



**Sumba v Republic (Criminal Appeal 164 of 2018)
[2024] KECA 521 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 521 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 164 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MAY 9, 2024**

BETWEEN

DONATOS WANGALA SUMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgement of the High Court of Kenya at
Busia (W. Korir, J.) dated 31st January 2017 in HCCRA No.12 of 2015)*

JUDGMENT

1. The appellant, Donatos Wangala Sumba, was convicted of the offence of defilement contrary to “Section 8(1) (3)” of the *Sexual Offences Act* and sentenced to life imprisonment on 19th March 2015 in the Chief Magistrates’ Court at Busia. The case against him was that on 2nd June, 2014 at Sikoma sub- Location Butula District within Busia County, he intentionally and unlawfully committed an act which caused his penis to penetrate the anus of VAN¹ a child aged 8 years.

Aggrieved by the trial court’s decision, he contested the outcome vide Busia High Court Criminal Appeal No. 12 of 2015. In a judgment delivered on 31st January 2017, the learned judge dismissed the appeal both on conviction and sentence.

2. The genesis of what now culminates into this appeal begun on 20th June, 2014 when V.A.N. was by the roadside where she had gone to tether her grandmother’s cow. The appellant arrived riding his bicycle and after chatting with her briefly, parked his bicycle, grabbed her, carried her on his shoulders into a maize plantation where he removed her pants, and inserted his penis into her vagina. She felt pain and bled heavily. After he finished with her, the appellant, who had a knife, threatened to stab her if she reported the incident to anybody. He then rode away, leaving her inside the maize plantation.



3. VAN eventually informed her brother, SO (PW3), and her grandmother, RN (PW4), about the incident, specifying that the culprit was the appellant whom she knew as Baba Shaddy aka Baba Elvis. Her grandmother examined her and noticed injuries in her private parts genitals, so she was taken to hospital and the matter reported to police. The medical examination by Dr. Walid Albakary (PW2) revealed injuries on the vagina with lacerations on the left side of the clitoris and the labia majora; the vulva was extremely red and the hymen had been broken. The injury was three days old.
4. The appellant denied committing the offence saying that by 19th June, 2014 at about 7.30p.m. the minor's father received a call in his presence informing him that complainant had been defiled; that the minor later said that the person who defiled her was unknown to her; and all the allegations were a mere frame-up due to an existing grudge PW4 had against him over a land dispute. He called two defence witnesses: DW2 Charles Osika and DW3 Joseph Akala Wangalwa, who basically just got information from the appellant that the minor had been defiled.
5. In his judgment on the first appeal, the learned judge (W. Korir, J.) found that the evidence adduced by the prosecution established that the complainant was defiled on the material day; and was corroborated by physical and medical evidence as well as by four witnesses. The learned judge also found that the appellant was properly identified by the minor as the incident took place in broad daylight; and the minor knew him as their neighbour – identifying him by the names of his children; and immediately after the incident she informed (PW3) and (PW4).
6. The appellant had also argued before the High Court, that he was charged and convicted on a defective charge as Section 8(1)(3) does not exist in the *Sexual Offences Act*, 2006. While acknowledging this position, the learned judge stated:

“He is right. However, it is clear that the prosecution intended to charge him with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, 2006. That is the offence the prosecution went ahead to prove. No prejudice was suffered by the appellant. This error can be corrected by invoking Section 382 of the Criminal Procedure Code, Cap. 75.

The appellant is correct that the offence with which he was charged and for which he was convicted attracts not less than 20 years imprisonment. Nevertheless, it should be noted that a person convicted for committing an offence contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, 2006 can be sentenced to life imprisonment. What that Section provides is a minimum sentence of twenty years imprisonment. In this case, the facts adduced established the kind of defilement whose punishment is provided by Section 8(2) of the *Sexual Offences Act*, 2006. The prosecution ought to have amended the charge so as to align it with the facts which was in its possession from the commencement of the trial. The appellant ought to have been charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. In line with the provisions of Section 382 of the Criminal Procedure Code I correct the error and convict the appellant for defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The correct sentence for such an offence is life imprisonment. That is the sentence the appellant is currently serving. Apart from the said rectification. I find the appellant's appeal has no merit. The same is therefore dismissed.”

7. The appellant is now before us in this second appeal in which he has appealed against both conviction and sentence on amended supplementary grounds of appeal that the charge- sheet was defective; the prosecutor who dealt with the matter in the Magistrate's Court, was the same one who prosecuted the



appeal in the High Court; the medical examination report produced by PW2 for both the complainant and the accused were not sufficient to sustain conviction; the evidence adduced by the prosecution witnesses had material contradictions that amounted to reasonable doubt; the sentence meted out by the trial magistrate and upheld by the learned Judge was harsh and unlawful; and ought to be set aside; the provisions of section 333 (2) of the Criminal Procedure Code (CPC) be considered by this Court when determining the sentence.

8. At the plenary hearing, the appellant relied on his written submissions, to argue that the charge sheet was defective as the date entered in the Occurrence Book (OB) No. 17/3/7/2014 as indicated on the charge sheet was the date he was taken to hospital by the police officer PW6, yet PW4 alleged to have reported the matter on 23rd June 2014. He points out that whereas the charge was brought under section 8 (1) (3) of the Sexual Offences Act, the particulars stated that the child was aged 8 years, the prosecution ought to have amended the charge sheet so as to align it with the facts and have him charged under section 8 (3) of the Act.
9. Drawing from the provisions of section 134 of the CPC which laments that he was prejudiced in being called upon to defend the charge and he had difficulties in knowing exactly whether he was convicted for the offence of defilement contrary to section 8 (1) (3) or 8 (1) (2) of the Act.
10. He also pointed out he was greatly prejudiced as Mr. Owiti who prosecuted the matter at the trial before the magistrate's court until 17th October 2014, was subsequently promoted to the High Court as the State Counsel, where he prosecuted the appeal.
11. The appellant dwells largely on issues of fact, which is not within our mandate pointing out to what he terms as were material contradictions in the evidence in chief and response on cross-examination which he says was fraught with contradictions, particularly with regard to when the incident took place; he also wonders how it is that the minor was not found to be infected with HIV Aids virus, yet he is among the people living with AIDS.
12. As regards the sentence, the appellant points out that the offence he was charged with carries a minimum of life sentence, which in his view was not appropriate; he argues that the two courts below simply dismissed the case but did not deal with the issue of sentence. The appellant requests this Court to consider section 333(2) of the CPC when determining the sentence by considering the period spent in custody by the appellant since his arrest in the year 2014 to date relying in the case of Ahmed Abolfathi Mohammed & Another v R (2018) KLR; where this Court, sitting in Nairobi stated that while applying section 333 (2) of the criminal procedure code alongside its proviso, the sentence of imprisonment ought to run from the date of arrest.
13. In pleading for a lenient sentence, the appellant explains that for the period he has been in prison he opted to join rehabilitation program in prison; trained and attained certificates and diploma level in theology which he did successfully and completed; was a first offender, is remorseful, reformed, rehabilitated of good character a law abiding citizen and is a born again Christian, so that if given a second chance will obey the law and keep peace within the country.
14. In opposing the appeal through written submissions, Counsel for the State points out that the issue regarding a defective charge was raised at the High Court and was duly addressed by the learned Judge who invoked section 382 of the Criminal Procedure Code to correct the error by convicting the appellant for defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006.
15. As to whether there was prejudice in prosecuting counsel handling both the matter at lower Court and at the High Court, it is argued that just in the same manner that defence counsel can handle a matter



from lower court to Supreme Court, a Prosecuting Counsel too can adopt the same approach, given that it is the Court that makes the determination and not an individual.

16. As to whether the ingredients of defilement were proved beyond reasonable doubt, it is submitted that all the ingredients of defilement citing the decision in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No, 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

It is argued that the ingredients of the offence were proven through oral and documentary evidence as follows: the age was confirmed through the birth certificate; penetration was proved by the physical inspection by PW4, and corroborated by medical evidence; identification was by recognition, and the opportunity and circumstances were favourable.

17. The respondent contends that there were no contradictions and inconsistencies in the prosecution case and even if there were there, they were minor and did not go to the root of the prosecution case hence we should ignore them; that the minor inconsistencies if any, were satisfactorily explained and that the record of appeal clearly reflects that prosecution witnesses were truthful.
18. On sentence, the respondent argues that the trial court and the 1st appellate court considered the mitigation of the appellant; and was right in imposing the sentence. While being cognizant of the recent jurisprudence in which the courts have addressed the issue of constitutionality of life imprisonment, the respondent, maintains that the sentence was not harsh; and citing the case of *Onesmus Musoki Mema v Republic Criminal Appeal No.104 of 2021* reiterates that life imprisonment, is still a legal and lawful sentence, and must be upheld. We are thus urged to dismiss the appeal.
19. This being a second appeal, our jurisdiction is limited under section 361(1) of the Criminal Procedure Code to matters of law only. In this regard, the appellant has raised issues against conviction, saying the charge sheet is defective; and the charge against him was not proved to the required standard. As regards the sentence, his lament is related to the legality of the sentence that was imposed upon him. Both are issues of law, thus satisfying the threshold for our appellate jurisdiction.
20. As regards the defective charge, our perusal of the record discloses that the same issue was raised at the High Court and adequately addressed by the learned Judge who acknowledged the error pointed out by the appellant, but found a cure by invoking section 382 of the Criminal Procedure Code to correct the error. Section 382 of the provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

The contents of the charge, and the particulars thereto, clearly communicated to the appellant the nature of the offence he was facing and the age of the minor, leaving no room for the argument that he did not know what charge he was facing. Our own analysis of the arguments raised and the evaluation



of the reasoning given by the learned judge demonstrates a proper application of the law and the legal principles, having acknowledged that the trial court convicted the appellant on the wrong provision of the law, but which error was redeemable through the application of the legal provision in the statutes.

21. The learned judge after acknowledging that the error in the charge sheet could be amended to read section 8(1) as read with section 8(3), then observed that the facts actually revealed an offence under section 8(1) as read with section 8(2) of the Sexual Offences Act, and corrected that error. The provisions relevant to this appeal are Section 8(1) of the Act which provides that:
 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 between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
 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.We detect no error on the part of the learned of the learned judge to the extent that he corrected the provision cited.
22. It is not denied that the prosecutor who dealt with the matter in the Magistrate's Court, was the same one who prosecuted the appeal in the High Court. Did this occasion any prejudice to the appellant? Was this issue raised before the High Court on appeal? We have perused the memorandum of appeal and note that this is a new matter that was not raised before the 1st appellate court. In any event, Mr. Owiti did not prosecute the matter to conclusion, having only participated when the complainant (PW1) and the doctor (PW2) testified; thereafter, it was Mr. Kelwon who took over and conducted the prosecution to conclusion. It has not been demonstrated what prejudice was occasioned by the subsequent participation of Mr. Owiti in the appeal, although for good order it would have been better for another State Counsel to conduct the appeal.
23. As to whether the ingredients of defilement were proved, we take note that the key ingredients are age (which was confirmed by the evidence of PW1 during the *voire dire* examination, and corroborated by the date of birth reflected in the birth certificate produced by PW6); penetration- which was described by the victim (V.A.N), corroborated by her grandmother (PW4) who noted the invaded state of the genitalia and heavy bleeding, and the medical examination which found evidence of lacerations and a broken hymen. We also take note that the learned judge also considered the opportunity and circumstances which favoured positive identification, and we find no error in his findings.
24. As regards the sentence, we agree with the appellant that sentencing should not be taken lightly, after all, it involves one's life and liberty. The trial court meted a life sentence which was confirmed by the 1st appellate court, which had been meted out. The question we ask ourselves is whether having corrected the provision under which the appellant was convicted, then the sentence too ought to have been interfered with. What is apparent is that the appropriate sentence was meted out and confirmed in line with the evidence presented which disclosed an offence with a higher sentence; and the appellant suffered no prejudice. It would have been different if the penalty had been meted out as provided under section 8 (3), which provides for a term not less than 20 years.
25. Having made the afore-going observation, the only issue for consideration is whether the sentence was manifestly harsh or excessive under the circumstances. We are alive to the pronouncement in several judicial decisions such as *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR); and *Julius Kitsao Manyeso v Republic* (Malindi Criminal



Appeal No. 12 of 2021), (Judgement 7th July, 2023 (unreported) in which this Court declared the indeterminate nature of life sentence unconstitutional.

26. We consider the seriousness of the nature of the offence and the tender ages of the victim, and the violent manner in which it was carried out as aggravating factors. This Court also consider the appellant's plea to take into account the period he spent in remand custody prior to his conviction and sentence. We are persuaded that all things considered, this is one instance where the life sentence was deserved; and in view of our findings regarding the indeterminate nature of life sentence in *Evans Nyamari Ayako v Republic*, Kisumu COA Criminal Appeal No. 22 of 2018 (UR), we translate the sentence of life imprisonment that was imposed upon the appellant to a term sentence of 30 years' imprisonment. The appeal thus lacks merit, and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2024

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

DEPUTY REGISTRAR

