama (the appellant) is well known to her. He was a friend and neighbor in their estate. In the year 2020, the minor was outside their house and the appellant called her so they could talk. He was outside his house. In their plot their rooms are adjacent to each other. They went and spoke at the garden it was at night and the accused asked her if they could have sex. She did not answer and went back home.
8. On a day she could not remember, the accused called her to the garden and asked her to pull down her pant, which she did and he asked her to lay down. He pushed down his trouser and inserted his penis in her vagina. Her mother was looking for her and demanded to know where she was. She punished her and that's when she informed her that she was at the garden with Jack. She also informed her that she had sex with him. She was taken to the hospital the following day; she did not take a bath before going to the hospital. She identified Jack in the dock.
9. On cross examination she stated that the offence took place during Ramadhan between 10pm – 11pm. Her mom operates a shop and she had already closed it when the offence took place. She told her mother she was with Jack; she does not know any other Jack in the estate. That Jack was both a neighbor and a friend.
10. **PW 2 Mariam Abdalla** a mother of 7 children. Testified that S.J is her daughter aged 14 years born on 9/2/2007, she produced a certificate of birth to that effect. On 6/5/2021 she was at home at around 8.00PM she closed her shop and told the victim to go and close the door to the shop as the shop is attached to her main house. She noticed the victim has not done so and came back home at around 9.30PM.
11. She punished her. She was wearing a long flowing cloth as she punished her. She noticed that she was not wearing a pant/inner wear and had a discharge at her private parts. She also noticed that she had soil/dust at the back of her head. The minor told her that she had been defiled by Jack. Riziki went to check on Jack who was found sleeping. PW2 reported the matter to the chief's camp- Lango. She reported to police. The accused was arrested by two neighbours who escorted him to the police. The minor was taken to the hospital the following day. The accused was well known to her, she identified him on the dock.
12. On cross examination she stated that she knew the accused well that he is Lucy's son. She did not see the act it was the minor who told her.



- 13. PW3 Riziki Juma Mohamed** testified that the complainant is her little sister. On 6/5/2021 at around 9.00Pm they could not trace the victim while in their sitting room sitted with the door wide open. She came back at around 9.30PM. Their mother reprimanded her on the bed and noticed that she had no pants. Their mother checked on her private parts and noticed that she was bruised on the private parts.
- 14.** She said she had been sexually assaulted by Jackson who was known PW3. Jackson's father used to be their tenant but they have moved out and Jackson used to sleep at a nearby house. Pw3 called him and detained him and walked him towards their house. They were joined by neighbours. The accused was taken to Longo Police Station. Victim was taken to Longo's chief Camp.
- 15.** On cross examination PW3 stated that he knew the accused through his mother he used to visit. She met and arrested the accused at their gate. The accused moved out of their house before the incident. That he continued to visit their home even after his mother had moved out.
- 16. PW 4 Victor Obando Were** a Senior Clinical officer at Likoni Hospital testified that he has medical notes for S.J aged 13 years. Op no. 2146/2021. On 7/5/2021 she came to hospital accompanied by her mother, on 6/5/2021 it was alleged that the girl had gone missing from home for an hour. When she came back she told her that she had been sexually defiled. Upon examination she had a cut wound and vaginal discharge. Her hymen was with an old scar. She was found to have bacterial infection.
- 17.** PW4 testified that on 7/5/2021 he filled the PRC form. It confirms the tear on the vaginal area, the hymen, was perforated and she had a whitish discharge. P3 indicates that the minor had been defiled vaginally. She produced Medical notes (Pex 1), Lab test results (Pexh2), PRC form (Pexh3), P3 form (Pexh4). The accused had no questions on cross examination.
- 18.** The trial magistrate Hon M.Mutuku (CM) was transferred and Hon Ithuku (CM) took conduct of the matter. On 16/11/2023 the matter came for mention to take directions as to the provision of Section 200 (3) CPC. The court complied with the same and the accused elected to proceed with the matter from where it had reached.
- 19.** On 7/6/2024 PW5 PC Jaliwa Kazungu testified that he took over the file from PC Kavita who has been transferred to Thika. On 6/5/2021 the complainant was brought to the station by her mother. She reported that the child had been defiled. They



were in the company of the accused. The accused was arrested. The victim informed the police that the accused was her boyfriend. That they used to meet in a store and have sexual intercourse. That the minor disappeared and when she came back she was asked by her mother and admitted having sex with the accused. PW5 produced the birth certificate showing that the minor was born on 9/2/2007. The accused had no question in cross examination.

Defence case

20. DW1 the accused person testified under oath that he studies at Mabati College. He knows the charges. He stated that on the alleged date when he went to Mtongwehe had gone to collect school fees. He got into his mother's house and did not find her. The victim's mother had him arrested alleging that she had defiled her daughter. He was taken to headquarters, the assistant chief and then to the police and thereafter to court.
21. On cross examination he stated that on 1/5/2021 he was at Mariakani. On 6/5/2021 he was at Bemba.
22. DW2 Lucky Choo testified under oath that he was with the accused. The accused was arrested at their home. They did not tell him what the problem was and the accused persons mother was a tenant of the complainant's mother.

Analysis and Determination

23. **Section 8 of the Sexual Offences Act, 2006** is captured in the following terms in creating the offence and punishment for defilement;

"8. Defilement

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

(2)

(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."

24. **Section 11 (1) of the Sexual Offences Act** provides for the offence of an



indecent act with a child in the following terms;

“11. Indecent act with child or adult

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

25. The crucial elements that need to be proved for a crime of defilement to be inferred can be drawn from the wording of Section 8 of the sexual offences Act. The prosecution needs to prove beyond reasonable doubt that; -

- i. There was an act which causes penetration (of the victim’s genital organs by the accused’s genital organs)**
- ii. The age of the victim (must be a child)**
- iii. Positive identification of the accused as the person who committed the act.**

Penetration

26. Section 2 of the Sexual Offences Act defines it as the partial or complete insertion of the genital organ of a person into the genital organs of another person. In this case, the victim stated that the accused person after ordering her to pull down her under wear he inserted his penis into her vagina. The complainant’s mother testified that she saw a discharge in the victim’s vagina and they asked the victim not to bath before being examined by the Dr.

27. Upon examination the PRC form shows that the minor had a cut wound on her vaginal area. The hymen was perforated. He also noted whitish discharge.

28. In the case of **Bassita Hussein vs Uganda, supreme Court Criminal Appeal no. 35 of 1995**, the court held: -

“the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”

29. In the above foregoing, I find that the evidence of the victim, her mother , and her



sister and that of the Doctor was consistent and sufficient to prove the element of penetration thus there is no reason to disturb the finding of the trial court. I affirm that penetration was proved beyond reasonable doubt.

Age of the victim

30. Proof of age is important in a sexual offense. In **Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR)**, the Court of Appeal stated that: -
“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
31. The record shows that the birth certificate of the complainant indicates that she was born on 9/2/2007 which meant that the victim was 13 years on the day of the alleged defilement. This court agrees with the trial court that the age of the victim was sufficiently proved beyond reasonable doubt.

Positive identification of the assailant

32. The complainant, her mother and her elder sister testified that they know the accused person as he was a next door neighbor. The victim described the accused person as a friend. The police stated that the minor informed them that the accused person was her boyfriend. I find that the appellant was positively identified by the accused.
33. In his defense, the accused confirms that on the material he visited his mother to get his school fees but did not find her. This evidence does not negate the evidence adduced against him. A closer at his defence, it is mere denials. I find that the same does not hold water against the prosecutions charges.
34. Having evaluated the evidence afresh, I conclude that the prosecution proved the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the



sexual offences act. I agree with the trial court that the alternative charge is spent.

35. I note that the age of the victim was 13 years at the time of the offence and the mandatory minimum sentence is 20 years. In the recent decision of **Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)** the Supreme Court considered the constitutionality of the minimum offence under the **Sexual Offences Act** and categorically and emphatically held that the same are constitutional and the courts must impose the same unless and until they are declared unconstitutional. In the case of **Charles & Another vs Republic (Criminal Appeal 38 of 2019) [2024] (Judgment) [2024] KECA 1902 (KLR)** the Court of Appeal ceded to the binding nature of the decisions of the Supreme Court and stated:

“(35) We will now come to the final issue: sentence. The appellants complain against the mandatory nature of the minimum sentence terming it unconstitutional for not permitting individualized mitigation. In the circumstances of the case, they both complain that the minimum sentence was harsh and excessive since they were both of extreme youth; first offenders; and were remorseful. Additionally, they showed great capacity for reform and rehabilitation.

36. *All these extenuating factors are true. It is also true that our jurisprudence had taken a turn to impugning the constitutionality of the minimum sentences prescribed in the Sexual Offences Act. Unfortunately for the appellants, that jurisprudential trajectory was halted by the recent decision by the Supreme Court in Republic vs Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024). In that case, the Supreme Court held that the mandatory minimum sentences in the Sexual Offences Act are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences.*

37. **The Supreme Court held:**

“56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. 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. In fact, to use the words mandatory and minimum together convolutes the express



different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.”

38. This decision is binding on us under the doctrine of stare decisis. In the present case, the appellants were convicted under Section 8(2) of the Sexual Offences Act. The statutory minimum sentence under that sub-section is twenty (20) years imprisonment. That was the sentence imposed on the appellants. Given the Supreme Court’s binding precedent, we cannot interfere with that sentence whatever our views on the extenuating circumstances.”

36. In light of the above, the decisions of the Court of Appeal and the Supreme Court are binding on this court. The appellant was sentenced to serve 15 years’ imprisonment which is below the minimum mandatory sentence. I would have set aside the sentence of the trial court and substitute it with 20 years’ imprisonment but he was not heard on this issue . So the court will not interfere with the sentence.

37. The appeal fails on all the grounds. The conviction and sentence are upheld

38. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER



2025.



**WENDY KAGENDO
JUDGE**

**IN THE PRESENCE OF:
THE APPELLANT in person
MR NGIRI AND MR SIRIMA FOR THE STATE
BEBORA COURT ASSISTANT**

SIGNED BY/FOR:
HON. LADY JUSTICE WENDY MICHENI



THE JUDICIARY OF KENYA.
MOMBASA HIGH COURT
HIGH COURT CRIMINAL
DATE: 2025-12-21 14:08:44