



REPUBLIC OF KENYA



**Arikula v Republic (Criminal Appeal 9 of 2021)
[2024] KEHC 2058 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 9 OF 2021
JN KAMAU, J
FEBRUARY 27, 2024**

BETWEEN

PATRICK ARIKULA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon D. Ogal (RM) delivered at Hamisi in Senior Resident Magistrate's Court in Criminal Case No 613 of 2016 on 23rd November 2016)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was convicted by Hon D. Ogal (RM) on the charge of defilement and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgment, he lodged an appeal herein. His Petition of Appeal was dated 8th December 2016 but the same did not bear a court stamp. He set out seven (7) grounds of appeal. Subsequently on 19th January 2024, he filed Supplementary Grounds of Appeal dated 2nd January 2024. He listed six (6) Supplementary Grounds of Appeal.
4. His Written Submissions were dated 2nd January 2024 and filed on 19th January 2024 while those of the Respondent were dated and filed on 14th December 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal and Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Appellant's right to fair trial was infringed upon;
 - b. Whether or not the Trial Court conducted a *voir dire* examination and if not, if the same rendered the trial a nullity;
 - c. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

I. Fair Trial

9. Ground of Appeal No (5) in the Supplementary Grounds of Appeal was dealt with under this head.
10. Both the Appellant and the Respondent herein did not submit on this issue. Suffice it to state that on 19th August 2016, the Appellant informed the Trial Court that he had been supplied with statements and was ready to proceed with his case.
11. In the premises foregoing, Supplementary Ground of Appeal No (5) was therefore not merited and the same be and is hereby dismissed.

II. *voir dire* Examination

12. Supplementary Ground of Appeal No (2) was dealt with under this head.
13. The Respondent did not submit on this issue. On his part, the Appellant herein argued that the Trial Court erred in law and fact in not having conducted a *voir dire* examination. He placed reliance on the case of *Marippet Loonkomok v Republic* [2016] eKLR where it was held that *voir dire* examination on children of tender years had to be conducted and that failure to do so did not in per se vitiate the entire prosecution case but that evidence that was not taken under oath could not be used to convict an accused.
14. Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 (Laws of Kenya) stipulates as follows:-

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the



opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”

15. In addressing what age would be appropriate for a trial court to conduct a *voir dire* examination, this court had due regard to the case of Maripett Loonkomok v Republic (*Supra*) where the Court of Appeal found and held that children under the age of fourteen (14) ought to be taken through a *voir dire* examination. It rendered itself as follows:-

“...the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that; “In appropriate case where *voir dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

16. Notably, the age at which a *voir dire* examination ought to be conducted depends on the circumstances of a particular case and was not cast on stone. Indeed, a court was obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a *voir dire* examination to determine if he or she should adduce sworn or unsworn evidence. Indeed, a child could be aged seventeen (17) years but have the mental capacity of a two (2) year child due to many health complications.
17. The ascertainment of whether such a witness understood the meaning of taking an oath could not therefore be taken lightly as an accused person could be convicted on the basis of sworn evidence of such a witness.
18. Bearing in mind the holding in the case of Maripett Loonkomok vs Republic (*Supra*), this court found and held that the Trial Court could not therefore have been faulted for having not conducted a *voir dire* examination for the reason that according to the Age Assessment Report in respect of PW 1 put her age at fourteen (14) years at the material time.
19. In the premises foregoing, Supplementary Ground of Appeal No (2) was therefore not merited and the same be and is hereby dismissed.

III. Proof of Prosecution’s Case

20. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (3) and (6) were dealt with under this head as they were all related.
21. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.



22. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

23. The Appellant submitted that whereas the Charge Sheet indicated that the Complainant (hereinafter referred to as "PW 1") was thirteen (13) years old, the Age Assessment Report that was produced as an exhibit during trial by the Investigating Officer, No 89368 PC Danstone Wangila (hereinafter referred to as "PW 4") showed that she was fourteen (14) years of age. It was his contention that the aforesaid Age Assessment Report was not produced by its maker and PW 4 did not seek leave of court to produce it and/or give reasons why its maker could not be procured. He submitted that the same ought to have been rejected as evidence pursuant to Article 50(4) of the *Constitution* of Kenya, 2010.
24. On its part, the Respondent submitted that PW 1 testified that she was a student at Muhudu Primary School and that she was fourteen (14) years at the time she was giving her testimony during trial. It pointed out that in this case there was no birth certificate to prove the age of the victim. It, however, placed reliance on the case of *Fappyton Mutuku Ngui v Republic* (eKLR citation not given) where it was held that conclusive proof of age in cases under *Sexual Offences Act* did not necessarily mean that it had to be proved by a birth certificate.
25. It contended that PW 4 testified that PW 1 was examined by a dental specialist who determined that she was aged fourteen (14) years old which was indicated in the aforesaid Age Assessment Report. It asserted that the Appellant did not dispute PW 4's evidence and hence her age was proved beyond reasonable doubt.
26. In the case of *Kaingu Elias Kasomo v Republic* Criminal Case No. 504 of 2010 (unreported), the Court of Appeal stated that the age of a minor in a charge of defilement ought to be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of *Musyoki Mwakavi v Republic* [2014] eKLR.
27. The offence was committed on 15th December 2015. PW 1's age assessment was done on 26th May 2016 which was about five (5) months after the said offence. The age assessment by way of dental examination put her age at fourteen (14) years.
28. This court agreed with the Respondent's submissions that the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary. In this case, PW 1's age was proven using medical evidence. Consequently, this court was satisfied that the Prosecution had proved beyond reasonable doubt that PW 1 was about fourteen (14) years at the material time of the incident.

B. Identification

29. The Appellant submitted that PW 1 did not prove that she had ever seen him before the incident or that he was her neighbour. He stated that it was her mother who mentioned the idea of neighbourhood but she did not establish the distance between them and his home to enable the Trial Court ascertain if the alleged neighborhood could justify recognition. He added that PW 1's mother was not the identifying witness in the circumstances.
30. To buttress his point, he placed reliance on the case of *Ng'ang'a vs Republic* (1981) KLR 483 where it was held that the evidence of identification of a single witness should be carefully tested and when



an accused person was unrepresented, it was the duty of the court to question the witness to establish his recognition.

31. He also cited the case of *Peter Musau Mwanzia v Republic* [2008] eKLR where it was held that the evidence of recognition had to establish circumstances that would prove that the suspect was not a stranger to the identifying witness.
32. It was his case that an identification parade ought to have been conducted to justify the correctness of his identification and in the absence of the same, it was fatal in this case.
33. On the other hand, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her and that he knew her as they were neighbors. It added that that she was able to recognise him as the incident happened during the day.
34. Notably, PW 1 testified that the incident happened during the day at around 9.00a.m. She stated that they shared a boundary with the Appellant herein. Her evidence was corroborated by her father, Henry Musanya (hereinafter referred to as “PW 2”), who confirmed that they had a very cordial relationship with the Appellant and they had no land dispute between them.
35. The incident happened in the morning. The lighting conditions were favourable for a positive identification of her perpetrator. PW 1 and the Appellant knew each other because they were close neighbours.
36. Indeed, in his unsworn evidence, he asserted that her mother was the one who framed him. He either knew PW 1 or he did not know her. He could not approbate and reprobate in the same breathe.
37. His argument that the distance between them was not established and/or there was need for an identification parade to be conducted therefore fell on the wayside.
38. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven through recognition in conditions that were favourable for a positive recognition of the Appellant herein.

C. Penetration

39. The Appellant submitted that the Trial Court relied on the pregnancy and a missing hymen which are inconclusive evidence of penetration. He pointed out that no DNA test was done to link him to the alleged penetration. In this regard, he relied on the case of *Mwangi v Republic* [1984] KLR 595 where it was held that the presence of spermatozoa in a woman’s vagina was not conclusive proof that she had sexual intercourse nor was the absence of spermatozoa in her vagina proof of the contrary.
40. It was his contention that the presence of pregnancy was not conclusive evidence of penetration and that it was trite law that hymen could be lost through many factors other than penetration. He added that PW 1’s evidence could not stand in the face of his defense that there was a grudge between him and her mother which made them frame him in the instant case.
41. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of *Mohammed Omar Mohammed v Republic* [2020] eKLR where it was held that the key evidence relied on by the court in rape cases and defilement in order to prove penetration was the complainant’s own testimony which was usually corroborated by the medical report.
42. It submitted that PW 1 testified that it was the Appellant who defiled and impregnated her and that Kosgei Erick (hereinafter referred to as “PW 3”) testified that she gave a history of being defiled by a person known to her and that upon examination, he established that she was about five (5) months



- pregnant. It was its contention that her evidence was corroborated by PW 3 who confirmed that penetration did in fact occur.
43. It invoked Section 124 of the *Evidence Act* and relied on the case of *Kassim Ali vs Republic Criminal Appeal No 84 of 2005* (eKLR citation not given) where it was held that examination to support the fact of rape was not decisive as the fact of rape could be proved by the oral evidence of a victim of rape or by circumstantial evidence. It was therefore its submission that the Trial Court had no reason not to believe PW 1's testimony as it was corroborated by other witnesses.
 44. It further cited the case of *Evans Wamalwa Simiyu v Republic [2016] eKLR* wherein the court cited the case of *AML vs Republic [2012]eKLR* where it was held that the fact of rape or defilement was not proved by a DNA test but by way of evidence.
 45. In this regard, it placed reliance on Section 36 of the *Sexual Offences Act* and submitted that the power of a court to order an accused person to undergo DNA testing was not couched in mandatory terms but rather that that power was discretionary.
 46. It contended that the Prosecution witnesses were sufficient to establish the case against the Appellant. Towards this end, it relied on Section 143 of the *Evidence Act* Cap 80 (Laws of Kenya) and the case of *Keter vs Republic [2007] EA 135* where it was held that the Prosecution was not obliged to call a superfluity of witnesses but only such witnesses as were sufficient to establish the charge beyond reasonable doubt.
 47. It submitted that if the Appellant thought PW 1's grandmother had evidence that may have been useful to his case, he could have applied for her to be summoned to testify.
 48. It added that the Trial Court considered his defense but rejected it. It asserted that he did not prove that he was framed due to an existing grudge between his family and that of PW 1 as she testified that there was no bad blood between him and her at the time of the incident.
 49. It was her evidence that on the material date, she was on her way to the stream to fetch water when he pulled her by the hand and led her to a tea plantation. He pushed her on the ground and covered her mouth. He then removed both her clothes and his clothes and inserted his penis into her vagina. She stated that he ran away after he heard people talking. Although she informed her grandmother of what had happened, she did nothing.
 50. PW 2 that testified on 17th May 2016, he was summoned to school as PW 1 appeared unwell. When he took her to hospital, medical examination revealed that she was pregnant. He said that she told the doctor that it was the Appellant who defiled her.
 51. PW 3 testified that she had a torn hymen and that she tested positive for pregnancy. He averred that she was twenty two (22) weeks pregnant which was five (5) months. He produced Treatment Notes and P3 Form as exhibits in the case herein.
 52. PW 4 reiterated the evidence that was adduced by PW 1, PW 2 and PW 3.
 53. In his defense, the Appellant contended that he was framed due to an existing grudge between him and PW 1's mother.
 54. Although PW 1 was medically examined about five (5) months after the incident, the period tallied with the time from when she was defiled. At the time of examination on 20th May 2016, she was twenty two (22) weeks pregnant. The Trial Court therefore arrived at a correct conclusion that the Appellant did in fact penetrate her.



55. It could not have ordered for DNA testing as PW 1 was still pregnant. In any event, a DNA analysis was not mandatory. It was discretionary.
56. Going further, there was no evidence that there was bad blood between PW 1 and PW 2 on one hand and the Appellant on the other hand and/or that there was a land dispute between them as the Appellant had alleged. This court was therefore not persuaded that he had been framed for the offence that he was charged with.
57. In addition, failure to call PW 1's grandmother as a witness did not weaken the Prosecution's case as the Appellant had contended. This court agreed with the Respondent that that the Prosecution was only obliged to call those witnesses who would prove the charge against him herein beyond reasonable doubt.
58. Without prejudice to the foregoing, this court noted that when the Appellant was first arraigned before the Trial Court on 23rd May 2016, he had admitted the charge. The matter was fixed on 31st May 2016 for the reading of facts. On the said date, he informed the Trial Court that he intended to change his plea. The charge was read to him afresh and he pleaded "Not guilty" whereupon the matter proceeded to trial.
59. The fact that he had initially pleaded guilty to the offence after charges were read to him in a language that he understood, Kiswahili, and the fact that he adduced unsworn evidence, his defense did not outweigh the Prosecution's case. The veracity of his unsworn evidence was not tested during cross-examination and it therefore had little or no probative value.
60. After carefully analysing the evidence that was adduced by the Prosecution and the Appellant herein, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt. The Trial Court could not be faulted for having found PW 1's evidence to have been well corroborated and arriving at the conclusion that it did.
61. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (3) and (6) were not merited and the same be and are hereby dismissed.

I. Sentencing

62. Supplementary Ground of Appeal No (4) was dealt with under this head.
63. The Appellant submitted that he was a first offender and had served sufficient term to meet the requirements of punishment, deterrence and rehabilitation and which had transformed him to a person who no longer posed a threat to the public.
64. He prayed for a least sentence than his current one and invoked his right under Section 333(2) of the Criminal Procedure Code.
65. On its part, the Respondent submitted that the sentence imposed on him was lawful.
66. The Appellant herein was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. 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.”



67. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.
68. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
69. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.
70. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
71. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK vs Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
72. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the [Constitution](#) of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
73. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
74. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
75. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to a lower sentence than the twenty (20) years imprisonment that had been prescribed in Section 8(3) of the *Sexual Offences Act*.
76. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.



77. Turning to the period that he spent in remand as the trial was on going, this court had due regard to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The same provides that:-

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court).”

78. This court noted that though the Trial Court granted the Appellant bond of Kshs 100,000/= with a surety of a similar amount. He remained in custody during his entire trial. He was arrested on 21st May 2016. He was convicted and sentenced on 23rd November 2016. He was therefore in custody for six (6) months and two (2) days, a period which ought to be taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code.

Disposition

79. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 8th December 2016 and lodged on 17th October 2017 and the Supplementary Grounds of Appeal dated 2nd January 2024 and filed on 19th January 2024, was partly merited only on the aspect of sentence only. His conviction be and is hereby upheld as the same was safe.

80. It is hereby directed that the sentence of twenty (20) years imprisonment be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to fifteen (15) years imprisonment. The period between 21st May 2016 and 22nd November 2016 to be taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

81. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF FEBRUARY 2024

J. KAMAU

JUDGE

