



REPUBLIC OF KENYA



KENYA LAW
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**Ipulo v Republic (Criminal Appeal 35 of 2017)
[2023] KECA 204 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 204 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 35 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 17, 2023**

BETWEEN

AMOS IPULO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of the High Court of
Kenya at Kakamega (Kariuki, J) Dated 13th September, 2016)*

JUDGMENT

1. On the strength of the evidence of four (4) prosecution witnesses, Amos Ipulo, the appellant, was convicted of the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offences being that between the night of 6th and the March 7, 2013 at [particulars withheld] location in Kakamega County within Western Province, the appellant intentionally and unlawfully caused his penis to penetrate the anus of IK a child aged 10 years.
2. The appellant's first appeal on conviction and sentence was unsuccessful and he is now before us on a second appeal.
3. IK (PW2) was born on March 23, 2003 to ASK and JIS and would have been just under 10 years at the time of the alleged offence. On that day IK was at home where he was playing, as a child of his age was wont to. He then decided to go to his grandmother who lived at a place called [particulars withheld]. But as it was late, he was afraid but nevertheless soldiered on. On his way, he met a man who asked him where he was going to which he responded. The man told him that he knew the place and that he would take him there on a bicycle but after they passed by his place. The man did not do as promised and instead they went on foot. Along the way, they stopped for the man to drink alcohol.
4. At some point, the man said that it was getting late and so they should spend the night at his house. His house was at [particulars withheld]. It was a small mud walled house with two rooms. Once inside,



- he lit a tin lamp. PW2 was able to see a table in the room. Perhaps to forewarn the minor as to what was about to befall him, the man told the minor that he had a sword under his bed.
5. The man offered PW2 food, ugali and Sukuma, which they both ate. He asked PW2 to remove his clothes and enter bed. PW2 attempted to resist, stating that he usually slept with his clothes on. The man would not hear of it and told him to obey. He held the boy on the throat and told the boy he would kill him. PW1 acceded to the menacing demand and removed his clothes.
 6. At that point the man removed something from his trouser pocket and put the contents on the minor's buttocks. The man joined the minor in the bed, removed his clothes and started holding the victim on the stomach and kissing him in the mouth. He then took his penis and inserted it in the anus of the minor whom he warned not to scream. The minor was in pain as the man inserted his penis into his anus three times. Another detail; before he had done so, the man put a lubricant on the victim's body. The two remained together until just before sunrise when the man escorted PW1 out of his house and told him to go away. PW1 had a lot of pain in his stomach and kept passing "gas" from his "buttocks". PW1 went straight to the police station where he reported the matter to a police officer. As he was being escorted home they met his mother (PW1) whom he told what had happened. She took him to a hospital in Kakamega where he was attended.
 7. The victim was able to recognize the person who had sexually assaulted him. It was the appellant. He led police officers to the house of the appellant where they found the appellant.
 8. PW1 is a businesswoman at [particulars withheld] where she sells cereals. IK is a son to her sister in law and lives with her as his mother had passed on. On March 8, 2013, PW1 went to work as usual and on returning home she did not find PW2. She looked for him at night but in vain. She woke up at 5.00am to continue with the search. She did so by visiting the homes of PW2's schoolmates. She got information that PW2 had gone to play at his grandmother's home at [particulars withheld], so she decided to check there. She called and she was told the child was not there and so she decided to go to the A.P's camp at Lurambi. On her way there, she met PW2 in the company of police officers. He was crying and the police officers told her what had happened.
 9. On examining him, she saw tears in his anus and some fluid there. He also had some oil around his buttocks. She immediately took him to hospital. Duncan Miningwa (PW3) is a clinical officer at Kakamega Provincial Hospital. On March 8, 2013, he received PW2 who was escorted by PW1. PW2 gave a history that he had been sodomized on the night of March 6, 2013 at Lubao. On examination he found a tear on both the upper and lower sides of the child's anus which also had a pus discharge. An anal swab was done but no spermatozoa was found. He filled a P3 form on the outcome of the examination.
 10. It fell to PC Policap Odoyo (PW4) to investigate the matter. He is also one of the officers who arrested the appellant.
 11. In his defence, the appellant gave an unsworn statement. He denied the offence and narrated to court how he was arrested. That on March 10, 2013 at around 4.00am to 5.00am he was asleep at his house when he was woken up by a knock on his door. There were police officers who ordered him to step out of the house and carried out a search in his house. He was then arrested and taken to the police station.
 12. Upon conviction, the appellant was sentenced to life imprisonment. The conviction and sentence was upheld by Kariuki, J in a judgement delivered on September 13, 2016.
 13. In this second appeal, the appellant raises four grounds. He asserts that the learned judge erred in law by:



- i. failing to appreciate that the conviction and sentence was based on a fatally defective charge sheet.
 - ii. failing to note that the appellant was not justly tried in accordance with article 50 of the Constitution.
 - iii. failing to appreciate that the evidence produced was not sufficient to sustain a conviction.
 - iv. by upholding the minimum sentence imposed by the trial court”
14. We deal with this matter on a second appeal cognizant of our circumscribed role set out in the provisions of section 361(1)(a) of the Criminal Procedure Code and restricted to dealing with matters of law only. This restriction was elaborated by this court in Njoroge v Republic [1982] KLR 388 where it stated:
- “On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence.”
15. At the hearing before us, conducted through the virtual platform, the appellant appeared in person while Mr Okang’o Senior Principal Prosecution Counsel represented the respondent. Both relied on their written submissions. We note however that while the appellant relied on the grounds and submissions dated August 21, 2018, counsel Okang’o answered appeal dated March 10, 2022 which we have not had sight of. We shall proceed on the basis of the grounds and submissions which, at plenary, the appellant chose to prosecute.
16. Just as he did before the High Court, the appellant argues that he was charged with a non-existing section of statute. He submits that he was charged with defilement contrary to section 8 (1) (2) of the Sexual Offences Act which does not exist. Further, that the charge sheet did not comply with the provisions of section 214 (1) of the CPC as it gave an erroneous description of alleged offence and did not accord with the evidence on record.
17. We think that on this aspect the High Court judge properly directed his mind on the law when he applied the principle in the following passage in the decision in Sigilai & another v Republic [2004] 2 KLR 480;
- “The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”
18. As far as we can see, the only defect in the charge sheet was that it merged the section that defines the offence with the one that sets out the punishment, resulting in it setting out a non-existent section. That said, the particulars of the charge spell out, without ambiguity, that the appellant is to answer a charge of defiling a minor aged 10 years. If one puts the particulars of the charge sheet together with the charge itself, which admittedly wrongly merges two sections, still it seems to us that there would be no ambiguity as to what the appellant faced. It is therefore no wonder that the questions he raised in cross-examination and the defence he took reveal that he was well aware of the nature and particulars of the offence for which he stood trial. There can be no merit on this ground as the nature of the defect is not fatal.



19. In his second ground the appellant’s complaint is that his constitutional right to a fair hearing was violated. Under this ground the appellant raises two issues.

The first is one that must be disposed of without much ado. He states that no plea was read to him and the records do not show whether he pleaded guilty or not. Answering to this issue, the first appeal court held:

“On the March 11, 2013 the accused was arraigned in court and the substance of the charge and every element thereof read to him in Kiswahili, a language that he understood and the accused pleaded not guilty. Plea was therefore taken on the first day when appellant appears in court and not after the hearing of the case .”

20. We have looked at the original court proceedings and affirm the holdings of the first appeal court.
21. A second constitutional matter taken up is that witness statements were not supplied to the appellant at trial. While the court record does not explicitly record that the appellant was supplied with witness statements during trial, it also does not do the converse. There is no record of any complaint by the appellant at trial that he was not furnished with witness statements in advance of them testifying and for that reason, we cannot vouch for the veracity of this complaint.
22. The third ground of appeal is that the evidence adduced by the prosecution was insufficient to found a conviction. In interrogating this ground, we remind ourselves that as a second appellate court we do not concern ourselves with issues of fact unless there is a demonstrable misapprehension of that evidence by the trial court in that the conclusion drawn from the evidence was perverse and could never be reached by a tribunal properly directing itself. Yet, for a different reason, this aspect of the appeal need not detain us at all. None of the alleged weaknesses or deficiencies in the prosecution case now raised before us were taken in the first appeal at the High Court. The appellant is seeking to set up an appeal which substantially differs from his appeal to the first appellant court. It is now too late to raise them. They are simply afterthoughts.
23. On sentence, the jurisprudence now taking root is that the minimum sentences prescribed under the *Sexual Offences Act* for various offences are not mandatory in nature and the sentence to be imposed is in the discretion of a trial court. In this matter, the trial court record shows that when invited to make his mitigation, the appellant stated:

“I did not commit the offence”

This stance may have been taken by the appellant in the hopelessness of the situation then that there was only one sentence available. While the victim was a minor aged 10 years and a certain amount of force was used by the appellant on the victim, we think that the appellant should benefit from a relook at his sentence in resentencing hearing. We trust that the resentencing court will exercise its discretion within the guidelines set out in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)

24. The appeal on conviction is without merit and is hereby dismissed. The appellant shall be produced before the Chief Magistrate’s court at Kakamega within 14 days of today for directions on resentencing. Those are the orders of court.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

P.O. KIAGE

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**JUDGE OF APPEAL
MUMBI NGUGI**

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**JUDGE OF APPEAL
F. TUIYOTT**

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

