



**Sankale alias Mzazi v Republic (Criminal Appeal E001 of 2022)
[2024] KEHC 5409 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E001 OF 2022**

F GIKONYO, J

APRIL 29, 2024

BETWEEN

ANTONY SANKALE ALIAS MZAZI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon.A.N. Sisenda (S.R.M)
in Narok CM SOA Case No. E028 of 2021 on 06.01.2022)*

JUDGMENT

1. The appellant filed this appeal against the appellant's conviction, and sentence of 20 years imprisonment imposed on 06.01.2022 for the defilement of the complainant- a girl aged 15 years.
2. The appellant filed an undated memorandum of appeal received in court on 13.01.2022. He cited the following grounds of appeal;
 - i. That the trial magistrate erred in law and fact in convicting and sentencing the accused but failed to find the totality of the prosecution evidence was fabricated.
 - ii. That the trial magistrate erred in law and fact in convicting and sentencing the accused but failed to note that the Sexual Offences Act is one of the existing laws that ought to be read with the sixth schedule (srt.262) rule 7 with necessary adaptations, qualifications, alterations and exceptions necessary to bring it into conformity with the Constitution (See Philemon Koeb v Republic Criminal Appeal No. 56 of 2016)
 - iii. That the trial court erred in law and fact in convicting the accused yet it failed to find that the age of the victim was not conclusively proved.
 - iv. That the trial court failed to take into account the judiciary sentencing policy guidelines.



- v. That the court by failing to find that the appellant's defence was strong and unchallenged.
- vi. That the trial court erred in law and fact by failing to find that there were grave contradictions.
- vii. That the trial court erred in law and fact in convicting and sentencing the accused yet failed to find that penetration was not proved conclusively.
- viii. That the trial court erred in law and fact in convicting and sentencing the accused yet failed to take into account the powerful mitigation of the appellant,
- ix. That the trial court erred in law and fact by failing to find the sentence is harsh and it did not take into account section 333(2) of the Criminal Procedure Code Cap 75 laws of Kenya, kimutai langat appeal no. 18 of 2018.
- x. That the learned trial magistrate failed to find that the sentence under section 8(1)(3) is couched in mandatory nature which takes away judicial discretion in sentencing- Wilson Kipchirchir Koskei v Republic [2019] eKLR.

Directions of the court

- 3. The appeal was canvassed by way of written submissions. Both parties have filed.

Appellant's submissions.

- 4. The appellant submitted that the complainant was not a credible witness. She alleged that she was the one who sneaked out of the school to go to the appellant. The appellant relied on the cases of Joseph Ndungu Kimanyi v Republic [1979] eKLR, Nguku v Republic [1985] eKLR, Elizabeth Waitiegeni Gatimu v Republic [2015] eKLR, the Supreme Court of India in the case of state of Punjab v Jagir Singh (1974) 3 SCC 277.
- 5. The appellant submitted that the trial magistrate analyzed the prosecution case and agreed with it before considering the defense case hence occasioning an injustice. The appellant relied on the cases of Bagmall, J Crowcher v Crowcher[1972] 1 WLR 425, 430.
- 6. The appellant submitted that section 333(2) of the criminal procedure code. The appellant relied on the case of Johana Nyagaka v Republic [2021] eKLR
- 7. The appellant submitted that the sentence is harsh. The appellant relied on the case of JKM v Republic [2020] eKLR.
- 8. The appellant urged this court to review the sentence and award a less severe sentence.

The respondent's submissions.

- 9. The respondent submitted that the prosecution proved their case against the appellant beyond reasonable doubt. The respondent relied on the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013.
- 10. The respondent submitted that the trial court correctly relied on the documentary evidence (P Exh 1) to ascertain the minor's age. PW1 testified that at the time of the commission of the offence, she was in class 6. Her evidence was corroborated by PW3(clinical officer) who produced the age assessment proving she was 15 years old. The respondent relied on the case of Nabayo Syprian v Republic [2016] eKLR.



11. The respondent submitted that penetration was proved through the testimony of PW1 who stated that she sneaked out of school by jumping over the fence and went to the [Particulars Withheld] shopping centre where she met the appellant in the company of 5 other friends. They headed to the appellant's homestead and she was left with him. She had taken off her tights and pants and had unprotected sex with the appellant. The appellant inserted his penis in her vagina. Penetration was corroborated by the P3 form, treatment notes, and the PRC form that were produced by the clinical officer, PW3 as P EXH 2,3 and 4 respectively who found evidence of long-standing broken hymen indicative of penetration.
12. The respondent submitted that the identification of the assailant was that of recognition and not needing identification. The complainant testified had personal knowledge of her assailant. The respondent relied on the case of *Anjoni & Others v Republic* [1980] KLR 57.
13. The respondent submitted that in this particular case, no relevant witness was left out by the prosecution. The respondent relied on the case of *Donald Majiwa Achilwa and 2 Other v R* [2009] eKLR and Section 143 of the *Evidence Act*.
14. The respondent submitted that the sentence was based on evidence presented by the prosecution. The sentence meted out to the appellant was fair and lenient. the appellant was duly sentenced to life imprisonment as is provided. Therefore, no prejudice is suffered by the appellant as the sentence serves the purpose of retribution. The sentence was within the law. The respondent relied on section 8(1) as read with section 8(3) of the *Sexual Offences Act* and the cases of *Bernard Kimani Gacheru v Republic* [2002] eKLR, *Denis Kinyua Njeru v Republic* [2017] eKLR, *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 and *Abdalla v Republic* (Criminal Appeal 44 of 2018) [2022] KECA 1054 (KLR) (7 October 2022) (judgment).

Analysis And Determination.

Court's duty

15. As a first appellate court, this 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] EA 32
16. Upon consideration of the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions, tThis court finds the main issues for determination to be;
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

17. The appellant 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.
18. It was alleged that on 28.02.2021 and 01.03.2021 at [Particulars withheld], Keekonyokie location in Narok East sub-county within Narok county the appellant intentionally and unlawfully caused his penis to penetrate the Vagina of SWN a girl aged 15 years.
19. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.



20. It was alleged that on 28.02.2021 and 01.03.2021 at [Particulars Withheld], Keekonyokie location in Narok East sub-county within Narok County intentionally touched the vagina of SWN a girl aged 15 years with his penis.

Elements of offence of defilement

21. Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) establishes the offence of defilement as follows:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) 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.”

22. The specific elements of the offence defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond a reasonable doubt are:

- 1) Age of the complainant;
- 2) Proof of penetration in accordance with Section 2(1) of the [Sexual Offences Act](#); and
- 3) Positive identification of the assailant.

Age of the complainant

23. Under the [Sexual Offences Act](#), defilement is a sexual offence committed against a child, thereby making proof of age an essential element of the offence. A child is a person below the age of 18 years ([Children Act](#)). The age of the child is also an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. See penalty clauses in SOA.
24. Was the age of the victim proved?
25. PW1 testified that she was 15 years old.
26. PW4 testified that PW1 was a learner at her school and was in class 6.
27. PW5, the investigating officer produced an age assessment report which showed that the complainant was 15 years old.
28. Based on the evidence adduced by the prosecution, this court finds the victim was 15 years old at the time of the offence.

Penetration

29. Penetration is defined in Section 2(1) of the [Sexual Offences Act](#) as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”



30. Penetration was further explained by the Court of Appeal in the case of *Mark Oiruri Mose v R* [2013] eKLR thus:
- “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.”
31. PW1 testified that she decided to sneak out of school at around 6:50 p.m. and went to the [Particulars Withheld] centre to meet her friends who informed her that her boyfriend was looking for her. The appellant joined them while they were watching a movie. They later went to his house using the appellant’s boda boda. While at the appellant’s house, they had sexual intercourse and the appellant did not force her.
32. PW4, a headteacher testified that the deputy informed her that SW was missing. She confirmed that PW1 had not gone home. She called the police officers at Nairegi Enkare police station to report the same. The following day PW1 was brought to her office. Upon questioning she stated she had gone to Anton’s place because she wanted to. She was not in school uniform. They took her to a health center for examination.
33. PW3 a clinical officer examined PW1 and noted that there was no spermatozoa. On examining her genitalia, he noted the hymen was broken with old tags. He produced a P3 form, treatment notes, and PRC form as P Exh 2, 3, and 4 respectively.
34. PW3, could not tell who the perpetrator was.
35. The appellant denied defiling PW1.
36. From the evidence by the victim coupled with the medical evidence, there was a penetration of the genitalia of PW1. Accordingly, this court finds that the prosecution proved beyond reasonable doubt that there was a penetration of PW1- a child. But by whom?

Was the appellant the perpetrator?

37. PW1 testified that on 28.02.2021 she sneaked out of school. She met her friends who informed her that her boyfriend was looking for her. The appellant joined her while she was watching a movie. They later went to her boyfriend’s place in [Particulars Withheld] using his motorcycle. While there they had intercourse. she added that the appellant did not force her.
38. PW4 testified that the complainant was missing from school and the following day when she returned she was questioned. She stated that she had gone to Anton’s place.
39. PW5 testified that PW1 told them that the appellant was a boda boda rider and she gave them the stage where he picks his clients. He was traced with the name ‘Mzazi’.
40. In his defence the appellant testified that he was arrested at the center. He knew SW as he used to see her at the center and her mother used to be his customer and would send him for stock.
41. DW2 testified that the appellant was his son. They lived together and he had never seen the complainant. He did not know what happened on the material night.
42. The appellant was well known to the complainant. The complainant gave evidence that they slept with the appellant on the material day and they had sex. She gave an account of how she went to the



appellant and ‘consented’ to the sexual intercourse. From the evidence that was adduced, there was no possibility of mistaken identity.

43. The fact that she may have had other previous sexual encounters does not justify defilement by the appellant. Similarly, she was a child incapable of consenting to sexual intercourse. Her claim that she ‘consented’ to the sexual intercourse with the appellant is inconsequential in law, and does not absolve criminal liability of the defiler.
44. Although the appellant generally denied having defiled the complainant, the pieces of evidence analyzed herein prove that the appellant defiled the complainant. The complainant and the appellant knew each other well. It appears she and her friends regarded the appellant as the complainant’s boyfriend. She gave a clear account of events of the the material day which culminated into sexual intercourse with the appellant. She was categorical that she had sex with the appellant on the material day. She claims she consented to the sexual intercourse. There was therefore no element of mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant caused the penetration of the complainant.
45. In the upshot, the court finds that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.
46. Accordingly, this court finds that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On sentence

47. The trial court applied Section 8 (3) of the *Sexual Offences Act* to convict. The section provides:

8 (3) 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.”
48. This court considers that the accused was a first offender. But the offence is serious, and its manner and circumstances require a real deterrent sentence. This court notes that the girl was aged 15 years. In these circumstances, a sentence of 20 years was not excessive. Nonetheless, it is capable of acting as a deterrent measure on these debauchery sexual attacks on children, yet, allowing them to be reintegrated back into society and be a productive citizen. This court, therefore, sees nothing upon which it may interfere with the sentence imposed of 20 years’ imprisonment. Accordingly, the appeal on the sentence is dismissed.

Of Section 333(2) CPC.

49. This court has perused the trial court record and found that the appellant was first arraigned in court on 05.03.2021. He remained in custody throughout the hearing till 06.01.2022 when he was convicted and sentenced. In this circumstance, the sentence shall run from 05.03.2021 the date he was first arraigned in court.

Conclusion and orders

50. The appeal on conviction and sentence is dismissed.
51. The sentence of 20 years imprisonment shall run from 05.03.2021.
52. It is so ordered



DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THE 29TH DAY OF APRIL, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of: -

Appellant - Present

Ms. Rakama for DPP

Mr. Otolu - C/A

