



**Baron v Republic (Criminal Appeal 3 of 2018)
[2022] KECA 21 (KLR) (21 January 2022) (Judgment)**

Neutral citation: [2022] KECA 21 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 3 OF 2018
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JANUARY 21, 2022**

BETWEEN

DAVIS MASUMBUO BARON APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (Muya J.) delivered on 15th November 2013 in High Court Criminal Appeal No 375 of 2010 arising from the original trial Taveta SRM Criminal Case 412 of 2009)

JUDGMENT

1. This judgment is on a second appeal by the Appellant herein, against the High Court’s decision to uphold his conviction for the offence of defilement and sentence of 30 years’ imprisonment. The Appellant had been charged in the Senior Resident Magistrate’s Court at Taveta (hereinafter “the trial Court”), with one count of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006, and an alternative count of committing an indecent assault of a female contrary to Section 11 (1) of the *Sexual Offences Act*.
2. The particulars of the charge against the Appellant were that on 6th August 2009 at about 11.00 a.m at [Particulars Withheld] village in Taveta District, he had unlawful carnal knowledge of PJ , a girl under the age of 11 years.

The Appellant is dissatisfied with the High Court’s decision, and has raised various grounds of appeal in his Memorandum of Appeal that was lodged in this Court on 8th July 2019. The grounds of appeal are that the High Court erred in upholding the Appellant’s conviction and sentence, for reasons that the same were based on an incurably defective charge, on contradictory evidence, and on the age of the complainant which was not proved beyond reasonable doubt. Further, that his defence was not considered.



3. The Appellant also filed supplementary grounds of appeal together with his submissions, wherein he further faulted the High Court for failing to notice the minor's testimony was of doubtful integrity considering the circumstances of the offence; that the medical evidence was not decisive; and that the prosecution had not proved its case beyond reasonable doubt. The Appellant also faulted the High Court for upholding the harsh degrading and inhuman sentence.
4. The brief facts leading to this appeal are as follows. PJ (PW1), the complainant, testified that she was 5 years old and was playing at her grandmother's house when the Appellant called her to his house and offered her sweets. The Appellant thereupon removed her clothes and inserted his penis in her vagina. PW1 after reported the incident to her grandmother and mother, CM (PW2). Upon receiving the information, PW2 took the complainant to the police station where she was issued with a P3 form and examined. The P3 form was filled by Dr. Sangolo Mike, a clinical officer. His examination of PW1 revealed pus in the vagina swab, a perforated hymen and lacerations on the vaginal wall, and his conclusion was forceful entry into the vagina.
5. The Appellant who was previously known to both PW1 and PW2, was then arrested by P.C. Purity Njoki (PW4), who also confirmed that she escorted PW1 to Taveta Hospital where she was examined and a P3 form filled. In his defence the Appellant denied knowing PW 1 or defiling her; and he stated that he was in his farm on the material day until 5.00pm, and was later beaten and arrested.
6. The Appellant appeared in person during the hearing of the appeal on 30th September 2021, while Ms. Keya, a Principal Prosecution Counsel, appeared for the Respondent. The Appellant relied on written submissions wherein he contended that PW 1's testimony was a made up case, as she was barely 5 years old, and from her testimony on her position, she could not have not seen the watery fluid in her genitals and could have been able to rush to her grandmother as she stated, considering the nature of the injuries. Further, that the grandmother, who was the first person to see PW 1 after the alleged offence was a material witness but was not called to testify, neither was PW1's father called to confirm PW1's testimony that PW1 had told him that the Appellant had defiled her before.
7. The Appellant also faulted the medical evidence, and submitted that doubt was raised by the presence of laceration on the vaginal wall without any injuries on the external genitalia considering the tender nature of the child's reproductive organs. The Appellant alluded to the existence of a familial relationship with PW1 and PW2 and a conspiracy to imprison him, and requested the Court in this regard to disregard his testimony on recognition. He however urged this Court to consider the rest of his defence, and to pronounce that the sentence already served was sufficient since he had learnt his lesson.
8. In opposition to the appeal, Ms Keya filed submissions dated 22nd September 2021, and stated that the Appellant's conviction was safe and the sentence was lenient and safe. On the issue of the defective charge sheet, while admitting that the wording in the charge sheet was "had carnal knowledge" instead of "caused the penis to penetrate the vagina", the meaning was that the Appellant was alleged to have had sexual intercourse with the complainant. The counsel placed reliance on the decision of the Court of Appeal in *Sigilani vs Republic* (2004) 2 KLR 480 that an accused should be charged with an offence known in law which should be disclosed and stated in a clear and unambiguous manner. Further, that section 134 of the Criminal Procedure Code provides for the ingredients of a charge sheet.
9. Ms Keya's position was that the offence was disclosed in a sufficiently accurate manner and gave the Appellant adequate notice of the charge facing him. Therefore, that he clearly understood the charge facing him and responded to the same denying the charges. The counsel further submitted that the prosecution's case was cogent, consistent and uncontroverted, and that the victim's evidence, though



corroborated by the medical evidence, needed no further corroboration under the proviso to section 124 of the *Evidence Act* where the Court is satisfied that the victim of sexual offence was truthful.

10. On the age of the complainant, counsel submitted that PW1 during the voir dire examination, PW2, and the P3 form indicated the complainant's age to be 5 years old, and the charge sheet stated that she was under the age of 11. Further, that where the age is not formally proved, the Court is at liberty to use the apparent age of the victim as held in *Gilbert Chemei vs Republic [2015] eKLR*, *Daniel Kamau vs Republic [2019] eKLR* and *Fappyton Mutuku Nguu vs Republic [2012] eKLR*. Therefore, that the application of apparent age was in no way prejudicial to the Appellant and a 5-year old could not be compared to a 12-year old.
11. Lastly, Ms Keya submitted that the Appellant gave unsworn evidence which was of no probative or evidentiary value as held in *Mercy Kajuju & 4 others vs Republic [2009] eKLR*, and the Prosecution proved its case against the Appellant to the required threshold. Therefore, that the High Court properly evaluated the evidence in the exercise of its jurisdiction, and the Appellant's conviction was safe and the sentence of 30 years was excessively lenient in the circumstances.
12. This Court as a second appellate court is confined to only considering questions of law raised in the appeal, as set out in section 361 (1) (a) of the Criminal Procedure Code and in various decisions of this Court including *Karani vs. R [2010] 1 KLR 73*, wherein the Court expressed itself as follows:-

“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.”

13. The issues of law raised in this appeal are firstly, whether the charge sheet was defective, and if so, the effect thereof; secondly, whether the High Court's evaluation of the evidence in the trial Court was legally sound, and lastly whether the sentence imposed on the Appellant was legal.
14. On the first issue of the presence of any defects in the charge sheet, the Respondent has conceded that there was some irregularity in the way the particulars of the offence in the charge sheet were framed, which its counsel described as “modest”. Under section 134 of the Criminal Procedure Code, a charge sheet should contain a statement of the specific offence and section of the law with which an accused is charged with, and enough information to demonstrate the nature of the offence charged. The rules as regards the framing of charge sheets are set out in section 137 of the Criminal Procedure Code, and paragraphs (ii) and (iii) of the said section in particular provide as follows:
 - ii. the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence
 - iii. after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an



offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required.

15. The Appellant had been charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) and 8(2) of the *Sexual Offences Act* provide as follows:

- (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 aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

16. In *John Mutua Munyoki vs Republic, [2017] eKLR*, this Court stated that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:

- (i) The victim must be a minor, and
- (ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

In the present appeal, the particulars of the offence were framed as follows in the charge sheet presented in the trial Court on which the Appellant took a plea:

“Davis Masumbuo Baron, On the 6th August 2009 at about 11.00am in Taveta district of the Coast Province, had unlawful carnal knowledge of PJW, a girl under the age of 11 years.”

17. The Respondent has urged, while relying in the definition of carnal knowledge as the act of having sexual intercourse in *Black’s Law Dictionary*, that the charge sheet alleges that the Appellant had sexual intercourse with the complainant, and he therefore clearly understood the charges against him. This argument presupposes that sexual intercourse is synonymous with penetration, which is the key element of defilement.

However, penetration is explicitly defined in the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person, and the particulars in the charge sheet were therefore vague in this respect.

18. This finding notwithstanding, it is our opinion that this technical defect in the charge sheet was not fundamental, since the charge sheet was clear and unambiguous as regards the offence alleged to have been committed, namely defilement and the applicable sections of the laws were correctly cited. In addition, the record shows that the Appellant was informed of the offence he was charged with, and had opportunity to cross-examine all the witnesses on their evidence on the elements of the said offence.

19. The technical defect in the particulars in the charge sheet was to this extent curable under the provisions of section 382 of the Criminal Procedure Code, as no prejudice or miscarriage of justice was caused to the Appellant. We also agree with the position of this Court in *Isaac Nyoro Kimita vs Republic (2014) e KLR* that such minor technical defects in the charge sheet that do not occasion any miscarriage of justice are not fatal, and did not violate the Appellants’ constitutional right to a fair trial.

20. On the second issue as regards the evaluation of the evidence adduced in the trial Court, the Appellant had appealed to the High Court on the grounds that the proper procedure for a voir dire examination was not adopted as envisaged in section 19 of the Oaths and Statutory Declarations Act; the evidence of the prosecution witnesses were contradictory and inconsistent; credible witnesses were not summoned



and the medical examination was not proper to ascertain penetration. The High Court in its judgment found that a *voire dire* examination was conducted by the trial Court, which satisfied that the complainant was intelligent and understood the meaning of an oath. Further, that the age of the complainant was corroborated by the mother and the complainant's evidence of penetration was corroborated by the medical examination and P3 report. Lastly, that the incident took place in broad daylight and by a relative, therefore, that the conviction was safe and there was no need to disturb it.

21. The record of the trial Court does indeed show that there was a *voire dire* examination undertaken of PW1 consequent to which the trial Court took her sworn evidence, the fact of penetration was proved by the narration by PW1 that Appellant inserted his penis in her vagina, and the medical evidence of PW3 that found that her hymen was perforated and she had lacerations on her vaginal wall. The evidence by the complainant that she was 5 years old was confirmed by her mother (PW2), and upon medical examination and stated as such in the P3 form. Although no official document was produced, there was sufficient evidence adduced as regards the age of the complainant, and as observed by the Court of Appeal in [*Thomas Mwambu Wenyi vs Republic \[2017\] eKLR*](#):-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense....”

22. In addition, the positive identification and recognition of the Appellant as the perpetrator of the offence was made by the complainant, having been previously known to the complainant and her mother. The evidence by the Appellant that he was in his farm working on the material date did not contradict the evidence of PW1 as to what happened on the said day, and in particular as regards the events of 11.00am when the offence is alleged to have been committed. In addition, the retraction by the Appellant of his evidence that he did not know the complainant, and admission that he was indeed related to PW1 and PW2 makes his evidence not only of minimal probative value but also not credible. The High Court therefore did not err in its evaluation of the evidence adduced in the trial Court and in upholding the conviction of the Appellant for the offence of defilement.

23. On the last issue as regards the sentence of thirty year's imprisonment, this Court can only address the legality of the sentence and not its severity, as the Appellant urges us to do. It is notable that under section 8(2) of the [*Sexual Offences Act*](#), there is a mandatory minimum sentence for defiling a child under the age of 11 years of life imprisonment. The legality of mandatory and minimum sentences has also been restated by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v. Republic*, (2016) e KLR and in the Kenyan Judiciary's Sentencing Policy Guidelines.

The sentence imposed on the Appellant by the trial Court was therefore manifestly illegal, and we cannot therefore accede to the Appellants' request that his sentence be reduced to time served, the same having been below the mandatory minimum sentence in the first place.

24. The Respondent, while conceding that the sentence was lenient, has asked this Court not to interfere with it. We are constrained to uphold the sentence meted by the trial Court, for reasons that there is no record that the Appellant was given notice of the possibility of enhancement of the sentence and the opportunity to respond appropriately. This position has been upheld by this Court in various cases. In [*Sammy Omboke & another vs Republic \[2019\] eKLR*](#) this Court held as follows:

“A ground urged in this appeal relates to enhancement of sentence without warning, notice or a cross-appeal. This Court in *Samwel Mbugua Kihwanga – v - Republic*, Cr. App. No. 239 of 2011, explained that although the practice of warning the appellant before enhancing



the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal. ”

25. Likewise, it was explained as follows in *JJW vs Republic [2013] eKLR*: -

“We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

26. We can only add that in light of the provisions of section 361(1)(b) and (2) of the *Criminal Procedure Code*, if a subordinate had no power to impose a particular sentence, this is a question of law that this Court has the jurisdiction to correct whether or not there was a cross appeal or notice of enhancement of the sentence in the first appeal to the High Court, subject to the Appellant being informed and given notice of that possibility. In this particular appeal the Appellant did not have notice of the possibility of enhancement of his sentence, and we cannot therefore interfere with it.

27. We accordingly find that this appeal has no merit and the same is dismissed in its entirety.

28. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA



.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

