



REPUBLIC OF KENYA



**Kadaji v Republic (Criminal Appeal 15 of 2021)  
[2024] KEHC 2893 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2893 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 15 OF 2021  
JN KAMAU, J  
MARCH 19, 2024**

**BETWEEN**

**MAXWEL KADAJI ..... 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 SO Case No 613 of 2016 on 13th June 2017)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was jointly charged with his Co-Accused, Brian Magesa) with the offence of gang defilement contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. They had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). They were tried and convicted on the main charge by the Learned Trial Magistrate, Hon D. Ogal Resident Magistrate who sentenced them to fifteen (15) years imprisonment each.
2. Being dissatisfied with the said Judgement, on 23<sup>rd</sup> September 2017, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 27<sup>th</sup> June 2017. He set out five (5) grounds of appeal. On 10<sup>th</sup> October 2023, he filed Amended Grounds of Appeal dated 16<sup>th</sup> August 2023. He set out seven (7) Amended Grounds of Appeal.
3. On 15<sup>th</sup> June 2023, this court gave directions on the filing of Written Submissions. The Appellant filed his Written Submissions dated 16<sup>th</sup> August 2023 on 10<sup>th</sup> October 2023.
4. When the matter came up for mention on 25<sup>th</sup> January 2024, the Respondent had not filed its Written Submissions. It asked for an extra month to file the same and confirmed that this court could reserve a date for Judgment. As at the time this court retired to write its judgment, the Respondent's Written



Submission had not been placed on the court file, if at all the same were filed by 25<sup>th</sup> February 2024. The Judgment herein is therefore based on the said Appellant's Written Submissions which he 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. In his initial grounds of appeal, the Appellant had challenged his conviction only. In the Amended Grounds of Appeal, he only concentrated on the sentence. While it appeared to this court that the only issue before it for determination was whether or not in the circumstances of this case the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted, this court appreciated that he was a layman and may not have intended to abandon his Grounds of Appeal. If he intended to do so, his intention was not clear.
8. It was for that reason that this court found it prudent to analyse the evidence that was adduced during trial and the appropriateness of the sentence that was meted out to the Appellant in the following separate and distinct heading.

### **I. Charge**

1. Ground of Appeal No (3) of the Petition of Appeal was dealt with under this head.
2. The Appellant had argued that the Trial Court did not consider that the charges against him were fabricated as he was arrested on the offence of breaking and stealing.
3. A perusal of the Charge confirmed that the Appellant herein was charged with the offence of gang defilement and an alternative charge of committing an indecent act with a child. When he was arraigned in court on 3<sup>rd</sup> October 2016, he pleaded not guilty to both charges and a plea of "Not Guilty" was entered accordingly. The Trial Court directed that he be furnished with statements and was given a bond of Kshs 100,000/= with one (1) surety of a similar amount or a cash bail of Kshs 50,000/=.
4. There was no indication in the proceedings that he was charged with the offence of breaking and stealing. However, when he cross-examined the Investigating Officer, No 92153 Police Constable Peter Onduso (hereinafter referred to as "PW 5"), PW 5 stated that the case concerning maize that had been stolen had been settled at the Station (sic).
5. The process of plea taking of the offences that the Appellant was charged with was regular and untainted. His plea to the charge of gang defilement and the alternative charge of committing an indecent act with a child was unequivocal. His assertion that his arrest was on a different offence thus fell on the wayside.
6. In the premises foregoing, this court found Ground of Appeal No (3) in the Petition of Appeal not to have been merited and the same be and is hereby dismissed.



## II. Proof Of The Prosecution's Case

15. Grounds of Appeal Nos (1), (2), (4) and (5) were dealt with under this head as they were all related.
16. The Appellant had submitted that the Trial Court did not consider the mode of arrest which was tainted one and a half (1 ½) years down the line, that it failed to consider that no identification parade was conducted to ascertain the credibility of the witnesses rendering the dock identification worthless, and that it failed to consider his defence and the fact that the medical evidence exonerated him.
17. According to the Charge Sheet, the Complainant (hereinafter referred to as "PW 1") was aged sixteen (16) years of age at the material time of the incident on 19<sup>th</sup> July 2015. As at the time she testified on 10<sup>th</sup> February 2017, she told the Trial Court that she was aged seventeen (17) years of age and was a student of Mutsatsa IPA Secondary School in Form 3.
18. PW 5 tendered in evidence the Age Assessment Report dated 17<sup>th</sup> February 2017 in respect of PW 1 which showed that she was aged nineteen (19) years at the time and as a result she was aged seventeen (17) years at the material time.
19. The Prosecution's case was that on the material date at about 8.00 am, PW 1 who was in the company of her two (2) brothers, RN and CS (hereinafter referred to as "PW 2" and "PW 4" respectively) left home for the forest to fetch firewood. While collecting firewood, the Appellant and his Co-Accused appeared. The Appellant got hold of her while his Co-Accused scared away her brothers with pangas. The Appellant then hit and cut her on her hand. He undressed her and raped her. His Co-Accused then raped her. They each raped her three (3) times.
20. She managed to walk for a distance and then saw her mother. She narrated to her of what had transpired. They reported the matter to the Village Elder and was then taken to the hospital. She subsequently reported the matter at Cheptulu Police Station. She was emphatic that she was able to identify the perpetrators of the heinous crime although she had never met them prior to the said incident.
21. Her evidence was corroborated by PW 2 and PW 4 who ran away to alert their parents. They were both emphatic that they recognised the Appellant and his Co-Accused person as the people they met while accompanied with their sister in the forest on that material date and who beat them with pangas. Their evidence remained unchanged even when the Appellant recalled them for further cross-examination on a subsequent date.
22. PK (hereinafter referred to as "PW 3") was PW 1's mother. She confirmed that PW 1's hand was bleeding when they met after the ordeal. This was also corroborated by JM (hereinafter referred to as "PW 5") who testified that PW 1 was bleeding from her hand and private parts.
23. Stephen Videnyi (hereinafter referred to as "PW 7") was the Nursing Officer at Serem Health Centre. He noted that PW 1's clothes were blood stained. She had scratch marks on her back, a cut wound on the left hand, bruises on the labia, deep penetration of her vagina and discharge of blood coming from her vagina.
24. On his part, the Appellant and his Co-Accused adduced unsworn evidence. They did not call any witnesses.
25. The Appellant's defence was that on 30<sup>th</sup> September 2016, he went to sell some mandazis that he had made at the shops. He was then arrested and taken to Cheptulu and Serem on the following day and thereafter charged with the offence herein.



26. The Trial Court determined that both the Appellant and his Co-Accused had common intention to rape PW 1 and that she believed her when she stated that they both raped her.
27. The incident herein occurred at 8.00 am when lighting conditions were favourable for a positive identification of the Appellant and his Co-Accused. PW 1, PW 2 and PW 4 were categorical that they saw their faces. It was not a case of mistaken identity. Rather, identification was by recognition.
28. The scientific evidence of deep penetration and bloody discharge from PW 1's vagina was evidence of forceful entry and that she did not consent to the sexual intercourse. The fact that the Appellant was in the company of his Co-Accused and they acted in concert at the material time was proof that the offence of gang rape and/or defilement was proved beyond reasonable doubt.
29. The power of a court to order an accused person to undergo DNA testing under Section 36 of the *Sexual Offences Act* was not couched in mandatory terms. Rather, that power was discretionary.
30. This position has been settled by many cases amongst them the case of *Evans Wamalwa Simiyu v Republic* [2016] eKLR wherein the court cited the case of *AML v 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.
31. The Appellant's cross-examination of PW 7 to ascertain why his spermatozoa was not taken to the Government Chemist was inconsequential. Indeed, he was arrested over a year after the incident which could have rendered the test unnecessary.
32. The above notwithstanding, failure to have his spermatozoa taken to the Government Chemist if the same was collected was not fatal to the Prosecution's case. As was held in the case of *Mohammed Omar Mohammed vs Republic* [2020] eKLR, 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.
33. Most importantly, the Appellant and his Co-Accused adduced unsworn evidence what had little or not probative value or low weight as the same was not subjected to cross-examination by the Prosecution. It could not therefore dislodge the cogent and consistent evidence that was adduced by the Prosecution witnesses.
34. After considering the evidence that was adduced by the Prosecution witnesses and the Appellant's defence, this court also agreed with the Trial Court that the Prosecution proved its case to the required standard, which in criminal cases is, proof beyond reasonable doubt.
35. In the premises foregoing, this court found Grounds of Appeal Nos (1), (2) (4) and (5) in the Petition of Appeal not to have been merited and the same be and are hereby dismissed.

### **III. Sentence**

36. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Amended Grounds of Appeal were dealt with together as they were all related.
37. The Appellant submitted that in as much as sentencing was at the discretion of the trial court, such discretion had to be exercised judicially and not capriciously. He pointed out that the Trial Court failed to apply its discretion in line with Article 50(2)(p) of *the Constitution* of Kenya 2010. He urged this court to apply its discretion and reduce his sentence and direct that the same be made to run from the date of his arrest which was 30<sup>th</sup> September 2016.



38. He contended that he was a young man at the time of his arrest and had been in custody for six (6) years. He was apprehensive that the long incarceration would ruin his life. He asserted that he was a first offender and was remorseful of his actions.
39. He added that during his time in prison, he had learned to be a good citizen through activities facilitated by NITA such as carpentry and joinery Grade III, Diploma in Bible Studies sponsored by Emmaus Bible College amongst others that were ongoing. He averred that he was awaiting his certificates of completion.
40. He further contended that he had maintained discipline while in custody which promoted him to the fourth stage (sic). He swore that he had reformed and was ready to be reintegrated back to the society. He urged the court to grant him that second chance to shape his future.
41. He also invoked Section 333(2) as read with Section 354 and 364 of the Criminal Procedure Code and placed reliance on the case of Paul Omondi Odipo v Republic Appeal No E049 of 2021 (eKLR citation not given) where it was held that the appellant's sentence ought to run from the date of arrest.
42. As pointed hereinabove, the Appellant herein was charged under Section 10 of the *Sexual Offences Act* No 3 of 2006 which provides that:-

“ Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”
43. Although the Prosecution went an extra mile to prove her age, the provision of the law under which the Appellant herein was charged was not determinant on the age of the victim like the offences under Section 8 of the *Sexual Offences Act*.
44. Accordingly, having convicted the Appellant herein, the Trial Court did not therefore err when it sentenced him to fifteen (15) years imprisonment as that is what was provided by the law. In fact, the Trial Court had the option of enhancing the sentence to life imprisonment. Indeed, the sentence could be enhanced to life imprisonment if there were aggravating circumstances such as the tender age of a victim, the brutality with which the offence was carried out, the nature and extent of the injuries that a victim sustained as a result of the gang rape or defilement amongst others.
45. Having said so, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
46. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another v Republic [2017] eKLR on 6<sup>th</sup> July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
47. 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 v 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.



48. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another v Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
49. However, on 3<sup>rd</sup> December 2021 while the Supreme Court directions of 6<sup>th</sup> July 2021 were still in place, in the case of GK v 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.
50. On 15<sup>th</sup> 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.
51. In the case of Joshua Gichuki Mwangi v Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake v 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.
52. 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.
53. Whereas 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 also exercise its discretion not to interfere with the decision of the lower court if there were aggravating circumstances. This was a case that this court took the view that a stiffer sentence would have been more suitable.
54. This court therefore declined to interfere with the decision of the Trial Court as the sentence of fifteen (15) years imprisonment that was meted upon the Appellant herein as the same was fair in the circumstances of the case herein to punish him 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.
55. Turning to the issue of 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).
56. The requirement under with section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR.



57. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

58. It was evident that the Trial Court erred in not having considered the provisions of Section 333(2) of the Criminal Procedure Code. A perusal of the proceedings of the lower court showed that the Appellant was arrested on 1<sup>st</sup> October 2016. Though he had been granted bond/bail, he did not post the same. He thus remained in remand until 13<sup>th</sup> June 2017 when he was sentenced. He therefore spent seven (7) months and eleven (11) days in remand during trial. He was therefore entitled to this period being taken into account in the computation of his sentence.

59. In the premises foregoing, the Amended Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), and (7) were not merited and the same be and are hereby dismissed.

#### **Disposition**

60. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 23<sup>rd</sup> September 2017 and amended on 10<sup>th</sup> October 2023 was partly merited but only on the aspect of the period that he spent in remand while his trial was ongoing. His conviction and sentence be and are hereby upheld as they were both safe.

61. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 1<sup>st</sup> October 2016 and 12<sup>th</sup> June 2017 be and is hereby taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

62. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF MARCH 2024**

**J. KAMAU**

**JUDGE**

