



**Musuluma v Republic (Criminal Appeal 39 of 2021)
[2025] KEHC 638 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 39 OF 2021
JN KAMAU, J
JANUARY 30, 2025**

BETWEEN

SAMUEL MUSULUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon M.L. Nabibya (PM) delivered at Hamisi in
Principal Magistrate's Court in Sexual Offence Case No 10 of 2019 on 24th July 2019)*

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. The Learned Trial Magistrate, Hon M.L. Nabibya (PM) convicted him on the main charge of defilement and sentenced him to thirty (30) years imprisonment.
3. Being dissatisfied with the said Judgment, he lodged an appeal herein. His Petition of Appeal was undated but was filed on 16th October 2020. The same did not bear a court stamp. He set out four (4) grounds of appeal. He was granted leave to appeal out of time on 22nd April 2024.
4. His undated Written Submissions were filed on 21st May 2024 while those of the Respondent were dated 23rd August 2024 and filed on 27th August 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal and Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Appellant's right to fair trial was infringed upon;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Fair Trial

9. Ground of Appeal Nos (1) and (2) were dealt with under this head as they were both related. The Appellant's grounds of appeal were that he pleaded guilty to the charge and the circumstances of the offence were not read out to him. He submitted that he spoke the Luhya language but the proceedings were conducted in Kiswahili. He contended that he was discriminated against and thus urged this court to acquit him. The Respondent herein did not submit on this issue.
10. A perusal of the proceedings showed that when the Appellant herein was arraigned in court on 7th February 2019, he initially pleaded guilty to the main Charge. Hon D. Ogal (SRM) who was seized of the matter at the time directed that he be taken for a mental assessment and that the matter be mentioned on 11th February 2018. On the said date, the Charges were read to him afresh and he replied that he had not yet defiled the Complainant, KM (hereinafter referred to as "PW 2").
11. The proceedings showed that he understood Kiswahili as he responded in Kiswahili. When asked if he pleaded to the charge on 7th February 2019 and 11th February 2018, he stated as follows:-

"Ni kweli."
12. On 11th February 2019, when the Trial Court warned him of the consequences of pleading guilty to the charge, he stated as follows:-

"Si kufanya"
13. On 15th April 2019, he again informed the Trial Court that he understood Kiswahili as ready to proceed.



14. He did not cross-examine Linet Omwayo (hereinafter referred to as “PW 1”) and stated that what she had told the Trial Court was true. He also agreed to PW 2’s evidence being given by an eye witness. He was given an opportunity to cross-examine witnesses but he consistently told the Trial Court that he had no questions for them. He was constantly warned of the dangers of not cross-examining witnesses. He was also informed of the right to get an advocate of his own choice. He confirmed that he understood the court’s sentiments.
15. After being found that he had a case to answer, he informed the Trial Court that he would adduce sworn evidence. He was warned of the consequences of giving the defence in the way he did and he said that he was aware of the same. He then closed his case.
16. A perusal of the proceedings showed that the information in the case was read out to the Appellant in a language that he understood, Kiswahili. The particulars of the charge were clear as to the offence he was facing. The wrong indication of PW 2’s age did not make the charge defective as the court could convict based on the age that was proven.
17. It was evident that he understood Kiswahili and did not raise any objection of a lack of understanding of the language during the entire trial. If he did not understand Kiswahili well, he was at liberty to have requested the proceedings being translated to by a Luhya translator. He did not do so. He could not, therefore, purport to submit, on appeal, that the proceedings ought to have been conducted in the Luhya language.
18. The proceedings of the lower court of 7th February 2019 showed that the Trial Court directed that the Appellant be taken for mental assessment. The Appellant submitted that the Report was not produced in court. However, it was evident from the proceedings that, the Medical Superintendent Vihiga County Referral Hospital wrote an assessment Report on 8th February 2019 in which he indicated that the Appellant was mentally fit and healthy and could be presented in a court of law as he was able to concentrate and follow proceedings. As the Appellant did not rebut this documentary evidence, this court found and held that he was mentally stable and fit to stand trial.
19. This court was not, therefore, persuaded that Articles 25(2) and 27 and his right to fair trial under Article 50 (2) of *the Constitution* of Kenya, 2010 were infringed upon, contravened and/or violated.
20. In the premises foregoing, this court found and held that Grounds of Appeal Nos (1) and (2) were not merited and the same be and are hereby dismissed.

II. Proof of Prosecution’s Case

21. The Appellant did not file an appeal relating to the proof of the Prosecution’s case. However, he submitted on the same. For the completeness of records, this court found it prudent to consider his Written Submissions in this regard.
22. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
23. It is now settled that the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.



A. Age

24. The Appellant submitted that the Age Assessment Report was “cooked” with the sole intention of convicting him. On the other hand, the Respondent contended that PW 7 testified that PW 2 was aged twelve (12) years at the time of the incident which was confirmed by an Age Assessment Report that she tendered in evidence in court.
25. It placed reliance on the case of Fappyton Mutuku Ngui vs Republic (eKLR citation not given) where it was held that conclusive proof of age in cases under Sexual Offences Act did not necessarily mean that it had to be proved by a birth certificate.
26. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim’s parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.
27. No 97846 Chepkorir Lorna (hereinafter referred to as “PW 7”) tendered in evidence the Age Assessment Report dated 8th February 2019 by Charles Ahore of Vihiga County Referral Hospital. The same showed that PW 2 was aged twelve (12) years as she had full eruption of all the 2nd molar teeth.
28. As the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 2’s age was proven using medical evidence and that she was a child at all material times.

B. Identification

29. The Appellant did not submit on this issue. On its part, the Respondent submitted that he was identified by PW 3 and PW 4 as the person who defiled the minor.
30. A perusal of the proceedings showed that the Appellant and PW 2 were not strangers. It did appear to this court that someone else was writing the submissions on his behalf. The writer admitted that the Appellant was found having sex with PW 2 but opined that both the Appellant and PW 2 were mentally unstable and played together and that the only complaint was that there was no consent and PW 2 was under age. In this regard, the Appellant admitted that he knew PW 2.
31. Going further, Sheila Minalo (hereinafter referred to as “PW 3”) testified that on the material date at 11.00 am, she was passing by the roadside when she saw the Appellant having sex with PW 2.
32. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven through recognition as the incident occurred during the day when conditions were favourable for a positive recognition of the Appellant herein. As could be seen from his Written Submissions, he admitted having been with PW 2 on the material date.

C. Penetration

33. The Appellant relied on the case of Sekitoleko vs Uganda (1967) EA 531 at page 533 where it was held that an accused person could not be convicted on the weakness of his case but rather on the weight of the prosecution’s case. He added that if an accused person raised the defence of an alibi, the burden did not shift to him but remained with the Prosecution. In this regard, he relied on the case of R vs Johnson 1961 3 AIIER 969 (sic).



34. On its part, the Respondent submitted that PW 3 saw the Appellant penetrating PW 2 and that he was apprehended as he tried to run away. It added that PW 6 confirmed that there had been penetration as she had a swollen vagina, she had bruises and had a broken hymen.
35. Dancan Chaviya (hereinafter referred to as “PW 6”) was a Clinical Officer at Serem Health Centre. He observed that PW 2 was not well oriented as she had a special mental problem. She could not communicate well. He confirmed that she had injuries in her vagina which confirmed that there had been penetration.
36. It was clear from the evidence that was adduced during trial that the Appellant admitted to having had sexual intercourse with PW 2. During his defence, he stated as follows:-
- “ E truly found me having sex with the child and I was taken to Serem Police Station.”
37. There could not have been any clearer evidence that he defiled PW 2 and that he knew what he was doing. His assertions that he defiled her because he was mentally unstable was negated by the fact that the Mental Assessment Report showed that he had coherent speech, good memory of past and present events, good orientation of time and place, good concentration, good judgment, good abstract reasoning, awareness that he was in hospital at the time of assessment and he had no delusions, no flight of ideas, no hallucinations or delusions.
38. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 2 on the material date.

III. Sentencing

39. Grounds of Appeal Nos (3) and (4) were dealt with under this head.
40. The Appellant submitted that he was a first offender and that the sentence of thirty (30) years was excessive considering that both he and PW 2 were mentally unstable and he was the only one who was imprisoned. He added that the sentence was unconstitutional as it deprived him of his right to mitigate.
41. He urged this court to consider giving him a minimum sentence of twenty (20) years that was provided under Section 8(3) of the *Sexual Offences Act*. In this regard he referred to the decisions of Mativo J (as he then was) in Petition Nos 97 of 2021, 88 of 2021, 90 of 2021 and 57 of 2021 (eKLR citation not given) and those of Odunga JA (as he then was) in Petition No E017 of 2021(2022) (sic). He averred that the meting out of the lengthy sentence on him was discriminatory contrary to Article 27 of *the Constitution* of Kenya, 2010.
42. On its part, the Respondent submitted that in the case of Francis Karioko Muruatetu & 5 Others vs Republic [2017] eKLR, the Supreme Court had held that mandatory sentences were unconstitutional to the extent that they deprived courts the discretion to mete out appropriate sentences but that on 6th July 2021, the same court clarified that the said case applied to murder cases only and not to any other sentence.
43. It averred that the sentence that was meted upon the Appellant herein was not unconstitutional and that the Trial Court considered his mitigation. It therefore urged this court to dismiss the Appeal herein.



44. The Appellant herein was convicted under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. Section 8(3) of the *Sexual Offences Act* provides that:-
- “ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
45. The Trial Court convicted the Appellant to thirty (30) years imprisonment. The proceedings of the lower court showed that he mitigated. He stated that he was born in 1897, he had no wife and children and that he used to graze animals.
46. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
47. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
48. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
49. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.
50. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.
51. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant’s sentence from what had been prescribed under Section 8(3) of the *Sexual Offences Act*.
52. The Trial Court acknowledged that superior courts had been reducing the minimum sentences on the basis that they were unconstitutional but that did not take away the discretion of a trial court to mete out a legally provided sentence. It observed that the Appellant had defiled a child and hence he deserved the sentence of thirty (30) years imprisonment.
53. However, it was this court’s view that a sentence of thirty (30) years was too excessive in the circumstances considering that the Prosecution did not demonstrate any aggravating circumstances and the fact that the Appellant was a first offender. Indeed, the Trial Court did not also justify it departed from sentencing him to the least prescribed sentence as stipulated in *the Constitution* of Kenya.



54. Notably, thirty (30) years was now an equivalent of life imprisonment as has been held by the Court of Appeal in several decisions amongst them Owiti *vs Republic (Criminal Appeal 108 of 2018)* [2024] KECA 298 (KLR) (15 March 2024) (Judgment).
55. Section 50(2)(p) of *the Constitution* of Kenya, 2020 provides that:-
- “Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”
56. Bearing in mind the provisions of Article 27(1) and Article 50(2)(p) and of *the Constitution* of Kenya, this court determined that this was a suitable case for it to reduce the sentence from thirty (30) years to the least prescribed punishment under Section 8(3) of the *Sexual Offences Act*.
57. Turning to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya), the said Section provides that:
- “Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court).”
58. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
59. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
60. The Appellant herein was arrested February 2019. Although he was granted bail, he did not appear to have posted the same. He was sentenced on 24th July 2019. A reading of the Trial Court’s Sentence showed that it did not take into consideration the time he spent in remand before conviction and sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders he had sought in this regard.

Disposition

61. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s undated Petition of Appeal that was lodged on 16th October 2020 was partially merited on the aspect of sentence only. The conviction be and is hereby upheld as the same was safe.



62. Even so, the sentence of thirty (30) years was too excessive in the circumstances and the same be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to twenty (20) years to run from the date of sentence.
63. For the avoidance of doubt, the period between 6th February 2019 and 23rd July 2019 to be taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
64. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF JANUARY 2025

J. KAMAU

JUDGE

