# Ikoel v Republic (Criminal Appeal E009 of 2023) [2024] KEHC 864 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 864 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT LODWAR**

**CRIMINAL APPEAL E009 OF 2023**

**RN NYAKUNDI, J**

**JANUARY 29, 2024**

**BETWEEN**

**SIMON IKOEL ........................................................................................ APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(Being an appeal from the judgment of Hon. D.A. Orimba in Kakuma law court cr. SO. N0. 47 of 2021)***

## JUDGMENT

1. The Appellant 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 offence were that on the 23rd day of September, 2021 at [particulars withheld] village in Turkana Central within Turkana County intentionally and unlawfully caused his penis to penetrate the Vagina of CSN a child aged 10 years.
2. He was also charged with 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 offence were more less the same.
3. The appellant was convicted on the main charge and sentenced to life imprisonment.
4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
    i. That the learned trial magistrate erred in law and in facts when convicting the accused person without observing the contradicting evidences in this instance.

ii. That the learned trial magistrate erred in law and in facts when convicting the accused person without observing that, the decision made by the accused person of being silent is dangerous as he did not know the dangers of keeping silent in court and that he was sick at the time.

iii. That the learned trial magistrate erred in law and in facts when convicting the accused person without observing that the prosecution did not prove the element of penetration.

iv. That the learned trial magistrate erred in law and in facts when convicting the accused person without observing that none of the prosecution witnesses saw the act done.

v. That the learned trial magistrate erred in law and in facts when convicting the accused person without observing that there was hearsay evidence which was not supported by the law.

vi. That the learned trial magistrate erred in law and in facts when convicting the accused person without observing that in the instance case, the accused was a watchman in the family and there was an issue of payment.

Parties filed written submissions in support of their arguments.

**Appellant's Submissions**

5. The appellant submitted that the evidence of PW2, the whistle blower was dubious and that he was not properly identified. He submitted that light is key in identification of suspects. That the absence of light in the boys' room would not have enabled PW2 to identify the people inside.

6. He further submitted that the evidence of PW3 was based on hearsay evidence. That PW3 being a chief officer of water in Turkana County works hand in hand with the trial magistrate together with the author of the P3 form who works in Turkana County referral Hospital (PW4).

7. It was his case that PW3 took the law into his hands, instead of confirming such allegations from the victim, he disregarded the legal process of reporting to the police.

8. It was submitted for the appellant that PW3's influence was manifested throughout the prosecution of the case, first by consulting the clinical officer without having accurate information of what transpired. That PW3 influenced the law as the magistrate harshly sentenced the appellant without considering the facts of the case.

9. The appellant further submitted that the clinical officer did not indicate whether the penetration was penile. That the victim was scratched by fingers and not a penis. He submitted that during judgment, the trial magistrate did not take this into account.

10. The appellant equally questioned the age of the victim. It was his submission that the birth certificate was not presented in court. He submitted that the appeal is merited and should be allowed on the aforesaid grounds.

**Respondent's Submissions**

11. Mr. Edward Kakoi, prosecution counsel in opposing the appeal submitted that the issue of age was sufficiently proven. He relied on her birth certificate which was produced as Exhibit 2.

12. On the issue of penetration, counsel submitted that the complainant testified that the appellant removed his penis and inserted to her vagina and at the examination, the clinical officer established that the hymen was broken and there were pus cells meaning bacterial infection. Counsel submitted that penetration was proved.

13. Counsel submitted that the appellant was positively identified since the appellant was a watchman in the home of the complainant. The appellant was found together with the complainant in a dark room by PW2.

14. On sentence, the prosecution submitted that the appellant was sentenced to life imprisonment as provided for under the *sexual offences act*. Counsel submitted that the appellant abused the privilege he had over the complainant to defile her on several occasions. Counsel urged the court not to interfere with the sentence

**Analysis and Determination**

15. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. See *Okeno vs. Republic* [1972] EA 32.

    The issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether the sentence meted upon the appellant was lawful.

**Elements of offence of defilement**

16. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

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

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    (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.”

17. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) Age of the complainant;

    2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    3) Positive identification of the assailant.

18. In the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 it was stated that:

    > “ The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

    What does the evidence portend?

**Age of the Complainant**

19. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

20. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

21. The appellant herein submitted that the birth certificate was not presented to court. The prosecution however submitted that the certificate was produced as exhibit 2. Further her brother who testified as PW3 testified that she was 10 years old. Her birth certificate was produced as exhibit 2. A birth certificate is prima facie evidence in proving the age of the minor. The trial court rightly found that the complainant was ten years old at the time.

I find the age of the victim was 10 years old.

**Penetration**

22. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

23. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

24. In light thereof, the appellant argued that the clinical officer did not indicate whether the penetration was penile. That the victim was scratched by fingers and not a penis. PW2 stated that she found accused holding the complainant alone in the boys' room on the material date and time. The medical evidence by PW4 confirms that the hymen was broken and that during examination the complainant stated that it was not the first time she was being defiled.

25. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I find that the medical evidence supports there was penetration of the child.

**Was the Appellant the Perpetrator?**

26. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia. The appellant worked as a watchman for the complainant. In the cases of *R vs Turbull and Others* (1976) 3 All ER 549. Lord Widgery C.J had this to say: -

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number

of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" was the observation impended in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before" How often" if only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

27. The evidence by the prosecution leaves no doubt that the Appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

28. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

**On Sentence**

29. The appellant argued that he was convicted on dubious evidence and prayed that the appeal be allowed. Section 8 (2) of the *Sexual Offences Act* to convict provides as follows:

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    (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."

30. In the "*Muruatetu Case*", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

    " (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

    (d) character and record of the offender;

    (e) commission of the offence in response to gender-based violence;

    (f) remorsefulness of the offender;

    (g) the possibility of reform and social re-adaption of the offender;

    (h) any other factor that the Court considers relevant."

31. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

32. Further, the sentencing objectives in Kenya have been captured in the *Sentencing Guidelines 2023* to be the following: -

1) Retribution: to punish the offender for his/her criminal conduct in a just manner.

2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

5) Community protection: to protect the community by incapacitating the offender.

6) Denunciation: to communicate the community's condemnation of the criminal conduct.

7) Reconciliation: To mend the relationship between the offender, the victim and the community.

8) Reintegration: To facilitate the re-entry of the offender into the society.

33. Therefore, mandatory minimum sentences place a bar on the trial court's ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or magistrate's power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber stamps.

34. In contrast to the above given the guidelines in the *Benard Kimani v Republic*

> " 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 stated is shown to exist."

35. The trial court while sentencing the accused persons noted the mandatory sentence to the offence of defilement but did not take into account mitigating factors and the objectives of sentencing in totality.

36. In the upshot, the life imprisonment sentence be and is hereby interfered with a lesser sentence of twenty-five (25) years' imprisonment. The court in arriving at this decision, has taken into account the aggravating factors, mitigation, that the appellant is a 1st offender and the objectives of sentencing.

37. In the upshot, the appeal partially succeeds on sentence whereas the order on conviction is affirmed.

**DATED AND SIGNED AT LODWAR THIS 29TH DAY OF JANUARY, 2024**

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**R. NYAKUNDI**

**JUDGE**