



**Lekasusu v Republic (Criminal Appeal 50 of 2018)  
[2021] KECA 24 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 24 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL 50 OF 2018  
RN NAMBUYE, HM OKWENGU & S OLE KANTAI, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**JONNES LEKASUSU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Eldoret  
(C. Kariuki, J. dated 24th July, 2015 in HC. CR.A. No. 147 of 2012)*

**JUDGMENT**

1. This is a second appeal from the conviction and sentence of the appellant, Jonnes Lekasusu, by the Chief Magistrate's Court, Kabarnet. The appellant was charged before that Court with the offence of defilement contrary to Section 8 (2) of the *Sexual Offences Act No. 3 of 2016* particulars being that on the 1st day of July, 2012 at the place named in the charge sheet he unlawfully caused his penis to penetrate the vagina of NM, a girl aged 4 years in violation of the said Act. He was charged in the alternative with the offence of Indecent Act with a child contrary to Section 11(1) of the said Act particulars being that on the same day at the said place he intentionally and unlawfully caused his penis to come into contact with the vagina of that said child contrary to law. A trial took place where the prosecution called five witnesses; the appellant was put to his defence, he gave an unsworn statement, he was convicted and sentenced to life imprisonment in a Judgment delivered on 13th August, 2012. He filed an appeal to the High Court of Kenya at Eldoret and in a Judgment delivered on 24th July, 2015 (Charles Kariuki, J.) the appeal was dismissed.



2. Section 361(1) (a) of the *Criminal Procedure Code* limits our jurisdiction in a second appeal like this one. We are to consider only issues of law but not matters of fact that have been tried by the trial court and re-evaluated by the first appellate court. *It was held in Njoroge v Republic [1982] KLR 388:*

" On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

3. We will visit the facts of the case to satisfy ourselves whether the two courts below carried out their mandates as required of them in law.

4. The prosecution case was simple and straightforward.

5. On 1st July, 2012 GL (PW1), the child's mother, was at home with her children. Her cousin, the appellant, arrived at her home at about 7.30 pm. and complained that he was feeling cold. They were all in the kitchen where GL was preparing the evening meal. There was a bed in the kitchen and she told the appellant to get into the bed to deal with the cold he was experiencing. The complainant, aged 4 years and who, according to the evidence was, like the other children, very friendly and playful to the appellant, joined him in the bed. Apparently GL realized that she had run out of salt and she walked the short distance to a shop owned by EL (PW3) where she bought salt. On returning home she found the child crying loudly and upon examining her (she had been joined by EL) they found blood flowing from her private parts. Her clothes were bloody. EL had the presence of mind to lock the kitchen door so the appellant was not able to escape. They summoned authorities and the appellant was arrested and locked up at Marigat Police Station.

6. Jonathan Mormoch, a Clinical Officer at Marigat District Hospital received the child for examination. He observed underpants and a skirt which were stained with dry blood. He found vaginal tear, the hymen was broken and there was blood in the vaginal canal. He concluded that the child had been defiled. He filled a P3 form which he produced into evidence.

7. Police witnesses testified on the arrest of the appellant and produced the bloodied underpant and skirt into evidence as exhibits.

8. On being put on his defence the appellant testified that he had differences with the child's mother from whom he had borrowed Ksh.50 which he had not paid back.

9. The trial court weighed the prosecution case and the defence offered by the appellant and found that the prosecution had proved its case beyond reasonable doubt. That led to the conviction and sentence as already stated above.

10. In homemade "Supplementary Grounds of Appeal" the appellant raises two grounds – that the Judge on 1st appeal erred in law in affirming the appellant's conviction without appreciating that the victim had not been declared a vulnerable witness as provided for in law and, secondly, that the Judge erred in law by upholding the appellant's sentence when recent law developments have declared the mandatory nature of sentences as unconstitutional.

11. Both grounds raised are points of law and they fall within our mandate for determination.

12. The appellant and learned State Counsel both filed written submissions which we have perused and considered.



13. The child victim of defilement was not called as a witness. This is the way the trial Magistrate dealt with that aspect of the matter in the Judgment:

“...I was disadvantaged by the fact that I was not able to communicate with L.N. which is understand (sic) in view of her tender age. At the age of 4 years and also granted that she has not been introduced to early learning the court environment may have been disarming to her....”

The Magistrate went on to consider the evidence of prosecution witnesses and found that the child had been defiled by the appellant.

14. The issue of the child not being called as a witness was not raised before the High Court at all.
15. From the facts as we have enumerated them in this Judgment the conviction of the appellant was sound even though the child victim of defilement was not called as a witness. She was 4 years old and may not have understood court processes to be able to give evidence. Her mother left her in the company of the appellant when she went to buy salt in the neighbourhood. She testified that upon her return, hardly 5 minutes later, she found the child at the door wailing and upon examining her assisted by the shopkeeper EL they saw fresh blood flowing from the child’s private parts. The child had joined the appellant in bed in the kitchen. The appellant, a cousin to GL, was a frequent visitor at her home and was trusted by GL and her children. The Clinical Officer who examined the child found that she had been defiled. The shopkeeper had locked the kitchen door and the appellant was arrested at the scene. The two courts below were right in entering a conviction and the ground of appeal against conviction is hereby dismissed.
16. The appellant faults the High Court for upholding life sentence imposed on him by the trial court. The appellant was sentenced on 13th August, 2012 and the first appeal was dismissed on 24th July, 2015.
17. The Supreme Court of Kenya was asked in the case of *Francis Karioko Muruatetu & Others v Republic* to answer the question whether it was constitutional for Parliament to impose mandatory sentences. That case involved an offence of murder. The Court returned an answer that it was unconstitutional for Parliament to provide for mandatory sentences. Courts are now free to consider circumstances of particular cases and impose an appropriate sentence.
18. Upon conviction the appellant stated in mitigation:

“I am very poor. I have a mother who is blind. I have 3 children. I don’t have livestock of my own.”

This was, indeed, a plaintive plea but the trial court proceeded to sentence him to a life sentence.

19. The record shows that the appellant abused a position of trust. The child victim and her mother trusted him as a close relative who visited their home often and played with the children. On the material day he seems to have been visited by demons and committed the heinous act where he defiled his relative aged 4 years.
20. This Court has in previous cases interfered with sentence. In *Daniel Kipyegon Toroitich v Republic [2021] eKLR* where the appellant had been sentenced to life imprisonment the sentence was reduced to imprisonment for 25 years from the date of conviction.
21. In *Eliphas Toili v Republic [2009] eKLR* the appellant who had been sentenced to death for the offence of murder had the sentence reduced to 10 years on appeal.



22. We have considered all relevant factors including the plea in mitigation given by the appellant. We think that this is an appropriate case where we should interfere with the sentence awarded to the appellant. The appeal on conviction fails and is dismissed. We set aside the sentence imposed against the appellant and substitute thereof a sentence of thirty (30) years imprisonment from the date of conviction.

**DATED AND DELIVERED ON THIS 23RD DAY OF SEPTEMBER, 2021.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

