Achieng v Republic (Criminal Appeal E031 of 2023)
[2025] KEHC 4844 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4844 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E031 OF 2023

DK KEMEI, J

APRIL 25, 2025

BETWEEN

LUCAS AIRO ACHIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. E. Malesi delivered on 6/7/2023 in Madiany Principal Magistrate's Court Sexual Offences Case No. E010 of 2022)

JUDGMENT

1. The Appellant herein LAA was charged with an offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence *Act No. 3 of 2006*. The particulars were that on the 8th day of December 2022 at around 2300hrs at [particulars withheld] village in Siger Sub County within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of YAO a child aged 14years 11 months.

2. The Appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 8th day of December 2022 at around 2300 hours at [particulars withheld] village in Siger Sub-location, Rarieda Sub County within Siaya County intentionally and unlawfully used his penis to touch the vagina of YAO a child aged 14 years eleven months.

3. After a full trial, the Appellant was convicted of the main count and sentenced to fifteen (15) years' imprisonment. He was aggrieved by the said conviction and sentence and has appealed to this Honorable Court against both the conviction and sentence wherein he has raised six grounds which can be condensed into two grounds namely:

i. That the trial magistrate failed in law and in fact in convicting the Appellant yet the ingredients of the offence of defilement were not proved beyond reasonable doubt.

ii. That the trial magistrate failed in law and in fact in meting a sentence that was harsh, excessive in the circumstances and unconstitutional.

4. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusions. (See Okeno vs. Republic [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.

5. The facts of the case are that the complainant YAO (PW1) aged 15 years and a pupil at [Particulars Withheld] primary school and who used to stay with her grandmother (PW2) went missing on 05/12/2022 at around 0200hrs to an unknown place. On 07/12/2022, the grandmother, JAD (PW2) reported to the area chief about the missing minor and that the chief promised to conduct a search for her.

   That on 08/12/2022 at about 07:45 PM, the assistant chief Moses Owino Ombewa (PW4) received a call from the area chief who informed him that the complainant had been spotted at the Appellant's home. PW4 testified that they agreed to liaise with the police in order to rescue the minor and arrest the perpetrator.

6. No. 12xxxx PC Cyrus Kimeu (PW7) a police officer attached to Aram police station testified to have received a call from the OCS on the night of 08/12/2022 at 10.00PM to wit that they were to work together with the area chief and assistant chief to rescue a minor from a certain house. He stated further that they all met and were taken to a certain home where the missing minor was suspected to be. That they peeped through the window and saw two people half naked lying on a bed. That he knocked on the door and that the Appellant opened it. That they entered the inner room and found a girl who upon inquiring about her age, she stated she was 14 years. They arrested both of them. That they also revered one broom of cannabis sativa and a packet of super match cigarettes.

7. No. 24xxxx PC Martha Gesare (PW5) was the investigating officer who testified that she was assigned that particular case on 09/12/2022 and both the minor and the perpetrator were already in custody. That she escorted both of them to hospital where specimens were collected and which were forwarded to the government chemist for analysis. That she issued a P3 form which was duly filled. That she obtained the minor's baptism card which she produced as Exhibit 7. That she likewise obtained a letter from the head teacher Rambira Primary school about the complainant and which she produced as Exhibit 8.

8. Gilbert Ambila (PW3), a clinical officer attached at Ongielo Health Centre, examined the complainant and filled the P3 form dated 09/12/2022. That on examination of the complainant's genitalia, he established that the hymen was broken and that pregnancy test was positive. That there were also spermatozoa seen on the High Vaginal Swab (HVS). That he concluded that there was defilement that had led to pregnancy on UTI. That he produced the P3 form as Exhibit 2, Treatment notes as P exhibit 1, PRC form as Exhibit 3. That Ultra sound was also conducted and it was confirmed that the minor's pregnancy was at eleven weeks five days. That the Ultra sound image was produced as Exhibit 6.

9. Godwin Waliama (PW6), a government analyst, conducted a DNA analysis of the specimens forwarded by PW5. He obtained buccal swabs from the Appellant and the minor and did an analysis. That the sample from HVS tested positive of seminal fluid. In conclusion, he stated that there was a

match from the buccal swab from the Appellant and the samples from the HVS. He produced the exhibit memo as Exhibit 4 and the DNA report dated 22/02/2023 as Exhibit 5.

10. The trial court later ruled that a prima facie case had been established against the Appellant and that he was consequently placed on his defense. The Appellant chose to give a sworn statement and did not call any witness. In his defense, he stated that when the officers came to arrest him in his house, they found him with a bunch of cannabis and packets of cigarettes but that the minor was not there. That he denied the charges of defilement. That the accusation was a fabrication from his aunt who had his debt and was using the criminal process to get back at him.

11. The appeal was canvassed by way of written submissions. The Appellant submitted that the prosecution did not prove the charge of defilement beyond reasonable doubt as by law required and prayed that the said conviction should be quashed. On sentence, the Appellant submitted that the sentence was harsh, and unconstitutional.

12. The Respondent on the other hand, submitted that it had proved its case beyond reasonable doubt as by law required and that the sentence is likewise lawful and consummate to the offence.

13. I have considered the record, the rival submissions and authorities by both sides and find the issues for determination as follows:

    a. Whether the prosecution proved the elements of the offence of defilement beyond reasonable doubt.

    b. Whether the sentence meted by the trial magistrate was harsh, excessive and unconstitutional.

14. On the first issue, there are three elements to be proved in a case of defilement which are inter alia; age of the minor; proof of penetration; identity of the perpetrator.

15. On the element of age, PW1 testified that she was born on 01/01/2008 and hence she was aged 14 years old at the time of the incident. PW5 the Investigating Officer produced the minor's baptism card as P exhibit 7 that confirmed the same. In the case of Omuroni *v Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate or a baptism card was a prima facie proof of age; and it was sufficient as proof of age. (See also Mwalango Chichoro v Republic MSA C. Appeal No. 24 of 2015). I find the this ingredient was proved beyond reasonable doubt.

16. On the element of penetration, PW1 testified that she was then in Grade six and that the Appellant had been her boy fried since she was in Grade four in the year 2020. She stated that she went to visit the Appellant at his home (where he stays with his parents) on Wednesday and that night she slept with the Appellant's sister. That the following day she slept with the Appellant and that they had sexual intercourse. That he inserted his penis in her vagina. The clinical officer (PW 3) corroborated the evidence of PW1 where he stated that upon examination, spermatozoa was seen on the HVS and pregnancy tested positive. The said clinical officer drew a conclusion that there was defilement that had led to pregnancy.

17. On the perpetrator's identity, PW1 testified that the Appellant had been his boyfriend since 2020 when she was in grade/Class four. Further, PW6, the government analyst stated that the sample from the High Vaginal Swab (HVS) tested positive for seminal fluid. Further, on cross-examination, he stated that the buccal swab from the Appellant matched the seminal fluid; sample on the HVS. In simple terms, this means that it is the Appellant's semen/ seminal fluid/spermatozoa that was in the vagina of the minor YAO at the time of the collection of the specimens. The Appellant was found in flagrant delicto with the complainant as they were half naked and both were arrested from the Appellant's house and escorted to hospital for medical checkup. The complainant clearly indicated that she had

known the Appellant way back while she was in grade four. There was therefore no issue of the identity of the Appellant as the perpetrator. Again, the pregnancy test confirmed that the complainant was about seven months and five days in pregnancy. I find that the Appellant's defence evidence di not shake that of the Respondent which was quite overwhelming against him.Iam unable to believe the Appellant's assertion that he had beeb framed up over some debt owed to an aunt. I find the trial court's rejection of the defence was sound. I find that the Appellant was the perpetrator of the crime.

18. In view of the foregoing, I find that the Respondent had proved the offence of defilement beyond any reasonable doubt. The finding on conviction by the trial court was therefore sound and must be upheld.

19. On the second issue of sentence, section 8(3) of the *Sexual Offences Act* No. 3 of 2006 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"

20. Sentencing, is usually at the discretion of the trial magistrate or trial judge. It is trite law and based on the doctrine of stare decisis that an appellate court will not normally disturb the sentence meted out by the trial court save where the said sentence is illegal, unlawful, or out rightly excessive in the circumstances.

21. This position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/O Owuor v Regina [1954] 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., [1950] 18 E.A.C.A 147: "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v Sher Shewky, [1912] C.C.A. 28 T.L.R. 364."

22. It is noted that Ogola s/o Owuor's case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.

23. In the instant appeal, the trial magistrate took into account everything that was urged before her by the Appellant. She did not disregard any material factor, nor did she take into account any irrelevant material. Similarly, he did not act on any wrong principle. The very same matters that the Appellant urged before me were urged before the learned trial magistrate and who took all of them into account.

24. The Appellant likewise claimed that the mandatory nature of the sentence was unconstitutional. On this, I am guided by the Supreme Court Petition No. E018 of 2023 [2023] eKLR where the Supreme court stated that all minimum mandatory sentences under the *Sexual Offences Act* no. 3 of 2006 are lawful as long as section 8 of the said Act remains valid.

25. In light of the foregoing, I am convinced that the trial magistrate correctly addressed himself on the issue of sentence. It is noted that the Respondent has not issued a notice of enhancement of sentence from that imposed by the trial court. As no such notice has been filed, I will not interfere with the sentence of fifteen (15) years' imprisonment. It is noted that the Appellant managed to post bail soon

after his arrest. The charge sheet indicates that the Appellant was arrested on 9/12/2022 and later got bailed out on 3/4/2023 and remained out on bond until 16/5/20223 when he was convicted and then remained in custody until 29/6/2023 when he was sentenced. It is clear that the Appellant was in custody for a period of about five months. This period will be taken into account pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*. Hence, the Appellant oght to have been sentenced to 14 years and five months imprisonment which was to commence from the date of conviction.

26. Consequently, the appeal on conviction lacks merit. The same is dismissed. However, the appeal on sentence partially succeeds to the extent that the sentence of 15 years' imprisonment is set aside and substituted with a sentence of fourteen years and five months imprisonment which shall commence from the date of conviction namely 16/5/2023.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.

D. KEMEI

JUDGE

In the presence of:

LAA.....Appellant

Murila .....for Appellant

M/s Mumu.....for Respondent

Mboya.....Court Assistant