



**Lugwe v Republic (Criminal Appeal 65 of 2022)  
[2023] KECA 259 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 259 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 65 OF 2022  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
MARCH 17, 2023**

**BETWEEN**

**SIFA KATANA LUGWE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 12th April 2021 in High Court Criminal Appeal No. 15 of 2020)*

**JUDGMENT**

1. Sifa Katana Lugwe, the appellant was on the 18<sup>th</sup> April 2016 charged with 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 2<sup>nd</sup> April 2016 at {Particulars Withheld} of Watamu Location within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the anus of MK, a boy aged 7 years.
2. The facts are that at the time of the commission of the offence, MK was a student in class KG3 at {Particulars Withheld}. During the late afternoon of April 2, 2016, MK was grazing goats at Jimba in the company of his younger brother when the appellant went to where they were and asked him to accompany him to the bush. MK declined. The appellant held him by force and pulled him into the bush, removed his (MK's) trouser and inserted his penis into his anus. The appellant threatened that should scream, he would kill him. After defiling MK, the appellant left. MK then went home where he found his grandmother NC(PW3).
3. PW3 was at home on April 2, 2016 at about 4.00 pm when "the children left with the herdsman", Sifa, the appellant, who apparently was to help the children in herding cattle. When the children returned at 7.00 p.m., MK was crying and "said that Sifa had done something bad to him" and that "he had been done bad manners"; that PW3 then accompanied MK to Sifa's home who denied having defiled



- MK. PW3 had looked at MK's anus and had seen "a watery substance"; she washed him and took him to Malindi Hospital where he was treated.
4. MK's father, EK (PW2), was on his way to his shamba on April 2, 2016 when his mother (PW3) (MK's grandmother) called him and informed him that his son MK had been defiled by a neighbour. On getting home, he found MK in pain. He checked his son's anus and found "some slimy liquid" and took him to Malindi General Hospital where he was treated.
  5. Mr. Ibrahim Abdullahi (PW4), a Senior Clinician at Malindi Hospital examined MK before filling the P3 Form. On examination, MK had bruises on anal orifice and tenderness to touch. He produced the treatment notes, P3 Form, birth certificate and PRC Form.
  6. The investigating officer was Corporal Nancy Anyuma of Watamu Police Station where the incident was reported and who, at the time of the trial, had been transferred to Eldoret. Her witness statement was however produced before the trial court by Corporal Peter Ndiema (PW5).
  7. In his defence, the appellant stated that on April 2, 2016 at 4.00 p.m., he went to herd cattle with his cousin and returned home at around 6.00 p.m. to take a shower; that while in the bathroom, he heard people talking and on going outside, he found his elder brother John holding a child (MK) well known to him; that John stated that the child's aunt had claimed that he (the appellant) had defiled the child which he denied; that the brother then left leaving the child behind; that they then slept and the child went home the following day; that he was later arrested and charged with the offence he knew nothing about.
  8. After reviewing the evidence, the learned trial magistrate in a considered judgment delivered on November 15, 2019 was satisfied that all ingredients of the offence were established and convicted the appellant and subsequently sentenced him to imprisonment for life. On appeal to the High Court, the appellant complained that the trial magistrate erred in failing to consider that no certified copies of the treatment notes, P3 Form and birth certificate had been produced and that the trial court erred in imposing the mandatory minimum sentence. In its judgment delivered on April 12, 2021, the High Court (R. Nyakundi, J.) upheld the conviction but substituted the life imprisonment sentence with a sentence for a term 25 years.
  9. Still dissatisfied, the appellant filed the present appeal on three grounds set out in his memorandum of appeal, namely that the High Court erred by not considering that there was massive contradictions and variances; that the Judge failed to consider section 163(1)(c) of the *Evidence Act*; and that his defence was not considered. However, in a departure from his grounds of appeal, in his amended grounds of appeal and written submissions, the appellant has urged that the trial court denied him the right to a fair trial by proceeding without ensuring that he was provided and or afforded the assistance of an advocate; that the sentence imposed was harsh and excessive; and that the possibility of reformation and social re-adoption in line with judiciary sentencing policy was not considered.
  10. Citing articles 25 and 50 of the *Constitution*, the appellant submitted that he was greatly prejudiced before the trial court and before the High Court by the failure of the state to provide him with legal assistance and his right to fair trial was thereby violated. Reference was made to the case of *David Macharia Njoroge vs. Republic* [2011] eKLR and *Republic vs. Karisa Chengo & 2 others* [2017] eKLR.
  11. As regard sentence, it was submitted that punishment is meant to rectify and rehabilitate and that excessive and harsh sentences are inhumane and degrading; that the appellant was 21 years when he was arrested and the 25-year sentence imposed by the High Court is excessive, harsh and inhumane and that he should be given a chance to re-integrate back to society.



12. Opposing the appeal, learned Senior Principal Prosecution Counsel Miss. Mulwa submitted that the prosecution evidence was cogent, consistent and corroborated and there were no contradictions or variances as claimed by the appellant; that the complaint regarding Section 163(1)(c) of the *Evidence Act* is wholly baseless as there was no application to declare any witness hostile and there was no occasion requiring the court to do so; and it is clear from the record that the defence put forth by the appellant was duly considered.
13. We have considered the appeal and the submissions. This being a second appeal, our mandate is limited and is confined to matters of law by reason of section 361(1) of the *Criminal Procedure Code*. As stated by the court in *Karani vs. R* [2010] 1 KLR 73:

“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.”

14. Bearing that in mind, the main complaint (others in the original memorandum of appeal having been abandoned) in the appellant’s amended grounds of appeal, which has in our view been raised as an afterthought is the important question of legal representation. The importance of legal representation is underscored in many decisions of the Court. See for instance *David Njoroge Macharia vs. Republic* [2011] eKLR; *Kennedy Hamisi Isigoli vs. Republic* [2019] eKLR; *Jackson Kalenga vs. Republic* [2019] eKLR.
15. That said, the record shows that the appellant ably conducted his trial and cross examined at length all the prosecution witnesses. Apart from the fact that he did not raise this complaint earlier, it is not shown that he was in any way prejudiced. As the court stated in *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs. Republic* (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) (21 January 2022) (Judgment):

“It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. The *Constitution* demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court, from the way the appellant cross examined the prosecution witnesses and from his general conduct during the trial, it is not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under articles 50(2)(g) and 50(2)(h) of the *Constitution*. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial. All in all, we are satisfied that the conviction is well founded, and we have no basis for interfering with the same.”

The same is true in this case.

16. With regard to the sentence, the High Court noted that the trial court sentenced the appellant to life imprisonment after considering his mitigation and that the sentence meted out was “merited in light of the circumstances of the instant matter which involves an adult that is incapable of controlling his sexual desires to the extent of sodomizing a boy child” but nonetheless went ahead to re-sentence



the appellant to 25 years imprisonment from the date of his arrest. We do not have a basis in law for interfering with that sentence.

17. The appeal fails and is hereby dismissed.

*Dated and delivered at Mombasa this 17<sup>th</sup> day of March 2023.*

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

