SSN v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 11199 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11199 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E037 OF 2024

S MBUNGI, J

JULY 30, 2025

BETWEEN

SSN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act*.
2. The particulars of the offence are that on the diverse dates of April 2022 in Isulu Location, Kakamega Subcounty within Kakamega County the Appellant intentionally caused his penis to penetrate the vagina of one AS, a minor aged 17 years old.
3. After trial, he was found guilty, convicted and sentenced to fifteen (15) years imprisonment on the charge.
4. The appellant, being aggrieved by the conviction and sentence, preferred the present appeal.
5. In the amended grounds of appeal, he contended that the trial magistrate;
    a. Made errors in both law and fact by upholding a fundamentally unfair trial by failing to make a finding that the case was not proved despite contradictory evidence.
    b. Failed to consider all the ingredients of defilement.
    c. imposed on him a sentence which was excessively harsh and disproportionate to the offence charged.

6. This court thus has the onus of carefully and exhaustively scrutinizing the evidence adduced before the trial court to arrive at my own independent conclusions regarding the validity or otherwise of the appellant's conviction and sentence.

7. In his petition of appeal dated 25th March 2024, the applicant made submissions against the sentence and conviction on the following grounds;

   a. That, the trial Court erred in law and in facts in not considering that the minimum mandatory nature of the sentence under section 8(4) is unconstitutional and unwarranted on plea.

   b. That, the learned trial magistrate erred in law and in facts by convicting and sentencing the appellant without observing keenly that the three elements of Defilement were not proved beyond reasonable doubt.

   c. That, the learned trial magistrate erred in both law and in facts in failing to observe that the intended effect of sentence can be achieved with a less severe sentence.

   d. That, the trial Court erred in both law and in facts by basing the appellant's conviction and sentence on biased, conclusive medical findings and investigations.

   e. That, the learned trial magistrate erred in law and in facts by finding penetration proved to the required standard (standards even in the wake of flimsy) and inadequate evidence of the prosecution.

   f. That, the trial magistrate erred in law and in facts by failing to make a finding that the case was not proved despite contradictory evidence.

   g. That, more grounds to be adduced after receiving the trial Court proceedings.

8. On these grounds the appellant made a prayer that his appeal succeed to the entirety and;

   a. His conviction be quashed

   b. Sentence set aside and

   c. Thes appellant be set free

Analysis And Determination.

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr. App No. 280 of 2004 [2005] 1 KLR where the Court of Appeal held that:

   > "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor"

10. I have keenly considered all the submissions, the judgement and the proceedings of the lower court and find that the key issues arising for determination are as follows:

    i. Whether the evidence presented before the trial court proved the guilt of the appellant as charged beyond any reasonable doubt;

    ii. Whether the sentence was constitutional.

iii. Whether the sentence was appropriate.

Proof Of Guilt Beyond Reasonable Doubt.

11. To establish a charge of defilement, the prosecution must prove beyond reasonable doubt all what constitutes the offence of defilement. Section 8(1) of the *Sexual Offences Act* of 2006 which definitively states that:

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

12. The law on defilement requires the proof of three key elements namely:-

    a. Age of the victim

    b. Penetration

    c. Identity of the perpetrator of the crime.

13. The prosecution was required to establish that the victim falls within the definition of a child as outlined in the *Children's Act*. On proof of age, I wish to state at the outset that the importance of proving the age of a victim in sexual offences is paramount considering that under the *Sexual Offences Act*, the prescribed sentence is determined by the age of the victim.

14. In respect to age of the victim, in the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the court had this to say in respect of proof of age of victim in cases under *Sexual offences Act*:

> "... 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."

15. The complainant produced her birth certificate as proof of her age, which indicates that she was born on the 8th of April 2005. The incident took place in April 2022. Based on this information, it can be concluded that the victim had just turned 17 years old at the time of the incident.

16. In this case, four witnesses gave their testimony;

    a. A.S.- the complainant-PW1

    b. Wilson Absalome Okongoh Odhiambo- Clinical Officer- PW2

    c. PI- sister-in-law to the appellant- PW3

    d. John Mutonyi Mutua- Police Constable- PW4

17. The record before me shows clearly that the complainant was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was intelligent and understood the duty of speaking the truth and directed that she be affirmed. She was thus subjected to cross-examination.

18. PW1's testimony stated that on a particular day in April, the appellant, who she claims is her uncle, called her to his house with the intent to give her money to take to her mother. She describes that the

appellant pushed her into his bedroom, undressed her, unzipped his trousers and inserted his penis into her vagina. She stated that she did not scream, following a threat by the accused to kill her if she did and only told her grandmother about it after a month.

19. PW2, a clinical officer attached the lab results PRC form (Ex4), which assessment established that her hymen was absent. Furthermore, an ultrasound (Ex3) confirmed that she was 24 weeks pregnant. Seeing that it was stated that the appellant was on HIV treatment, the victim was put on Post Exposure Profilaxis and she was confirmed to be HIV Negative.

20. PW3, a resident of Isulu, claimed that she was present when the victim admitted to her father that the appellant used to give her mandazi or money and have sex with her.

21. PW4, the Police Constable, escorted the complainant for examination at Shibwe Sub County Hospital where a P3 was filled by the doctor and it was found she was pregnant. Furthermore, the complainant's father had written a letter to through the assistant chief indicating that they could not raise the child because the accused and complainant were relatives.

22. From the medical evidence, the hymen was absent and the victim asserted that the assailant had inserted his penis into her vagina. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

    > " Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

    Based on the evidence presented, there is no doubt that penetration took place.

23. As for the ingredient of positive identification, the victim had testified that the accused person was her uncle. PW3 corroborated the evidence of PW1 as to the identity of the appellant to which he did not dispute.

24. The complainant's testimony was one of a single witness, who testified that the incident occurred in the appellant's house. It is not in dispute that the appellant and the victim were known to each other.

25. The appellant denied committing the offence, stating that he was arrested and asked whether he knew the complainant and thereafter charged with the offence.

26. PW2 testified that the complainant gave a history of having been defiled severally by the appellant. PW3 stated that the complainant informed her that the accused used to give her mandazi to have sex with her. I agree with the trial magistrate who reasoned that the contradiction did not go into the root of the case.

    It is also my view that the contradiction is immaterial for it does not negate the evidence of the actus reus on the part of the appellant as had been submitted in the petition of appeal.

27. That said, the complainant's demeanor was also taken into consideration, and the trial magistrate found that she remained unshaken, proving no possibility of mistaken identity and as such the trial magistrate positively recognized him as the perpetrator.

    Section 124 of the *Evidence Act* allows the court to convict based solely on the Complainant's testimony, provided it is deemed reliable. In this case, the Complainant's account was convincing enough for the court to move forward with a conviction despite the defence's assertions. From the evidence adduced, I agree with the trial magistrate that the assailant was positively identified.

28. The upshot of the above is that the evidence tendered by the prosecution proved the offence of defilement beyond a reasonable doubt thus the conviction was merited. The appeal on conviction therefore fails.

Constitutionality Of The Sentence

29. As for the issue of the constitutionality, the appellant submits that the trial court erred in law and in facts in not considering that the minimum mandatory nature under section 8(4) is unconstitutional and unwarranted on plea.

30. I shall refer The Supreme Court of Kenya which in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) allowed the petition of appeal to the extent of setting aside the judgment by the Court of Appeal in Nyeri in which it declared [mandatory] minimum sentences for sexual offences unconstitutional in that they limit the discretion of the court. The Supreme Court also ordered that the Respondent should complete his 20-year sentence from the date of imposition by the trial court.

31. In the judgment, the Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act*, or any other statute. The court agreed with the submissions of the amici curiae that "...sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences," such as the one being handled by this court.

32. The Supreme Court of Kenya also distinguished between mandatory sentences and minimum sentences, where it stated that;

> " ...where mandatory sentences leave no discretion for the judge to individualize punishment whereas minimum sentences set the floor rather than the ceiling. It held that although the term 'mandatory minimum' has been used in other jurisdictions, it is not applicable as a legally recognized term in Kenya. A mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different sets of meanings and circumstances."
>
> Following the Supreme Court of Kenya's reasoning, the sentence that was meted out by the trial court magistrate was thus constitutional.

33. In light of this it is my view that the focus should be shifted to proportionality, which is a central tenet of sentencing, to wit I shall determine whether the proportionality was considered and whether the sentence was appropriate in the next issue.

Appropriateness Of The Sentence

34. Turning on to the issue of sentencing, the appellant has urged this court to find that the minimum mandatory nature of the sentence under section 8(4) of the *Sexual Offences Act* that was imposed upon him was harsh and the effect of the sentence could be achieved with a less severe sentence.

35. It is trite that although sentencing is at the discretion of the trial Court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case. The strict principles guiding interference with sentencing by the appellate Court were set out in *S v Malgas* 2001 (1) SACR 469 (SCA), as cited with approval in *Kigen v Republic* [2023] KEHC 1173 (KLR).

    In this persuasive authority, the Supreme Court of Appeal of South Africa held that: -

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court... However, even in the absence of material misdirection, an appellate court

may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

36. In this case, the trial magistrate rightfully followed the provisions of Section 8(4) of the *Sexual Offences Act* which provides that "a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years". The appellant's prayer to achieve the effect of his sentence within a shorter time is in excess, as the trial magistrate gave him the minimum sentence.

    It is highly reprehensible that the appellant broke the filial trust that should have been there between him and his niece. Even worse was the endangerment of the complainant's health since the appellant is HIV positive as evidenced in the P3 form. In any case, I find that the sentence was as a matter of fact, lenient.

37. The Trial Court magistrate carefully weighed several factors in its sentencing decision. It took into account the mitigating arguments presented by the Appellant. Additionally, the Court considered the aggravating factors, such as the child's age and the violation of her dignity and the trial court magistrate sentenced him accordingly.

38. Referencing the established *Sentencing Policy Guidelines of 2016*, which aim to ensure that sentences are fair and proportionate, I find that the sentence does not appear to be harsh or excessive. The trial Court took into consideration the period spent in custody and clearly indicated that the 15-year sentence runs from the 18th of July 2022 when the appellant was placed in remand pending trial.

39. I uphold the conviction and the sentence. The appeal stands dismissed.

40. It is so ordered.

41. Right to appeal within 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT OF KAKAEMGA THIS 30TH DAY OF JULY, 2025.

S. N MBUNGI

JUDGE

Court Assistant -Fred Owegi

Ms. Osoro for the Respondent present online.

Applicant present online.