



**Wachira v Republic (Criminal Appeal E087 of 2022)
[2024] KEHC 633 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E087 OF 2022
KW KIARIE, J
JANUARY 25, 2024**

BETWEEN

JOSEPH WANYIRI WACHIRA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.80 of 2018 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Joseph Wanyiri Wachira, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 29th day of September 2018, in Jomvu sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of R.O., a child aged three years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The appellant was in person. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact in failing to appreciate that penetration and identity were not proved to the required standards
 - b. The learned trial magistrate should have appreciated that the voir dire examination was irregular and contravened section 19 of Kenya's [Oaths and Declarations Act](#) Cap 15 Laws.
 - c. That the learned trial magistrate erred in law and fact in misdirecting himself on the evidence.
 - d. That the learned trial magistrate further erred in law and fact in failing to appreciate that the instant matter was riddled with material discrepancies and contradictions.



- e. That the sentence of life imprisonment meted out was harsh and manifestly excessive.
4. The state opposed the appeal through Mr Hillary Isiaho, learned counsel, who urged for the dismissal.
5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they are proven.

7. The complainant was a child aged three years at the time of the offence. The evidence of her mother (PW1) is that she was helping her neighbour in parking. She was in the house with the complainant, her husband and the appellant. The appellant was playing with the child, apparently in another room. Suddenly, the child went out of the room, limping. On checking her genitalia, she noticed that the child was bleeding.
8. Dr Otieno examined the complainant on the 30th day of September 2019. In the report that was produced by Dr Nafisa Seif (PW3), he made the following findings: The patient was bleeding from the vagina and was in pain. The hymen was broken. He was of the opinion that the child, aged three years, was defiled. There was evidence of penetration.
9. In his defence, the appellant contended that he found the complainant's mother quarrelling his mother. When he enquired why she was squabbling with his mother, she asked him not to get involved. She threatened him with dire consequences. When an accused person raises an *alibi* defence, the onus is on the prosecution to prove the defence false. In the case of *Victor Mwendwa Mulinge v R* [2014] eKLR, the Court of Appeal, while addressing the *alibi* defence, stated:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of *alibi* lies on the prosecution; see *Karanja v R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of *alibi* and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of *alibi* at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

10. This defence was an afterthought. After the evidence of PW1, he never challenged her during cross-examination about the alleged threat. The learned trial magistrate rightly dismissed the *alibi* defence.



11. A copy of the Certificate of Birth of R.O. was produced as an exhibit. It indicates that she was born on the 23rd day of December 2014. At the time of the offence, she was three years and nine months old. Section 8 (2) of the *Sexual Offences Act* provides:

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.

The prosecution, therefore, proved the age of the complainant.

12. The appellant argued that the sentence meted out to him was harsh and manifestly excessive. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, as follows:

The principles upon which an appellate court will exercise its jurisdiction to review sentences are pretty 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 Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. 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 Shersbewsity* (1912) C.CA 28 T.LR 364.

13. The sentence prescribed for the offence is life imprisonment. I have not been persuaded that the learned trial magistrate applied the wrong principle or overlooked some material factor.
14. I may agree with him that an indeterminate sentence is harsh. However, there is no other prescribed sentence for the offence. Parliament must define what a life sentence means. Until such a definition is legislated, courts will continue to pronounce the stipulated sentence. Secondly, in this case, the sentence is the most appropriate.
15. Based on the preceding analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

