



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sao v Republic (Criminal Appeal E011 of 2023)  
[2024] KECA 564 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 564 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL E011 OF 2023  
JW LESSIT, PM GACHOKA & GV ODUNGA, JJA  
MAY 24, 2024**

**BETWEEN**

**WASHINGTON ODHIAMBO SAO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the High Court of Kenya at Malindi  
(S. M. Githinji, J.) delivered on 29th June 2023 from the original Malindi  
SO No. 40 of 2017 in High Court Criminal Appeal No. E017 of 2023)*

**JUDGMENT**

1. The Appellant, Washington Odhiambo Sao, was charged before the Malindi Chief Magistrate’s Court in SO No. 40 of 2017 with the offence of Defilement Contrary to Section 8(1)(3) of the [Sexual Offences Act](#), the particulars being that on the 22<sup>nd</sup> September 2017 in Malindi Sub-county within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of JKK, the complainant herein, a girl aged 14 years. As is common in such charges, he faced an alternative count of Committing an indecent Act with a Child Contrary to Section 11(1) of the [Sexual Offences Act](#), particulars being that on the said date at the same place, the appellant intentionally and unlawfully touched the vagina of the said complainant.
2. The appellant pleaded not guilty to the said charge. After hearing, he was found guilty, convicted and sentenced to serve eighteen (18) years imprisonment for the principal offence of defilement.
3. The prosecution’s case was that in September 2017 at 7pm, the complainant, a 14 years old girl was at their home with two of her cousins aged 12 and 7 years when the appellant, a neighbour, went and told her that he wanted to ‘sleep with her’ (ninataka kulala na wewe). When the complainant declined, the appellant held her by the head, laid her down on the floor and stripped off her skirt and underwear. The appellant then removed the suit he was wearing, covered her mouth and inserted his penis (mdudu)



into her vagina. Being the first time she was experiences such episode, the complainant felt so much pain and when she cried, the appellat threatened to kill her.

4. About a week later, the appellat knocked on her door one evening around 11. 00 p.m. saying that he had been sent. When the complainant opened for him, he locked himself inside and once again undressed her and put his penis (mdudu) inside her vagina (mkawa). During the incident, her two cousins were asleep in the room. While the appellat was still in the house, a village elder knocked on the door and entered looking for the appellat. This prompted the appellat to hide under the bed instructing the complainant not to disclose his presence. On failing to locate the appellat the village elder left. Thereafter, the complainant heard a neighbour, one Ibrahim, asking the appellat's wife of the appellat's whereabouts before informing the appellat's wife that the appellat was in the complainant's house. The wife then instructed her nine year old son to go and check whether it was true. Upon proceeding to the complainant's house, the said boy found the appellat under the bed and informed the appellat's wife/ his mother.
5. The following day, the complainant's brother in law took her to the hospital where she was examined, treated and her age assessed. It was her evidence that the appellat lived in room no. 8 with his wife while she was staying in room no. 7 within the same building.
6. PW3, Christopher Kingi Baya, a village elder and the house caretaker testified that on 22<sup>nd</sup> September 2017, one Ibrahim informed him that he had seen the appellat, an occupant of room no. 8, enter room no. 7 in the absence of the father of the children in that room. When he went to room no. 7 the complainant let him in but he did not see the appellat. He returned to his house but the said Ibrahim asked him to check again as the appellat was still inside the house. This time, accompanied by the said Ibrahim and the appellat's son, they entered the complainant's room and the appellat's son went under the bed and called out his father saying "baba toka". The appellat crawled out from under the bed where he had concealed himself wearing a shirt and a long trouser and pleaded for forgiveness. Though the complaint was initially reluctant to disclose what was happening between her and the appellat, she later revealed that the appellat had been having sex with her.
7. PW4, the complainant's brother in law, testified that on the material date he was at his work place when he received a phone call from PW3 at around 3.30 p.m informing him that the appellat had been found in his house with the complainant. Moments later, he received two messages on his phone from the appellat stating "Bro I am sorry. I was drunk nikapatikana kwako sikufanya chochote wakati wamenishika nisamehe." In the second message, the appellat pleaded for forgiveness since his wife was shouting at him. Upon going home, the following day, it took PW4's wife's intervention for the complainant to open up and to reveal to them that the appellat had had sexual intercourse with her twice and how the appellat seduced her through a phone that had been bought for her. It was his evidence that accompanied by the appellat and PW3, he took the complainant to the hospital on 24<sup>th</sup> September 2017.
8. The Investigation Officer, PW5, CPL Mariam Hussein, stated that on 25<sup>th</sup> September 2017, PW3 and PW1 filed a report that on 22<sup>nd</sup> September 2017 one of their neighbours, the appellat herein, entered the complainant's house at around 10.00 p.m and had sexual intercourse with the complainant. She issued a P3 form and recorded the complainant's statement on 27<sup>th</sup> September 2017. Upon investigations, she established that indeed the appellat and the complainant were neighbours. Based on the statements of PW3 and PW5, he charged the appellat.



9. PW6, Ibrahim Abdulahi, a clinician at Malindi Sub-County Hospital filled the P3 form and his examination of the complainant revealed that the hymen was broken but there were no tears or injuries or sperms. He produced the medical notes, lab results, age assessment report as exhibits.
10. At the close of the prosecution's case, the appellant was placed on his defence in which he made an unsworn statement and called no other witness. According to him, on 22<sup>nd</sup> September 2018 he had borrowed a charger from the complainant's father which he decided to return that same evening after work; that he met the said Ibrahim at the gate and proceeded to the complainant's house where he met the complainant and other children eating what he referred to as some strange food; that he spent about five minutes asking about the food and then left for his room; that moments later, the caretaker called him to ask what he had gone to do in the complainant's room; that the following day, while he was at his place of work, he was informed that the police were looking for him; that as he left for home, he was arrested and taken to the police station where he was told that he had defiled the complainant; that the text message he sent to PW4 was only meant to inform him that he had returned his charger. He wondered why he was being accused of defiling the complainant. He alleged that the charges were instigated by bad blood between him and the said Ibrahim.
11. In her judgement, the learned trial magistrate (Hon. Oseko) found that the appellant was well known to the complainant and they lived in the same plot; that on the material date, time and place the appellant did enter the house where the complaint was and stayed for 5 minutes; that the age assessment report showed that the complainant was a minor aged 14 years; that from the complainant's evidence as well as the medical evidence there was proof of penetration; that the appellant was identified by the complainant as her perpetrator and that the appellant was flushed out of the complainant's house by his own 9 year old son from under the bed; that the complainant's narration clearly and positively identified the appellant as the perpetrator which evidence was corroborated by PW3, the village elder who entered the room and found two young children sleeping; that the complainant's evidence was corroborated by the brother in law's evidence that he received a message from the appellant seeking forgiveness; that the evidence of the appellant being in the house was confirmed by the appellant himself in his defence when he told the court that he went to the house to collect a charger; that the appellant's evidence of the existence of a grudge between himself and the said Ibrahim did not hold water since it was the village elder who found the appellant inside the house; and that Ibrahim's evidence was inconsequential.
12. The learned trial magistrate therefore found that the evidence tendered met the threshold required for conviction and found the appellant guilty and convicted him of the offence of defilement. After considering the appellant's mitigation, the learned trial magistrate sentenced him to 18 years imprisonment.
13. Aggrieved by the said decision, the appellant appealed to the High Court on the grounds that the trial court erred in law and in fact: in failing to find that the offence of defilement was not proved beyond reasonable doubt; when it ignored to find that crucial witnesses and pieces of evidence were absent and/or not presented in court thereby creating gaps and causing reasonable doubts which ought to benefit the appellant; when it failed to find that the age of the complainant was not properly established and that an age assessment report is not conclusive evidence of age as it has a margin of error and that the procedure for evaluating and/or assessment of age was not followed; by failing to find that there were inconsistencies in the testimonies of the prosecution witnesses thereby causing reasonable doubts in the evidence as was presented; and in meting out an extremely punitive, harsh and excessive sentence without conducting a sentence hearing and/or inviting submissions from both the appellant and the respondent on sentence.



14. After considering the appeal, the learned Judge found that although the birth certificate was not produced in evidence, the age assessment report for the complainant estimated her age as 14 years which evidence supported the complainant's own evidence; that the appellant did not challenge the production of the age assessment report; that the evidence of the complainant's age was corroborated by PW3; that the trial court was satisfied that the complainant was telling the truth, and that should include also on her age; that the contradiction in the treatment notes which showed her age as 13 years was insignificant given that both age 13 and 14 falls within the age group provided for under section 8(1) (3) of the *Sexual Offences Act*; that the duty of the prosecution is to prove either partial or full penetration; that from the evidence of the complainant, PW6 and the P3 form, there was vaginal penetration hence penetration was proved beyond reasonable doubt; that the appellant was well known to the complainant hence the evidence was that of recognition; that no corroboration is necessary in criminal cases involving a sexual offence and a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and that it was satisfied that the victim told the truth; that the appellant placed himself at the scene on the material date; the appellant's allegations were unsubstantiated and in view of the weight of the prosecution case, unbelievable; that the trial magistrate was right in believing the complainant's evidence; and that the prosecution proved beyond reasonable doubt all the ingredients of the offence of defilement.
15. On whether the sentence was harsh and excessive, the learned Judge found that the trial magistrate aptly considered the appellant's mitigation and other factors and proceeded to sentence him to serve 18 years' imprisonment, which was even a term lesser than what is recommended by the statute. He found no reason to interfere with both the conviction and the sentence meted by the trial court and dismissed the appeal for want of merit.
16. The appellant was still not satisfied with the decision and appealed to this Court on the grounds that the learned Judge erred in law and in fact: by failing to find that the appellant's identification was not positive; by failing to appreciate the fact that the appellant's defence was cogent and believable but proceeded to dismiss the same nevertheless; by failing to find that the crucial witnesses were never availed by the prosecution; by failing to appreciate that the prosecution's case was marred with numerous contradictions and inconsistencies; by failing to appreciate that evidence relied on to find the appellant's conviction was circumstantial and as such could not sustain a safe conviction. It was further contended that the sentence imposed was both harsh and excessive since it was applied in mandatory terms without considering the appellant's mitigation.
17. We heard the appeal on the Court's GoTo virtual platform on 19<sup>th</sup> December 2023 when the appellant appeared in person from Manyani Prison while learned Prosecution Counsel, Mr Mulamula, appeared for the respondent. Both the appellant and Mr Mulamula relied entirely on their written submissions which we have considered.
18. This being a second appeal, this Court's mandate is limited by section 361(1)(a) of the Criminal Procedure Code to consider issues of law only, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere with the decision. This position was restated in *Karani vs. R* [2010] 1 KLR 73 that:-

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to



consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

19. In his submissions, the appellant substantially deviated from the grounds of appeal set out in his memorandum of appeal contrary to rule 74(a) of the Court of Appeal Rules which provides that:

the appellant shall not, without the leave of the Court, argue any ground of appeal that was not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 67.

20. An appellant must restrict his submissions to the grounds expressly set out in the memorandum of appeal or the supplementary memorandum of appeal. In this case, though the appellant expressly set out his grounds of appeal, he proceeded to argue some grounds which did not form part of his memorandum of appeal.

21. In the appeal before us the appellant took issue with the fact that the record was silent as to the type of examination that was conducted to test whether the complainant understood the responsibility of telling the truth. That issue, though taken up before the first appellate court, was not one of the grounds upon which the appeal was based. This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR held as follows:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

22. It was also submitted that the complainant’s age was not proved beyond reasonable doubt. As we have stated above, this Court, sitting as a second appellate court does not have the jurisdiction to revisit the concurrent findings of fact by the two courts below. We are mindful of the position adopted by this Court in *Njoroge v Republic* [1982] KLR 388 that:

“On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.”

23. We are also guided by the decision in *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007 where it was held thus:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by 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.”

24. The two courts below were satisfied, based on the evidence adduced, that the complainant was aged 14 years. There was both oral and documentary evidence presented before the trial court to support such a finding hence there was a basis upon which that finding could be made. It was not a finding based on no evidence. Accordingly, we must pay homage to the said finding of fact. That position also applies to the finding by the two courts below as regards penetration. Both on the complainant’s evidence and



the medical evidence, it was proved that the complainant’s genital organs had been penetrated as the hymen was missing. Therefore, nothing turns upon these grounds.

25. As regards, the complainant’s conduct, 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.”

26. We have not been persuaded that based on the evidence adduced, no reasonable tribunal could have arrived at the decision arrived at by the trial court and confirmed by the first appellate court.

27. As regards the sentence, this Court in Robert Mutungi Muumbi vs. Republic [2015] eKLR stated that:

“Section 361(1)(a) of the Criminal Procedure Code restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact.

However it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing. In BERNARD KIMANI GACHERU V REPUBLIC, CR APP. NO. 188 OF 2000 (NAKURU), the Court reaffirmed the principle thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

28. We have ourselves considered the sentence imposed on the appellant and we find nothing to persuade us that it was illegal. To the contrary, as the learned Judge found, the sentence was very lenient in the circumstances. In the premises, this appeal fails and is dismissed in its entirety

29. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**J. LESIIT**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**



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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

