Imbiakha v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 5530 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5530 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E008 OF 2024

RB NGETICH, J

APRIL 30, 2025

BETWEEN

EMMANUEL MAKWATA IMBIAKHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentencing from the decision of the Honourable Senior Resident Magistrate Mr. Edwin Mulochi in Sexual Offence Case No. E027 of 2022 delivered on 14th March, 2024 at Kabarnet Court)

JUDGMENT

1. The Appellant Emmanuel Makwata Imbiakha was 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. The particulars of the charge are that the Appellant on the 17th day of October, 2022 at about 1900 hours at [Particulars Withheld] village in Baringo North Sub-county within Baringo County, willingly and unlawfully caused his penis to penetrate the vagina of V.J. a girl aged 13 years in contravention of the *Sexual Offences Act* No.3 of 2006.

2. The accused faced an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No. 3 of 2006. The particulars of the charge being that the Appellant on the 17th day of October,2022 at 1900hours at [Particulars Withheld] village in Baringo North Sub-county within Baringo County, willingly and unlawfully did commit his hands to come in contact with the vagina of V.J. a girl aged 13 years in contravention of the *Sexual Offences Act* No.3 of 2006.

3. The accused denied all the charges and the matter was set down for full trial with the prosecution calling a total of 6 witnesses in support of the charges against the accused. Upon close of hearing, the trial court delivered judgment on 14th day of March 2024, finding the accused guilty as charged, convicted him and sentenced him to serve 20 years imprisonment.

4. Being aggrieved and dissatisfied with the conviction and the sentence of the trial court, the Appellant filed this appeal on the following grounds:-

   i. That the learned trial magistrate erred in law and fact when he failed to consider that the Appellant was examined medically and cleared the doubts he was involved in the incident. The court should discharge him on that account.

   ii. That the learned trial magistrate erred both law and fact as it enforced a mandatory sentence on him of 20 years depriving him the benefit of Article 50(2(p) for either appropriate or a lesser sentence.

   iii. That the learned trial magistrate erred in law and fact by failing to invoke Section 333(2) of the *Criminal Procedure Code* so that the period of time in pre-trial custody is taken into account as part of the time served. The sentence should commence on 19th October, 2022 to factor this omission.

   iv. That the learned trial magistrate erred in law and fact in not considering there was room for his acquittal or imposing a lenient sentence on account that the complainant implicated him in the case after being placed in the police cell and the court failed to declare her a hostile witness and disregard her testimony for being unreliable.

   v. That the Learned trial magistrate erred in law and in fact by failing to make a finding that most elements of the offence of defilement were not conclusively proved to warrant a conviction as provided by law. The conviction was not safe in the circumstances that the age was not properly established and penetration.

   vi. That the learned trial magistrate erred in law and in fact by erroneously adopting the evidence of the complainant as she can be presumed to be a hostile witness because she was locked up in the police cell to coerce her testify against the Appellant.

   vii. That the learned trial magistrate did not strictly comply with section 124 of the *Evidence Act* as the complainant was not credible enough and reliable to be a single identifying witness and he did not warn herself on the same.

   viii. That the Learned trial magistrate erred in law and in fact by failing to consider that the evidence of the doctor was an exculpating piece of evidence as it confirmed that the complainant was not defiled when the physical and lab test examination yielded nothing to confirm that she was defiled by the Appellant as there was no traces of sexual intercourse, the two months pregnancy cannot be attributed to him.

   ix. That the learned trial magistrate erred in law and in fact by failing to make a finding that the case had many material inconsistencies and discrepancies that cannot be cured under Section 382 of the *Criminal Procedure Code*.

   x. That the learned trial magistrate erred in law and in fact by failing to follow up on its doubt as to whether the accused defiled the complainant. The benefit of doubt should have turned in favour of the Appellant and should have entitled him to acquittal under Section 215 of the *Criminal Procedure Code*.

   xi. That the learned trial magistrate erred in law and in fact by failing to make a finding that Nathan who was the boyfriend to the complainant was being simultaneously charged with the same offence in a separate court which raises the issue of the true identity of the perpetrator in this case.

xii. That the learned trial magistrate erred in law and in fact in not making a finding that after the doctor presented evidence that did not support defilement, furthermore the circumstances of the case did not point to a normal defilement scenario such as the complainant did not exhibit trauma of a person who had undergone defilement for instance she did not run away when PW 3 presented itself.

xiii. That the trial magistrate erred in law and in fact for mis trying him for the offence of other persons who were in this instance responsible for the pregnancy of the complainant despite being charged separately the case did not go far as he was let off the hook (Nathan).

xiv. That the trial magistrate erred in law and in fact by not passing over the benefit of the major contradiction on age. That the parent is the best guide to matters regarding the age of his child, the complainant also indicated she was 15 years. This leaves doubts the court was probably presented with a questioned document in terms of the authenticity and content. The court should investigate this issue and discharge the appellant from prison.

xv. That the petitioner will adduce more grounds when the record of appeal becomes available.

5. The appellant prays that this Honourable court be pleased to allow the appeal by setting aside the sentence and set him at liberty. The appeal was canvassed by way of written submissions.

APPELLANT'S SUBMISSIONS

6. The appellant submit that he was subjected to a medical examination which did not yield any evidence to link him to the alleged offence. That the P3 form that was filed and presented in court cleared him of the charges he was facing according to the expert opinion by the medical doctor. He submits that the trial magistrate ignored his evidence and urged this court to allow this appeal.

7. In respect to sentence, the appellant submits that the he deserved a benefit of an appropriate or lesser sentence in his case and that the trial magistrate enforced a 20 years mandatory minimum sentence on him despite having other appropriate alternative or lesser sentence. That while he takes note that the supreme court has ruled that mandatory minimum sentences to be constitutional he would not argue against that ruling and would rather rely on Article 50 (2) (p) of Constitution of Kenya where he is seeking favour from the appellate court to consider conferring the benefit of the above constitutional provision for a less punitive sentence without offending the supreme court ruling that upheld mandatory minimum sentences as constitutional. The appellant submits that the appellate court has the jurisdiction to enforce his right to a fair hearing by ensuring that he benefits from a less punitive sentence if circumstances allow for imposition without going into merits of mandatory minimum sentence constitutionality.

8. The appellant submit that the trial magistrate committed a procedural impropriety by not complying with Section 333 (2) of *Criminal Procedure Code* during his sentence hearing. That Section 333 (2) of *Criminal Procedure Code* imposed an obligatory duty on courts to take into account the period appellant spent in pre-trial custody prior to his sentencing. That the purpose for taking this period into account is to ensure that the appellant does not suffer an excessive sentence. The appellant submits that he was arrested on 19th October, 2022 and was sentenced on 17th March, 2024. That during this whole period of 1 year 7 months & 16 days, he was not admitted to bail or bond due to unaffordability. He submits that during the appellant's sentence hearing Hon. Mulochi ordered his sentence to commence from the date he sentenced him on 17th March, 2024 in effect denying him the pre-trial period. He prayed that this court consider the period he was in remand from 23rd May, 2023 the date he was arrested.

9. The appellant submits that he was denied the opportunity for an acquittal as the complainant became an hostile witness from the start resulting in his arrest and placement in cell and was eventually made to coercively implicate the appellant on the promise she would be released; and the evidence of a hostile witness does not carry much weight and should be disregarded and the trial court should have acquitted him.

10. The appellant further submits that the ingredients of the defilement were not proved as identity of the perpetrator, penetration and age were not conclusively proved in the case. The Appellant submits that the court failed to make a finding that Nathan who was the boyfriend should have carried his own cross but was unfortunately let off the hook. That being charged for a similar charge should have introduced doubt as to the true identity of the perpetrator.

11. On the issue of age, he submits that the court was presented with a questioned document as the parent and the complainant both indicated that she was above 15 years old which would invite the court to get to the bottom of this age discrepancy. That the birth certificate authenticity was questionable.

12. The appellant submits that apart from the medical test carried on him that did not link him to the alleged crime, there were other pieces of evidence that also exonerated him from the blame of the alleged crime. That the medical evidence did not establish he had a recent sexual intercourse with her. That it was also factual that the complainant was two (2) months pregnant which could not be attributed to him. That considering the physical and laboratory test done on both complainant and appellant, that she was pregnant for someone else and was forced to be a victim in this case were enough evidence to excuse the appellant from this offence, which the trial court missed.

13. Further that there was an ongoing case involving the complainant with her boyfriend and were placed in the police custody separately and trial run simultaneously involving the same complainant. That with this doubt throughout the proceedings, the trial court should have discharged him under Section 215 of the *Criminal Procedure Code* as there were numerous pieces of evidence that were pointing to his innocence which the court should consider by allowing the appeal and set him at liberty.

14. Further that there were major inconsistencies and discrepancies which the trial magistrate did not pay attention to and which ran to the root of this case. That the major inconsistency was the decision to charge him and the boyfriend separately and in different courts which amounted to a situation of defeating justice as the prosecution avoided a situation which would make the case collapse. That this inconsistencies among others are not curable under Section 382 of *Criminal Procedure Code* as there is a miscarriage of justice that has been occasioned by the inconsistencies and discrepancies and urged this court to allow the appeal by setting aside the sentence and set him at Liberty.

Response By State

15. The Prosecution counsel Ms. Bartilol submitted orally and opposed the appeal in its entirety. She stated that the prosecution proved its case beyond reasonable doubt. She submitted that there were no inconsistencies in the evidence adduced. On penetration, she submitted that the complainant confirmed that indeed she was defiled by the convict and the same was confirmed by the medical evidence and the P3 was produced.

16. On identification, she submits that the complainant was categorical that it was only the Appellant who interacted with her from 10a.m as she was coming from a shop nearby and it was the Appellant who lured her to his house, prepared lunch for her and thereafter locked the house leaving her as he went to milk the cows he was herding. That he went back to the house and prepared supper and served the complainant and after taking supper they had sexual intercourse on the Appellants bed.

17. She submits that the time spent by both the complainant and the appellant was sufficient enough to prove identification beyond reasonable doubt as there was no other person apart from the Appellant in that house.

18. In respect to age, she submits that the complainant stated that she was 13 years old and her birth certificate was produced in court as exhibit 2 and which shows the date of birth as 18th July, 2009 and the offence was committed on 17th October, 2022. That it confirmed the complainant was 13 years. She submitted that it is indeed true that the complainant's mother in her evidence stated that the complainant was 15 years but the birth certificate confirmed she was 13 years at the time of the offence and that when the mother was shown the birth certificate she confirmed the girl was 13 years old.

19. She further submitted that the appellant said that the birth certificate was not authentic but nothing has been produced to show the birth certificate was not authentic and even if the complainant was 15 years the same sentence is prescribed for 15 and 13 years.

20. On sentence, she submit that the sentence was lawful and the trial court did not err in imposing the sentence. She prayed that this court upholds the judgement and sentence as no sufficient grounds have been advanced to warrant the interference with the conviction and sentence.

Analysis and Determination

21. This being the first appellate court, I am required to analyze and evaluate afresh all the evidence adduced before the lower court. In the case of Okeno vs. Republic [1972] EA 32 the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

22. In view of the above, I have perused and considered the record of appeal and the submissions filed by both parties herein and consider the following as issues for determination: -

    a. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt

    b. Whether the sentence imposed was harsh and excessive.

        a. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt.

23. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR). Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8. A person who commits an act which causes penetration with a child is guilty
> (1) 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.

(3) 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.

(i) Proof of penetration

24. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

25. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

26. The complainant who testified as pw1 said she had gone to buy bread and on coming back, she met accused and to avoid a drunk person on the way, accused asked her to follow him through a short cut and they ended up in his house where they took lunch and stayed in the house up to around 7:00 p.m. then the appellant gave her supper which she ate after which she insisted that she wanted to go home and he said that he wanted her to spend the night there. They spent the night in the appellant's house where the accused defiled her on his bed after undressing her and touching her vagina and her breasts. She said he did that for about 3 minutes then removed his clothes, removed his penis and inserted in her vagina for about 10 minutes. The complainant said there was light from solar lights and she saw everything that was happening and that the accused had increased the volume of his radio and no one could hear even if she had screamed. She said she felt pain and later when people went to knock the door, she had put on her clothes. That the people who knocked on the door called the accused and a neighbor called Nyayo informed accused that the complainant was being sought at home and the accused informed him that he will let her go home and shortly after Nyayo went back, the accused opened the door and several people entered the house.

27. She said that one of the people who entered the house slapped her and pulled her out of the house then made a phone call to the area chief and they then took her home which was a bit far and they reached at around midnight. On reaching home she found members of the community policing and her parents waiting for her and that they were with the accused. That members of the community policing called police from Kasisit police station who went to complainant's home and handcuffed the accused. That they were the taken to Kasisit police station then to Kabartonjo and were taken to Kabartonjo sub-county Hospital in the morning where she was subjected to pregnancy and HIV Test and was given medication. She went back to police station and recorded a statement. The complainant said she did not agree to have sex with him but he forced her into having sex with him.

28. PW5 Sam Talam Lengoi a Clinical Officer working at Kabartonjo Sub-county Hospital produced P3 Form dated 20th October, 2022 in respect to the complainant who visited their facility on 20th October, 2022 complaining of being defiled by 2 people on diverse dates. That the two were Emmanuel Imbiaka and Nathen Tarus.

29. On examination on her genitalia, it was intact. There were no injuries and no bruises save for vaginal discharge. That the discharge indicated vaginal infection. He said that he also has a medical examination report (treatment notes) with regard to the minor which was done on 20th October, 2022. That her genitalia had a white discharge and her hymen was wet but not freshly. That the pregnancy test was negative. He produced the treatment notes as exhibit one and the P3 Form as exhibit three.

30. From the above evidence adduced, it is clear that the appellant lured the complainant into his house where they spent a night and defiled her, PW 5 the clinical officer produced the P3 Form which confirmed that the complainant was defiled .From evidence adduced, there is no doubt that penetration was proved beyond reasonable doubt.

(ii) Proof of complainant's age

31. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

32. PW6 the investigating officer produced birth certificate which confirmed that the complainant was born on 18th July, 2009 and was therefore aged 13 years at the time of the offence. From the foregoing it is clear that the issue of age was proved to the required standard.

(iii) Identification of assailant

33. PW1's testimony is that she was defiled by the Appellant. She was able to identify the accused person in the dock as the assailant. The complaint walked with the complainant to his house and was with him in his house for several hours. She saw the appellant during the day and they were arrested together from appellant's house. From the foregoing, there is no doubt that the complainant properly identified as the person who defiled the complainant.

34. The Appellant argued that his defence was not considered by the trial court. I however, note from the judgment that the learned magistrate considered the accused defence and it is therefore not true that his defence was not taken into consideration.

35. The appellant's defence did not cast any doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

b. Whether sentence imposed against the appellant was harsh and excessive

36. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of Mbogo & Another vs. Shah (1968) 1 E.A. 93 thus:-

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole

that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

37. The Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

38. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)."

39. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

40. In this case, the offence in which the Appellant was convicted of is the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual offences Act* No. 3 of 2006. 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."

41. The appellant seeks the sentence of 20 years imprisonment to be reduced. In this case, the offence was defilement of a minor aged 13 years. I have considered the material on record and even if this Court were minded to impose a lesser sentence were it sitting as the trial court that in itself does not justify interference with the sentence imposed by the trial court.

42. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed shows that the younger the victim, the more severe the sentence. Age of the victim of sexual offence is therefore an aggravating factor which the court should always consider amongst others in sentencing.

43. In this case, the complainant was of the age of 15 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the Act which prescribes the mandatory minimum sentence of 20 years imprisonment where the victim is 15 years and below.

44. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. Generally, it is worth to note that, the assault leaves the innocent victim traumatized for the rest of her lifetime.

45. I take note of the fact that the trial court considered the fact that the Appellant was a first offender, he also considered the circumstances of both the victim and the appellant and noted that the offence required a stiff punishment. In this regard, I am satisfied that due consideration was made in safeguarding the interests of the victim, the Appellant and the community at large.

46. I find that the trial court took into consideration all the requisite factors in sentencing the appellant to 20 years imprisonment. The sentence was proper/legal and I therefore find no reason to interfere with the lower court's decision on the sentence.

47. Final Orders: -

    Appeal on both conviction and sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30TH DAY OF APRIL, 2025.

RACHEL NGETICH

JUDGE

In the presence of:

Ms. Kosgei for State.

Appellant – present.

Court Assistant – Elvis.