



**Elemon v Republic (Criminal Appeal 103 of 2019)
[2023] KECA 734 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KECA 734 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 103 OF 2019
F SICHALE, FA OCHIENG & LA ACHODE, JJA
JUNE 16, 2023**

BETWEEN

PHILIP ORIGO ELEMON APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the decision of the High Court at Eldoret (D.K. Kimei.
J) dated 14th November, 2018 In Criminal Appeal No. 13 of 2014)*

JUDGMENT

1. This is the second appeal of Philip Origo Elemon (the appellant), against the judgment delivered at Eldoret High Court, on November 14, 2018 by DK Kemei J. The appellant was charged in the Magistrate's Court at Eldoret with defilement contrary to section 8(1), as read with section 8(2) of the [Sexual Offences Act](#) (SOA). He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the SOA.
2. The particulars were that on the March 23, 2014 in Eldoret East District, within the Uasin Gishu County, the appellant defiled JJK a child aged 9 years old.
3. He pleaded not guilty to the charge and the matter went to trial. The prosecution marshalled five witnesses to prove its case, while the appellant gave an unsworn statement in his defence and called no witnesses. The appellant was found guilty of the main count and sentenced to imprisonment for life.
4. His first appeal to the High Court was dismissed and the conviction and sentence were affirmed, hence the instant appeal.
5. A brief background is necessary to contextualize the appeal. The prosecution's case was that 9 years old JJK (PW1), went out to herd cattle with the appellant and an old woman on the material day. When the old woman left, the appellant got hold of PW1 removed her clothes, gagged her mouth with his



- hand, lay on top of her and did what the minor referred to as bad manners to her. The attack occurred in an open place and when the appellant saw some people approaching, he ran away. PW1 then went home and told her aunt, PW2 what the appellant had done to her.
6. MC (PW4), for whom the appellant worked as a herdsman, told the court that she had seen the appellant sitting with PW1 earlier on and the sight made her uncomfortable. She called PW1's aunt and asked her to tell PW1 to take their cattle back home.
 7. MC, PW2 confirmed that she received a call from PW4 at about 4 pm on the material day. Further, that when PW1 finally arrived home, she told her that the appellant had defiled her. PW2 took her to Iten Hospital, where she was examined and it was confirmed that she had been defiled. Consequently, the matter was reported to the police and the appellant was arrested and charged.
 8. Dr Nancy Ruto (PW3), examined PW1 and observed that her hymen was irregular and her vagina was tender and painful. She produced the P3 form which confirmed that PW1 had been defiled.
 9. PC Joseph Kamau (PW5), produced PW1's clinical card obtained from PW2. The card indicated that she was born on February 10, 2005. She was therefore 9 years old at the time of the incident.
 10. The appellant's unsworn statement in response was a summary of what he did on the material day. He said that he went for a walk, returned to his place of work, took his supper and retired to bed. That the police arrested him from his house and later informed him that he had defiled a girl. Further, that PW1 was a stranger whom he saw for the first time in court.
 11. Upon considering the evidence before him, the learned magistrate, T Orlando (P.M) found the appellant guilty of the offence of defilement contrary to section 8(1) as read with section 8(2) of the SOA and sentenced him to life imprisonment.
 12. Aggrieved by the judgement of the trial court, the appellant filed an appeal in the High court. The learned Judge considered the appeal and found it to be devoid of merit. He dismissed the appeal entirely and confirmed both the conviction and sentence.
 13. The appellant did not give up. He filed this appeal against the decision of the High Court on grounds that:
 - a. The appellant's identification was not positively done;
 - b. The penetration was not conclusively proved;
 - c. The appellant's right to a fair trial was violated; and
 - d. The mandatory nature of the sentence was unconstitutional.
 14. The appeal was disposed of by way of written submissions which were orally highlighted during plenary hearing. Both parties filed written submissions. The appellant was in person, while the respondent was represented by Principal Prosecution Counsel, Ms Sakari Miriam Kibiti.
 15. The appellant contended first, that he was not properly identified. He urged that since PW1 testified that she saw him for the first time while she was out herding cattle, he ought to have been subjected to an identification parade to ascertain the accuracy of her identification.
 16. The appellant's second argument was that penetration was not proved, for the reason that PW1 did not state that the appellant inserted his penis in to her vagina.



17. Thirdly, the appellant submitted that the court failed to inform him of his rights to legal representation as provided by Article 50 (2)(g) and (h) of the Constitution. That in the circumstances, the trial proceedings caused him grave injustice and prejudice and ought not to stand.
18. Lastly, he urged that the sentence of life imprisonment imposed upon him in mandatory terms as stipulated under section 8 (2) of the SOA was unconstitutional, in light of the reasoning in the Supreme Court case of Francis Karioko Muruatetu and Another vs Republic (2017) eKLR. Further, that the sentencing process is part of the right to fair trial under Article 50 (2) of the Constitution and as such, the mandatory sentences provided by the SOA violates that right by denying the trial court discretion in sentencing.
19. Ms Sakari filed submissions dated February 10, 2023 in rebuttal, and urged that the appellant's constitutional rights were not violated in anyway. She asserted that the prosecution proved the age of PW1. That penetration was proved by the evidence of PW1 who testified that the appellant 'alinifanyia tabia mbaya' (he did bad manners to me) and her evidence was corroborated by that of PW3, the doctor who examined her and produced the P3 form confirming that she had been defiled.
20. Counsel submitted also that the appellant was positively identified as the perpetrator of the offence by PW1 and PW4, who were the crucial witnesses on his identity. That in any case, the appellant did not claim in his defence that his identity was mistaken.
21. Counsel did not submit on sentence. She concluded by urging this Court to dismiss this appeal and uphold both the conviction and sentence.
22. We have considered the Record of Appeal, the rival submissions of the parties and the law applicable. This being a second appeal, our mandate as stipulated under section 361(1)(a), of the Criminal Procedure Code is limited to re-evaluation and consideration of matters of law. We defer to the findings of fact by the two courts below, except where any such findings of fact as reached by the two courts below, is not supported by the evidence on record or where the findings are made as a result of a wrong application of the law.
23. In the case of Chemagong vs Republic [1984] KLR 213 the role of this Court was stated as follows:

' A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs Republic 17 EACA 146)'
24. Having said that, the issues that fall for our consideration in this appeal are whether:
 - a. The appellant's right to be informed of his right to have an advocate was contravened;
 - b. The prosecution proved the ingredients of the offence to the required standard; and
 - c. The mandatory minimum sentence meted on the appellant is unconstitutional.
25. The appellant's argument was that his rights under Article 50 (2) (g) and (h) were contravened because the trial court did not inform him of his right to have a legal representative at the earliest opportunity. In opposition, the respondent submitted that the appellant's constitutional rights were not contravened at all.
26. Article 50 (2) (g) and (h) of the Constitution provides that:
 - (2) Every accused person has the right to a fair trial, which includes the right—



- g. To choose, and be represented by, an advocate, and to be informed of this right promptly;
- h. To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.'

27. The learned Judge considered these arguments and, guided by this Court's decision in [*David Njoroge Macharia vs Republic \[2011\] eKLR*](#), held thus:

' The Court of Appeal held the opinion that the state ought to provide legal representation to accused faced with capital offence. Further, the same can be availed through a case-by-case basis i.e, where there exists complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. It is my considered view that the appellant's case is not one such case for the reason that he understood the charge and the case in particular and was able to conduct his case. I find and hold that he was not prejudiced by lack of representation. That ground therefore fails.'

28. From the record, there is no indication that the appellant was informed of his rights as stated above. However, the question that needs to be answered is whether the appellant was prejudiced as a result. The appellant was not prevented from choosing an advocate to represent him and he did not expound on what prejudice he suffered. The record indicates that the appellant understood the charge and was able to cross examine all prosecution witnesses properly, as well as mount his defence. In the premise, we agree with the learned Judge, that there is no proof of prejudice suffered by the appellant on this account and this ground therefore, fails.

29. On whether the prosecution proved all the ingredients required to prove the offence of defilement to the required standard, the appellant was charged with defilement contrary to section 8 (1) as read with section 8(2) of the SOA. Section 8 (1) of the SOA which provides:

' A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.'

30. The elements that must be proved for the offence of defilement to be deemed committed were set out by this Court in [*John Mutua Munyoki v Republic \[2017\] eKLR*](#) as follows:

' For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:

- i. The victim must be a minor
- ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice.'

31. The appellant argued that he was not positively identified. That the complainant stated that she saw him for the first time when they were herding the cattle and did not know him before. The respondent on their part urged that the appellant was positively identified as the perpetrator of the offence by the evidence of PW1 and PW4.

32. The learned Judge relied on section 124 of the [*Evidence Act*](#) and held:

' I have evaluated the record and found that the trial court adhered to the provision of section 124 of the [*Evidence Act*](#). The appellant has further not established how he was prejudiced



by the evidence of the single witness. Furthermore, the said single witnesses' evidence was not shaken in any manner by the appellant. The said ground fails'

33. We examined the evidence to establish the circumstances under which the identification was made. We revisited the guidelines laid down in the decision of *R v Turnbull & Others (1973) 3 AllER 549*, where it was held that:

' The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance.'

34. The evidence in the record before us shows that PW1 and the appellant spent some time in the field together before the incident. PW1 was herding their family cattle, while the appellant herded those of PW4, his employer. PW4 confirmed that she saw the two seated together in the field and informed PW1's aunt to call the child back home. Therefore, in as much as PW1 met the appellant for the first time on the ill-fated day, it is evident that they spent a considerable amount of time together, in broad day light and without any impediments.

35. PW1 was very clear in her evidence that it was the appellant who set upon her and defiled her after the third person in their company, who was an elderly woman left them. It is therefore our considered view that in those circumstances, both the trial and 1st appellate courts reached the proper conclusion, that the evidence tendered by PW1 and supported by PW4 who saw them together before the attack proved the identification to the required standard.

36. The appellant also contended that penetration was not proved, as PW1 did not testify that he inserted his penis into her vagina. In rebuttal, the respondent asserted that the child testified that the appellant did bad manners to her and therefore, penetration was proved.

37. The learned Judge addressed himself thus on penetration:

' It emerged from the evidence of PW3 that PW1's hymen was incomplete and that her genitalia was mildly swollen and was reddish.'

38. Section 2 of the SOA defines penetration as the partial or complete insertion of genital organs into the genital organs of another person.

39. Concerning penetration, the testimony of PW1 at page 11 and 12 of the record is as follows:

' The accused then removed my cloths, the person (pointing to the accused) blocked my mouth. He came on top of me. I felt pain. He used his hand to block my mouth. When he spotted people coming, he left me. It was in an open place. He left me and he ran away. I made noise when he was running away. No one came and I left and went home. I found Chela at home. She is a mother. I told her that the accused had defiled me (alinifanyia tabia mbaya)'



40. It is clear from the above excerpt from the record that the complainant was alluding to penetration when she spoke of 'he came on top of me', 'I felt pain' and 'alinifanyia tabia mbaya' (He did bad manners to me).
41. The language that minors employ to narrate what they were subjected to in sexual offences is often times, couched in euphemisms due to shame, embarrassment or their sheer immaturity. This was explained by this Court in *Muganga [Cbilejo Saba v Republic \[2017\] eKLR](#)* where this Court pronounced itself thus:
- ' Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, 'alinifanyia tabia mbaya', (IE V R, Kapenguria HC Cr Case No 11 of 2016), 'he pricked me with a thorn from the front part of this body.', (Samuel Mwangi Kinyati v R, Nanyuki HCCR A NO 48 of 2015), 'he used his thing for peeing, (David Otieno Alex v R, Homa Bay HC Cr Ap No 44 of 2015), 'he inserted his 'dudu' into my 'mapaja', (Josés Kaburu v R, Meru HC Cr Case No 196 of 2016), 'he used his munyunyu', (Thomas Alugha Ndegwa, Nbi HC Cr Appeal No 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like 'he defiled me', which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi HC Cr App No 35 of 2014, EMM V R Mombasa HC Cr Case No 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.'
42. Further, we agree with the learned Judge that the evidence of PW3, the doctor, corroborated that of PW1 that she was indeed defiled. Accordingly, we find no basis to fault the finding of the two courts below, that penetration was proved to the required standard.
43. The age of the victim was not disputed, neither was it a ground of appeal. We therefore, did not belabor it.
44. Consequently, we are satisfied that all the ingredients required to prove the offence of defilement to the required standard, were satisfied and this ground too fails.
45. On the sentence, the appellant urged that the mandatory minimum sentence meted upon him is unconstitutional. The respondent did not submit on this ground. It was also not a ground of appeal in the Superior Court and therefore, the Superior Court did not pronounce itself thereon.
46. Section 8(2) of the SOA provides that:
- ' A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'
47. The constitutionality of mandatory minimum sentences has been a subject of debate in our Courts for a while now. However, as settled in the Supreme Court decision of *Francis Karioko Muruatetu & Another vs Republic [2017] eKLR*, what renders a sentence unconstitutional is the fact that the Court is precluded from exercising its discretion, regardless of whether or not the circumstances require it.



48. We are once again called upon to determine whether the sentence meted in this case upon the appellant is in tandem with our constitution. We are guided by the comparative decision of the South African Court of Appeal (Corbett, CJ) in *S v Toms 1990 (2) SA 802 (A) at 806(b)-807(b)*, where it was held that:

' The infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant.'

49. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in *S v Malgas 2001 (2) SA 1222 SCA 1235* paragraph 25 as follows:

' What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.'

50. In our jurisdiction, this Court has grappled with this issue in a plethora of decisions. We rely on this Court's decision in *Dismas Wafula Kilwake vs Republic [2019] eKLR* where it held that:

' In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.'

51. The appellant was handed a sentence of life imprisonment in its mandatory nature. It is however noteworthy that, although jurisprudential development from this Court and the Supreme Court has taken a different trajectory as far as mandatory statutory sentences are concerned, since the Supreme Court declared the mandatory nature of death sentences unconstitutional in *Muruatetu (supra)*, imprisonment for life is still legal and Courts will impose it in appropriate cases.

52. In light of the foregoing, we have considered the appellant's mitigation that he has children who depend on him and the fact that he was treated as a first offender. The aggravating circumstances however, are the lack of remorse on the appellant's part, the nature of the offence and the manner in which it was executed against a child of tender years who, most likely due to poverty, was herding cattle instead of going to school. Consequently, we are satisfied that life imprisonment is commensurate with the gravity of the offence committed.

Accordingly, we find that the appeal is lacking in merit and dismiss it in its entirety.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

