



**PK v Republic (Criminal Appeal E077 of 2017)
[2024] KEHC 5410 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E077 OF 2017
F GIKONYO, J
APRIL 29, 2024**

BETWEEN

PK APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. T. A. Sitati (S.R.M)
in Narok CMCR No. 992 of 2013 on 21st November 2014)*

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve life imprisonment for the defilement of an 8-year-old girl.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide the undated petition of appeal. Under section 350(2)(iv) of the *Criminal Procedure Code*, the appellant filed amended grounds of appeal received in court on February 28, 2024 as follows;
 - i. That the learned trial magistrate erred in law and fact in awarding an excessive sentence (life sentence) which is unconstitutional.

Brief facts

3. On diverse dates between 03/08/2013 and 04/08/2013 at Olkinyei area in Narok south district within Narok county, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of S.C. a girl aged 8 years. PW2 in her evidence during the trial that she had gone to fetch firewood in the bush upon the instructions of the appellant who is her uncle. The appellant accompanied PW2 to the bush and while PW2 was collecting firewood, the appellant removed her underwear and then covered her mouth with his hands. PW4 heard the screams and went to the scene and found the appellant belting up



4. The appellant was found guilty of the offence and was sentenced to serve life imprisonment.

Directions of the court.

5. The appeal was canvassed by way of written submissions.

Appellant's submissions.

6. The appellant submitted that he is a first offender, he has taken advantage of the rehabilitative programs offered in prison. He urges this court to allow him to make a meaningful life given that he has skills and is fully reformed. He also urged this court to be guided by the interpretation of the court of appeal that life imprisonment is equal to a term of thirty years. He relied on the cases of Evans Nyamari Ayako Criminal Appeal No. 22 of 2018, *Julius Kitsao Manyeso case*, articles 2(5) (6), 27 and 28 of the *Constitution*, *Mwangi v Republic* (Criminal Appeal 84 of 2015) [2022] KECA 1106(KLR) (7 October 2022) (judgment), *Dismas Wafula Kilwake v Republic* [2019] eKLR, *Wilson Kipchirchir Koskei v Republic* [2019] eKLR and *Baragoi Rotiken v Republic* [2022] eKLR.
7. The appellant submitted that due to the nature of the sentence time spent in custody was not computed. He urged this court to find that he was not out on bond at any particular time during trial and order that the said period be computed to the sentence that this court shall impose. The appellant relied on section 333(2) of the *Criminal Procedure Code*, Ahamad Abolfathi Mohammed & Another v Republic, and Bethwel Wilson Kibor v Republic.

The respondent's submissions.

8. The respondent submitted that the age of the child was fully proved beyond doubt. The respondent relied on section 2 of the *Children's Act* and the testimony of PW2 and PW3.
9. The respondent submitted that proof of penetration was done beyond any reasonable doubt. The prosecution relied on the evidence of PW2, PW1, and PW4.
10. The respondent submitted that the prosecution proved its case that there was no mistake of identity as to who defiled the complainant. The incident occurred during the day and the appellant was well known to PW2 and PW4.
11. The respondent submitted that the trial magistrate did not error in conviction and sentence as the evidence adduced was solid. The respondent urged this court to dismiss the appeal in its entirety

ANALYSIS AND DETERMINATION.

Court's duty

12. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. Republic* [1972] E.A 32
13. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
- i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the appellant's alibi defense was considered.
 - iii. Whether the sentence was manifestly harsh and excessive



Elements of the offence of defilement

14. 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:
- “8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- 8(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.”
15. The specific elements of the offence of 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) Penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - 3) The accused was the assailant.
16. See the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013.

Age of the complainant

17. The trial court noted that SC did not understand the consequence of an oath. She therefore gave unsworn evidence.
18. PW2 testified that she was in class one.
19. PW3, a mother of PW2 testified that her child was aged 8 years at the time of the offence though she could not recall her birth date.
20. Based on the evidence adduced, the age of the victim was 8 years old.

Penetration

21. According to Section 2(1) of the *Sexual Offences Act* penetration is defined as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
22. Penetration in the sense of section 2(1) of the *Sexual Offences Act* was further defined in the case of *Mark Oiruri Mose v R* [2013] eKLR by the Court of Appeal as follows:
- “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.” (Emphasis added).
23. PW2 testified that she had gone to fetch firewood in the bush upon the instructions of the appellant who is her uncle. The appellant accompanied PW2 to the bush and while PW2 was collecting firewood, the appellant removed her underwear and then removed his penis and inserted it in her vagina, and defiled her. PW2 screamed but the appellant covered her mouth with his hands. PW4 went to the scene



and found the appellant belting up. PW4 further stated that she noted that PW2 was dripping with blood between her legs and she had no underwear upon examination. After PW4 interrogated PW2, she told her that she was defiled by the appellant.

24. PW1 a medical practitioner testified that the hymen was torn and there was slight bleeding, pain, and an inflamed vaginal canal, whitish and smelling discharge was also noted in the vagina as well. Pus cells were also noted which was a clear indication that there was a fresh infection. On examination, PW1 concluded that there had been penetrative sexual intercourse. The P3 form, treatment card, lab results, and PRC form were produced as evidence.
25. The analysis of the evidence yields inescapable conclusion that the prosecution proved to the required standard that penetration did occur of SC.
26. Accordingly, the medical evidence supports the claim that there was a penetration of the child. But by whom?

Was the appellant the perpetrator?

27. The respondent relied on the testimony of PW2, PW3, and PW4. PW2, PW3, and PW4 all testified that they knew the appellant as he was their neighbor. PW2 testified that she knew the appellant as her uncle and that he used to work as a timber dealer. PW2 further stated that the appellant removed her underearn and lay on her on the ground, removed his male organ, and inserted it in her private parts.
28. PW4 stated that when she went to the scene on the date of the incident, she stumbled upon the appellant putting on his trousers. She noted that PW2 was dripping with blood between her legs and had no underwear upon examination. After interrogation, PW2 told her that she was defiled by the appellant. It was clear that PW2 was defiled by the appellant as he was caught at the scene belting up and also owing to the state that PW2 was found in by PW4.
29. PW4 corroborates the evidence of PW2 in all material respects.
30. Based on the evidence adduced, the appellant caused the penetration of SC.

Whether the appellant's alibi defense was considered

31. The appellant gave unsworn testimony and did not call any witnesses. The appellant testified on 04/08/2013 at 12 midday he was with SC's father in the forest cutting down trees using a chainsaw. They worked until 2 p.m. when they went for lunch. They found the children were with Milanoi. They rested outside with the father of the complainant. Later in the evening again joined the family of the complainant when they returned from the forest. Without provocation, the father of the complainant hit him with a metal bar on the head he lost consciousness. He found himself in the hospital admitted. He was later accused of defiling the girl he stated that the father of the complainant took away his ID, phone Nokia 1208, and kshs 7,600 cash. The father of the complainant was called in . he denied the allegations by the appellant. He stated that the appellant gave his personal belongings to his pastor when they handed him over to the OCS.
32. The appellant did not cross-examine the prosecution witnesses on the aspect. Therefore, the defense by the appellant was an afterthought which did not dislodge the prosecution's case. This court does not find any credibility in the alibi defense as the issue of this relationship with assault never came up during the prosecution's case.
33. Notably, the issue that the appellant was framed did not arise during the cross-examination of PW2 PW3, or PW4.



34. The court does not find anything that shows that there was a grudge between the complainant's father and the appellant.
35. Thus, the court does not also find anything which shows any collusion between SC, and PW2's father to frame the appellant for the offence herein.
36. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled SC. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by PW2's father. The defense was a red herring and an afterthought. It is dismissed.
37. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.
38. In the upshot, the appeal on conviction is dismissed.

On sentence.

39. The relevant penalty clause under which the appellant was sentenced is section 8 (2) of the *Sexual Offences Act* which section provides that:
8(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."
40. The prosecution submitted that the sentence was within the law.
41. This appeal relates to section 8(2) of *SOA* which provides for a mandatory sentence, and in respect thereto, the court is content to cite the Court of Appeal in *Dismas Wafula Kilwake v. Republic* [2018] eKLR that: -

"We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."
42. It appears from the judgment of the trial court that the trial magistrate believed only one sentence is prescribed in law for the offence; a life sentence and to which she condemned the appellant. She stated, thus: -

' A sentence of life imprisonment is hereby imposed on the convict as provided for by law. this was utmost betrayal by an uncle to a niece.'
43. In so far as the trial court felt it did not have and did not exercise discretion, was a misconception of the law and error in principle.
44. The court will exercise discretion in sentencing, and impose an appropriate sentence- which must be dictated by the circumstances and facts of the case.



45. The court has considered the fact that the accused is a first offender, and is remorseful.
46. The court has also considered that the offence is serious. The victim was a child of tender age- she was 8 years old. The manner the offence was committed was brutality causing her injuries. The child also suffers post-traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, this kind of offences leaves the victim with post-traumatic experiences. In addition, the fact that the prevalence of the offence, despite him being a first offender and remorseful, justifies a life sentence in this case. Therefore, a deterrent sentence is necessary.
47. Opinion is divided on whether a life sentence is unconstitutional. But, the concern now is about fixing the definite period representing a life sentence. Some benches impose 30 years, whilst others 40 years.
48. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences is important, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free man at some point. Life sentence in its indeterminate nature, may not achieve this wholesome objective. The court also noted that the sentence was imposed on the belief that it was the only sentence prescribed.
49. In the circumstances, the life sentence translates to 30 years. The appellant is sentenced to 30 years imprisonment.

Section 333(2) CPC.

50. Except, the court has perused the trial court record and found that the appellant was first arraigned in court on 06/08/2013. He remained in custody through the trial. The sentence will run from the date he was first arraigned in court; 06/08/2013.

Conclusion and orders

51. The appellant is hereby sentenced to 30 years' imprisonment.
52. The sentence will run from 06/08/2013 when he was first arraigned in court.
53. It is so ordered.

Dated, Signed, and Delivered at Narok Through Microsoft Teams Online Application This 29th Day of April, 2024.

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Hon. F. Gikonyo M.

Judge

In the Presence of: -

M/s Rakama for ODPP - Present

Appellant – Present

Mr. Otolo – C/A

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