



**Kakovu v Republic (Criminal Appeal E091 of 2023)
[2024] KECA 283 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 283 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E091 OF 2023
MSA MAKHANDIA, A ALI-ARONI & JM MATIVO, JJA
MARCH 8, 2024**

BETWEEN

SAMBASTIAN SILA KAKOVU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment of the High Court at Machakos (D.K. Kemei J.) dated 17th September 2020.) in Machakos HCCRA No. 76 of 2019)

JUDGMENT

1. As already stated in the intitulum above this is an appeal against the judgment of the High Court at Machakos delivered on 17th September 2020 by Kemei J. in Criminal Appeal No. 76 of 2019.
2. The appellant was charged in the trial court with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act*. The particulars were that sometimes in August 2018, the appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of RMK a child aged 11 years.
3. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. It was alleged that on the same dates and place, the appellant intentionally and unlawfully touched the vagina of RMK, a child aged 11 years with his penis.
4. The appellant denied the charges and was however tried, found guilty and upon conviction by the trial court, sentenced to 15 years imprisonment. Aggrieved by the conviction and sentence, the appellant preferred a first appeal in the High Court at Machakos. The same was heard by Kemei, J. who in a judgment delivered on 17th September 2016, dismissed the appeal on conviction but enhanced the sentence to 20 years imprisonment after the respondent sought such enhancement through its written submissions.



5. During the trial, the prosecution called five witnesses, PW1, RMK, testified that she was a class 3 pupil and that she knew the appellant as one who used to work at her cousin's farm. She told the court that there was a day during the school holidays when her aunt G, PW2, with whom she stayed with, sent her to the farm to pick tomatoes. Whilst at it, the appellant came from behind and pushed her to the ground. The appellant then unzipped his trouser, removed her panty and defiled her. Whilst in the act, Ruth saw them, ran and told PW2 what she had seen. Together, they rushed back to the scene and found them still in flagrant delicto. They shouted and upon seeing them, the appellant ran away. She stated that her Uncles, W and M went in search of the appellant whom they found and tied with a rope. She added that, she was taken to Mama Lucy Hospital and that she did not remember the date she was born.
6. 2018 she was alerted by a scream from Joyce (PW3), who informed her that she had seen the appellant lying on top of RMK and raping her. They rushed to the scene and when she saw what was happening, she let out a scream that made the appellant run away. She then alerted Uncles W and M who went out in search of the appellant who was apprehended at 8.00 pm. It was her testimony that RMK was taken to Mama Lucy Hospital while the appellant was taken to Malaa Police Station.
7. PW3, testified that on a day she could not remember, between August and September, 2018 RMK had been sent to pick tomatoes from the farm when she heard her screaming. She went to the farm and found the appellant lying on top of her and that he had lowered his trouser a few inches down. She rushed to inform PW2 with whom she returned to the scene; that the appellant ran away but was, however, tracked down and taken to Malaa Police Station whereas RMK was taken to Mama Lucy Hospital.
8. PW4, A, an uncle was informed on 23rd August 2018, that RMK had been raped by the appellant who suddenly appeared at 8.00pm and sought forgiveness for what he had done as he claimed that it was the work of the devil. He later went to Mama Lucy Hospital where he was given a medical summary sheet and a post-rape care form (PRC) both dated 24th August 2018.
9. PW5, Esther, a nurse at Mama Lucy Kibaki Hospital, attended to RMK on the same day. She did not know her age but upon age assessment, her age was given as 15 years. She had a history of defilement. According to the witness, the examination revealed a red vagina that was caused by friction and explained that the same was as a result of an insertion of a penis. She told the court that the vaginal swab indicated the presence of spermatozoa, which meant that there was sexual activity. She tendered in evidence the medical summary sheet, the PRC form, and the age assessment report.
10. PW6, PC Charles Oduor, attached to Malaa Police Station, on 23rd August 2018, saw the appellant being frog-marched into the police station by members of the public. RMK reported to him that while she was on the farm getting tomatoes, the appellant who was a farm worker for one of her uncles pounced on her and defiled her. After the investigations, he preferred the charges against the appellant.
11. Put on his defence, the appellant opted to give unsworn evidence and called no witnesses. He testified that he worked at Koma on the farm until noon then went to Kalingile where he stayed until 6.30p.m., after which he went to Dust Bar in Mitamboni where he stayed up to midnight. However, when he came back home, he was tied up with a rope and taken to Malaa Police Station and later arraigned in court. He denied committing offence.
12. He was nonetheless convicted and sentenced to 15 years' imprisonment on the main count. The trial court made no findings on the alternative charge and rightly so in our view. Aggrieved with the conviction and sentence, the appellant filed an appeal in the High Court at Machakos. After proper re-consideration and re-evaluation of the evidence tendered in the trial court, the High Court concluded



- that the appeal on conviction was bereft of merit and dismissed it. It, however, set aside the sentence imposed by the trial Court as it deemed it illegal and substituted it with a proper sentence of twenty years imprisonment effective from the date of arrest.
13. The appellant aggrieved with the judgment of the High Court is now before us on a second and perhaps last appeal. This being the case and, by dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We can only interfere with the decision of the High Court on facts if it is demonstrated that the High Court failed to consider matters it should have considered, or that looking at the evidence as a whole, it was plainly wrong in its decision, in which case, such omission or commission would be treated as a matter of law. See *Karani v Republic* [2010] 1 KLR 73
 14. The appellant in his amended memorandum of appeal filed alongside his submissions has raised seven (7) grounds of appeal, being that both courts below failed to find that: the trial was unconstitutional and void ab initio; the charge sheet was defective for duplicity; penetration was not proved; the medical report tendered in evidence was not authentic; the prosecution's evidence was incredible, inconsistent and contradictory; rejection of the appellant's otherwise cogent defence was unjustified; and, by amending the charge sheet to enhance the sentence without due warning to the appellant as required.
 15. The appeal was heard on 21st November 2023 on a virtual platform. The appellant appeared in person while Mr. Okeyo, learned prosecution counsel appeared for the respondent. Both parties opted to rely wholly on their written submissions.
 16. The appellant submitted that there was violation of Articles 25 (c), 27, 49(f), (g), 50 (2) (c), (g), (h), (j) and (4) of the *Constitution* during his trial. Relying on the High Court case of *Simon Githaka Malombe v Republic* [2015] eKLR, he submitted that he was never informed by the trial court of the right to be supplied with witness statements, and legal representation.
 17. He further relied on the cases of *Simon Ndichu Kahoro v Republic* [2016] eKLR, *Rattiram v State of M. P.* [2012] 4 SCC 516 and *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR, to submit that the right to a fair trial is not one of those rights that can be limited under Article 25 of the *Constitution*. This omission grossly crippled his answer to the charges and was therefore prejudiced.
 18. The appellant further submitted that the manner in which the Age Assessment Report was admitted in evidence was contrary to Article 50 (4) of *the Constitution* as read with sections 33 and 77 of the *Evidence Act* as a Police Officer (PW6), was not authorized to produce the report as he was not an expert in that field. He further submitted that the maker of the report was not availed for the reasons best known to the prosecution and therefore, denied him a chance of cross-examining the author of such a vital document.
 19. On the charge sheet being defective for duplicity, the appellant submitted that it was apparent that he was charged with the offence of defilement twice. This is so because the charge sheet simply read defilement contrary to section 8 (1) (2) of the *Sexual Offences Act*. This confused the appellant, as he did not clearly know to which particular provision of the *Sexual Offences Act* he was pleading to. Relying on the case of *Joseph Njuguna Mwaura & 2 Others v Republic*, [2013] eKLR, the appellant submitted that, it was now trite that it is improper to charge a person under two separate sections of the law. The defect was not minor, that was curable under section 382 of the *Criminal Procedure Code*.
 20. Given the admissibility of an unauthentic report by an unauthorized person coupled with evidence that was full of inconsistencies, discrepancies and contradictions then penetration was not proved. The appellant submitted that it was not in contention that RMK was below 18 years of age and could have been defiled. However, the only borne of contention was whether it was the appellant who committed



the act to the exclusion of any other person. That the reddening of the vagina, thick and elastic hymen was not sufficient evidence to infer guilt of the appellant.

21. Regarding the defence case, the appellant submitted that his conviction was based on mere suspicion which made it unsafe. That it was up to the prosecution to rebut his alibi defence but failed to do so.
22. Regarding the enhancement of the sentence, it was submitted that the High Court erred in enhancing the initial sentence without due notice to the appellant. This omission was prejudicial to the appellant for he was denied the opportunity to be heard on the issue. He relied on the case of *MK v Republic*, [2015] eKLR, KSM CA, *Nelson Magomere Ambetsa v Republic* [2015] eKLR, *Josea Kibet Koech v Republic* [2009] eKLR and lastly, *MGR v Republic* [2020] eKLR for the proposition.
23. In response, Mr. Okeyo, submitted that proof of the offence of defilement under the *Sexual Offences Act* revolves around three ingredients: age, penetration and the identity of the perpetrator. That the age of RMK, was proved through PW5 who carried out an age assessment on her. That according to the report she was aged 15 years old at the time of the commission of the offence. The evidence of RMK, PW2, PW3 who found the appellant in the act, and PW5, who examined RMK led to the irresistible conclusion that there was sexual activity involving RMK and the appellant, hence penetration is a non-issue.
24. On identification of the perpetrator, it was submitted that RMK testified that the appellant was a person well known to her as he used to be employed in their home. PW2, PW3 and PW4 confirmed this fact as well. The offence was committed in broad daylight, at 4.00p.m., to be precise and having been caught red-handed, there can be no question of mistaken identity.
25. Section 8 (3) of the *Sexual Offences Act* provides that if a child, subject of defilement is aged between twelve to fifteen years, the sentence upon conviction is not less than twenty years imprisonment. The trial court had meted out a sentence of 15 years imprisonment which fell under the provisions of section 8 (4) of the *Sexual Offences Act*. By so doing, it was submitted that the sentence was unlawful and the first appellate court pursuant to section 382 of the Criminal Procedure Code was right to enhance the sentence to conform with section 8 (3) of the *Sexual Offences Act*. A further submission was that the appellant never raised the violations of his constitutional rights in the two courts below. They were being raised for the first time in this Court, which was not permissible. We were therefore urged to dismiss the appeal in its entirety.
26. We have considered the record of appeal, respective submissions, the authorities cited and the law.
27. In this appeal, the two courts below arrived at concurrent findings of fact that the appellant committed the offence of defilement as charged. In *Adan Muraguri Mungara v Republic* [2010] eKLR, this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court, in the following terms:

“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”
28. By the very definition of the offence of defilement under section 8(1) of the *Sexual Offences Act*, three elements should be satisfied before the conviction of an accused person. These are penetration, age of the victim and identity of the perpetrator.



29. The record reveals that the appellant was a person well-known to RMK. His identification as the perpetrator of the offence was by way of recognition. The evidence of PW1 was corroborated in material particulars by PW2, PW3 and PW4. They all knew the appellant very well. Furthermore, the offence was committed in broad daylight. Therefore, his identification by recognition cannot be in doubt. Two courts below concurrently found that indeed the appellant was identified as the perpetrator of the offence. It has been said time without number that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another. We have no reason to depart from the concurrent findings of the two courts below on the issue.
30. The age assessment report from Kangundo Level 4 Hospital indicated that RMK was aged between 14 and 15 years of age. This document was produced by PW6, the investigating officer, without any resistance from the appellant. The appellant now argues that it was not produced by the maker as required, yet he had the opportunity to object to its production on that basis before the trial court but did not. Further, he never even raised it in the High Court. In our view, he cannot raise it now. Accordingly, we are satisfied just like the two courts below that the age of RMK was proved to the required standard.
31. As regards penetration, the evidence of RMK is instructive. She detailed how the offence was committed and the act of penetration. Indeed, even the appellant concedes in his defence and submissions that RMK was defiled thereby admitting to penetration. The evidence of penetration was further corroborated by the medical evidence of PW5 a nurse at Mama Lucy Kibaki Hospital, who testified that her examination of RMK revealed a red vagina that was caused by friction and explained that the same was as a result of an insertion of a penis. Further, that the vaginal swab indicated the presence of spermatozoa which meant that there was intercourse. Given all the foregoing there can be no doubt that penetration was proved by the prosecution to the required standard and that therefore, the two courts were right in arriving at that conclusion.
32. Bearing all the foregoing in mind, we are satisfied that the two courts below arrived at the sound conclusion that the appellant was guilty of the offence and was therefore properly convicted and sentenced.
33. The appellant raised constitutional violations of Articles 25 (c), 27, 49(f), (g), 50 (2) (c), (g), (h), (j) and (4) during his trial. On the onset, we wish to point out that this issue was never raised in the two courts below and cannot be raised for the first time in this Court. That notwithstanding and having perused the record, we note that the only request the appellant made and which a determination was made by the trial court was on the issue of DNA testing which he wanted to be undertaken. The court rightly held that the same would be of no value given the time between the commission of the offence and the time it was being demanded to be undertaken. The record similarly does not show that the appellant ever requested for witness statements and other documentary evidence and was denied. The record further shows that the appellant actively participated in the trial without any hitch by cross-examining all prosecution witnesses and gave his defence. We are satisfied that despite the documents not having been availed to him, he was not prejudiced at all in his defence.
34. Was the charge sheet defective for duplicity? Having looked at the record, we are satisfied just like the trial and first appellate courts that the charge was not duplex. The appellant was charged with one count of defilement contrary to his submissions that he was charged with the offence of defilement twice. The mere fact that the charge sheet talked of defilement contrary to section 8(1) 2 of the [Sexual Offences Act](#) does not make it duplex. Further from the record, it is clear that the appellant was fully



aware of the case he was to meet, going by his active participation in the proceedings. He therefore did not suffer any injustice.

35. With regard to inconsistencies, the same were adequately addressed by the first appellate court and we see nothing new to add to the court's findings on the issue.
36. Lastly, the appellant has complained that the first appellate court erred in enhancing the sentence imposed on him by the trial court without giving him notice as required. Having carefully perused the record, we are satisfied that the request for enhancement of the sentence came through the written submissions of the respondent. Nothing from the record shows that there was such formal notice filed by the respondent and served on the appellant of the intention to enhance the sentence. Nor is there anything on record to show that the first appellate court warned the appellant of the possibility of enhancement of sentence if he pursued the appeal and lost. See *MK v Republic*, [2015] eKLR, [Nelson Magomere Ambetsa v Republic](#) [2015] eKLR, and lastly, *MGR v Republic* [2020] eKLR.
37. The first appellate court suo motu enhanced the sentence from 15 years that had been imposed by the trial court to 20 years. Under section 8(1) as read with section 8(3) of the [Sexual Offences Act](#), this was the appropriate sentence.
38. We appreciate the reasoning of the first appellate court leading to the enhancement of the sentence. However, there having been no formal notice to enhance the sentence served on the appellant as required by law and practice, the enhancement was irregular and illegal. No doubt the appellant was prejudiced. We are satisfied in the premises that the appeal on sentence should succeed. In the result, we reinstate the sentence initially imposed by the trial court of 15 years imprisonment.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

