



**Odhiambo v Republic (Criminal Appeal 37 of 2020)  
[2024] KEHC 7886 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 37 OF 2020  
SC CHIRCHIR, J  
JUNE 27, 2024**

**BETWEEN**

**MICHAEL OUMA ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment of Hon. Wandera in kakamega chief Magistrate's court in sexual offences case No. 141 of 201 delivered on 1/10/2020)*

**JUDGMENT**

1. The Appellant was charged, with the offence of defiling a 15 – year old girl at the chief magistrate's court at Kakamega , contrary to section 8(1) and 8(3) of the sexual offences Act.( The Act)
2. The particulars of the offence were that on diverse dates between 12<sup>th</sup> to 20<sup>th</sup> days of November 2018 at Kakamega Central district within Kakamega County unlawfully and intentionally caused his penis to penetrate the vagina of Y A, a child aged 15 years.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act.
4. The particulars of the offence were that, on diverse dates between 12<sup>th</sup> to 20<sup>th</sup> days of November at kakamega Central district within Kakamega County, the accused unlawfully and intentionally caused his penis to be in contact the vagina of Y A a child aged 15 years.
5. He was convicted of the main charge and sentenced to serve 20 years in prison.
6. The Appellant was aggrieved with the outcome and filed the present Appeal.



## Petition of Appeal

7. The Appellant has set out the following grounds:
  - a. That the complainant in this case had attained maturity of fifteen 15 years and that she had consented to take part in the sexual Act.
  - b. That the age of the complainant was only placed at 15 years but in real sense appeared to be 18 years.
  - c. That the High court should revisit its finding and come up with a lesser and a fair sentence or allow for an acquittal as the appellant was a young man in early maturity and was in school and that the hopes of becoming a responsible citizen had been cut short by the long sentence imposed on the appellant.
  - d. That the honourable court to provide the appellant with a counsel since the appellant was not informed in any matter of law.
  - e. That the appellant's right to a fair trial were prejudiced since the appellant is not learned doesn't understand the law and allowed to argue a criminal case on his own.
8. The Appeal was canvassed by way of written submissions.

## Appellant's submissions

9. In his submissions the Appellant has questioned the constitutionality of the mandatory sentences under the Act and submits that they were unfair, unjust and unconstitutional. He has relied on the case Julius Kitsao Manyeso vs. Republic (2023) eKLR as well as the case of *Philip Mainigi and others vs. Republic* in H.C petition no. E017 of 2021 at Machakos where the two courts held that the mandatory minimum sentence under the *sexual offences Act* are unconstitutional.
10. He submits that he had offered the complainant shelter for the night and that did not warrant him to be charged and sentenced for 20 years, which he asserts was harsh and excess in the circumstances.
11. On the age of the complainant, he stated that PW2 age was not proved by a birth certificate . He has relied on the case of *P.O.N vs. REP* (2019) e KLR and *Mwalango Chichoro Mwajembe vs. Rep.*(2016) e KLR in this regard. It is further submitted that the age of the complaint was not
12. He urged the court to consider the circumstances of the defilement . He states that the complainant had been chased away by her uncle and he could not deny her shelter. He relied in the case of *Absolom Amboka Ookila vs. Republic* (2020) eKLR where the court held that the court in considering the three ingredients of defilement ought to consider the circumstances surrounding the defilement .
13. He finally submits that the case was a product of unfair and unjust investigation and that the prosecution evidence was shoddy, and the medical and investigating officer evidence was based on speculations.
14. The Respondent did not file any submission.



## Summary of the evidence

15. Pw1 was the complainant's grandmother. She testified that she has been the custodian of the complainant since she was born. She further stated that the complainant was 11 years in November 21/11/2018. She produced an age assessment report dated 21/11/2018.
16. She recalled that between the date of 12<sup>th</sup> and 20<sup>th</sup> November, the complainant disappeared. She was later informed that the complainant been arrested on allegation that she was with a young man ,who was their neighbour.
17. She stated that the complainant was taken to Kakamega General Hospital for examination and that they later went to the police station where she recorded her statement.
18. She claimed that the complaint informed her that the accused was her boyfriend and that they had been having sex.
19. At cross examination, she was not aware that the complainant had been chased away from home as she was attending to her sick husband.
20. PW2 testified was the complainant .She told the court that she was 15 years old, and at Primary school in class 8. She sated that on 15/11/2018 at 2.00 P.M. her uncle came home drunk and he chased her and her sister SG claiming that her grandmother's home was not their home and that they should leave. she then ran away . On the road, she met the Appellant and told him what had happened; that since he was her boyfriend , they went to his house and slept there. She further stated that they had sex for the first time.
21. PW3 was the clinical officer. He told the court that he examined the complainant on 20/11/2018. He stated that upon examination, she was found to have bruises on her labia , the hymen was broken, though not freshly. Urinalysis showed that she had some infection. He produced the signed Post rape care form dated 20/11/2018 and a lab request .
22. He stated that he also examined the Appellant and one Joseph Khasewa and produced the lab request forms .
23. PW4 testified that on 19/11/2018 he was at home, when he was informed by one of the tenants that he had seen a school girl entering one of the houses from the 12<sup>th</sup> to the 19<sup>th</sup> November 2018 . The house was being occupied by one Joseph and one other young man.
24. He further stated that the complainant's mother came to reported that her daughter was missing. The Appellant's house was locked at the time. They kept vigil until 12 midnight when the door was opened by one Joseph. Joseph led them to a house at Elukho where the accused was found with the complainant. They were escorted to the police station.
25. Pw5 was the investigating officer . He recalled that on 19/11/2018,BEO came to report that her daughter, the complainant had gone missing since 12/11/2018 and needed assistant to trace her. The information on a missing child was circulated. He later received information that a suspect had been arrested. She testified that the girl had informed them that the accused was her boyfriend .
26. The Appellant was put on his defence at the conclusion of the prosecution's case.
27. The accused testified that on 17/11/2018, he came from work and he met an old man and woman who accused him of having a girl in his house. He further stated that he was arrested and escorted to kakamega police station . After 3 days, he saw the girl as she recorded her statement. He denied the charge.



## Analysis and Determination

28. The role of this court as the first Appellate court is now well settled. In the case of *Okeno vs Republic* ( 1972) E.A 32, the court spelt out the role of an appellate court as follows: An Appellant on a first Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ( *pandya vs R*( 1957) E.A 336) and to the appellate court’s own decision on the evidence.....”
29. I have considered the grounds of appeal , the Appellant’s submissions and the evidence tendered at the trial court and the following issues lend themselves for determination:
- a. Whether the prosecution proved its case beyond reasonable doubt
  - b. Whether the appellant was genuinely misled to believe that the complainant was an adult and that she consented to the sexual act.
  - c. Whether the Appellant’s right to legal representation was denied.
  - d. Whether the appellant sentence was harsh and unreasonable.
30. For the prosecution to secure a conviction on the charge of defilement the following three ingredients of the charge must be proved:
1. The age of the complainant;
  2. Penetration
  3. Positive identification of the perpetrator.

## Penetration

31. Penetration is defined in Section 2 (1) of the [Act](#) as follows: “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
32. I have taken note of the fact that penetration was not taken up as a ground of Appeal . However it suffices to state that the testimony of the complainant and the clinical officer proved penetration . The clinical officer told the court that examination of the complainant’s vagina showed that there were bruises on her vagina. He also produced the P3 form ( PExb.4). The entry in section “ C” (2) (a) of the P3form states that the complainant sustained bruises on the fourchette and on the left side of labia minora. This element of the offence was therefore proved.
33. On the age of the complainant, the Appellant’s submission, is that a birth certificate was not produced .
34. I agree with the Appellant that Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. In the case of [Hadson Ali Mwachongo Vs. Republic](#) [2016] eKLR, the Court held that: “The importance of proving the age of a victim of defilement under the [Sexual Offences Act](#) by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim...”
35. The prosecution produced an age assessment form dated 21/11/2018 ( Pexb 1) which placed the complainant’s age at approximately 14-15 years old.



36. The appellant argument that a birth certificate should be availed for purposes of proving age. However in the case of *Mwalango Chichoro Mwanjembe V. Republic*, Mombasa Criminal Appeal No. 24 of 2015 [2016]eKLRthe Court of Appeal held as follows:

“The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof ..... We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable.” ( Emphasis added)

37. In *Evans Wamalwa Simiyu vs R* Criminal Appeal No. 118 of 2013 [2016] eKLR. The decision of the Court of Appeal observed as follows:

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

38. As illustrated by the above authorities, there is no requirement that age can only be proved by way of a Certificate of Birth, other evidence such as medical proof, baptismal card birth notification, the testimony of the victim’s parents or guardian or even an age assessment form and observation can establish the age of a victim.

39. PW1 produced an Age assessment report dated 21<sup>st</sup> November 2018 from Kakamega county Teaching Referral Hospital ( PExb. 1) showing that the complainant’s age was placed at between 14-15 years. The Appellant’s age was proved.

40. On identification, this was by way of recognition as the complainant told the court that the Appellant was her boyfriend. This evidence was not challenged at cross- examination . It is also instructive that the issue of identification was not a ground of Appeal.

41. Am therefore satisfied that the prosecution did prove all the ingredients of defilement.

### **Whether the Appellant was misled about the complainant’s age.**

42. The appellant’s argument is that he was misled to believe that the complainant was 18 years old.

43. Section 8(5) and (6) of the *Act* states as follows;

“(5) It is a defence to a charge under this section if -



- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
  - (b) the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

44. It is the Appellant’s submission that the complainant was destitute and he could not deny her shelter for the night. This submission suggest that the Appellant treated the complainant’s agreement to be offered shelter as a licence to sexual intercourse. He did not explain what was it he noted from the complainant’s conduct that made him to believe that the complainant was an adult. Even if it is assumed that the complainant consented to sex, it is not the consent of the complainant that exonerates the appellant from the offence. Rather it is the reasonable belief that she was above the age of majority therefore capable of consenting.
45. Further as per the requirement of section 8(6) of the *Act*, the onus was on the Appellant to demonstrate the steps he undertook to ascertain the age of the complainant. There was no evidence of such steps as aforesaid.
46. I have further noted that this issue is being raised for the first time in this Appeal. The Appellant did not bring up this defence in trial court. He simply denied the charges. This defence therefore has not only been proved but appears to be a mere afterthought.

#### **Whether the Appellant’s right to legal representation was breached.**

47. Although the issue of legal representation appears as a ground of Appeal, the Appellant has not elaborated on this, in his submission. However the same having been raised , and noting that the Appellant is not represented, I will proceed to address this right and determine whether the same was violated.
48. Article 50(2)(h) of the *constitution* provides as follows:
- “Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” ( Emphasis added)
49. What amounts to substantial injustice was addressed in the case of *David Macharia Njoroge V R*, (2011) eKLR where the court held:

“State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the *constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where „substantial injustice would otherwise result.... persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of



a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided.”

50. The Court considered the right to free legal counsel at state expense for the first time in Kenya and expounded on the principle of “substantial injustice”.

51. In *Karisa Chengo & 2 Others V R*, CR NOs. 44, 45 & 76 OF 2014, stated:

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. the *constitution* is crystal clear that an accused person is entitled to legal representation at the States expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result, and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

52. The upshot of the above two decisions is that legal representation is not mandatory , save where the Accused person is charged with an offence whose penalty is death. The Accused herein was not facing death sentence as to warrant mandatory assignment of an Advocate. His complain in this regard is without merit.

#### **Whether the sentence of 20 years was too excessive.**

53. The Appellant has argued that the sentence was too severe considering he was a young man.

54. Section 8(1) of the *Act* provides as follows:

“8.

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

(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.

(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.

55. It is now settled that sentencing is an act of discretion by the trial court. In the Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that



the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

56. The appellant further argues that in any event the courts in *Julius Kitsao Manyeso vs. Republic* (2023) eKLR and *Philip Maingi and others vs. Republic* in H.C petition no. E017 of 2021 at Machakos have declared that the mandatory minimum sentence under the *sexual offences Act* was unconstitutional. He urged the court to arrive at the same finding.
57. I have considered the findings in the two petitions cited by the Appellant against the decision of the supreme court in *Francis Muruatetu & Ano vs Republic* (2021) KESC31 (KLR), commonly referred to as Muruatetu 2. In the later case the supreme court stated that : “ The decision in Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*.” In my view , it follows that notwithstanding the former two decisions, the law on sentences prescribed under the *sexual offences Act*, unless and until determined otherwise by the supreme court, remain unchanged.
58. In the present case, the sentence passed was the minimum and mandatory provided under the Act and as such there was no error on the part of the magistrate in imposing the sentence of 20 years.
59. The Appeal has no merit and it is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin – court Assistant

The Appellant.

