



**GAO v Republic (Criminal Appeal 25 of 2018)
[2024] KECA 1580 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1580 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 25 OF 2018
M NGUGI, F TUIYOTT & JM NGUGI, JJA
NOVEMBER 8, 2024**

BETWEEN

GAO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Siaya (Makau J.) dated 16th February, 2017 in Siaya High Court Criminal Appeal No. 23 of 2015)

JUDGMENT

1. In this second appeal, the appellant, GAO, challenges the decision of the High Court in Siaya (Makau J.) upholding his conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 4th day of March 2014 in Siaya sub-County within Siaya County, he intentionally caused his penis to penetrate the vagina of one MAM, a child aged 5 years.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge were that on the same day and place as in the main charge, the appellant intentionally touched the vagina of MAM, a child aged 5 years. The appellant was found guilty on the main count and sentenced to life imprisonment. His appeal to the High Court was found to be without merit, leading to this appeal.
3. In his memorandum of appeal dated 20th May, 2021, the appellant raises three rather prolix grounds of appeal which, summarised, are that the two courts below failed to protect his fundamental rights; erred in point of law in failing to note that the age of the child was not proved beyond reasonable doubt; and in failing to observe that the prosecution case was not proved beyond reasonable doubt.
4. As this is a second appeal, we are required, as provided under section 361(1)(a) of the Criminal Procedure Code, to confine ourselves to a consideration of matters of law only. On a second appeal, we



are under a duty to pay homage to the 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. In such a case, the decision would be bad in law, thus entitling this Court to interfere- see *Adan Muraguri Mungara v. Republic* [2010] eKLR.

5. Before considering the appellant's grounds of appeal, we set out, briefly, the prosecution evidence presented before the trial court, through six prosecution witnesses. The complainant, MAM (PW1), a child of five (5) years, was going home from school in the company of three other children, one M., J. and D. when they met the appellant at a shop. The appellant told MAM to accompany him to his house and she went with him, while the other children went to their homes. The appellant bought her a chapati, ball gums and also gave her four shilling coins. He then put her on his mattress, removed her biker, petticoat and pants, and defiled her-in her words, he did 'tabia mbaya' to her. She screamed and one R. came to her rescue. MAM identified the four shilling coins which the appellant gave her, as well as her white biker and navy blue panty and petticoat as the clothes she had been wearing on the material day.
6. The complainant's mother, WAA (PW2), who stated that the appellant was her nephew, testified that she had been informed by a small child that the appellant was sleeping on top of the complainant. She entered his house and found the appellant lying on top of her daughter, the complainant. She took a stick and hit the appellant, then she took the complainant out. She then locked the appellant inside his house from outside. She sent for the complainant's father (PW4), who arrested the appellant.
7. JAA (PW3), the complainant's teacher, was informed that someone had defiled the child. She rushed to the complainant's home and found a crowd at the appellant's house. The appellant was asked to produce the complainant's underpants which were in his house, and he produced her biker, petticoat and panty from under his mattress.
8. Like PW2, PW4, JM, the complainant's father, was informed by his grandson, R., that someone had taken away the complainant. He rushed to the appellant's house and found a crowd which wanted to beat up the appellant. He also saw his daughter, PW1, who only had her uniform on, but no underpants. He checked the appellant's house and found PW1's bag and school shoes. The appellant produced the complainant's blue underpants, biker and petticoat from beneath his mattress.
9. The complainant was examined by PW5, Jared Obiero Opondo, a clinical officer at Siaya Hospital, on 5th March 2014. He also completed a P3 form for her, noting that she had been defiled by a person known to her. He testified that the complainant had a torn hymen, a 'parenic' vagina and a vaginal discharge, which had blood stains in it. A urinalysis revealed pus cells in the urine. He also examined the appellant, aged 49 years, and completed a P3 form with respect to him.
10. The investigating officer was Police Constable Carolyne Mukabe (PW6). She testified that she received the appellant, who had been arrested by members of the public, on 4th March 2014 at the Siaya Police Station. The allegation against him was that he had defiled a child. PW6 produced in evidence the complainant's clothing recovered from the appellant's house- a black petticoat, navy blue panty and a biker. He also produced the age assessment report which showed that the complainant was 5 years old.
11. When placed on his defence, the appellant elected to remain silent and call no witness. He was found guilty as charged and sentenced to life imprisonment.
12. The appellant was aggrieved by the decision of the trial court and he filed an appeal to the High Court, contending that: the trial court erred in law and fact by failing to observe that the police investigation was insufficient and shoddy; failing to observe that some of the key witnesses were not summoned to



shed light on both the prosecution and defence case; failing to give the appellant a chance to deliver his defence as the law provides; and failing to notice that the P3 form presented ‘was merely forged hence lacked the office rubber stamp and the official signature’.

13. In its decision, the first appellate court considered the grounds of appeal in the appellant’s memorandum of appeal, as well as additional grounds in his submissions. The High Court noted that the appellant appeared before the trial court on 6th March 2014 when an order was also made for him to be supplied with statements; that his trial did not start till a month later, on 24th April 2014; and that on the hearing date, the appellant indicated that he was ready to proceed.
14. The High Court, therefore, found that it was not correct that the appellant was not accorded adequate time and facilities to prepare for his defence. The court further found that when placed on his defence, the appellant did not ask for time to prepare his defence but informed the court that he wished to remain silent. The court found, upon an analysis of the evidence before the trial court, that the prosecution had proved the charge of defilement against the appellant, and it upheld his conviction and sentence.
15. In his written submissions before us, the appellant submits that the first appellate court erred in failing to find that his constitutional rights had been violated as he was not accorded legal representation; and that it failed to properly analyse the prosecution evidence and find that he had been HIV positive, yet the complainant was not infected. It is his submission, further, that the sentence of life imprisonment is unconstitutional in light of the Supreme Court decision in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR.
16. In submissions dated 14th March 2023, the respondent submits that contrary to the appellant’s contentions, the first appellate court properly determined the issue of fair trial; that it found that at no time did the appellant request for counsel during trial and his plea denied; that he is raising alleged violation of his constitutional rights for the first time before this court, with no specificity regarding how they were breached.
17. Regarding the appellant’s submission that penetration was not proved as he was HIV+ at the time of the offence and he could not have been the perpetrator as the child was not infected, the respondent submits that there was no evidence before the courts below that indeed the appellant was HIV+ at the time of the act; that in any event, all the elements of the offence of defilement—the age of the victim, the act of penetration and the identity of the perpetrator were proved by the prosecution
18. The respondent further submits that there was an age assessment report that indicated that the child was 5 years old; that the act of penetration was proved by the evidence of the complainant and the clinical officer (PW5); and the identity of the appellant as the perpetrator was also proved as the offence happened during the day; the appellant was known to the victim; and he was caught in the act by PW2. The respondent therefore submitted that the appeal against conviction was without merit.
19. With respect to sentence, the respondent submitted that since the High Court decision in Maingi & 5 others v Director of

Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) this Court has also accepted the exercise of judicial discretion in sentencing in sexual offence cases as expressed in, among other cases, *Mwangi v Republic (Criminal Appeal 84 of 2015)* [2022] KECA 1106 (KLR) (7 October 2022) (Judgment). The respondent, therefore, submitted that the life sentence meted out on the appellant be set aside and replaced with a term limit.



20. The respondent notes, however, that when called upon to mitigate by the trial court, the appellant chose not to. The respondent, therefore, proposes that the matter be remitted to the trial court, the Principal Magistrate Court at Siaya, for a re-sentencing hearing where the mitigation of the appellant will be recorded.
21. We have considered the record of appeal and the submissions of the parties. The appellant impugns the decision of the first appellate court on three grounds: an alleged failure to protect his fundamental rights; failure to note that the age of the child was not proved; and failure by the respondent to prove its case beyond reasonable doubt.
22. As we noted earlier in this judgment, the remit of this Court, on a second appeal, is confined to matters of law. The only matter of law raised before us is on the alleged failure by the first appellate court to find that the appellant's rights had been violated. Before we address ourselves to this issue, we must observe that the other two grounds raise matters of fact which are outside our remit on second appeal, except in the limited circumstances set out in *Adan Muraguri Mungara v. Republic* (supra).
23. Even were we able to inquire into matters of fact, however, the prosecution case in this matter, as both the trial court and the first appellate court concluded, unerringly pointed to the guilt of the appellant. What were these facts? The events happened in broad daylight when the complainant, in the company of three other children, was going home for lunch from school. The appellant, a 49-year old man, asked the complainant, a 5-year old girl, to go to his house. He bought her a chapati and bubble gum, and gave her four shillings. He defiled her on his bed and was found in the act by the complainant's mother, PW2. She locked him in his house from outside, and called her spouse (PW4), who, with other members of the public, arrested the appellant, and he was taken to the police. The complainant's school bag and shoes were found in the appellant's room, while her under pants, petticoat and biker were under his mattress from where the appellant removed them.
24. The evidence of PW5, who examined both the complainant and the appellant, confirmed the fact of penetration. He also produced the age assessment of the complainant, which showed that she was 5 years old. The elements of defilement: the fact of penetration, the age of the victim and the identity of the perpetrator were proved beyond reasonable doubt.
25. The second issue is whether the appellant's rights to a fair trial were violated. The appellant had raised this issue before the first appellate court, contending that he was not afforded a lawyer, and was not afforded adequate time to prepare his defence. The first appellate court found that the appellant did not request for legal assistance; he did not ask for time to prepare his defence when the court ruled that he had a case to answer; and he elected to remain silent, an election that is constitutionally protected under Article 50(2)(i) of *the constitution*. We find no merit in this ground, either.
26. The appellant complains about the sentence meted out against him and cites the Supreme Court decision in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated))* [2017] KESC 2 (KLR) (14 December 2017) (Judgment). The respondent agrees that we should interfere with the sentence, citing *Maingi & 5 others v Director of Public Prosecutions & another* (supra) and the decision of this Court in *Mwangi v Republic* (supra) with regard to the exercise of judicial discretion in sentencing.
27. However, in its recent decision in *Republic v 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 held that its decision in *Muruatetu & another v Republic* (supra) does not apply, by parity of reasoning, to the minimum sentences prescribed under the *Sexual Offences Act*.



It further held that the constitutionality or otherwise of minimum sentences under the Sexual Offences Act would need to be tested through the hierarchy of courts before ultimately reaching the Supreme Court for consideration and determination. Under Article 163(7) of the Constitution, this Court is bound by decisions of the Supreme Court. We are, accordingly, unable to interfere with the sentence meted out against the appellant by the trial court and upheld by the first appellate court as it is the minimum sentence prescribed under section 8(1) as read with section 8(2) of the Sexual Offences Act.

28. Accordingly, we find the appellant's appeal to be without merit, dismiss it in its entirety and uphold both the conviction and sentence.

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

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

