



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Baraka v Republic (Criminal Appeal 53 of 2021)
[2024] KEHC 4555 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 53 OF 2021
JN KAMAU, J
APRIL 30, 2024**

BETWEEN

JOSEPH OMWOMA BARAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon W. K. Cheruiyot (RM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No 14 of 2018 on 5th September 2018)

JUDGMENT

Introduction

1. The Appellant herein 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. 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 the Learned Trial Magistrate, Hon W. K. Cheruiyot (RM), on the charge of defilement and sentenced to life imprisonment.
3. Being dissatisfied with the said Judgement, on 5th April 2019, he lodged the Appeal herein. His Petition of Appeal was dated 27th September 2018. He set out five (5) grounds of appeal. In his undated Written Submissions that were filed on 13th August 2020, he incorporated four (4) Supplementary Grounds of Appeal.
4. The Respondent's Written Submissions were dated and filed on 14th December 2022. 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 vs 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 Grounds of Appeal and Supplementary Grounds of Appeal 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;
 - b. Whether or not the charge sheet was amended, if so, whether the said amendment prejudiced the Appellant;
 - 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. Right to Fair Trial

9. This issue was dealt with under the different sub-heads.

A. Supply of Witness Statements

10. Ground of Appeal No 1 of the Petition of Appeal was dealt with under this head. The Appellant claimed that the Trial Court did not comply with the provisions of Article 50(2)(j) of *the Constitution* of Kenya, 2010.
11. On its part, the Respondent submitted that the Appellant was accorded a fair trial as he was availed all the prosecution witness statements, medical reports and the Charge Sheet before trial and that he was given an opportunity to cross-examine the prosecution witnesses based on evidence adduced in court against him and that he could not then claim that his rights under Article 50(2)(j) of *the Constitution* of Kenya had been violated.
12. Article 50(2)(j) of *the Constitution* of Kenya provides:-

“every accused person has to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”
13. A perusal of the proceedings of the lower court showed that on 9th March 2018, the Prosecution informed the Trial Court that it had supplied statements and documents to the Appellant. If at all the Appellant had not been furnished with the same, he ought to have raised the issue before the trial commenced, which he did not. As he did not deny this fact, this court was thus satisfied that he was supplied with the statements and documentary evidence that the Prosecution intended to rely on during trial.



14. In the premises foregoing, the Ground of Appeal No 1 of the Petition of Appeal was not merited and the same be and is hereby dismissed.

B. Mode of Defence

15. The Appellant asserted that his rights under Section 211 of the Criminal Procedure Code were not explained. The Respondent did not submit on this issue.

16. Section 211(1) of the Criminal Procedure Code Cap 75(Laws of Kenya) states as follows:-

“At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”

7. On 6th June 2018, the Trial Court found the Appellant had a case to answer and placed him on his defence. The proceedings in the lower court showed that the Trial Court explained to him the provisions of Section 211 of the Criminal Procedure Code as the same was recorded. The following was recorded as his response:-

“Sworn statement with no witness”.

18. It was therefore evident from the manner in which the proceedings were recorded that the Appellant was aware of the three (3) different ways of defending himself and that was why he chose to adduce sworn evidence but not call any witnesses.
19. This court thus came to the firm conclusion that the Appellant understood how he was to conduct his defence under the provisions of Section 211(1) of the Criminal Procedure Code and did not therefore suffer any prejudice that would have rendered the trial a nullity and require a retrial.
20. In the premises foregoing, the Appellant’s assertion that his rights under Section 211 of the Criminal Procedure Code were not explained to him thus fell on the wayside.

C. Voire Dire Examination

21. The Appellant submitted that a voire dire was not conducted to ascertain the intelligence of the Complainant (hereinafter referred to as “PW 4”). The Respondent did not submit on this issue.
22. It was evident that on 26th March 2018, the Trial Court conducted a voire dire examination before PW 4 gave her unsworn statement. It enquired into her age, where she went to Church, where she went to school and the names of her mother and her teacher. After considering her age and the voire dire examination, it directed that she adduces unsworn evidence on which alone, the Appellant could not be convicted. Her evidence had to be corroborated for him to be convicted. Indeed, it is trite law that an accused person could not be convicted on the basis of unsworn evidence.
23. In the premises foregoing, the Appellant’s assertion that a voire dire examination was not conducted also fell on the wayside.



II. Charge Sheet

24. Supplementary Ground of Appeal No 1 was dealt with under this head.
25. The Appellant submitted that the Charge Sheet on record referred to one William Tom Mboya and not himself and that it indicated an offence of incest contrary to Section 29(1) of the [Sexual Offences Act](#) No 3 of 2006 and not defilement. He pointed out that while it showed that he was arrested on 6th February 2018, Ruth Akoya (hereinafter referred to as “PW 1”) (sic) stated that he (sic) arrested him on 7th March 2018. He further added that it showed that the offence took place on 26th December 2015.
26. He pointed out that the said Charge Sheet was not amended hence the inconsistencies it caused were incurable. It was his contention that the evidence on record did not support the Charge. The Respondent did not also submit on this issue.
27. Notably, Section 214(1) of the Criminal Procedure Code provides as follows:-

“Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.”
28. This court had due regard to the case of *Obedi Kilonzo Kevevo vs Republic* [2015] eKLR where the Court of Appeal held that when an appellate court was determining whether or not the charge sheet was defective, the applicable test was whether the conviction based on the defective charge occasioned the appellant great prejudice.
29. Notably, under Article 159(2)(d) of [the Constitution](#) of Kenya, courts have been mandated to administer justice without undue regard to procedural technicalities. That notwithstanding, Section 214 of the Criminal Procedure Code allows the prosecution to amend the charge at any time before it closes its case.
30. The Prosecution closed its case on 16th May 2018. The Charge Sheet was amended on 26th March 2018. This was within the period stipulated under Section 214 of the Criminal Procedure Code.
31. A perusal of the Amended Charge Sheet showed that it contained all the necessary information to inform the Appellant of the offences that he had been charged with. It specifically explained what offences were committed and how they were committed. It also set out the date and place of the incident and further mentioned the name and age of the person who was defiled and indecently assaulted.
32. When asked if he admitted or denied the Charges, he responded “Si kweli (It is not true)” A plea of “Not Guilty” was entered against him and the case proceeded to full trial. This was evidence of the fact that he was aware of what charges he was facing before the Trial Court.
33. This court did not therefore find any merit in his assertions that the Charge Sheet was not amended. Indeed, the Appellant did not demonstrate any prejudice that he suffered as a result of the amendment.
34. In the premises foregoing, this court found and held that Supplementary Ground of Appeal No 1 was not merited and the same be and is hereby dismissed.



III. Proof of Prosecution's Case

35. Grounds of Appeal Nos (2), (3), (4) and (5) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (2), (3), (4) and (5) were dealt with under this head as they were all related.
36. 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.
37. 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 vs Republic* [2016] eKLR.
38. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

39. The Appellant submitted that although the evidence on record indicated that PW 4 was a minor, her age was not established as required by law.
40. On its part, the Respondent submitted that the ingredient of age was proved beyond reasonable doubt in that an age assessment was done and the minor was found to have been six (6) years old at the material time.
41. It placed reliance on the case of *Fappyton Mutuku Ngui vs Republic* (eKLR citation not given) where it was held that conclusive proof of age in cases under *Sexual Offences Act* did not necessarily mean a birth certificate.
42. Notably, PW 4 testified that she was seven (7) years old. Her mother, Josphene Kadeveke (hereinafter referred to as "PW 3") confirmed to the Trial Court that PW 4 was seven (7) years old.
43. On his part, the Clinical officer, Sammy Chelule (hereinafter referred to as "PW 5") testified that PW 4's approximate age was seven (7) years old. On her part, No 107376 PC Beatrice Leven (hereinafter referred to as "PW 6") produced an Age Assessment Report which showed that PW 4 was approximately six (6) years old at the material time.
44. In the case of *Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010* (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of *Musyoki Mwakavi vs Republic* [2014] eKLR.
45. Notably, the offence herein was committed on 5th March 2018. The said age assessment was done on 15th March 2018. This was about ten (10) days after the said offence. The Age Assessment put PW 4's age at six (6) years at the material time.
46. In this case, PW 4's age was proven by medical evidence. The Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary. Consequently, this court was satisfied that the Prosecution had proved that PW 4 was about six (6) years old at the material time.

B. Identification

47. The Appellant did not submit on this issue. The Respondent submitted that PW 1 (sic) testified that he was the one who defiled her and that she knew him by appearance and by name. It added that she



stated that he used to visit their home and that PW 2 (sic) confirmed that position. It was categorical that since PW 4 knew the Appellant by name, it was therefore not in doubt that she could easily identify him. It was its submission that the Prosecution had proved its case beyond reasonable doubt.

48. PW 4 testified that on the material day, she was from school on her way going to her grandmother's home when the Appellant waylaid her and took her to his house. She referred to him by his name, "Omwoma". She stated that she used to see him at their home as he would usually visit her father. She positively identified him as her perpetrator by pointing at him at the dock. PW 3 corroborated her evidence as she testified that she knew the Appellant as her husband's friend.
49. The incident occurred during the day when it was still daylight and favourable for a positive identification of the Appellant herein as the perpetrator of the offence herein. There was no possibility of a mistaken identity because PW 4 and the Appellant were not strangers and knew each other as he visited her home frequently. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

50. The Appellant did not clearly submit on this issue. On its part, the Respondent invoked Section 2 of the *Sexual Offences Act* and cited the case of Mohammed Omar Mohammed vs Republic [2020] eKLR where it was held that the key evidence relied on by the courts in rape cases and defilement in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report. It reproduced the PW 4's evidence and pointed out that the same was corroborated by scientific evidence that the Prosecution proved beyond reasonable doubt, that penetration occurred.
51. It further cited the case of AML vs Republic [2012]eKLR where it was stated that the fact of rape or defilement was not proved by way of a DNA test but by way of evidence and the case of Kassim Ali vs Republic Criminal Appeal No 84 of 2005 (Unreported) where it was held that the absence of medical evidence to support the fact of rape was not decisive as the fact of rape could be proved by oral evidence of a victim of rape or by circumstantial evidence. It invoked Section 36 of the *Sexual Offences Act* and pointed out that there was no mandatory obligation on the court to order DNA testing.
52. It further cited 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. It was its contention that the witnesses the Prosecution called were sufficient to establish the charge beyond reasonable doubt and that if the Appellant was dissatisfied, he could have asked for the other witnesses to be summoned to testify if he thought they had evidence that may have been useful to him.
53. It was categorical that the Trial Court considered the Appellant's defence but rejected it, thus, his conviction was warranted.
54. According to PW 4, the Appellant removed her shorts and inserted his penis into her vagina. She stated that she felt pain and bled. It was her further testimony that he took her home and left her outside their house. She said that she told her teacher, Ruth Akoya (hereinafter referred to as "PW 1") of what had transpired. PW 1 corroborated her evidence. It was her testimony that PW 4 told her that he enticed her with a "mandazi" and defiled her. PW 3 also testified that PW 4 informed her that he defiled her.
55. On his part, PW 5 told the Trial Court that PW 4 had fresh tears, visible reddening and swelling on the hymen and unusual tears and reddening on the labia. He concluded that PW 4 was forcefully defiled and had unprotected sex. He produced Treatment book, General Outpatient record and P3 form as exhibits in support of the Prosecution's case.



56. Notably, the evidence of a child under the age of fourteen (14) years may be received even if it was not on oath, provided that the court was satisfied, after conducting a voire dire examination, that the child possessed sufficient intelligence and understood the duty to tell the truth.
57. The law relating to unsworn statements was well expressed in the case of *Mercy Kajuju & 4 Others vs Republic* [2009] eKLR where they were found to have no probative or evidential value.
58. This court had due regard to the case of *Oloo vs R* (2009) KLR, where the Court of Appeal held that:-

“In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence.”
59. It was noteworthy that PW 4 gave an unsworn testimony. Having said so, the same was well corroborated by the oral evidence of PW 1 and PW 3 and by the scientific evidence that was tendered by PW 5 which confirmed recent penetration.
60. Against this evidence, the Appellant’s defence was simply a denial and did not outweigh the inference of guilt on his part as was depicted by the Prosecution. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 4 and that the Prosecution had proved its case against him beyond reasonable doubt.
61. In the premises foregoing, Grounds of Appeal Nos (2), (3), (4) and (5) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (2), (3) and (4) were not merited and the same be and are hereby dismissed.

IV. Sentencing

62. The Appellant did not submit on this issue. On its part, the Respondent urged the court to uphold his sentence.
63. The Appellant herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The same provides as follows:-

“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.”
64. This court could not therefore fault the Trial Court for having sentenced him to life imprisonment as that was lawful.
65. 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.
66. 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.
67. 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.



68. 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.
69. 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.
70. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others vs 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.
71. 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.
72. The principle of sentencing was fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing were retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya had added community protection and denunciation as sentencing objectives. The objectives were not mutually exclusive and could overlap.
73. 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 life imprisonment that had been prescribed in Section 8(2) of the *Sexual Offences Act*. The above notwithstanding, it could also exercise its discretion to interfere with the decision of the lower court if there were aggravating circumstances.
74. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of twenty five (25) 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 4 and the society to find retribution in that sentence.
75. Going further, this court found it prudent to consider if the Appellant had spent time in custody while his trial was ongoing and if so, to take it into account and further direct that the same be taken into account while computing the sentence that he was going to serve as his sentence was now determinate.
76. In this regard, Section 333(2) of the Criminal Procedure Code provides as follows:-

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall (emphasis court) 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).



77. This duty to take into account this period is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is provided 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.”

78. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

79. A perusal of the proceedings of the lower court did not show if the Appellant herein was released on bond/bail while the trial was ongoing. He remained in custody throughout his trial. He was arrested on 8th March 2018 and was sentenced on 5th September 2018. The period that he spent in prison between 8th March 2018 when he was arrested and 4th September 2018 therefore ought to be taken into account while computing his sentence.

Disposition

80. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 5th April 2019 and the Appellant’s Supplementary Grounds of Appeal were partly merited only on the aspect of sentence only. His conviction be and is hereby upheld as the same was safe.

81. It is hereby directed that the sentence of life imprisonment be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to twenty five (25) years imprisonment. The period between 8th March 2018 and 4th September 2018 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).

82. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF APRIL 2024

J. KAMAU

JUDGE

