

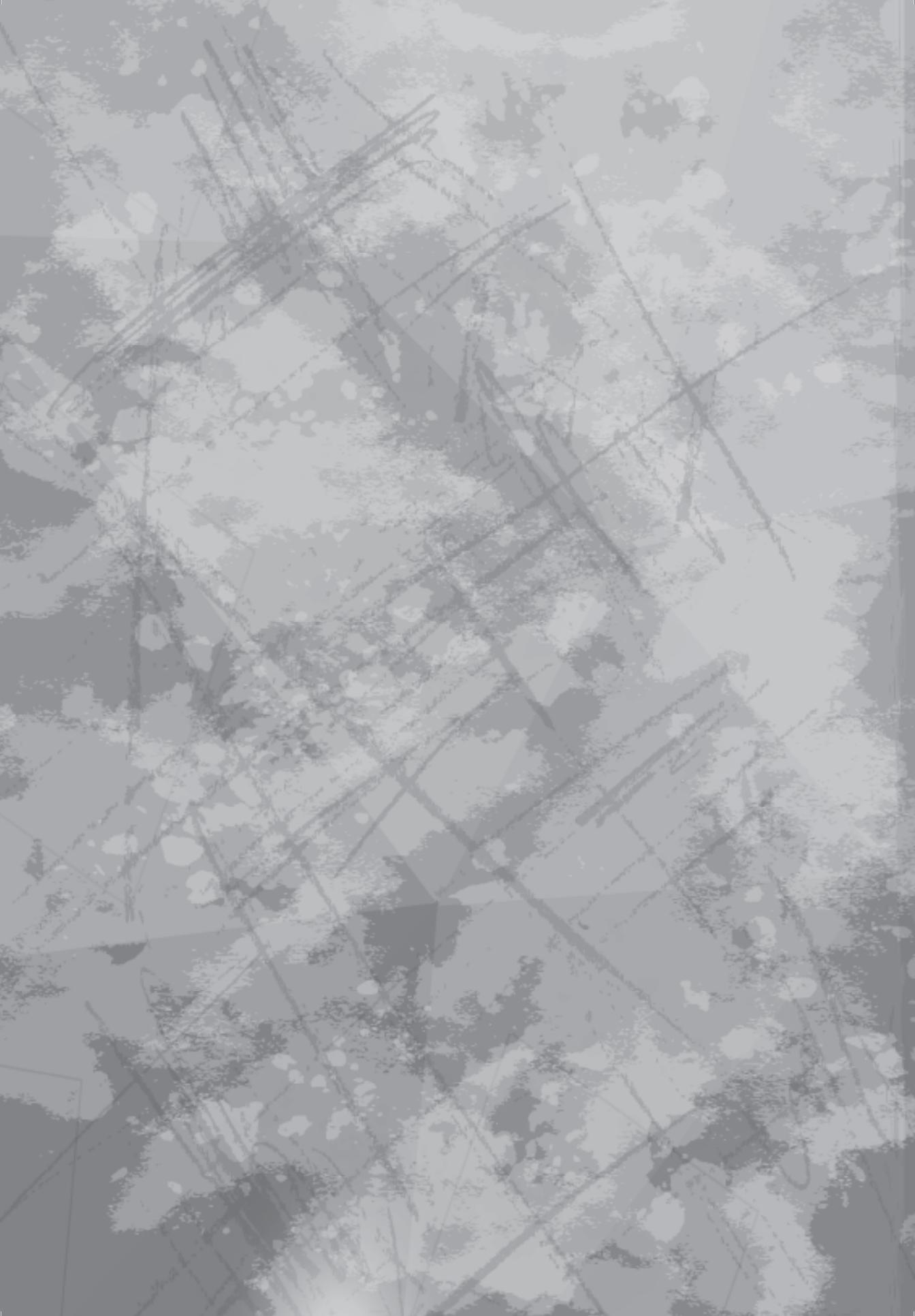


Sexual and Gender Based Violence Case Digest

Typeset and published by the National Council for Law Reporting
(Kenya Law)
PO Box 10443 - GPO 00100 Nairobi.

ISBN: 978-9914-751-02-4





Members of the Council for Kenya Law, 2024

Hon Chief Justice Martha K Koome, EGH

Chief Justice and President of the Supreme Court of Kenya/Chairperson

The Hon Lady Justice Wanjiru Karanja

Judge of the Court of Appeal of Kenya

The Hon Mr Justice James Rika

Judge of the Employment and Labour Relations Court of Kenya

The Hon Mr Justin Muturi

Attorney General

Alt - Ms Linda Murila, Chief State Counsel

Prof Winifred Kamau

Dean, School of Law, University of Nairobi

Ms Lynette Mwangi

Advocate & Public Officer, Office of the Attorney General & DoJ

Mr Abdi Hassan Ali

Government Printer (Ag), Government Press (Represented by Ms Eva Kimeiywo, Principal Printer)

Ms Nyoike Sarah Waigwe

Advocate, Law Society of Kenya

Mr John Dudley Ochiel

Advocate, Law Society of Kenya

Professor Jack Mwimali

CEO/Editor

Members co-opted to serve in *ad-hoc* Advisory Capacity

Ms Winfridah Boyani Mokaya

Chief Registrar, The Judiciary

Prof Njuguna Ndungu, CBS

Cabinet Secretary (Ag), National Treasury (Represented by Mr Jona Wala, Director, Accounting Services)

Mr Samuel Njorge, EBS

Clerk of the Kenya National Assembly

(Represented by Michael Karuru, Dep. Director, Legislative and Procedural Services)

Editorial Team

Editor

Professor Jack Mwimali

Senior Assistant Editor

Janet Munywoki | Shiro Mogeni

Senior Law Reporters

| Andrew Halonyere | Emma Kinya |

Assistant Law Reporters

| Faith Wanjiku | Kevin Kakai | Ian Kiptoo |

Legal Researchers

| Bonface Nyamweya | Betty Nkirote | Brian Okumu | Isaac Mounde

Publishing Officers

| Josephine Mutie | Catherine Moni |

Design and Layout

| Robert Basweti |

Technical Proofreaders

| Innocent Ayatollah | Phoebe Juma |

Table of Contents

List of Acronyms	xv
Preface.....	xiii

Cases Reported

A. Defilement

1. Effect of failure to conduct a <i>voir dire</i> (an oral examination) in a trial with a minor as a complainant. Ogola v Republic Criminal Appeal No 135 of 2017; [2023] eKLR	1
2. Time spent by a sexual offender in custody while undergoing trial ought to be factored during sentencing. NMK v Republic Criminal Appeal No E007 of 2021; [2023] KECA 127 (KLR).....	7
3. Age determination in defilement cases includes direct observation and supportive documents. Wanjiku v Republic Criminal Appeal No E007 of 2022 [2022] eKLR	12
4. For the offence of defilement to be proved, the prosecution has to prove identification or recognition of the offender, penetration, and age of victim beyond reasonable doubt. Mwangi v Republic Criminal Appeal No E001 of 2022; [2022] eKLR.....	14
5. The use of euphemism by children in describing the sexual intercourse acts done to them. Okoko v Republic Criminal Appeal No E002 of 2022; [2022] eKLR.....	17
6. Failure to take a fresh plea after amending the charge sheet does not render a charge and the subsequent conviction defective. NNC v Republic Criminal Appeal No 46 of 2017; [2018] eKLR.....	21
7. The absence of medical evidence to support the fact of defilement was not decisive as the fact of defilement could be proved by oral evidence of a victim or circumstantial evidence. BOO v Republic Criminal Appeal No 5 of 2017; [2018] eKLR	25
8. Constituting elements of the defence of deception in section 8(5) of the Sexual Offences Act ought to be read disjunctively not conjunctively. Wambui v Republic Criminal Appeal No 102 of 2016; KECA 906 (KLR).....	29
9. Conclusive proof of age in cases under the Sexual Offences Act did not necessarily mean birth certificate. KA v Republic Criminal Appeal No E064 of 2021; [2023] eKLR	33
10. Ambiguity in phrasing a sentencing provision entitles an accused to the benefit of the least severe punishment for an offence Muriungi v Republic Criminal Appeal No E091 of 2022; [2023] eKLR.....	35

11. Exclusion of the words ‘unlawfully and intentionally’ in a charge sheet in an offence of defilement did not render a charge sheet incurably defective.	
IAE v Republic Criminal Appeal No 159 of 2018; [2023] KECA 127 (KLR).....	38
12. Prescribed mandatory sentences in the Sexual Offences Act were unconstitutional as it limited the discretion of trial courts to impose appropriate sentences.	
Mwendwa v Republic Criminal Appeal No 027 of 2022; [2023] eKLR.....	41
13. Admissibility of unsworn evidence with respect to children of tender years.	
Kivunjo v Republic Criminal Appeal No 46 of 2018; [2023] KEHC 1568	45
14. Proof of age where medical evidence is not available.	
Chome v Republic Criminal Appeal No 92 of 2022; [2023] KECA 69	47
15. The ingredients of defilement have to be proved conjunctively and not disjunctively.	
Chepkoech v Republic Criminal Appeal No E0001 of 2021; [2022] eKLR.....	50
16. The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she had sexual intercourse and <i>vice versa</i>.	
Sigei v Republic Criminal Appeal No E009 of 2021; [2022] KEHC 3161 (KLR).....	53
17. Prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose fell afoul of article 28 of the Constitution.	
Kibara v Republic Criminal Appeal No E075 of 2022; [2022] KEHC 15412 (KLR).....	57
18. In sexual offences, the evidence of the victim is enough to convict the accused person as provided in section 124 of the Evidence Act, if that evidence is found by the trial court to be soundly credible and believable.	
Oloo v Republic Criminal Appeal No E026 of 2021; [2022] eKLR.....	59
19. The evidence of the offence of defilement or sexual assault can only be given by the victim.	
Murimi v Republic Criminal Case No E061 of 2021; [2021] eKLR.....	62
20. A lenient sentence at the discretion of the court cannot be meted out considering lenient sentence is not allowed considering the circumstances of the offence and the age of the complainant who is left traumatized.	
SOA v Republic Criminal Appeal No E025 of 2021; [2022] eKLR	65
21. There are no confines or limits for sentencing an accused for the crime of defilement.	
EKT v Republic Criminal Appeal No E018 of 2022; [2022] eKLR.....	68
22. Actions of a child below eighteen behaving like an adult and willingly engaging in sex do not amount to defilement.	
Charo v Republic Criminal Appeal No 32 of 2015	71

- 23. Exposure of a child to pornography renders them in need of care and protection as it affects their social and mental development.**
R v Wekesa MCSO E004 of 202173

B. Rape

- 1. The state had an obligation to protect the fundamental rights and freedoms of victims of the Post-Election Violence 2007-2008.**
Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)
Petition No 122 of 2013; [2020] eKLR77
- 2. The Sexual Offences Act's section 7 offence is not an offence for the rape of a person with mental disabilities, which is the subject of an offence under section 146 of the Penal Code.**
Tarus v Republic Criminal Appeal No E075 of 2021; [2023] KEHC 1315 (KLR)90
- 3. Failure to charge the appellants jointly in one count for the offence of gang rape did not render the charge sheet fatally defective.**
Kaunda & another v Republic Criminal Appeal No E1151 of 2021; [2022] eKLR94
- 4. The prosecution needs to prove either complete or partial penetration to secure a conviction for the offence of rape.**
Kimani v Republic Criminal Appeal No 32 of 2019; [2021] eKLR96
- 5. A witness recalled for further cross-examination cannot be allowed to testify afresh.**
Karisa v Republic Criminal Appeal No 43 of 2019; [2020] eKLR99

C. Female Genital Mutilation

- 1. Court sentences a person who subjected herself to the practice of Female Genital Mutilation.**
Ruto v Republic Criminal Appeal No E007 of 2022;
[2022] KEHC 10191 (KLR)..... 103
- 2. Female genital mutilation was unlawful regardless of consent from the victim.**
Kamau v Attorney General & 2 others; Equality Now & 9 others
(Interested Parties); Katiba Institute & another (*Amicus Curiae*)
Constitutional Petition No 244 of 2019; [2021] eKLR..... 107
- 3. Absence of the premise owner was not a defence for allowing premises to be used for FGM.**
Bett v Republic Criminal Appeal No 10 of 2017; [2018] eKLR..... 117
- 4. No appeal should be allowed in the case of an accused person who had pleaded guilty and had been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.**
Chebet v Republic Criminal Appeal Case No E029 of 2021; [2021] eKLR..... 119

D. Domestic Violence

1. **The scope and nature of the element of malice aforethought for it to be proved.**
Namachanja v Republic Criminal Appeal No E025 of 2021; [2021] eKLR 123
2. **The words of the deceased in hospital that she had been assaulted by her husband, the accused, amounted to a dying declaration and was admissible in court.**
Republic v Ekirapa Criminal Case No E013 of 2022; [2023] eKLR 128
3. **Probation is commendable instead of imprisonment for a pregnant child charged with manslaughter because the child offender is a child in need of care and protection.**
Republic v BC Criminal Case No E061 of 2022; [2022] eKLR..... 130
4. **The doctrine of recent possession in relation to murder case resulting from sexual gender based violence.**
Republic v Mucheru & another Criminal Case No 45 of 2018; [2021] eKLR..... 134
5. **Supreme Court issues guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the *Muruatetu* [2017] case.**
Muruatetu & another v Republic; Katiba Institute & 5 others (*amicus curiae*) Petition Nos 15 & 16 of 2015; [2021] eKLR 137
6. **The scope of domestic violence.**
Republic v Mbugua Criminal Case No 3 of 2018; [2020] eKLR 141
7. **Section 26 of the Sexual Offences Act is constitutional and does not violate or limit the rights of persons living with HIV under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution.**
EM & 6 others v General & another; HIV Justice Worldwide & another (*amicus curiae*); National Aids Control Council (Interested Party) Petition No 447 of 2018; [2022] eKLR 143
8. **Court sentences the accused to life imprisonment for the murder of the deceased after being charged with the offence of defiling them.**
State v FAO Criminal Case No 4 of 2020; [2021] eKLR..... 148

E. Incest

1. **Section 22(2)(a) of the Sexual Offences Act, that defined ‘uncle’, was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultural definition of relatives.**
JMN v Republic Criminal Appeal No 11 of 2020; [2021] eKLR..... 151
2. **Ingredients that had to be proven in an offence of incest.**
JMN v Republic Criminal Appeal No 12 of 2020; [2021] eKLR..... 156
3. **For the offence of incest to stand, the age of the victim, identity of the offender and penetration have to be proved by the prosecution beyond reasonable doubt.**
JMM v Republic Criminal Appeal No E041 of 2022; [2023] eKLR..... 159

4. **Sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.**
PKS v Republic Criminal Appeal No 56 of 2013; [2023] KEHC 373 (KLR) 161
5. **A conviction for incest could not be converted into a conviction for defilement.**
NAM v Republic Criminal Appeal No 3 of 2019 165
6. **A man cannot commit the offence of incest with a male relative under the Sexual Offences Act.**
JKM v Republic Criminal Appeal No 54 of 2018 170

F. Unnatural Offences

1. **Factors a court took into consideration and had to balance before sentencing a convicted person.**
Kiombo v Republic Criminal Appeal No E067 of 2021; [2023] eKLR 173
2. **Subjecting an accused person to anal medical examination so as to provide evidence of involvement in a sexual offence is a violation of the accused person rights to dignity and privacy.**
COI & another v Chief Magistrate Ukunda Law Courts & 4 others
Civil Appeal No 56 of 2016; [2018] eKLR 178

G. Trafficking in person

1. **In sex trafficking, the prosecution has to prove abduction for the purpose of exploitation.**
Karuu v Republic Criminal Appeal No E004 of 2022; [2018] eKLR 183
2. **The offence of trafficking in persons captured the entire trafficking continuum, and engagement in just one of those trafficking “stages” was sufficient.**
Muhammad Asif v Republic Criminal Appeal No 82 of 2017 189
3. **Intent to exploit as opposed to actual exploitation taking place was required in an offence of trafficking in persons.**
Geoffrey Mutemi Manzi v Republic Criminal Appeal No 39 of 2020 192

H. Indecent Acts

1. **Kissing and indecently touching another person against his/her will is not an offence under section 2 of the Sexual Offences Act.**
Njoroge v Republic Criminal Appeal No 183 of 2014 197
2. **Arrest, strip search and detention of a minor without considering the best interests of the minor violated article 53 of the Constitution of Kenya, 2010.**
MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)
Constitutional Petition No 347 of 2015 201

3. Court sets aside the 7 years jail term and substitutes thereof 3 years under supervision of a probation officer and appellant to sensitize his congregants about the Sexual Offences Act at least one Sunday in a month. Nzioka v Republic Criminal Appeal No E058 of 2023	211
I. Legislative and Administrative Gaps.....	213
J. International Jurisprudence	
United Kingdom	
1. The litigation process adopted by the Court of Appeal was flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm pursuant to the care orders made. In the matter of H-W (Children); In the matter of H-W (Children) (No 2) [2022] UKSC 17	225
2. In having capacity to decide to have sexual relations with another person, a person needs to understand that the other person’s capacity to consent to the sexual activity discusses that before and throughout the sexual activity. A Local Authority v JB (By his Litigation Friend, the Official Solicitor) [2021] UKSC 52	232
Canada	
1. Consent to one form of sexual touching or penetration was not agreement to any or all forms of sexual touching or penetration. K v Her Majesty the Queen & 7 others 2022 SCC 33.....	238
2. The relationship between consent and the capacity to give consent in a sexual offence case. R v GF & RB 2021 SCC 20.....	246
Tanzania	
1. Mandatory pregnancy testing, detention and expulsion from school of pregnant and married girls with no chance of re-entry was a violation of their right to education and also amounted to cruel, inhuman and degrading treatment. Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania 0012/Com/001/2019.....	253
2. In proving sexual offences, the best evidence is that which comes from the victim but if the victim is a child, then he/she must be treated in accordance with section 127(2) of the Evidence Act during adducing of evidence. Musa v Republic 1 of 2022.....	261
Zimbabwe	
1. An early complaint was admitted to show consistency by the complainant, not as proof of the sexual offence. Baloyi v Republic HMA 14-18/HCA 11-17.....	263

- 2. Crucial witnesses have to be called during trial in a sexual offence of rape to avoid the danger of false incrimination on the aspect of consent.**
 R v Dhlamini HMA 5-18/CRB MSVR 133/17.....267

Sierra Leone

- 1. What amounts to penetration in an offence of defilement?**
 R v Kamara CR No 6457 of 2020271

Liberia

- 1. Failure by a prosecution to prosecute an offence of rape, on account of failure of witness absence was an abuse of an accused person's right to fair and speedy trial.**
 R v Managbolor 2021274

J. Lessons learnt from other jurisdictions.....277

K. Comparative Analysis Between Kenya and International Jurisprudence281

List of Acronyms

CPA	-	Criminal Procedure Act
CPC	-	Criminal Procedure Code
DCI	-	Director of Criminal Investigations
DTO	-	Detention and Training Order
DNA	-	Deoxyribonucleic Acid
ECHR	-	European Convention on Human Rights
JSC	-	Judicial Service Commission
ODPP	-	Office of the Director of Public Prosecutions
PACS	-	Probation and Aftercare Services
PW	-	Prosecution Witness
UNCRC	-	United Nations Convention on the Rights of a Child
YCJA	-	Youth Criminal Justice Act

Definition of Terms

<i>Actus reus</i>	-	Act or omission that comprise the physical elements of a crime
<i>Ad infinitum</i>	-	Without end or limit (forever)
<i>Alibi</i>	-	a claim or piece of evidence that one was elsewhere when an act, especially a criminal one, is alleged to have taken place (absent from the scene of crime)
<i>Amicus curiae</i>	-	Friend of the court
<i>Court a quo</i>	-	Court of first instance
<i>De novo</i>	-	Anew/afresh
<i>Ex-debito justitiae</i>	-	Of or by reason of an obligation of justice : as a matter of right
<i>Functus officio</i>	-	Without further force or authority
<i>Ipsa facto</i>	-	By the fact itself
<i>Mens rea</i>	-	the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused (guilty mind)
<i>Parole</i>	-	the temporary or permanent release of a prisoner before the expiry of a sentence, on the promise of good behavior
<i>Prima facie</i>	-	At first sight
<i>Rem judicatam</i>	-	Judgment already given/matter closed
<i>Sub judice</i>	-	Of a matter being under judicial consideration and therefore prohibited from public discussion

Suo-moto

- On its own motion

Voire dire

- A preliminary examination of a witness by a judge

Preface

Sexual and gender-based violence is any act that is committed against a person's will and is based on gender norms and unequal power relationships. Examples of the main types of SGBV are; rape, sexual assault, physical assault, forced marriage, denial of resources/opportunities or services and psychological and emotional abuse. SGBV has reared its ugly head and continues to do so despite there being laws in place to curb it. Thus, it's a serious concern that needs to be dealt with finality.

This digest highlights the jurisprudence emanating from courts both local and international on matters SGBV and goes on further to provide a comparative analysis. The comparative analysis is crucial in highlighting how Kenyan and foreign courts have dealt with issues they've faced in comparison to each other. From the jurisprudence emanating from the Kenyan courts, this digest has identified legislative and administrative gaps which need to be tackled by the relevant State agencies. The digest further demonstrates the trends on the cases contained in the digest.

This digest is therefore very useful and insightful to members of the Bench, the Bar and the public in general. It will enable the readers to gain the knowledge and understand how courts have gone about in handling cases touching on SGBV and what is required in order for courts to deliver justice to the victims of SGBV and to deter masses from engaging in the vice. This digest is a good step towards SGBV eradication for the current and future generations.

Introduction

SGBV has been a thorn in the flesh of many Kenyans and has done harm to numerous people. The major laws in Kenya which deals with sexual and gender-based violence are; the Constitution of Kenya, 2010, the Sexual Offences Act Cap 63A, the Penal Code Cap 63, Criminal Procedure Code Cap 75 and the Evidence Act Cap 80.

This case digest ventilates matters of SGBV as handled by the courts. The cases featured in this digest are from Kenya and from courts of foreign nations which were rendered between the years 2018 and 2023. The Kenyan decisions featured in this digest are from the superior courts of record namely; the Supreme Court, the Court of Appeal and the High Court. This digest further highlights legislative and administrative gaps identified from the cases featured in the digest. The digest also highlights the trends in sexual and gender-based cases from the cases featured herein.

The international jurisprudence contained in this digest is from; regionally, the cases featured are from; the African Committee of Experts on the Rights and Welfare of the Child, the Supreme Court of Liberia, the High Court of Tanzania, the High Court of Zimbabwe, and the High Court of Sierra Leone. Internationally the jurisprudence featured is from; the Supreme Court of Canada and the Supreme Court of the United Kingdom.

The featured jurisprudence is divided into seven (7) thematic areas, namely; defilement; rape; female genital mutilation; domestic violence; incest; unnatural offences; and trafficking. Under the thematic area dealing with defilement, the major issues dealt with include; the effect of failure to conduct a *voir dire* in a trial with a minor as a complainant; consideration of time spent by a sexual offender in custody while undergoing trial during sentencing; age determination in defilement cases; factors to be proved for the offence of defilement to be established; the use of euphemism by children who have experienced sexual abuse in describing the sexual intercourse acts done to them; whether failure to take a fresh plea after amending the charge sheet rendered a charge and the subsequent conviction defective; whether constituting elements of the defence of deception in section 8(5) of the Sexual Offences Act ought to be read disjunctively as opposed to conjunctively; whether where there is an ambiguity in phraseology

of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence; whether an error in the charge sheet on the age of the victim altered the offence of defilement, its conviction and sentencing; constitutionality of mandatory minimum sentences in the Sexual Offences Act; and whether in sexual offences, the evidence of the victim is enough to convict the accused person.

The major topics dealt with under the rape thematic area include; consequences of failure to prosecute post-election violence related SGBV cases; and whether the Sexual Offences Act's section 7 offence is an offence for the rape of a person with mental disabilities, which is the subject of an offence under section 146 of the Penal Code.

The matters covered under the female genital mutilation thematic area include; the right procedure in plea taking and the assessment of mitigation during sentencing; whether female genital mutilation is unlawful regardless of consent from the victim; and whether actual physical presence or absence of the owner of a premise, where female genital mutilation had taken place, was a defence against a charge for the offence of knowingly allowing premises to be used for the purpose of performing female genital mutilation.

Under the domestic violence thematic area, the major topics dealt with include the following; the scope and nature of the element of malice aforethought for it to be proved; whether the words of a deceased in hospital that she had been assaulted by her husband amount to a dying declaration and is admissible in court; whether probation is commendable instead of imprisonment for a pregnant child charged with manslaughter; the doctrine of recent possession in relation to murder case resulting from SGBV; 5. Supreme Court guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the Muruatetu case; definition of domestic violence; and the constitutionality of section 26 of the Sexual Offences Act and whether it violates or limits the rights of persons living with HIV.

The topics covered under the incest thematic area include; whether section 22(2)(a) of the Sexual Offences Act, that defined 'uncle', was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultures definition of relatives; and the ingredients to be proven in an offence of incest;

Under the unnatural offences thematic areas, the topics interrogated include; factors a court took into consideration and had to balance before sentencing a convicted person; and whether subjecting an accused person to anal medical examination so as to provide evidence of involvement in a sexual offence is a violation of the accused person's rights to dignity and privacy.

The topics discussed in the trafficking thematic area include; whether the offence of trafficking in persons captures the entire trafficking continuum, and engagement in just one of the trafficking stages; and the ingredients of the offence of trafficking in persons for sexual exploitation.

Concerning the international jurisprudence, the matters dealt with covered, among others, the following issues; mandatory pregnancy testing, detention and expulsion from school of pregnant and married girls with no chance of re-entry; whether consent to one form of sexual touching or penetration was agreement to any or all forms of sexual touching or penetration; whether in proving sexual offences, the best evidence is that which comes from the victim but if the victim is a child, then he/she must be treated in accordance with section 127(2) of the Evidence Act during adducing of evidence; whether a litigation process adopted by a court was flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm pursuant to the care orders

Made; whether in having capacity to decide to have sexual relations with another person, a person needs to understand that the other person has to have the capacity to consent to the sexual activity and has to in fact consented before and throughout the sexual activity; whether failure by prosecution to prosecute an offence of rape, on account of failure of witness to appear, was an abuse of an accused person's right to fair and speedy trial; whether an early complaint in a rape case, or any other sexual offence, was admitted, not as proof of the rape or of the sexual offence rather, it was admitted to show consistency by the complainant; whether crucial witnesses have to be called during trial in a sexual offence of rape to avoid the danger of false incrimination on the aspect of consent; and finally what amounts to penetration in an offence of defilement.

This digest concludes by giving a comparative analysis of the jurisprudence on SGBV emanating from Kenyan courts and from international courts followed by a conclusion. Considering the need for the protection of the data of the victims involved in the cases contained in the digest, the digest has not disclosed the particulars of any of the victims.



Professor Jack Mwimali
CEO/Editor

A. Defilement

- 1. Effect of failure to conduct a *voir dire* (an oral examination) in a trial with a minor as a complainant.** Ogola v Republic Criminal Appeal No 135 of 2017; [2023] eKLR
- 2. Time spent by a sexual offender in custody while undergoing trial ought to be factored during sentencing.** NMK v Republic Criminal Appeal No E007 of 2021; [2023] KECA 127 (KLR)
- 3. Age determination in defilement cases includes direct observation and supportive documents.** Wanjiku v Republic Criminal Appeal No E007 of 2022; [2022] eKLR
- 4. For the offence of defilement to be proved, the prosecution has to prove identification or recognition of the offender, penetration, and age of victim beyond reasonable doubt.** Mwangi v Republic Criminal Appeal No E001 of 2022; [2022] eKLR
- 5. The use of euphemism by children in describing the sexual intercourse acts done to them.** Okoko v Republic Criminal Appeal No E002 of 2022; [2022] eKLR
- 6. Failure to take a fresh plea after amending the charge sheet does not render a charge and the subsequent conviction defective.** NNC v Republic Criminal Appeal No 46 of 2017; [2018] eKLR
- 7. The absence of medical evidence to support the fact of defilement was not decisive as the fact of defilement could be proved by oral evidence of a victim or circumstantial evidence.** BOO v Republic Criminal Appeal No 5 of 2017; [2018] eKLR
- 8. Constituting elements of the defence of deception in section 8(5) of the Sexual Offences Act ought to be read disjunctively not conjunctively.** Wambui v Republic Criminal Appeal No 102 of 2016; KECA 906 (KLR)
- 9. Conclusive proof of age in cases under the Sexual Offences Act did not necessarily mean birth certificate.** KA v Republic Criminal Appeal No E064 of 2021; [2023] eKLR
- 10. Ambiguity in phrasing a sentencing provision entitles an accused to the benefit of the least severe punishment for an offence.** Muriungi v Republic Criminal Appeal No E091 of 2022; [2023] eKLR
- 11. Exclusion of the words 'unlawfully and intentionally' in a charge sheet in an offence of defilement did not render a charge sheet incurably defective.** IAE v Republic Criminal Appeal No 159 of 2018; [2023] KECA 127 (KLR)
- 12. Prescribed mandatory sentences in the Sexual Offences Act were unconstitutional as it limited the discretion of trial courts to impose appropriate sentences.** Mwendwa v Republic Criminal Appeal No 027 of 2022; [2023] eKLR
- 13. Admissibility of unsworn evidence with respect to children of tender years.** Kivunjo v Republic Criminal Appeal No 46 of 2018; [2023] KEHC 1568
- 14. Proof of age where medical evidence is not available.** Chome v Republic Criminal Appeal No 92 of 2022; [2023] KECA 69
- 15. The ingredients of defilement have to be proved conjunctively and not disjunctively.** Chepkoech v Republic Criminal Appeal No E0001 of 2021; [2022] eKLR

16. **The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she had sexual intercourse and *vice versa*.** Sigei v Republic Criminal Appeal No E009 of 2021; [2022] KEHC 3161 (KLR)
17. **Prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, fell afoul of article 28 of the Constitution.** Kibara v Republic Criminal Appeal No E075 of 2022; [2022] KEHC 15412 (KLR)
18. **In sexual offences, the evidence of the victim is enough to convict the accused person as provided in section 124 of the Evidence Act, if that evidence is found by the trial court to be soundly credible and believable.** Oloo v Republic Criminal Appeal No E026 of 2021; [2022] eKLR
19. **The evidence of the offence of defilement or sexual assault can only be given by the victim.** Murimi v Republic Criminal Case No E061 of 2021; [2021] eKLR
20. **A lenient sentence at the discretion of the court cannot be meted out considering lenient sentence is not allowed considering the circumstances of the offence and the age of the complainant who is left traumatized.** SOA v Republic Criminal Appeal No E025 of 2021; [2022] eKLR
21. **There are no confines or limits for sentencing an accused for the crime of defilement.** EKT v Republic Criminal Appeal No E018 of 2022; [2022] eKLR
22. **Actions of a child below eighteen behaving like an adult and willingly engaging in sex do not amount to defilement.** Charo v Republic Criminal Appeal No 32 of 2015
23. **Exposure of a child to pornography renders them in need of care and protection as it affects their social and mental development.** R v Wekesa MCSO E004 of 2021

Ogola v Republic**1. Effect of failure to conduct a *voir dire* (an oral examination) in a trial with a minor as a complainant**

Significance: It was not sufficient to ascertain that the child had enough intelligence to justify the reception of the evidence, but also that the child understood the difference between the truth and falsehood.

Ogola v Republic [2023] eKLR

Criminal Appeal No 135 of 2017

Court of Appeal at Kisumu

PO Kiage, F Tuiyott & JM Ngugi, JJA

February 3, 2023

Evidence Law – oral evidence – oral evidence by a minor in oral examination – oral evidence by a minor who was a complainant – what was the scope of an oral examination.

Brief facts

The appellant was arraigned before the senior resident magistrate's court in Rongo in Criminal Case No 991 of 2009. He was charged with the offence of defilement of a girl contrary to section 8(1)(2) of the Sexual Offences Act, No 3 of 2006. The particulars of the offence were that the appellant, on December 15, 2009, at a village in Uriri District of Nyanza Province, willfully and intentionally caused an act of penetration to the genital organ of MA, a girl of the age of seven (7) years. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that of the main charge.

The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court. The High Court dismissed the appeal and upheld the conviction and sentence in a judgment dated December 18, 2010.

Issue

What was the scope of a *voir dire* (an oral examination) and what the effect of failure to conduct one in a trial where the complainant was a minor?

Held

1. The appeal was a second one and the court's jurisdiction was limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It was only on rare occasions that the court interfered with concurrent findings of fact by the two courts below. The court had stated before that it would not normally interfere with concurrent findings of fact by the two courts below unless such findings were based on no evidence, or were based on a misapprehension of the evidence, or the courts below were shown demonstrably to have acted on wrong principles in making the findings.
2. Where, in any proceedings before any court, a child of tender years was called as a witness, the court was required to form an opinion, on a *voir dire* examination whether the child understood the nature of an oath in which even his sworn evidence could be received. If the court was not so satisfied, his unsworn evidence could be received if in the opinion of the court he was possessed of sufficient intelligence and understood the duty of speaking the truth. In the latter event an accused person would not be liable to be convicted on such evidence unless it was corroborated by material

- evidence in support thereof implicating him.
3. It was important to set out questions and answers when deciding whether a child of tender years understood the nature of oath so that the appellate court was able to decide whether the important matter was rightly decided, and not be forced to make assumptions.
 4. Dealing with the question of the girl taking oath, it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the questions put to a child had to appear on the shorthand note so that the course the procedure took in the court below could be seen.
 5. When a court had to decide whether a child should properly be sworn, was whether the child had sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which was involved in an oath, over and above the duty to tell the truth which was an ordinary duty of normal social conduct. There were therefore two aspects when considering whether a child should be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life.
 6. Even in the absence of express statutory provision it was always the duty of the court to ascertain the competence of a child to give evidence; it was not sufficient to ascertain that the child had enough intelligence to justify the reception of the evidence, but also that the child understood the difference between the truth and falsehood.
 7. Failure to conduct a *voir dire* rendered the entire evidence of the complainant of no use to the court. In cases where there was no other evidence sufficient to sustain a conviction, the failure to conduct *voir dire* properly was fatal.
 8. The *voir dire* was not the epitome of the ideal thorough-going *voir dire* of minors but that, in itself would have been insufficient to render the conviction unsafe. The court was far more worried about the second problematic aspect of the record: that was a record of the proceedings in a language that appeared plain not to be fidel to what the complainant testified in court.
 9. There was no doubt that a 6 or 7-year old girl in Rongo would not use the word defile in court proceedings. Such a girl would have had a more metaphorical or euphemistic expression to explain what happened to her. It seemed, therefore, that the reproduction of the proceedings was not faithful to what actually happened in court. During the hearing of the appeal, the matter was raised with Mr Okango, learned state counsel, and, to his credit, he conceded that it was highly unlikely that the complainant used those words.
 10. There was yet another aspect of the case that was troubling: the failure to call witnesses who, in context, seemed crucial. First, the complainant testified that she was playing with her two friends, Toto and Roney, when the appellant called her and locked the other two children in the house and went with the complainant in to a maize plantation where he defiled her. Those two other children who were allegedly locked up were clearly crucial witnesses who would have corroborated that part of the story. The fact that they were not called to testify in the circumstances of the case had to yield an inference adverse to the prosecution. That was also true for the assistant chief who was the first authority figure to whom the incident was reported. The failure to call those witnesses in the case was only made worse by the fact that the investigating officer was not called to testify either.
 11. The end result was to firmly place the case in the Bukenya exception – eponymously named after the case, *Bukenya & others v Uganda* [1972] EA 549 where the Court of Appeal for Eastern Africa held that the prosecution had to make available all witnesses necessary to establish the truth, even though their evidence could be inconsistent. The court had the right, and the duty to call any person whose evidence appeared essential to the just decision of the case. Where the evidence called barely

Ogola v Republic

was adequate the court could infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

12. The fact that the incident allegedly happened on December 13, 2009 and was not reported until about two weeks later – on December 27, 2009; and medical examination carried out on December 29, 2009, there was a need to call those witnesses to remove any reasonable doubts that the minor was not defiled by a third party during the intervening period. The un-explained failure to call those witnesses threw a shadow of doubt about the certainty of the conviction.
13. From the trial court record, the appellant informed the court that he had two witnesses he wanted to call to prove his *alibi* defence. The court noted his request and directed that witness summons be issued to the witnesses; However, when the trial resumed the two witnesses were not in court. The trial court did not indicate why they were not there and if the witness summons were ever issued. The trial court simply recorded “accused present” before recording him as saying “That is the close of my case.” The court failed to give the appellant all the facilities for his defence that he needed as demanded by article 50(2)(c) of the Constitution.
14. In view of all the concerns about how the trial was conducted, concerns which rose to the level of attaining categorization as questions of law appropriate for review at the second level of appeal, the conviction in the case was unsafe and had to be reversed. If the reversible errors were merely the procedural infirmities that were pointed out (reflected in the issues of recordation of proceeding and failure to accord the appellant adequate facilities for his defence), the High Court judgment would have been reversed; the judgment of the lower court set aside and then carried out an analysis whether to order for a retrial. However, in the instant case, the procedural infirmities were compounded by substantive evidential infirmities (reflected in the failure to call crucial witnesses). That confluence of procedural and substantive infirmities ineluctably led to the outcome that the conviction in the case had to be quashed and the sentence set aside.

The judgment of the High Court was reversed and judgment entered acquitting the appellant. He would be released from custody forthwith unless he was otherwise lawfully held.

Cases**East Africa**

1. *Alfayo Gombe Okello v Republic* [2010] eKLR – (Explained)
2. *Bernard Kebiba v Republic* [2000] eKLR – (Explained)
3. *Bukenya & others v Uganda* [1972] EA 549 – (Explained)
4. *Charles Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 – (Explained)
5. *Francis Karioko Muruatetu & another v Republic* Supreme Court Petition Nos 15 & 16 of 2015; [2017] eKLR (Consolidated) – (Explained)
6. *John Murithii Nyagah v Republic* [2014] eKLR – (Explained)
7. *Johnson Muiruri v Republic* [1983] KLR 445 – (Explained)
8. *Joshua Gichuki Mwangi v Republic* Nyeri Criminal Appeal No 84 of 2015
9. *Kiare v Republic* [1984] KLR 739 – (Explained)
10. *Maingi & 5 others v Director of Public Prosecutions & another* Petition No E017 of 2021; [2022] KEHC 13118 (KLR) – (Explained)
11. *Samuel Warui Karimi v Republic* [2016] eKLR – (Explained)

Statutes**East Africa**

1. Constitution of Kenya, 2010 articles 50(2)(c); 55 – (Interpreted)
2. Evidence Act (cap 80) section 124 – (Interpreted)
3. Oaths and Statutory Declarations Act (cap 15) section 19 – (Interpreted)

4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2); 11(1) – (Interpreted)

Advocates

None mentioned

2. Time spent by a sexual offender in custody while undergoing trial ought to be factored during sentencing

Significance: In this instance, the punishment of a sexual offender who had been detained for a year and a half during the trial was at question.

NMK v Republic [2023] KECA 127 (KLR)

Criminal Appeal No E007 of 2021

High Court at Chuka

LW Gitari, J

February 2, 2023

Criminal Law – offences – defilement – consent in defilement – where the victim who was aged 15 dropped out of school and was married to the appellant for five days – where on the fifth day they were arrested – where the appellant pleaded not guilty but was found guilty of defilement – where the appellant contended that the victim had not revealed her age to him – whether failure of the victim to reveal her age to the perpetrator could justify a perpetrator’s act of marrying a 15 year old school girl – Sexual Offences Act, 2006, section 8(1)(3).

Criminal Law – offences – defilement – consent in defilement – where the victim who was aged 15 dropped out of school and was married to the appellant for five days – where on the fifth day they were arrested – where the appellant pleaded not guilty – where defilement had to be proved – what were the ingredients of defilement – Sexual Offences Act, 2006, section 8(1)(3).

Criminal Procedure – sentencing – time spent in custody while undergoing trial – where the appellant had been arrested after being found with a 15 year old school girl – where the appellant pleaded not guilty of defilement – where the appellant had already spent 1 year and 6 months in custody while undergoing trial – where the appellant was convicted and sentenced of defilement for 15 years – whether 15 years sentencing was appropriate for a defilement case where the accused had already spent 1 year and 6 months in custody while undergoing trial – Sexual Offences Act, 2006, section 8(1)(3); Criminal Procedure Code, cap 75, section 333(2).

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act (No 3 of 2006) (the Act). In the alternative, the appellant faced the charge of committing an indecent act with a child contrary to section 11(1) of the Act. The trial court found the appellant guilty of the main count and sentenced him to serve fifteen years’ imprisonment. The appellant, being dissatisfied with the decision of the trial court filed the instant appeal challenging both the conviction and sentence.

Issues

- i. Whether failure of the victim to reveal her age to the perpetrator could justify a perpetrator’s act of marrying a 15 year old school girl.
- ii. What were the ingredients for the offence of defilement?
- iii. Whether a 15 year sentence was appropriate for a defilement case where the accused had already spent 1 year and 6 months in custody while undergoing trial.

Held

1. The 1st appellate court had a duty to re-evaluate the evidence adduced before the trial court, analyse it, and come up with its own independent finding. The court was however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to

- assess their demeanour. An appellant on a first appeal was entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The 1st appellate court had to itself weigh convicting evidence and draw its own conclusions. It was not the function of a 1st appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then could it decide whether the trial court's findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses.
2. The trial court after evaluating the evidence came to the conclusion that it supported the main charge of defilement. It found the appellant guilty and convicted him. In a case of defilement contrary to section 8(1) of the Act, the evidence produced by the prosecution had to prove the ingredients of the offence which were:
 - a. that the victim was a minor;
 - b. that there was penetration, whether partial or complete; and
 - c. that the accused was positively identified as the perpetrator.
 3. The complainant was born on March 7, 2003 as per her certificate of birth which was produced as an exhibit. The complainant was a week shy of turning 16 years old at the time that the offence was committed. Under section 8(3) of the Act, a person committed an offence of defilement where the child was between the age of twelve and fifteen years. It was the age of the child which determined the sub-section under which the offender would be charged. Age was therefore a key ingredient which had to be proved. It formed part of the charge which had to be proved in the same way as penetration in cases of rape and defilement. It was therefore essential that the same be proved by credible evidence for sentence to be imposed upon conviction would depend on the age of the victim.
 4. The complainant was examined by a medical officer and found to be pregnant. The evidence of pregnancy of the complainant was sufficient proof beyond reasonable doubt that penetration took place, whether partial or complete. The fact of the broken hymen also proved that there was penetration.
 5. An accused had to raise the defence on age factor. It was only after the defence had been raised that the court would consider the defence on age factor, the circumstances and the steps which the appellant took to ascertain the age of the complainant. That was because when the accused opted to rely on the defence, the evidential burden shifted on him to which satisfied the conditions under the section. It was a defence which was available to an accused person. He should lay a basis for that defence during the trial. The appellant did not raise the defence during the trial. It could not therefore be considered at that stage.
 6. The age of a child determined the sentence to be imposed upon the offender in cases of defilement. The law on defilement in cases where a child fell in the age bracket of between 12 and 15 years was provided for under section 8(1) as read with section 8(3) of the Act.
 7. The minimum sentence of 15 years was imposed where the child victim was aged between the sixteen and eighteen years as per the provisions of section 8(4) of the Act. On the other hand, a minimum of twenty years was prescribed under section 8(3) of the Act for a victim child aged between twelve and fifteen years.
 8. The complainant was 15 years old as at the date of the commission of the offence. The court however sentenced the applicant to 15 years' imprisonment yet the applicable sentence, considering the complainant's age should have been 20 years as prescribed under section 8(3) of the Act.
 9. The sentence imposed by the trial court could not be said to be harsh and excessive. The trial court considered all the relevant factors and a social inquiry report. Sentencing was an exercise of discretion by the trial court. An appellate court would not interfere with the discretion of the trial court in

NMK v Republic

sentencing unless it was shown that the sentence was manifestly excessive, took into consideration irrelevant factors or overlooked some material factors, or acted on wrong principles.

10. Sentence was essentially an exercise of discretion by the trial court and for the court to interfere it had to be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of those the sentence itself was so excessive and therefore an error of principle, had to be interfered with.
11. Subject to the provisions of section 38 of the Penal Code (Cap 63), every sentence should 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 the Penal Code provided that where the person sentenced under subsection (1) of section 38 had, prior to such sentence, been held in custody, the sentence should take account of the period spent in custody.
12. The appellant was arrested on February 27, 2019. He failed to meet the bail/bond conditions set by the trial court and as such remained in custody from February 27, 2019 until August 27, 2020 when the trial court delivered its judgment in the matter. The appellant spent 1 year and 6 months in custody while undergoing trial. That time ought to have been considered by the trial court during sentencing.
13. There was no reason to interfere with the sentence of 15 years' imprisonment imposed by the trial court. Considering section 333(2) of the Criminal Procedure Code which was couched in mandatory terms, the sentence should run from February 27, 2019, when the appellant was arrested, so as to factor in the time that the appellant spent in custody while undergoing trial.

Appeal dismissed; Deputy Registrar to issue an amended committal warrant and serve it on the officer in-charge of the Prison where the appellant was serving sentence.

Cases***East Africa***

1. *Benard Kimani Gacheru v Republic* [2002] eKLR – (Explained)
2. *JWA v Republic* [2014] eKLR – (Explained)
3. *Kaingu Elias Kasono v Republic* Criminal Appeal No 54 of 2010 – (Explained)
4. *Kiilu & another v Republic* [2005] 1 KLR 174 – (Explained)
5. *Ogolla s/o Owuor v Republic* [1954] EACA 270 – (Explained)
6. *Okeno v Republic* [1972] EA 32 – (Applied)
7. *Shadrack Kipkoech Kogo v Republic* Criminal Appeal No 253 of 2003 – (Explained)

Statutes***East Africa***

1. Criminal Procedure Code (cap 75) sections 333(2) – (Interpreted)
2. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2)(3)(5)(6); 11(1) – (Interpreted)
3. Evidence Act (cap 80) section 107 – (Interpreted)
4. Penal Code (cap 63) sections 38 – (Interpreted)

Advocates

None mentioned

3. Age determination in defilement cases includes direct observation and supportive documents

Significance: In age determination, there was no better evidence one could get than that of the mother who gave birth to the child victim.

Wanjiku v Republic [2022] eKLR

Criminal Appeal No E007 of 2022

High Court at Nyeri

M Muya, J

October 27, 2022

Criminal Law – sexual offences – defilement – where the appellant was convicted and sentenced to 20 years’ imprisonment for the offence of defilement – where the appellant appealed that the trial court erred in both law and fact in placing reliance on inconsistent and contradictory prosecution evidence – what was the proof for defilement – Sexual Offences Act, 2006, section 8(5).

Evidence Law – age – age determination – age determination in defilement case – where the appellant was convicted and sentenced to 20 years’ imprisonment for the offence of defilement – where the appellant appealed that the trial court erred in both law and fact in failing to consider that the victim was a truant child who had already ran away from the family hence unreliable – where the appellant appealed that the trial court erred in both law and fact by failure to note that the case was grounded on extortion by the parents of the victim – whether provision of an identity card was mandatory for proving one’s age – Sexual Offences Act, 2006, section 8(5).

Brief facts

The appellant was convicted and sentenced to 20 years’ imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (the Act). The particulars being that on July 9, 2021 at a village in Nyeri sub county within Nyeri County he intentionally and unlawfully caused his penis to penetrate the vagina of FAM a child aged 12 years and eleven months. The appellant appealed on several grounds citing errors in both law and fact from the trial court.

Issues

- i. What was the requisite proof for defilement?
- ii. Whether provision of an identity card was mandatory for proving one’s age.

Held

1. What appeared to be the appellant’s contention was that he honestly believed that the complainant was over the age of eighteen years. That was why in his evidence he stated that he had asked the complainant whether she had an identity card.
2. During cross-examination of the complainant, the appellant did not raise the issue of having asked her for her identity card or any question as to her age status. While deliberating on the issue of age, the trial court did place reliance on the court of appeal case of *Richard Wahome Chege v Republic* [2014] eKLR where it was held that on the contention that the age of the complainant was not proved if it was the court’s considered view that age was not proved primarily by production of a birth certificate. PW2, who was the mother of the complainant testified that the complainant was aged ten years old. There was no better evidence one could get than that of the mother who gave

Wanjiku v Republic

birth. The age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant herself.

3. The complainant's mother who testified as PW2 informed the court that her daughter was born on July 16, 2008. A child Health Card was produced indicating the date of birth of the complainant as July 16, 2008. However, the name was shown as EK. That discrepancy was explained away by the mother who stated that it was her local pastor who decided to have her name changed so as to attract favour.
4. During cross-examination of the complainant the accused did not allude to the issue of demanding to be shown identification documents so as to ascertain her age. The complainant did admit that she had left her parents' home for close to one month and was staying in the streets of Othaya town. She also testified to have known the accused for one year and that he knew that she was in school as he used to take pupils to that school. The appellant's contention was that the complainant lied to him over her age. The appellant did not deny having known the complainant before as a pupil. He was a *boda-boda* rider and he used to ferry children to the institution she was attending.
5. The appellant could not qualify under the defence provided under section 8(5) of the Act as he knew the complainant before and the school she was attending. The trial court did note that the neighbours to the accused did complain that there was a certain *boda-boda* person who was staying with a child at that estate. That was a clear indication that it was not the first time that the accused had an encounter with the complainant in his house as he was staying with her before police went there and arrested him.
6. The court found the evidence adduced by the prosecution against the appellant was overwhelming and there was no good ground to interfere on both the conviction and the sentence.

Appeal dismissed.

Cases***East Africa***

1. *Okeno v Republic* [1972] EA 32 – (Applied)
2. *Richard Wahome Chege v Republic* [2014] eKLR – (Explained)

Statutes***East Africa***

Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(3); 11(1) – (Interpreted)

Advocates

None mentioned

4. For the offence of defilement to be proved, the prosecution has to prove identification or recognition of the offender, penetration, and age of victim beyond reasonable doubt

Significance: This case examines the ingredients and burden of proof to prove defilement.

Mwangi v Republic [2022] eKLR

Criminal Appeal No E001 of 2022

High Court at Embu

LM Njuguna, J

June 15, 2022

Criminal Law – offences – defilement – ingredients for defilement – where the appellant was arraigned before the court with the offence of defilement – what were the ingredients of defilement – Sexual Offences Act, 2006, sections 2 and 8(3).

Criminal Law – offences – defilement – ingredients for defilement – where the appellant was arraigned before the court with the offence of defilement – what was the burden of proof for defilement – Sexual Offences Act, 2006, sections 2 and 8(3).

Brief facts

The appellant was on July 27, 2019 arraigned before the Senior Principal Magistrate’s court at Runyenjes in Sexual Offence No E013 of 2021 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 (the Act). The particulars of the offence were that on diverse dates between March – April, 2021 at Kwanjara sub -location in Embu County intentionally and unlawfully caused his penis to penetrate the vagina of SN a girl aged 14 years.

He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act, the particulars being that; on diverse dates between March – April 2021 at unknown time at Kwanjara Sub location in Embu County, intentionally touched the vagina of SN a child aged 14 years with his penis. The case proceeded with the prosecution calling 3 witnesses and at the close of the prosecution’s case, the appellant was put on his defence and he opted to give a sworn statement and thereafter called two witnesses to support his case. In a judgment delivered on December 1, 2021, the appellant was convicted and thereafter sentenced to 20 years’ imprisonment. Being dissatisfied with both the conviction and the sentence, he appealed to the court *vide* a petition of appeal basing his appeal mainly on the allegation that the prosecution failed to discharge the burden of proof.

Issues

- i. What were the ingredients needed to prove the offence of defilement?
- ii. What was the burden of proof to prove defilement?

Held

1. The ingredients of an offence of defilement were:
 - (a) Identification or recognition of the offender;
 - (b) penetration; and
 - (c) Age of victim.

For the offence of defilement to be proved, the prosecution had to prove each of the above ingredients beyond reasonable doubt.

Mwangi v Republic

2. Section 2 of the Act defined penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another. The key evidence relied on by the courts in rape and/ or defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. The complainant testified that she had sexual intercourse with the accused on several days and further that, the appellant chased her upon realizing that she was pregnant. PW2, a clinician also gave evidence in regard to the complainant having been sexually abused and thereafter, impregnated. He stated that the hymen was perforated at 3 o'clock with laceration and tears which were about 1 cm large and the pregnancy was less than 12 weeks.
3. Conviction on the evidence of a single witness had been subject of appeals for a long time but it was settled that the oral evidence of a single witness was indeed sufficient to warrant a conviction. The trial court that saw the complainant testify was satisfied that the complainant spoke the truth.
4. Contrary to assertions that the object used for penetration was not named, it remained baseless given that the complainant testified that she had sexual intercourse with the appellant and further, PW2 confirmed that there was penile penetration thus corroborating the testimony of PW1; there was proof beyond reasonable doubt and that ground could not stand.
5. Age of the victim of sexual assault under the Act was a critical component. It formed part of the charge which had to be proved the same way as penetration in the cases of rape and defilement. It was therefore essential that the same be proved by credible evidence for the sentence to be imposed would be dependent on the age of the victim.
6. It was not in dispute that the victim was a minor aged between 13 - 14 years at the time of the occurrence of the alleged offence. The age assessment that was conducted showed that the complainant at the time of the incident was between the ages of 13 – 14 year. Her age was therefore adequately proven.
7. In reference to the identification of the appellant as being the person who perpetrated the offence, in sexual offences, the positive identification of the victim was what connected them to the offence. It was therefore extremely important that any evidence on identification had to be thoroughly and carefully scrutinized to avoid any miscarriage of justice.
8. The court had from time to time held that the evidence relating to identification had to be scrutinized, and should only be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. Further to the above, recognition could be more reliable than identification of a stranger. However, caution had to always be taken where a witness was purporting to recognize someone that they knew since even in such cases, mistakes could sometimes be made.
9. The appellant was charged under section 8(3) of the Act. Under that section, a person who committed an offence of defilement with a child between the age of twelve and fifteen years was liable upon conviction to imprisonment for a term not less than twenty years. The trial court imposed a sentence of 20 years' imprisonment. The appellant had not challenged the sentence as being excessive. The trial court did not act on any wrong principle, overlook any material factor, or took into account some wrong material in meting out the sentence. The court exercised its discretion in sentencing and in doing so, meted the appropriate sentence and which was lawful.

Appeal dismissed; the conviction and sentence meted out on the appellant by the trial court upheld.

Cases

East Africa

1. *Benard Kimani Gacheru v Republic* [2002] eKLR – (Mentioned)
2. *Dismas Wafula Kilwake v Republic* [2018] eKLR – (Mentioned)
3. *George Opondo Olunga v Republic* [2016] eKLR – (Explained)
4. *John Mutua Munyoki v Republic* [2017] eKLR – (Mentioned)
5. *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010
6. *Kariuki Njiru & 7 others v Republic* Criminal Appeal No 6 of 2001
7. *Kassim Ali v Republic* [2006] eKLR – (Mentioned)
8. *Okeno v Republic* [1972] EA 32 – (Applied)
9. *Sahali Omar v Republic* [2017] eKLR – (Mentioned)

United Kingdom

1. *Miller v Minister of Pensions* 2 All ER 372-373 – (Explained)
2. *RvTurnbull & others* [1976] 3 All ER 549 – (Mentioned)

Statutes

East Africa

1. Criminal Procedure Code (cap 75) sections 7(1)(b); 211; 216; 329 – (Interpreted)
2. Evidence Act (cap 80) sections 107(1) – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 8(1)(3); 11(1) – (Interpreted)
4. Constitution of Kenya, 2010 articles 50(2)(m)

Advocates

None mentioned

Okoko v Republic

5. The use of euphemism by children in describing the sexual intercourse acts done to them

Significance: This case is essential as it determined the issue as to when evidence could be considered uncorroborated and hearsay in proving defilement. It also makes a case for the use of euphemism by children in describing sexual acts done to them to avoid them undergoing devastation and shame.

Okoko v Republic [2022] eKLR

Criminal Appeal No E002 of 2022

High Court at Siaya

RE Aburili, J

June 22, 2022

Criminal Law – offences – defilement – ingredients of defilement – proving ingredients of defilement – where the appellant was charged with the offence of defilement and pleaded not guilty – where the matter proceeded to full trial where the prosecution called 4 witnesses in support of their case – where the trial court found that the prosecution had proved its case beyond reasonable doubt against the accused person and so it convicted the appellant and after considering his mitigation, it sentenced him to serve twenty (20) years imprisonment – where the appellant appealed that the prosecution did not prove the case against the appellant beyond reasonable doubt – when was a defilement case said to be proven beyond reasonable doubt – Sexual Offences Act, 2006, section 8(3).

Criminal Law – offences – defilement – ingredients of defilement – proving ingredients of defilement – where the appellant was charged with the offence of defilement and pleaded not guilty – where the matter proceeded to full trial where the prosecution called 4 witnesses in support of their case – where the trial court found that the prosecution had proved its case beyond reasonable doubt against the accused person and so it convicted the appellant and after considering his mitigation, it sentenced him to serve twenty (20) years imprisonment – where the appellant appealed that the evidence of the victim, PW1 was uncorroborated and hearsay and should not have been admitted or relied on – when could evidence be considered uncorroborated and hearsay when proving defilement – whether it was necessary for the prosecution to call key witness i.e. the investigating officer in the trial of the appellant – Sexual Offences Act, 2006, section 8(3); Evidence Act, cap 80, section 124.

Criminal Law – offences – defilement – ingredients of defilement – proving ingredients of defilement – where the appellant was charged with the offence of defilement and pleaded not guilty – where the matter proceeded to full trial where the prosecution called 4 witnesses in support of their case – where the trial court found that the prosecution had proved its case beyond reasonable doubt against the accused person and so it convicted the appellant and after considering his mitigation, it sentenced him to serve twenty (20) years imprisonment – where the appellant appealed that the prosecution did not prove the case against the appellant beyond reasonable doubt – whether a sentence of 20 years’ imprisonment was manifestly excessive – Sexual Offences Act, 2006, section 8(3); Evidence Act, cap 80, section 124.

Brief facts

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 (the Act). The particulars of the charge were that on February 5, 2020 at about 1500hrs at a village in Central Sakwa location Bondo sub county within Siaya county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BA, a child aged 15 years old. The appellant also faced the alternative charge of committing an indecent

act with a child contrary to section 11(1) of the Act. The appellant pleaded not guilty to both the main and the alternative charge and the matter proceeded to full trial where the prosecution called 4 witnesses in support of their case. Placed on his defence, the accused gave sworn testimony maintaining his innocence. In its judgment, the trial court found that the prosecution had proved its case beyond reasonable doubt against the accused person and so it convicted the appellant and after considering his mitigation, sentenced him to serve twenty (20) years imprisonment.

Aggrieved by the trial court's verdict, conviction and sentence imposed, the appellant initially filed his petition of appeal but subsequently filed an amended memorandum of appeal.

Issues

- i. What was the threshold of proving a defilement case beyond reasonable doubt?
- ii. When could evidence be considered uncorroborated and hearsay when proving defilement?
- iii. Whether it was necessary for the prosecution to call key witness i.e. the investigating officer in the trial of the appellant.
- iv. Whether a sentence of 20 years' imprisonment for the offence of defilement was excessive.

Held

1. The birth certificate as produced had no issue and it proved beyond reasonable doubt the complainant's birth date and thus her age. The prosecution proved that element of age of the complainant to be 15 years beyond reasonable doubt. Penetration was defined under section 2 of the Act to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The complainant testified that she was defiled by the appellant therein whom she knew very well. The question was whether that evidence required corroboration.
2. The evidence of the complainant on the fact of her being defiled was corroborated by that of the clinical officer (PW3) who testified that there was penetration of the child's genitalia, and that fact was noted in the P3 form and post rape care reports produced as exhibits, which also confirmed that. The broken hymen was no doubt evidence of penetration. There was no contrary evidence. That evidence proved beyond reasonable doubt that there was penetration as contemplated by the Act.
3. The appellant denied committing the offence and elected to adduce and challenge the evidence adduced by the prosecution witnesses. The appellant claimed that the complainant's parents used the complainant to bring the case against him. On being cross examined, he stated that there was no grudge between him and the complainant's parents. Considering the firm and consistent evidence adduced by the minor that was corroborated by the medical evidence adduced by PW3, the court was unable to decipher any material that would suggest that the complainant's parents could have coached the complainant to frame the appellant with such a heinous offence.
4. It was clear that the complainant was firm in her sworn testimony which was very detailed and which evidence remained unchallenged even under cross-examination. The trial court believed the complainant to be telling the truth, after analyzing her testimony. Further as earlier stated, in accordance with the provisions of section 124 of the Evidence Act, the complainant's testimony on defilement was corroborated by the medical evidence adduced by PW3, the clinical officer who examined her. Further, the inconsistencies alleged by the appellant in the testimonies of PW1 and PW2 did not exist from the scrutiny of the said testimonies.
5. The appellant also faulted his conviction on grounds that the matter was reported 9 days later. However, that issue was never raised during the trial. In addition, there was no evidence that the material evidence was destroyed by the late reporting of the defilement. Taking into account all the evidence adduced by the prosecution as against the appellant's defence, the court was satisfied that the prosecution proved all the elements of the offence of defilement as there was no inordinate delay

Okoko v Republic

in reporting the occurrence of the offence against the minor who stated that she feared informing her aunt. It was not in dispute that most children who were defiled were scared and embarrassed of the act and feared disclosing what was done to them. It was for that reason that even the Court of Appeal had acknowledged the use of euphemism by children in describing the sexual intercourse acts done to them.

6. Children who were victims of sexual abuse were likely to be devastated by the experience and given their innocence, they could feel shy, embarrassed and ashamed to relate that experience before people. The reporting after 8 days after the incident was not prejudicial to the appellant and neither was it fatal to the prosecution's case. The appellant further pleaded and submitted that the prosecution failed to call a key witness, the investigating officer or even the arresting officer to give evidence on how he was arrested. PW4 Ayub Ogolla testified that he was the assistant chief and that he received a warrant of arrest which he executed against the appellant. He had earlier on received a report from the complainant's aunt that the appellant had defiled the minor.
7. The court was however alive to the fact that there was no legal requirement in law on the number of witnesses to prove a fact. Section 143 of the Evidence Act provided that no particular number of witnesses should, in the absence of any provision of law to the contrary, be required for the proof of any fact. No doubt the witness was important as he could have shed more light as to investigations carried out and would have explained on what basis the accused was charged.
8. The evidence of the investigating officer and the arresting officer could only have been crucial in that case if the evidence adduced was barely adequate to establish the elements of the offence of defilement. The court did not find that that was a case where the trial court and the High Court could have or should make an adverse inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution and that that was the reason it was not called.
9. Whereas it was a welcome move for the evidence of a police investigating officer to be given so as to inform the court the circumstances of arrest of an accused person by the police, in matters where other evidence was available and the same proved the prosecution case to the required standard, the absence of the evidence of the investigating officer would not weaken the prosecution case. The call would have to be made on whether the police evidence was essential to prove the charges that the appellant was facing. The court found no merit in the ground that was raised by the appellant.
10. The minor's and the clinical officer's evidence was largely uncontroverted. The witnesses who were said not have been called were to give the same evidence already presented. It had not been shown that the evidence on record had gaps which needed further clarification. A conviction in sexual offences cases could be based on the testimony of a single credible witness, a position that was ably captured in section 124 of the Evidence Act. The court found no reason to make adverse inference in the circumstances of the case. Taking all the above into consideration, the court was satisfied that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the Act and that the conviction of the appellant was sound and safe.
11. The appellant pleaded in his grounds of appeal and submitted that his 20-year prison sentence was excessive in view of the Supreme Court Decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Francis K. Muruatetu*) where the court held that the court was not bound to impose a mandatory sentence as the same was unconstitutional. Section 8(3) of the Act provided that upon conviction the offender should be imprisoned for a term of not less than twenty years. Previously, the principle laid down in the *Francis K Muruatetu* case, was that, provisions of law which excluded or fettered discretion of a court of law in sentencing were inconsistent with the Constitution.
12. The Court of Appeal on its part stated that pursuant to the *Francis K. Muruatetu* case, if the reasoning

was applied, the sentence stipulated by section 8(2), (3) and (4) of the Act which was a mandatory minimum should also be considered unconstitutional on the same basis. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentence failed to conform to the tenets of fair trial which were an in-alienable right guaranteed under articles 50 and 25 of the Constitution.

13. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (amicus curiae)* [2021] eKLR (*Muruatetu*) clarified the position and stated *inter alia* that the decision in *Francis K Muruatetu* case could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution but that the said decision only applied in respect of the sentence for murder under sections 203 and 204 of the Penal Code.
14. Taking into consideration the decision of the Supreme Court in *Muruatetu* 2021, it was clear that the mandatory sentence provided in section 8(3) of the Act was lawful unless otherwise challenged through a constitutional petition and upheld by a court superior to that court.

Appeal dismissed; conviction of the appellant and sentence imposed on him by the trial court upheld.

Order

In accordance with section 333(2) of the Criminal Procedure Code, the court ordered that the sentence imposed should take into account any period spent by the appellant in remand custody during the trial, before he was released on bond.

Cases

East Africa

1. *Bukenya & others v Uganda* [1972] EA 549 – (Applied)
2. *BW v Republic* Criminal Appeal No 313 of 2010; [2019] KLR – (Explained)
3. *Francis Karioko Muruatetu & another v Republic* [2017] eKLR – (Applied)
4. *George Opondo Olunga v Republic* [2016] eKLR – (Explained)
5. *Joseph Kieti Seet v Republic* Criminal Appeal No 91 of 2011, – (Explained)
6. *Keter v Republic* [2007] 1 EA 135 – (Applied)
7. *Mark Oiruri Mose v R* [2013] eKLR – (Explained)
8. *Mohammed Chebii Okomba v R* [2021] eKLR – (Explained)
9. *Muganga Chilejo Saha v Republic* [2017] eKLR – (Explained)
10. *Okemo v R* [1977] EALR 32 – (Applied)
11. *Oluoch v R* [1985] KLR 549 – (Explained)
12. *Pius Mutua Mbuvi v Republic* [2021] eKLR – (Followed)
13. *Republic v Cliff Macharia Njeri* [2017] eKLR – (Explained)
14. *Waita Munyoki v R* [2018] eKLR – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 25, 50 – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 333(2) – (Interpreted)
3. Evidence Act (cap 80) section 2, 124 – (Interpreted)
4. Penal Code (cap 63) sections 203, 204 – (Interpreted)
5. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 8(1)(3)(4); 11(1) – (Interpreted)

Advocates

None mentioned

NNC *v* Republic

6. Failure to take a fresh plea after amending the charge sheet does not render a charge and the subsequent conviction defective

Significance: The case explores the issue whether the failure to take fresh plea after amending the charge sheet by substituting section 8(4) of the Sexual Offences Act with section 8(2) rendered the charge of defilement and subsequent conviction defective.

NNC *v* Republic [2018] eKLR

Criminal Appeal No 46 of 2017

High Court at Mombasa

ARM Visram, MK Koome & W Karanja, JJA

June 21, 2018

Criminal Law – offences – defilement – conviction for defilement – where the appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act – where the charge sheet was amended by substituting section 8(4) with section 8(2) without the appellant taking a new plea – whether the failure to take a fresh plea after amending the charge sheet by substituting section 8(4) with section 8(2) rendered the charge of defilement and subsequent conviction defective – Sexual Offences Act, 2006, section 8(1), (2) and (4); Evidence Act, cap 80, section 124.

Brief facts

The appellant was challenging his conviction and sentence by the Resident Magistrate’s court, Mombasa. He was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act (the Act). The background facts of the matter were that on July 30, 2013, the complainant (EMM- PW1); a minor aged 9 years old and a standard two pupil, was busy fetching firewood in a forest. While at it, she realized that she needed a piece of rope with which to tie the firewood, but was unable to cut the rope to size. Fatefully, her uncle, the appellant, happened to live nearby and came to her aid. Once he was done cutting the rope for her, he offered to escort her back into the forest. However, once they got there, he forced her to the ground, took off her clothes and proceeded to defile her. Her cries and screams came to naught as there was no one else in the vicinity. Thereafter, the appellant threatened her with dire consequences should she tell anyone what had transpired. That notwithstanding, she went home and revealed to her mother what had happened.

Upon learning of her daughter’s unfortunate experience at the hands of the appellant, NSM (PW 2) examined her daughter’s private parts and was of the opinion that indeed she had been defiled. She then took the complainant to the village chairman, Mr Ndegwa Mrinzi Ndoro (PW 3) who accompanied them to Mwanguli police station to report the matter. At the police station, they found PC Livingstone Koech (PW4) who took their statements, issued them with a P3 form and referred the child to Msambweni District Hospital for medical examination and treatment. At the hospital, they were received by Mr Phillip Kibet Chebii (PW5), a clinical officer who examined the complainant and filled out the P3 form. He assessed the age of the complainant at 9 years and his further findings were that the complainant had been defiled and her hymen ruptured and consequently, he administered treatment and counselled her.

Issue

Whether the failure to take a fresh plea after amending the charge sheet by substituting section 8(4) of the Sexual Offences Act with section 8(2) rendered the charge of defilement and subsequent conviction defective.

Held

1. The appeal was ventilated through written as well as oral submissions. In his written submissions, the appellant contended that the charge and conviction was defective because though the charge sheet stated that he was charged with defilement contrary to 8(1) as read with section 8(4) of the Sexual Offences Act (the Act), his conviction was based on section 8(1) as read with section 8(2) of the Act. To the appellant, that variance rendered the charge and his conviction fatally defective. He added that though the court allowed the amendment of the charge sheet, no amended charge sheet was ever filed, nor was he allowed to plead to the amended charge.
2. The appellant argued that the age of the complainant and the act of penetration by the appellant were never proven. The appellant was emphatic that even though the prosecution produced an age assessment report in court, the same was unlawfully adduced in evidence as the witness who tendered it in court was not the maker of the document. Citing the case of *Kaingu Elias Kasomo v Republic*, Malindi Court of Appeal Criminal Case No. 504 of 2010; the appellant submitted that proof of age was a critical component in proving defilement which had to be supported by credible evidence.
3. With regard to the act of penetration, the appellant contended that a ruptured hymen did not constitute evidence of penetration as the medical evidence and the testimony of PW5 appeared to suggest. To the contrary, that a ruptured hymen could have been occasioned by other factors, such as fingernails as the complainant took a bath. On that note, he urged the court to find merit in the appeal, quash the conviction and set aside the sentence.
4. The complainant testified and gave a detailed account of how she was defiled by the appellant, her own uncle who was well known to her. The complainant's mother examined the child's private parts and confirmed there were lacerations evidencing an act of penetration; the matter was reported to the police station and a P3 form was issued documenting the injuries that were consistent with defilement. As per the provisions of the Sexual Offences Act and section 124 of the Evidence Act, the trial court could convict on the basis of the complainant's evidence, if satisfied that the complainant was a truthful witness.
5. The conviction was supported by the evidence of the complainant's mother, the medical examination that revealed the complainant was a victim of defilement and the police officer who recorded the statement and escorted the complainant to the hospital. The trial court believed all those witnesses and found the defence evidence lacking in credibility and it was better placed to judge their credibility as it heard and saw them testify.
6. The record showed the clinical officer who examined the complainant stated her age as 9 years, her own mother said she was the same age but during the *voir dire* the child said she was 8 years. Granted, the age of a victim of a sexual assault under the Act was a critical component of the charge and one which required conclusive proof due to sentencing. Section 8(2) of the Act thereof stipulated that any person found guilty of defiling a child under the age of 11 years should be sentenced to life imprisonment. The mother of the complainant who would naturally be the best placed person to tell the age of her own child said she was 9 years old; the P3 form, stated that the girl was 9 years old. That age assessment had been questioned by the appellant, who contended that other than a birth certificate or an age assessment report, nothing else could suffice as proof of age.
7. The age of the victim of the sexual assault under the Act was a critical component. It formed part of the charge which had to be proved in the same way as penetration in the cases of rape and defilement. It was therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction would be dependent on the age of the victim.
8. The court had also taken into account the provisions of section 2 of the Children Act which defined age to mean the apparent age in cases where actual age was not known. The apparent age of the

NNC *v* Republic

complainant to the doctor who examined the complainant in that case, was 9 years. Though PW1's level of schooling could not be conclusive proof of her age, when it was looked at together with the fact that a clinical officer (PW5) had pegged her age at 9 years, the Court of Appeal was not satisfied that the trial court erred by concluding the complainant was below the age of 11 years. There was nothing on record to controvert those findings; furthermore, just like the issue of penetration even that issue of age was never raised on first appeal. There was therefore no legal foundation upon which the court could be faulted for failing to determine an issue of proof of penetration and age which were never argued before it. Those two grounds of appeal would as of necessity fail.

9. The appellant impugned the charge on the ground that he was never given an opportunity to plead afresh following the amendment of the statement of offence. Section 8(1) of the Act was the provision that created the offence of defilement while section 8(2) of the Act prescribed the punishment for defilement of a girl aged 11 years and below. In that case the charge sheet had stated the charge to be defilement of a child contrary to section 8(1) as read with subsection 4 of the Act.
10. At the commencement of trial, on July 14, 2014, the prosecution called the complainant as its first witness but just after her *voir dire* examination, the prosecution made an application to have the charge amended, to which the appellant responded 'No problem. *Hakuna shida*'.
11. The court allowed the amendment, which was to the effect that section 8(4) of the Act was substituted with section 8(2) in the charge sheet. That meant that the appellant was then charged with defilement contrary to section 8(1) as read with section 8(2) of the Act. However, no fresh plea was ever taken and the appellant contended that the failure to take fresh plea rendered the charge and subsequent conviction defective.
12. The substitution of section 8(2) of the Act in the charge in place of section 8(4) only meant that if convicted, the appellant would be handed an automatic life sentence; as opposed to what would have been the case under section 8(4) which carried a sentence ranging from 15 years to life imprisonment. That was because, while section 8(4) was concerned with defilement of a girl aged between 16 to 18 years, section 8(2) was concerned the punishment for defilement of a girl aged of lesser years (under 11 years old), which called for a harsher sentence. Given the circumstances, the failure to have the appellant take fresh plea rendered the charge defective.
13. The purpose of taking plea was to ensure that the accused person understood the charge facing him and to enable him give an indication of whether he admitted or denied having committed the offence charged. Should he admit the charge, a summary determination of the case followed but if he denied the charge, a formal trial was held. In order to determine whether it was necessary for the appellant to take a fresh plea, the principle to be adopted was that a fresh plea would not be held to have been necessary if from the record, it was evident to that court that the appellant was accorded a satisfactory trial, was able to cross examine witnesses and suffered no prejudice notwithstanding the failure to plead afresh.
14. The appellant was able to fully participate in the proceedings before the trial court. In addition, the amendment of the statement of charge could not be said to have resulted in any prejudice to the appellant, nor could he claim to have been taken by surprise because from the very beginning, the particulars of the offence as per the charge sheet made it clear that the complainant was a child under 11 years of age. In the circumstances, failure to take a fresh plea was in that case a non-fatal defect and curable under the provisions of section 382 of the Criminal Procedure Code.

Appeal dismissed.

Cases

East Africa

1. *David Irungu Murage & another v Republic*, Criminal Appeal No 184 of 2004 – (Followed)
2. *Evans Wamalwa Simiyu v Republic* [2016] eKLR – (Mentioned)
3. *Kaingu Elias Kasomo v Republic* Criminal Case No 504 of 2010; [2010] eKLR – (Explained)
4. *Karani v Republic* [2010] 1 KLR 73 – (Mentioned)

Statutes

East Africa

1. Children Act, 2001 (Act No 8 of 2001) section 2 – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 361, 382 – (Interpreted)
3. Evidence Act (cap 80) section 63(3); 124 – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 8(1)(2)(4) – (Interpreted)

Advocates

None mentioned

BOO v Republic

7. The absence of medical evidence to support the fact of defilement was not decisive as the fact of defilement could be proved by oral evidence of a victim or circumstantial evidence

Significance: The case delves into the proof for the element of penetration in defilement cases, especially in a scenario where medical evidence is absent to support the fact of defilement.

BOO v Republic [2018] eKLR

Criminal Appeal No 5 of 2017

High Court at Machakos

GV Odunga, J

October 2, 2018

Criminal Law – sexual offences – defilement – ingredients for the offence of defilement – age and penetration as the ingredients of defilement – where the appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act, No 3 of 2006 – where in the alternative the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006 – where on the day of the incident there were people in the plot including the complainant's brother yet they were not called to testify – where the trial court failed to consider the cause of penetration as the medical report did not link the appellant to the cause of the penetration – whether penetration and age of the complainant as ingredients of defilement were proved – Sexual Offences Act, No 3 of 2006, sections 8(1)(3) and 11(1).

Criminal Law – sexual offences – defilement – ingredients for the offence of defilement – age and penetration as the ingredients of defilement – where the appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act – where alternatively the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act – where after the hearing the trial court found the appellant guilty of the main count of defilement, convicted him accordingly and sentenced him to pay a fine of Kshs 100,000.00 and in addition to pay the complainant compensation of Kshs 50,000.00 – whether the trial court ought to have meted the appropriate sentence aimed at preventing such crimes in society rather than fining the appellant – Children Act, cap 141, section 191(1)(f); Sexual Offences Act No 3 of 2006, sections 8(1)(3) and 11(1).

Brief facts

The appellant, BOO, was charged in the Principal Magistrate's Court at Kangundo in Criminal Case No 4 of 2015 with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No 3 of 2006 (the Act). The particulars were that the appellant, on March 28, 2015 at a market in Matungulu Sub-County within Machakos County, he intentionally caused his penis to penetrate the vagina of MM, a child of 8 years old. Alternatively, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Act, the particulars being that on March 28, 2015 at a market in Matungulu Sub-County within Machakos County, he did an act of indecency with MM, a child of 8 years by touching her vagina.

After the hearing, the trial court found the appellant guilty of the main count of defilement, convicted him accordingly and sentenced him to pay a fine of Kshs 100,000.00 and in addition to pay the complainant compensation of Kshs 50,000.00. It was submitted by the appellant that the blood that was seen on the victim's under pant was never presented in court.

According to the appellant on the day of the incident there were people in the plot including the complainant's brother yet they were not called to testify. It was further submitted that the trial court failed to consider the cause of penetration as the medical report did not link the appellant to the cause of the penetration. It was further contended based on Machakos High Court Criminal Appeal No. 91 of 2016 – *Republic v Winfred Muthikwa Nzioka*, that the trial court ought to have meted the appropriate sentence aimed at preventing such crimes in society rather than fining him.

Issues

- i. Whether penetration and age of the complainant as ingredients of defilement were proved.
- ii. Whether the trial court ought to have meted the appropriate sentence aimed at preventing such crimes in society rather than fining the appellant.

Held

1. For the accused to be convicted of the offence of defilement, certain ingredients had to be proved. The first was whether there was penetration of the complainant's genitalia; the second was whether the complainant was a child; and finally, whether the penetration was by the appellant. While the court could in certain circumstances rely on evidence other than an age assessment report, the *onus* of proving the age of the victim resided with the prosecution and a simple statement by the complainant as to their age did not constitute such proof.
2. In defilement cases, medical evidence was paramount in determining the age of the victim and the doctor was the only person who could professionally determine the age of the victim in the absence of any other evidence. The age of the victim of the sexual assault under the Act was a critical component. It formed part of the charge which had to be proved the same way as penetration in the cases of rape and defilement. It was therefore essential that the same be proved by credible evidence for the sentence to be imposed would be dependent on the age of the victim.
3. The *onus* of proving the age of the complainant lay on the prosecution and that while, in the absence of any other evidence, medical evidence was paramount in determining the age of the victim, where there was credible evidence other than medical evidence, the conviction would not be overturned simply because of lack of medical evidence. Age could well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach had to be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances.
4. What the court frowned upon was mere averments of age without any documents in support thereof. In that, the evidence of age was clearly proved by way of birth certificate which clearly placed the complainant's age at 8 years at the time of the commission of the offence.
5. With respect to the evidence of penetration, the general rule was that even without considering the presence or otherwise of medical evidence, an offence of that nature could be proved by oral evidence of a victim of rape or circumstantial evidence.
6. The complainant had soreness inflammation of the vaginal orifice (canal) and her hymen was absent. She also had a bruised wound just before the anal region in the canal. It was therefore clear that there was evidence of penetration and for purposes of the offence of defilement it mattered not whether the penetration was partial or complete.
7. Both the appellant and the complainant knew each other very well. According to the complainant, the appellant was their neighbour. That was confirmed by DW2. In those circumstances there could not be any mistake as to the identity of the appellant. As to whether it was the appellant who penetrated the complainant, the only evidence is that of the complainant. That brings forward the issue whether that evidence alone could be the basis of conviction.

BOO v Republic

8. The evidence of the complainant, if a minor, required corroboration, save that in sexual offences where the minor was the victim of the offence, the evidence of that minor, if believed by the trial court, could, without corroboration, found a conviction. The courts should no longer be hamstrung by requirements of corroboration where the victim of a sexual offence was a child of tender years if it was satisfied that the child was truthful.
9. Not only did the court find that the complainant was truthful but also recorded the reasons for said belief. The complainant's evidence was never shaken in cross-examination hence the court's finding that her evidence was truthful was based on firm grounds and could not be unsettled. The conviction of the appellant was grounded on sound evidence and should not be disturbed.
10. Sentence was essentially an exercise of discretion of the trial court and for the court to interfere, it had to be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle had to be inferred.
11. The court could impose the sentence of a fine, compensation or costs directly on the child offender in which event the said fine, compensation or costs was payable by the child offender. The second scenario was where the court directed that the said fine, compensation or costs imposed upon the child offender be paid by the child's parent or guardian instead of by the offender. The court seemed to have opted for the sentence under section 191(1)(f) of the Children Act. A fine should only be directly imposed on a child offender where there was evidence that the child had means of income in some form. Imposing a sentence of a fine on a child without any means of income amounted to failure to take into account a relevant factor which could justify interference by the appellate court.
12. That sentence was to be distinguished from the sentence provided for under section 193 of the Act where the fine, compensation or costs was to be paid by the parent or guardian of the child. It was clear however that the court could not impose the fine on the parent or guardian where it was satisfied that the parent or guardian could not be found or that he or she had not induced the commission of the offence, by neglecting to exercise due care of the offender.
13. The sentence was passed against the appellant. Thereafter, the court called upon the guardian to be heard on whether he would be willing to pay the said fine and compensation on behalf of the minor. The court imposed a fine, compensation or costs where the offender was a child it had first to investigate whether the child had a source of income from which the same could be paid. Where the court intended that the same be paid by the parent or the guardian, it had to similarly, before imposing such a sentence investigate whether the conditions precedent to the imposition of the fine, compensation or costs did exist. To impose the same against the child and/or the parent or guardian prior to the conduct of such investigation amounted to placing the cart before the horse.
14. A finding for example that a parent or guardian had induced the commission of the offence by neglecting to exercise due care of the offender denoted some level of criminal culpability on the parent or guardian. The burden of proving that the commission of the offence by the child offender was induced by the neglect of the parent or guardian to exercise due care of the offender had to fall on the prosecution and not on the defence.
15. Once the accused was convicted and sentenced, the surety was thereby released. The committing the offender to the care of a fit person, whether a relative or not, pursuant to section 191(1)(d) of the Children Act was one of the sentences under the Act and therefore could not be construed as a continuation of the criminal trial so as to extend the surety or the surety's liability past the conviction and sentence. It was therefore clear that the detention of the cash bail had no basis in law.

Petition partly allowed sentence quashed, appellant to report to the nearest chief's office once a week for community service for three months. Judgement to be served on the probation officer to liaise with the relevant

officer for implementation.

Cases

East Africa

1. *Alfayo Gombe Okello v Republic* [2010] eKLR – (Explained)
2. *Arthur Muya Muruiki v Republic* [2015] eKLR – (Mentioned)
3. *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 – (Explained)
4. *Dominic Kibet v Republic* Criminal Appeal No 155 of 2011 – (Explained)
5. *Francis Omuroni v Uganda* Criminal Appeal No 2 of 2000 – (Explained)
6. *John Mutua Munyoki v Republic* [2017] eKLR, – (Explained)
7. *Kaingu Elias Kasomo v Republic* Criminal Appeal No 504 of 2010 – (Explained)
8. *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 – (Explained)
9. *Kevin Kiprotich Amos alias Rotich v Republic* Criminal Appeal No 89 of 2016 – (Explained)
10. *Kiilu & another v Republic* [2005]1 KLR 174 – (Explained)
11. *Martin Nyongesa Wanyonyi v Republic* Criminal Appeal No 661 of 2010,
12. *Mohamed v Republic*, (2008) 1 KLR G&F 1175 – (Explained)
13. *Okeno v Republic* [1972] EA 32 – (Mentioned)
14. *Republic v Winfred Muthikwa Nzioka* Criminal Appeal No 91 of 2016
15. *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No 253 of 2003 – (Explained)

United Kingdom

Woolmington v DPP [1935] A C 462 pp 481 – (Explained)

Statutes

East Africa

1. Penal Code (cap 63) section 35(1) – (Interpreted)
2. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(3)(7); 11(1); 193 – (Interpreted)
3. Evidence Act (cap 80) section 124 – (Interpreted)
4. Children Act, 2001 (Act No 24 of 2001) section 191(1)(f) – (Interpreted)
5. Probation of Offenders Act (cap 64) In general – (Cited)

Texts and Journals

Halsbury's Laws of England, 4th Edn, Vol 17, paras 13 & 14

Advocates

None mentioned

Wambui v Republic

8. Constituting elements of the defence of deception in section 8(5) of the Sexual Offences Act ought to be read disjunctively not conjunctively

Significance: The case clarified the issue whether the constituting elements of the defence of deception in section 8(5) of the Sexual Offences Act, in a charge of defilement, ought to be read disjunctively as opposed to conjunctively.

Wambui v Republic KECA 906 (KLR)

Criminal Appeal No 102 of 2016

Court of Appeal at Nairobi

RN Nambuye, DK Musinga & P O Kiage, JJA

March 22, 2019

Jurisdiction – jurisdiction of the Court of Appeal-matters of law – where an accused stated that the first appellate court did not subject evidence on record to fresh scrutiny, analysis and re-evaluation – whether a second appellate court could refer to facts tendered in evidence before a trial court in its determination – Criminal Procedure Code, cap 75, section 361(a).

Criminal Law – sexual offences – defilement – ingredients of the offence of defilement – age of the complainant – standard of proof – whether a complainant’s age in a charge of defilement in section 8(1)(4) of the Sexual Offences Act was an essential ingredient that needed to be proved beyond reasonable doubt – Sexual Offences Act, No 3 of 2006, section 8(1)(4).

Evidence Law – documentary evidence-secondary evidence – Photostat copy of an alleged birth certificate-where secondary evidence sought to prove the contents of primary evidence-where the Photostat copy was not certified – whether a Photostat copy of an alleged birth certificate that had not been certified was conclusive proof of the age of a complainant in a charge of defilement – Evidence Act, cap 80, sections 64 and 66.

Statutes – interpretation of statutory provisions – interpretation of section 8(5) of the Sexual Offences Act – elements to the defence of deception – deception and reasonable belief that a complainant was over the age of 18 years – where conjunctive terms were used-whether the constituting elements of the defence of deception in section 8(5) of the Sexual Offences Act, in a charge of defilement, ought to be read disjunctively as opposed to conjunctively – whether the age of sexual consent ought to be reviewed from 18 years to 16 years in light of human development and social change – section 8(5) of the Sexual Offences Act, No 3 of 2006

Words and Phrases – deceive – definition of – deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to – Concise Oxford English Dictionary, 12th Edition, 2011.

Brief facts

The appellant was arrested and arraigned before the Chief Magistrate’s Court at Thika on a charge of defilement contrary to section 8(1)(4), and an alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act, No 3 of 2006 (the Act). He was found guilty and sentenced to 15 years’ imprisonment and thus brought the appeal.

Issues

- i. Whether a second appellate court could refer to facts tendered in evidence before a trial court in its determination.
- ii. Whether a complainant’s age in a charge of defilement in section 8(1)(4) of the Act was an essential ingredient that needed to be proved beyond reasonable doubt.
- iii. Whether a Photostat copy of an alleged birth certificate that had not been certified was conclusive proof of the age of a complainant in a charge of defilement.

- iv. Whether the constituting elements of the defence of deception in section 8(5) of the Act, in a charge of defilement, ought to be read disjunctively as opposed to conjunctively.
- v. Whether the age of sexual consent ought to be reviewed from 18 years to 16 years in light of human development and social change.

Held

1. As the appeal was a second appeal, the court's jurisdiction was confined to a consideration of questions of law only by dint of section 361(a) of the Criminal Procedure Code. The memorandum of appeal framed raised questions of law. The court's interaction with those grounds could of course involve, as in the complaint that the trial court did not re-evaluate the evidence, a reference to the facts as they emerged from the evidence that was tendered before the trial court. Such reference was not the same as hearing an appeal on a matter of fact which the court was statutorily debarred to do.
2. The appellant's complaint that the first appellate court did not subject the evidence to fresh scrutiny, analysis and re-evaluation was not an idle one. A first appeal always proceeded by way of re-hearing based on the evidence on record and an appellant was therefore entitled to expect that the first appellate court would go beyond a mere rehashing of what was on record or a repetition of the findings of the trial court.
3. The High Court was required to, and had to be seen to have consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant. The only limitation to its task being a remembrance that it was without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it had to make due allowance.
4. The importance of proving the age of a victim of defilement under the Act by cogent evidence could not be gainsaid. It was not in doubt that the age of the victim was an essential ingredient of the offence of defilement and formed an important part of the charge because the prescribed sentence was dependent on the age of the victim.
5. A Photostat copy of the alleged birth certificate was produced, which copy was not certified as required by section 66 of the Evidence Act when permitting the production of secondary evidence if primary evidence, which was the document itself, was not produced for the inspection of the court. The contents of the document were sought to be proved by secondary evidence, which was not a document that could be relied on in proof of the complainant's age. Further, the document itself purported to have been issued before the birth of the complainant, evidence of which it purported to be, was a logical impossibility. Therefore, the document as was, was of no probative value.
6. There was no age assessment as such that was done on the complainant whereas the P3 Form that was produced indicated 17 years as the approximate age of the person examined, namely the complainant. The other evidence of age was that of the complainant herself which, other than being hearsay in character, was no more illuminating. The complainant stated that on November 14, 2009, she got married to the appellant and she was about 17 years having been born on October 3, 1991. Simple arithmetic showed that as at that date she would have been 18 years and one month old. She further stated that she conceived in May 2009 which would place her age at 17 years and 6 months at the time but, one could not speak competently on her date of birth as she could not have witnessed it and the only document that was produced of the same was of no probative value.
7. The totality of the evidence on age was that it did not possess the consistency and certainty that would have proved the exact date of the complainant's birth beyond reasonable doubt. Therefore, had the trial court gone into an analysis of the evidence with the thoroughness that was required of it, it would probably have arrived at a different conclusion. In failing to engage in that exhaustive re-evaluation, it fell into error and the lingering doubts had to be resolved in favour of the complainant.

Wambui v Republic

8. The picture that emerged was of a father righteously indignant that his daughter had been seduced and put in the family way, and who would have the culprit prosecuted unless he would pay some kind of compensation. That too, raised questions as to whether the prosecution was for the proper purpose of enforcing the law or settling a score. At any rate, the effect was to whittle the reprobate value of the father's evidence and to lend credence to the appellant's contention that both the father and chief did know that the girl was of age.
10. A witness in a criminal case upon whose evidence it was proposed to rely should not create an impression in the mind of the court that he was not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicated that he was a person of doubtful integrity, and therefore an unreliable witness which made it unsafe to accept his evidence. The evidence of PW2, properly evaluated, would have been in the category of an unreliable witness.
11. Section 8(5) of the Act stated that it was a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. Subsection (5) was a curious provision in so far as it was set in conjunctive as opposed to disjunctive terms which would seem to be more logical. Once a person had actually been deceived into believing a certain state of things, it added little to require that his belief be reasonably held.
12. A reading of section 8(6) of the Act seemed to add a qualification to subsection (5)(b) that separated it from the belief proceeding from deception in subsection (5)(a). Therefore, the elements constituting the defence should be read disjunctively if the two sub-sections were to make sense. Further, it stood to reason that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.
13. The burden of proving that deception or belief fell upon the appellant, but the burden was on a balance of probabilities to be assessed on the basis of the appellant's subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Had the two lower courts properly directed their minds to the appellant's defence and the totality of the circumstances of the case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.
14. **[Obiter]** "We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps."
15. **[Obiter]** "Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the

challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.”

Appeal allowed, conviction quashed and sentence set aside. The appellant would be set at liberty unless otherwise lawfully held.

Cases

East Africa

1. *Okeno v Republic* [1973] EA 32 – (Applied)
2. *Pandya v Republic* [1957] EA 336 – (Applied)
3. *Hadson Ali Mwachongo v Republic* [2016] eKLR – (Explained)
4. *Ndungu Kimanyi v Republic* [1979] KLR 282 – (Explained)

United Kingdom

1. *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 – (Explained)
2. *R v Howard* [1965] 3 All ER 684 at 685 – (Explained)

Statutes

East Africa

1. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(4)(5)(6); 11(1); 43(4)(7) – (Interpreted)
2. Evidence Act (cap 80) sections 64, 66, 111 – (Interpreted)
3. Criminal Procedure Code (cap 75) sections 361(a) – (Interpreted)

Texts and Journals

Richardson, P.J., Et al (Eds) (2002) Criminal Pleading, Evidence and Practice, London: Sweet & Maxwell, p 1720

Advocates

None mentioned

KA v Republic**9. Conclusive proof of age in cases under the Sexual Offences Act did not necessarily mean birth certificate**

Significance: This case discusses the age aspect of defilement, mostly the issue whether conclusive proof of age in cases under Sexual Offences Act necessarily meant the birth certificate.

KA v Republic [2023] eKLR

Criminal Appeal No E064 of 2021

High Court at Mombasa

FG Mugambi, J

February 14, 2023

Criminal Law – sexual offences – defilement – where the appellant was charged with the offence of defilement – where the age of the victim was proved – where the age of the victim was proved using her health card – whether conclusive proof of age in cases under Sexual Offences Act necessarily meant the birth certificate – Sexual Offences Act, No 3 of 2006, section 8.

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) and 8(4) of the Sexual Offences Act No 3 of 2006 (the Act). The particulars of the offence were that on diverse dates between the year 2017 and December 1, 2019 at an area in Changamwe Sub County within Mombasa county, he intentionally and unlawfully caused his penis to penetrate the vagina of AK, a girl aged 17 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Act on which the charge sheet alleged that on the same dates and place, he intentionally and unlawfully caused his penis to rub the vagina of AK a child aged 17 years old.

The trial court found that the appellant had a case to answer and put him on his defence. The appellant gave unsworn evidence and did not call any witnesses. He denied having committed the offence terming it as fabricated.

Issue

Whether conclusive proof of age in cases under the Sexual Offences Act necessarily meant the production of a birth certificate.

Held

1. As the 1st appellate court, it was the duty of the court to analyse and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. The court was cautious and gave due regard to the fact that it neither saw nor heard the witnesses. Depending on the facts and circumstances of the case, the court was at liberty and could come to the same conclusions as those of the lower court or it could rehash those conclusions. There was nothing objectionable in doing so, provided it was clear that the court had considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.
2. AK testified that she was 18 years of age. The evidence of age from PW3, the complainant's mother, was that her daughter was 19 years. The medical examination report read 17 and 19 years in different sections and then there was the charge sheet which read 17 years.
3. The lower court record showed that a Health Clinic Card was produced by the prosecution and

marked as PMF1 3 and that the card indicated the date of birth of the appellant to be December 28, 2001. The same was missing from the original court records and the record of appeal. No birth certificate was produced.

4. From the trial court records it was also clear that the trial court based his finding on the health card which would corroborate the appellant's testimony that she was 18 at the date of testifying and also place her age at approximately 16 to 17 years of age between 2017 and December 1, 2019, when the offence was alleged to have been committed.
5. Conclusive proof of age in cases under the Sexual Offences Act did not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age were available and could be used in other cases. The appellate court was in agreement with the trial court that all the ingredients necessary to satisfy a charge of defilement were proved by the prosecution against the appellant.

Appeal dismissed; trial court conviction and sentence affirmed.

Cases

East Africa

1. *David Njuguna Wairimu v Republic* [2010] eKLR – (Explained)
2. *Francis Omuroni vs Uganda* CC No 2 of 2000 – (Explained)
3. *Njoroge v Republic* [1987] KLR 19 – (Applied)
4. *Okeno v Republic* [1972] EA 32 – (Applied)

Statutes

East Africa

Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(4); 11(1) – (Interpreted)

Advocates

None mentioned

Muriungi v Republic

10. Ambiguity in phrasing a sentencing provision entitles an accused to the benefit of the least severe punishment for an offence

Significance: The case provides a statutory interpretation of section 5(2) of the Sexual Offences Act where use of two phrases in the section, that are completely different to each other, creates an ambiguity in sentencing. Furthermore, the case reiterates how prescribed minimum mandatory sentences violate an accused person's right to dignity.

Muriungi v Republic [2023] eKLR

Criminal Appeal No E091 of 2022

High Court at Meru

WTW Cherere, J

February 2, 2023

Statutes – statutory interpretation – sections 5(2) and 20(1) of the Sexual Offences Act, 2006 – shall be liable to and not less than – ambiguity – where the appellant was charged with defilement – where the appellant was convicted and sentenced the appellant to serve 10 years' imprisonment – where the relevant provisions used the phrases shall be liable and not less than in the same breath – where the two provisions, suffered from the malady of poor legal drafts-manship since the two phrases implied, in legal terms, diametrically opposed positions – whether the use of the words 'shall be liable' and 'not less than' in section 5(2) of the Sexual Offences Act created an ambiguous situation when it came to sentencing for the offence of defilement – Sexual Offences Act, No 3 of 2006, sections 5(2) and 20(1).

Constitutional Law – rights and fundamental freedoms – right to dignity – where the Sexual Offences Act prescribed minimum mandatory sentences – where a trial court had no discretion to impose appropriate sentence – whether the provisions of the Sexual offences Act that prescribed minimum mandatory sentences violated an accused/convicted person's right to dignity as it did not provide discretion to a trial court to determine appropriate sentence to impose - Constitutional of Kenya, 2010, article 28.

Brief facts

The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No 3 of 2006 (the Act). The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. The offences were allegedly committed March 16, 2019 against PK a child aged 7 years. The complainant stated that she was 9 years when he testified in 2022. She stated that the appellant whom she referred to as Chris touched her vaginal area with his fingers causing her to bleed. The complainant's mother upon receiving the complainant's report immediately escorted her to the police station where the complaint was booked and then to the hospital where the complainant was examined.

A clinical officer examined the complainant on March 22, 2019 and filed a P3 form with remarks that complainant had bruises on her vaginal wall and freshly broken hymen. Subsequently, the appellant was arrested and charged. The appellant in his sworn defence denied the offence and stated that he was arrested after illicit brew was recovered from his house. After considering both the prosecution and defence cases, the trial court found the prosecution had proved a case of sexual assault contrary to section 5(1) of the Act and on June 29, 2022 convicted and sentenced appellant to serve 10 years' imprisonment. Dissatisfied with both the conviction and sentence, the appellant lodged the instant appeal.

Issue

- i. Whether the use of the words 'shall be liable' and not less than' in section 5(2) of the Sexual Offences Act created an ambiguous situation when it came to sentencing for the offence of defilement.
- ii. Whether the provisions of the Sexual Offences Act that prescribed minimum mandatory sentences violated an accused/convicted person's right to dignity as it did not provide discretion to a trial court to determine appropriate sentence to impose.

Held

1. The court was expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.
2. An accused was innocent until the prosecution proved its case beyond any reasonable doubt. Proof beyond reasonable doubt stemmed out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution had to be prove beyond reasonable doubt that the person accused was guilty of the offence charged. Absolute certainty was impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt meant just what it stated, did not admit of plausible possibilities but did admit of a high degree of cogency consistent with an equally high degree of probability.
3. The evidence on record revealed that the appellant was not a stranger to the complainant. The offence was allegedly committed in broad day light and there was therefore no possibility that the appellant was confused for someone else. The minor's evidence that the appellant inserted his fingers in her vagina was confirmed by the clinical officer who found her with bruises and a freshly broken hymen. The trial court's finding that the prosecution had proved a case of sexual assault contrary to section 5(1) of the Act was well founded.
4. The appellant was treated as a first offender. However, the court in sentencing the appellant was of the view that the offence carried a minimum prescribed sentence. The appellant was charged and convicted under section 5(2) of the Act which stated that a person guilty of an offence under the section was liable upon conviction to imprisonment for a term of not less than ten years but which could be enhanced to imprisonment for life.
5. Section 5(2) of the Act applied the phrase was liable. The words shall be liable to did not import that the sentence mentioned in any particular section in which those words occurred was merely a maximum and that the court could impose any lesser sentence below the limit indicated.
6. The words shall be liable to did not in the ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court. In other words, they were not mandatory but provided a maximum sentence only and while the liability existed, the court might not see fit to impose it.
7. The operative words should be liable to imprisonment for life meant that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The court however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within its powers to do so. The resulting sentence was within the limits permitted by law and the instant court found no reason to interfere with the exercise of that discretion.
8. The relevant provisions used the phrases shall be liable and not less than in the same breath. As a result, the two provisions suffered from the malady of poor legal draftsmanship since the two phrases implied, in legal terms, diametrically opposed positions. In criminal law, where there was an ambiguity in phraseology of sentencing the accused was entitled to the benefit of the least severe of

Muriungi v Republic

the prescribed punishments for an offence.

9. The accused was entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person was the most favourite child of the law and every benefit of doubt went to him regardless of the fact whether he had taken such a plea.
10. To the extent that the Act prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, it fell afoul of article 28 of the Constitution which provided that every person had the inherent dignity and the right to have that dignity respected and protected.

Appeal partly allowed; conviction of the trial court upheld. The 10 years' sentence set aside and substituted with an imprisonment term of five (5) years which ought to commence from March 16, 2019 when the appellant was arrested.

Cases**East Africa**

1. *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR – (Explained)
2. *Kichanjele slo Ndamungu v Republic* (1941) 8 EACA 64 – (Explained)
3. *Kiilu & another v Republic* [2005] 1 KLR 174 – (Explained)
4. *Okenov Republic* [1972] EA 32 – (Applied)
5. *Opoya v Uganda* [1967] EA 752 – (Explained)
6. *Pandyav Republic* [1957] EA 336 – (Applied)
7. *Patrick Malombe Masaku v Republic* [2019] eKLR – (Explained)

United Kingdom

1. *Miller v Minister of Pensions* 2 All ER 372-373 – (Explained)
2. *Woolmington v DPP* [1935] AC 462 – (Explained)

Statutes**East Africa**

Sexual Offences Act, 2006 (Act No 3 of 2006) sections 5(1); 8(1)(2); 11(1); 20(1) – (Interpreted)

Advocates

None mentioned

11. Exclusion of the words ‘unlawfully and intentionally’ in a charge sheet in an offence of defilement did not render a charge sheet incurably defective

Significance: The exclusion of the words ‘unlawfully and intentionally’ in a charge sheet in an offence of defilement did not render a charge sheet incurably defective. Furthermore, the court reiterated that the intact nature a complainant’s hymen was not a fact that needed to be proved in an offence of defilement.

IAE v Republic [2023] KECA 127 (KLR)

Criminal Appeal No 159 of 2018

Court of Appeal at Eldoret

F Sichale, FA Ochieng & WK Korir, JJA

February 10, 2023

Criminal Law – sexual offences – defilement – ingredients of defilement – age as an ingredient of defilement – where the appellant had been charged and convicted of defilement – where the age of the victim had been captured as 11 on the charge sheet – where the doctor later determined victim to be 15 years – whether an error on the charge sheet on age discrepancy of the victim could affect the charge of defilement, conviction and sentencing – Sexual Offences Act No 3 of 2006, section 8(1)(2).

Criminal Procedure – charge sheet – contents of – where the appellant was charged with the offence of defilement - claim that the charge sheet did not include the words “unlawfully and intentionally” – claim that chargesheet was defective - whether failure to include the words ‘unlawfully and intentionally’ in a charge sheet for the offence of defilement rendered the charge sheet defective - Criminal Procedure Code, section 382; Sexual Offences Act No of 2006, section 8.

Criminal Law – sexual offences – defilement – claim by appellant that hymen was not broken – penetration without going past hymen - whether or not a complainant’s hymen was broken was a fact that needed to be proved by the prosecution in an offence of defilement - Sexual Offences Act No. of 2006, section 8.

Brief facts

The appellant had preferred the second appeal against the judgment of dated April 12, 2018, in which he had initially been charged at the Chief Magistrate’s Court in Kitale with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act No 3 of 2006 (the Act). The particulars of the offence were that on March 23, 2015 he intentionally caused his penis to penetrate the vagina of CN a child aged 11 years. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of section 11(1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally touched the vagina of CN a child aged 11 years. The appellant denied the charge after which a trial ensued. In a judgment delivered on December 1, 2016, the trial court convicted him of the main charge and sentenced him to 20 years’ imprisonment.

Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and *vide* a judgment delivered on April 12, 2018, the court, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence. Unrelenting, the appellant filed the instant appeal.

Issues

- i. Whether an error on the charge sheet on age discrepancy of the victim could affect the charge of defilement’s conviction and sentencing.

IAE v Republic

- ii. Whether failure to include the words ‘unlawfully and intentionally’ in a charge sheet for the offence of defilement rendered the charge sheet defective.
- iii. Whether or not a complainant’s hymen was broken was a fact that needed to be proved by the prosecution in an offence of defilement.

Held

1. The appeal before the court was a second appeal. By dint of section 361(1)(a) of the Criminal Procedure Code (CPC), the court was mandated to consider only matters of law. Only matters of law fell for consideration and the court would not normally interfere with concurrent findings of fact by the two courts below unless such findings were based on no evidence, or were based on a misapprehension of the evidence, or the courts below were shown demonstrably to have acted on wrong principles in making the findings.
2. From section 8 (1) and (2) of the Sexual Offences Act, it was evident that there was no requirement in law for the words unlawfully and intentionally to be used in a charge sheet for the offence of defilement. That notwithstanding, looking at the evidence holistically, it was apparent that the appellant clearly understood the charges he was facing and he even ably cross examined the prosecution witnesses and had not demonstrated any prejudice he would have suffered by the omission of these two words.
3. PW1 stated in her evidence in chief that she was 11 years old, an orphan and that she used to stay with her grandparents. The trial court took PW1’s word that she was 11 years old since PW1’s grandparents did not testify until later, when PW6 Dr Mercy Oyieke produced an age assessment report which showed that PW1 was 15 years old. The doctor’s evidence remained firm and unconverted since the appellant did not even cross-examine PW6 on the same. The trial court found the appellant guilty of the offence of defilement (pursuant to section 179 of the CPC) contrary to section 8(1) as read with section 8(3) and not 8(2) of the Act as stated in the charge sheet and subsequently sentenced him to 20 years’ imprisonment.
4. There was no reason whatsoever to fault the trial court for invoking the provisions of section 179 of the CPC and convicting the appellant with the offence of defilement contrary to section 8(1) as read with section 8(3) and not section 8(2) of the Act that the appellant had been initially charged with when it subsequently became apparent that PW1 was 15 years old. The fact that that the appellant had been initially charged under section 8(1)(2) of the Act did not change the fact that the appellant was facing a charge of defilement. The offence still remained defilement and the appellant was properly convicted and sentenced to 20 years’ imprisonment under section 8(3) of the Act. Had the appellant been convicted under section 8(1)(2), he would have been liable to a sentence of life imprisonment.
5. The error in the charge sheet was not material as the appellant was not prejudiced in any way by the said error and the same was not fatal to the prosecution’s case. Further, the error was curable pursuant to the provisions of section 382 of the CPC.
6. The appellant first alleged that his constitutional rights had been infringed, when he, in his defence stated that he was detained beyond the 24 hours’ period. There was however no evidence on record to support that allegation.
7. The appellant seemed to be taking issue with the fact that PW1’s hymen was intact. The court had on several occasions pronounced itself with regard to penetration and medical evidence and more so the fact that that hymen need not be broken for the offence of defilement to be proved.
8. For the offence of defilement to be proved, the prosecution evidence had to show that the appellant inserted his penis into the vagina of the child. It was not sufficient that the said organs came into contact. However, partial insertion succeeded for the purposes of penetration as the said insertion needed not be complete.
9. Taking into account PW1’s evidence which remained uncontroverted and which evidence was

corroborated by the evidence of PW3 and PW4 who produced the P3 Form that showed inter alia that PW1's genitals were swollen and painful, the court could not agree with the contention by the appellant that the medical evidence on record did not prove the offence of defilement and that the prosecution's case was not proved beyond reasonable doubt notwithstanding the fact that hymen was not broken.

10. The instant court was in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

Appeal dismissed; conviction and sentence upheld.

Cases

East Africa

1. *Kados v Republic* Nyeri Criminal Appeal No 149 of 2006 – (Explained)
2. *David Njoroge Macharia v Republic* [2011] eKLR – (Explained)
3. *Mutali Nyamwea v Republic* [2019] eKLR – (Explained)

Statutes

East Africa

1. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2)(3); 11(1) – (Interpreted)
2. Penal Code (cap 63) sections 11 – (Interpreted)

Advocates

None mentioned

Mwendwa v Republic

12. Prescribed mandatory sentences in the Sexual Offences Act were unconstitutional as it limited the discretion of trial courts to impose appropriate sentences

Significance: The instant case reiterates the effect of prescribed minimum sentences in the Sexual Offences Act on the discretion of trial courts to impose sentences and also the constitutionality of said provisions.

Mwendwa v Republic [2023] eKLR

Criminal Appeal No 027 of 2022

High Court at Kitui

F Wangari, J

February 6, 2023

Criminal Procedure – charge sheet – contents of – claim that dates of commission of alleged offence and witness statements were contradictory – where charge sheet gave reasonable information as to nature of offence accused had committed – whether charge sheet was defective – whether discrepancy in the dates of the commission of an alleged offence in a charge sheet prejudiced an appellant/accused to a point of accessioning miscarriage of justice – Criminal Procedure Code, section 134; Sexual Offences Act No of 2006, section 8.

Criminal Law – sexual offences – defilement – elements needed to be proved – what were the elements that a prosecution needed to prove in an offence of defilement- Sexual Offences Act No 3 of 2006, sections 2(1) and 8.

Criminal Law – offences – defilement – sentencing in defilement cases – provisions for sentencing in defilement cases – where the appellant was charged with defilement – where the appellant who was aged 19 had been convicted and sentenced to 20 years in prison pursuant to section 8 of the Sexual Offences Act – the appeal of the conviction and sentencing – Whether mandatory minimum sentences in the Sexual Offences Act were unconstitutional to the extent of prescribing minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence – Sexual Offences Act, No 3 of 2006, section 8; Constitution of Kenya, 2010, article 28.

Brief facts

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 (the Act). Particulars of offence that on diverse dates between May 25, 2016 and June 30, 2016 at a sub-county within Kitui County, intentionally caused his penis to penetrate the vagina of SM a child aged 14 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the offence were that on diverse dates between May 25, 2016 and June 30, 2016 at a sub-county within Kitui County, intentionally touched the vagina of SM a child aged 14 years with his penis. The appellant was convicted in the main charge and was sentenced to serve imprisonment for a period of 20 years. Having been dissatisfied with the judgment, conviction and the sentence imposed, the appellant lodged the instant appeal. In the alternative, he sought for a revision of the sentence.

Issues

- i. whether discrepancy in the dates of the commission of an alleged offence in a charge sheet prejudiced an appellant/accused to a point of accessioning miscarriage of justice.
- ii. What were the elements that a prosecution needed to prove in an offence of defilement.
- iii. Whether mandatory minimum sentences in the Sexual Offences Act were unconstitutional to the extent of prescribing minimum mandatory sentences, with no discretion to the trial court to determine

the appropriate sentence to impose.

Held

1. There was no limitation on the part of the appellate court to review the evidence upon which the order appealed against was founded and to come to its own conclusion. The first appellate court could also review the trial court's conclusion with respect to both facts and law. It was the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons could set aside the decision appealed against or the entire proceedings if they were flawed. That included when the trial court had breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached the rules of procedure, or ignored crucial evidence or misread the material evidence or had ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused. The appellate court was competent to reverse the decision of the trial court depending on the materials in question.
2. The principle of the law governing the charge sheet was that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused could be able to plead to a specific charge that he could understand. It would also enable the accused to prepare his defence.
3. The main defect as alleged by the appellant was that the dates of the commission of the alleged offence as per the charge sheet contradicted the dates given by the witnesses. From the above, the question was whether the defence did prejudice the appellant's case to a point of occasioning a miscarriage of justice. The offence charged was that of defilement and the sections of the law disclosing the offence were stated in the charge sheet. The particulars of offence stated to whom the offence was committed against. Despite there being a discrepancy on the dates of the commission of the offence, the court found that the charge sheet gave reasonable information as to the nature of the offence that the accused was charged with. The difference in the dates as per the charge sheet and the evidence adduced did not amount to having the charge sheet being defective.
4. The essence of proof of age in defilement matters was in determination of the sentence to be given upon conviction, as the Act had different sentences based on the age of the victim. The appellant submitted that there was no proof of complainant's age. The complainant stated during the *voir dire* examination that she was born on March 10, 2020. The mother to the complainant availed the birth certificate which was produced as an exhibit.
5. The medical evidence through a doctor, birth certificate, victim's parents or guardians' evidence could be used to determine the age of the victim. A birth certificate was produced and indicated that the complainant was born on February 3, 2002. At the time of the alleged offence, the complainant was 14 years old. The prosecution did prove the age element.
6. Section 2(1) of the Act defined penetration as the partial or complete insertion of the genital organs of a person into the genital organ of another person. The clinical officer who treated the complainant produced the treatment notes and the P3 form. From the treatment notes dated June 5, 2016, it was noted that the hymen was broken but 'not recently'. There were no injuries noted in the genitalia. From the P3 form, it was indicated that there was a whitish discharge which was 'more of semen'. Though the trial court did not dwell on that, it was an indication that there was penetration. The presence of epithelial cells which was a suggestion of friction on vaginal canal was also another indicator of penetration. The element of penetration was proved.
7. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The complainant's evidence that it was the appellant who forced her to his home and defiled her for 2 days corroborated the identity of the perpetrator being known. There was no proof that there was an error in identification of the appellant. The element of identification was thus proved.

Mwendwa v Republic

8. The appellant first raised the defence of *alibi* during the defence hearing. The burden of proof did not shift to the appellant to prove his *alibi* defence. The prosecution had the burden of disproving the *alibi* and proving its case against the accused person. Even though the defence of *alibi* was not challenged on cross examination or otherwise, the evidence adduced against the appellant on the offence of defilement was proved beyond reasonable doubt, and it put the accused at the scene of crime.
9. Section 8(3) of the Act provided that a person who committed an offence of defilement with a child between the age of twelve and fifteen years was liable upon conviction to imprisonment for a term of not less than twenty years. The above provision prescribed a mandatory minimum sentence of 20 years' imprisonment.
10. Mandatory minimum sentences in the Act were unconstitutional to the extent that the Act prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell foul of article 28 of the Constitution of Kenya, 2010. The court was therefore bound to re-examine the sentence in the light of the above.
11. The prosecution proved the elements of the offence of defilement and the appellant was therefore properly convicted and sentenced. The appeal on conviction thus failed.

Appeal partly allowed.

Orders

- i. *In respect to the sentence imposed, the trial magistrate was tied by the minimum sentence imposed in the Act. The same having been held to be unconstitutional, the application for revision of the sentence had to succeed.*
- ii. *The court was guided by the Sentencing Guidelines. At the time of commission of the offence, the appellant was 19 years old. Since he was arraigned in court on July 11, 2016, the appellant had been in custody ever since. The accused was still a youth. The time spent in custody had to have been a lesson learnt. He deserved a second chance to make good use of his life. Though it had not been disclosed the skills he had learnt while in prison, going by the various rehabilitation programs in the penal institutions, the appellant had to have been a beneficiary of the same.*
- iii. *The sentence of 20 years' imprisonment was therefore substituted with an imprisonment term of 10 years.*
- iv. *The time spent in custody should be deemed to form part of the sentence that was with effect from July 11, 2016.*

Cases**East Africa**

1. *Kiilu & another v Republic* [2005] 1 KLR 174 – (Explained)
2. *Maingi & 5 others v Director of Public Prosecutions & another* Petition No E017 of 2021; KEHC 13118 (KLR) – (Explained)
3. *Makau v Republic* Criminal Appeal No E015 of 2021; [2022] KEHC 179 (KLR) – (Explained)
4. *Musyoki Makavi v Republic* [2014] eKLR – (Explained)
5. *Okeno v Republic* [1972] EA 32 – (Applied)
6. *Sigilai v Republic* [2004] 2 KLR 480 – (Explained)

India

- Ganpat v State of Haryana* (2010) 12 SCC 59 – (Explained)

Statutes

East Africa

1. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2(1); 11(1) – (Interpreted)
2. Constitution of Kenya, 2010 In general – (Cited)
3. Criminal Procedure Code (cap 75) section 134 – (Interpreted)

Advocates

None mentioned

Kivunjo v Republic**13. Admissibility of unsworn evidence with respect to children of tender years**

Significance: The case determined the admissibility of unsworn evidence with respect to children of tender years where the court had to undertake a two stage process before doing so and had to appear on the record of the trial court. Additionally, it also reinstated that a conviction could not be sustained in a charge defilement in the absence of proof of penetration.

Kivunjo v Republic [2023] KEHC 1568

Criminal Appeal No 46 of 2018

High Court at Kitui

RK Limo, J

February 15, 2023

***Evidence Law** – medical evidence – admissibility of medical evidence by witnesses – where the appellant was charged with the offence of defilement – where age and identification were proved beyond reasonable doubt – where the penetration was not proved beyond reasonable doubt – whether in the absence of proof of penetration, partial or complete, conviction could be sustained in matters of defilement – Sexual Offences Act, No. 3 of 2006, section 8; Evidence Act, 1963, section 124.*

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) & (4) of Sexual Offence Act No 3 of 2006 (the Act) *vide* Mwingi Principals Magistrate’s Court Sexual Offence Case No 769 of 2014. The particulars of the offence as captured in the charge sheet were that the appellant on December 21, 2014 in Mwingi Central District within Kitui County did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of a girl aged 16 years old. He also faced an alternative count of indecent act with a child but since he was convicted of the main charge, the alternative count was not relevant.

The appellant denied committing the offence and the record of proceedings from the trial court showed that the prosecution called a total of six witnesses. The appellant felt aggrieved against both conviction and sentence and preferred the instant appeal.

Issue

Whether in the absence of proof of penetration, (partial or complete), conviction could be sustained in matters of defilement.

Held

1. There were two stages which had to be followed and had to appear on the record of the trial court. First, the examination had to endeavour to ascertain whether the witness understood the meaning, nature and purpose of the oath. The question or questions by the court had to be directed to that. If the court from the answer it received from the witness was satisfied that the witness understood the meaning, nature and purpose of the oath, the witness had to then be allowed to give sworn evidence.
2. Where the witness did not understand the meaning and the purpose of the oath, stage two of the examination then followed. The witness was examined by the court to ascertain whether the witness was possessed of sufficient intelligence to justify the reception of his or her evidence though not on oath. The examination had to equally appear on record. Simple elementary questions would normally be asked like date, the day, the school the witness was attending and other matters. If the court was

satisfied from the answer to such questions that the witness was possessed of sufficient intelligence, the court would allow the witness to give unsworn evidence. The above observations were in respect to children of tender years (11 years and below).

3. There was nothing to show that the complainant aged 16 years did not understand the meaning of an oath or the importance of giving evidence or oath. A child of tender years required to be interrogated via *voir dire* examination but, children of 12 years and over need not have been subjected to *voir dire* examination before being sworn unless a trial court had reasons to believe that the child did not understand the nature of oath.
4. The trial court fell into error by, admitting inadmissible medical evidence from PW5 and secondly, by relying on evidence that was technically hearsay evidence to render a conviction. In the absence of proof of penetration, whether partial or complete, then conviction could not be sustained in matters of defilement. It was on that ground alone, that the instant court found merit in the appeal. The court could have ordinarily ordered for a retrial but given the fact that the offence took place almost eight years ago, and given the circumstances of the cases, a retrial would not serve the interest of justice.
5. The only just finding was to allow the appeal, set aside conviction and sentence. The appellant having spent 8 years in jail ought to have perhaps learnt useful lessons. He was acquitted and set free forthwith unless lawfully withheld.

Appeal granted.

Cases

East Africa

1. *Gabriel Kamau Njoroge v Republic* [1982-88] KAR – (Mentioned)
2. *Joseph Opando v Republic* Criminal Application No 91 of 1999 – (Explained)
3. *Okeno v Republic* [1972] EA 32 – (Applied)
4. *Omari Ismael Mazzba v Republic* [2017] eKLR – (Explained)
5. *Ouma v Republic*, Criminal Appeal No 91 of 1985 – (Mentioned)
6. *PKW v Republic* [2018] eKLR – (Explained)
7. *Salim Juma Dimiro v Republic* Criminal Appeal No 114 of 2004 – (Mentioned)

Statutes

East Africa

1. Criminal Procedure Code (cap 75) sections 350(2) – (Interpreted)
2. Evidence Act (cap 80) sections 33, 48, 124 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(4) – (Interpreted)

Advocates

None mentioned

Chome v Republic**14. Proof of age where medical evidence is not available**

Significance: Apart from medical evidence, age could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.

Chome v Republic [2023] KECA 69

Criminal Appeal No 92 of 2022

Court of Appeal at Mombasa

P Nyamweya, SG Kairu & JW Lessit, JJA

February 3, 2023

***Evidence Law** – burden of proof – proof for age in defilement – proof of age beyond reasonable doubt – where the appellant had been charged for defilement – where the victim claimed to be aged thirteen but had not produced the birth certificate nor the health card to prove age – where the appellant appealed that failure to produce the birth certificate or the health card translated to failure to prove the ingredient of age beyond reasonable doubt – whether failure by the victim to produce a birth certificate or health card amounted to lack of proof of age beyond reasonable doubt – Sexual Offences Act, No 3 of 2006, section 8.*

Brief facts

The appeal by the appellant was a second one. Following a trial before the resident magistrate's court at Hola, the appellant was convicted for the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act, No 3 of 2006 (the Act). He was sentenced to imprisonment for a term of twenty (20) years. The particulars of the offence were that between the month of September 2010 and January 2011 at Zubaki Location in Tana River District within Tana River County, he intentionally caused his penis to penetrate the vagina of MB, a child aged 13 years. The appellant's first appeal against the conviction and sentence was dismissed by the High Court.

Issue

Whether failure by the victim to produce a birth certificate or health card amounted to lack of proof of age beyond reasonable doubt as required by statute.

Held

1. There was no doubt that in an offence such as faced by the appellant and in most of the offences under the Act where the age of the victim determined the nature of the offence and the consequences that drew from it, it was a matter of great importance that such age be proved to the required standard, which was beyond reasonable doubt.
2. There were concurrent findings by the trial court and the High Court that MB was 13 years when the offence was committed. On its part, the High Court after analysis concluded: that it was satisfied that the complainant was aged 13 years. The instant court had no reason to doubt the father and given the reason in the cited cases it was safe to settle on the age. Apart from the complainant's own testimony that she was 13 years old, her mother (PW2) was stated that MB was 13 years old. PW 2 stated that MB was born during El Nino, and that she was in class five. In cross examination she stated that she gave birth to the complainant at home and that she had lost the clinical card. The complainant's father was categorical that the complainant was 13 years old. She was born on December 1, 1997. She was a pupil in class five.
3. The investigating officer (PW8) stated that the complainant was examined and the P3 Form filled and that age assessment was done, although the report on that assessment was not produced. Based on the foregoing, there was evidence on the basis of which both courts concluded that the age of the

- complainant was established to the required standard. The court had no basis for interfering with the concurrent findings in that regard. Apart from medical evidence, age could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.
4. The court was entirely in agreement with the previous decision of the High Court that the trial court had jurisdiction to try the case. Section 7(1)(b) of the Criminal Procedure Code, cap 75 (CPC) provided that a subordinate court of the first class held by a resident magistrate could pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code, cap 63 or under the Act.
 5. The appellant having been charged with an offence under the Act, the trial court had the requisite jurisdiction to sentence the appellant in accordance therewith. Next was the complaint that section 211 of the CPC was not complied with. The record showed that on June 21, 2011, the trial court delivered its ruling that the prosecution had made a *prima facie* case against the appellant to warrant him to be placed on the defence.
 6. Section 211 of the CPC commanded that if it appeared to the court that a case was made out against the accused person sufficiently to require him to make a defence, the court should again explain the substance of the charge to the accused, and should inform him that he has a right to give evidence on oath from the witness box, and that, if he did, so, he would 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, in the court should then hear the accused, and his witnesses and other evidence (if any).
 7. The record of proceedings did not show that there was compliance with that provision. The appellant's complaint in that regard was not without foundation. It was incumbent upon the trial court to comply with the command of section 211 of the CPC and the omission to do so was irregular. However, the record showed that throughout the trial including when the matter was called out for defence hearing on July 11, 2011, the appellant was represented by an advocate. In effect, the appellant duly and fully exercised his rights notwithstanding the omission by the court to explain as required by section 211. In the circumstances, the court did not think that the omission by the court to comply with section 211 in any way prejudiced the appellant or otherwise occasioned a failure of justice.
 8. In that regard the Supreme Court expressed that *Francis Karioko Muruatetu & another v Republic and Katiba Institute & 5 others (amicus curiae)* [2021] eKLR could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution of Kenya, 2010. It bore restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

Appeal dismissed.

Cases

East Africa

1. *Eliud Waweru Wambui v Republic* [2019] eKLR – (Explained)
2. *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR – (Explained)
3. *Francis Karioko Muruatetu & Another v Republic and Katiba Institute & 5 others (amicus curiae)* [2021] eKLR – (Explained)
4. *Francis Omuroni v Uganda* Criminal Appeal No 2 of 2000 – (Explained)
5. *Karani v R* [2010] 1 KLR 73 – (Explained)
6. *Kossam Okiru v Republic* [2014] eKLR – (Mentioned)
7. *Muiruri Njoroje v Republic* Criminal Appeal No 115 of 1982 – (Explained)
8. *Samuel Kahinga Gathire & anor v Republic* [1997] eKLR – (Mentioned)

Chome v Republic

Statutes***East Africa***

1. Criminal Procedure Code (cap 75) sections 7(1)(b); 211; 216; 329 – (Interpreted)
2. Evidence Act (cap 80) sections 66, 124 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(3) – (Interpreted)

Advocates

None mentioned

15. The ingredients of defilement have to be proved conjunctively and not disjunctively

Significance: This case clarifies that ingredients of defilement have to be proved together and the effect of bringing a defense of *alibi* (evidence of absence in commission of a crime) brought later in a defilement proceeding.

Chepkoech v Republic [2022] eKLR

Criminal Appeal No E0001 of 2021

High Court at Bomet

RL Korir, J

February 28, 2022

Criminal Law – offences – defilement – ingredients for defilement – proving ingredients for defilement – where the appellant was charged and convicted for the offence of defilement – where the appellant was charged with an alternative count of committing an indecent act with a child – where the appellant pleaded not guilty – whether the ingredients of defilement had to be proved conjunctively or disjunctively – Sexual Offences Act, No 3 of 2006, sections 8(1)(3) and 11.

Criminal Law – offences – defilement – ingredients for defilement – proving ingredients for defilement – where the appellant was charged and convicted for the offence of defilement – appeal defences— defence of *alibi* – whether a defense of *alibi* brought later in a defilement proceeding amounted to a fabricated afterthought – Sexual Offences Act, No 3 of 2006, sections 8(1)(3) and 11.

Brief facts

The appellant was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (the Act). The particulars of the offence were that on May 18, 2019 within Bomet County, intentionally and unlawfully caused the penis of EKR, a boy aged 15 years, to penetrate her vagina. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act.

The appellant pleaded not guilty to both the main and the alternative charge. A full hearing was conducted in which the prosecution called six (6) witnesses.

The appellant was convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied with the decision of the trial court, the appellant instituted that appeal against the conviction and sentence.

Issues

- i. Whether the ingredients of defilement had to be proved either conjunctively or disjunctively.
- ii. Whether a defense of *alibi* (evidence of absence in commission of a crime) brought later in a defilement proceeding amounted to a fabricated afterthought.

Held

1. It was the court's duty as the first appellate court to consider the evidence presented in the trial court afresh, bearing in mind that the benefit of receiving the evidence first hand and assessing the demeanor of the witnesses was lacking. The court was duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
2. The court had to consider the testimonies of all the witnesses afresh in order to determine if the

Chepkoech v Republic

offence of defilement was proven to the required standards. In the alternative, consideration had to also be made as to whether the ingredients of the alternative charge could have been proven to the required standard based on the circumstances of the instant case, if the threshold required for the main charge was not met. The appellant had also raised the issue of an *alibi* (*evidence of absence in commission of a crime*).

3. The age of the victim of sexual assault under the Act was a critical component. It formed part of the charge which had to be proved the same way as penetration in the cases of rape and defilement. It was therefore essential that the same be proved by credible evidence for the sentence to be imposed would be dependent on the age of the victim.
4. The trial court conducted a *voir dire* (a mini-hearing within a trial) as indicated in the proceedings to ascertain that the victim who was a minor, understood the importance of the oath and the evidence he adduced before court. However, the court did not record the reasons why it was satisfied that the victim was telling the truth under the circumstances. It merely acknowledged in the judgment that the victim was advanced in his teenage years, was carrying condoms and yielded to the offer for sex by the appellant. No reasons were recorded to demonstrate why the court chose to believe the victim's sole evidence that he and the appellant had sex. The appellant was subsequently convicted on the sole testimony of the victim.
5. The court faulted the trial court for giving the reasons why it chose to believe the sole evidence of the victim in that case. The court was alive to the standard of proof in such a case that it had to be beyond reasonable doubt so as to lead to a conviction. The court's criminal justice system was pegged on article 50(2)(a) of the Constitution of Kenya, 2010 (Constitution) which guaranteed individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It could not be gainsaid that that burden of proof rested on the state and did not shift to the accused.
6. Standard of proof needed not reach certainty but it had to carry a high degree of probability. Proof beyond reasonable doubt did not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence was so forceful against a man to leave only a remote possibility in his favour which could be dismissed with the sentence, of course it was possible but not in the least probable, the case was proven beyond reasonable doubt but nothing short of that would suffice.
7. The ingredients of defilement had to be proved conjunctively and not disjunctively. When one of the elements could not be adequately established based on the absence of some fact or otherwise, thereby creating any form of doubt, however small, that doubt had to go to the benefit of the accused person.
8. The only evidence as to whether penetration occurred was that of the victim when he testified that they had sex. That evidence was not cogent enough to sustain a criminal conviction for defilement. It was evidently clear that there was a strong suspicion that the victim and the appellant were in a relationship, whether intimate or otherwise, and that the said relationship could have materialized into a sexual engagement on the night in question. Suspicion, however strong, could not provide the basis of inferring guilt which had to be proved by evidence beyond reasonable doubt.
9. The court was reluctant to find that the appellant committed the offence of defilement and that the same had been proven beyond reasonable doubt. There was a strong suspicion that the appellant and the minor victim were sexually involved. However, suspicion alone would not be enough especially where the liberty of an accused person was concerned. In considering the alternative charge of committing an indecent act with a child, the offended section of the law was section 11 of the Act. It stated that any person who committed an indecent act with a child was guilty of the offence of committing an indecent act with a child and was liable upon conviction to imprisonment for a term of not less than ten years.

10. The Act also defined what entailed an indecent act. Section 2 provided that indecent act meant an unlawful intentional act which caused any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but did not include an act that caused penetration. It also meant exposure or display of any pornographic material to any person against his or her will.
11. In the entire testimony of PW1, there was no indication that the appellant touched him in any of the places outlined in the above section of the law. There was the blanket testimony of the fact that they had sex. Having noted previously that that was not proven to the required threshold, it was even harder for the court to determine that an indecent act occurred where the evidence available did not point to it. None of the elements of indecent act came out in the victim's testimony and as such, the court also found that the alternative charge had not been proven.
12. There was nothing on the record showing that the victim did raise that specific defense of *alibi*. She claimed that she had an *alibi* during the material night but failed to call any witnesses to establish that defence. In addition, that defense was never raised throughout the trial.
13. The defense of an *alibi* had to be raised at the earliest opportunity by an accused person during trial to enable the prosecution look into the same and verify whether the trial ought to proceed or be stopped because such a trial would be superfluous in the event that the accused person could not be placed at the scene of crime at the material time.
14. If a person was accused of anything and his defence was an *alibi*, he should bring forward that *alibi* as soon as he could because, firstly, if he did not bring it forward until months afterwards there was naturally a doubt as to whether he had not been preparing in the interval, and secondly, if he brought it forward at the earliest possible moment it would give prosecution an opportunity of inquiring into that *alibi* and if they were satisfied as to its genuineness, proceedings would be stopped.

Appeal granted; conviction quashed and sentence set aside.

Cases

East Africa

1. *George Muchika Lumbasi v Republic* [2016] eKLR – (Explained)
2. *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010 (UR) – (Explained)
3. *Mark Oiruri Mose v Republic* [2013] eKLR – (Explained)
4. *Mueke v Republic* [2017] eKLR – (Explained)
5. *Republic v Sukha Singh s/o Wazir Singh & others* [1939] 6 EACA 145 – (Explained)
6. *Sawe v Republic* [2003] KLR 364 – (Explained)

Statutes

East Africa

1. Evidence Act (cap 80) section 124 – (Interpreted)
2. Constitution of Kenya, 2010 articles 50(2)(b) – (Interpreted)
3. Criminal Procedure Code (cap 75) sections 207(1) – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(3) – (Interpreted)

Advocates

None mentioned

Sigei v Republic

16. The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she had sexual intercourse and *vice versa*

Significance: The case highlights the various elements that must be proved beyond reasonable doubt in an offence of defilement. Furthermore, evidence of penetration was discussed by the court in relation to presence of spermatozoa.

Sigei v Republic [2022] KEHC 3161 (KLR)

Criminal Appeal No E009 of 2021

High Court at Bomet

RL Korir, J

January 15, 2022

Criminal Law – sexual offences – defilement – elements of the offence – proof beyond reasonable doubt – where the appellant allegedly intentionally and unlawfully caused his penis to penetrate the vagina of FC, a child aged 13 – where the appellant was convicted by the trial court of the offence of defilement – what were the elements for the offence of defilement that a prosecution had to prove beyond reasonable – Sexual Offences Act, No 3 of 2006, section 8.

Criminal Law – sexual offences – defilement – where the appellant allegedly intentionally and unlawfully caused his penis to penetrate the vagina of FC, a child aged 13 – proof of penetration – whether the presence or absence of spermatozoa in a woman's vagina was conclusive evidence that sexual intercourse had taken place – Sexual Offences Act, No 3 of 2006, section 8.

Criminal Law – sexual offences – defilement – where the appellant allegedly intentionally and unlawfully caused his penis to penetrate the vagina of FC, a child aged 13 – where the appellant was convicted by the trial court of the offence of defilement – what were the factors that an appellate court took into consideration before reviewing a sentence imposed by a trial court – Sexual Offences Act, No 3 of 2006, section 8.

Words and Phrases – Alibi – definition of – a defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time – Black's Law Dictionary, 10th Edition

Brief facts

The appellant was convicted by the trial court for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (the Act). The particulars of the charge were that on July 1, 2018 in a sub county, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of FC, a child aged 13 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the alternative charge were that July 1, 2018 in a sub county, within Bomet County he intentionally and unlawfully caused his penis to come into contact with the vagina of FC, a child aged 13 years. The appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the accused and he was put on his defence. At the conclusion of the trial, he was convicted of the main charge and sentenced to serve 20 years in prison. Being dissatisfied with the judgment, the accused appealed.

Issues

- i. What were the elements for the offence of defilement that a prosecution had to prove beyond reasonable?

- ii. Whether the presence or absence of spermatozoa in a woman's vagina was conclusive evidence that sexual intercourse had taken place.
- iii. What were the factors that an appellate court took into consideration before reviewing a sentence imposed by a trial court?

Held

1. For the offence of defilement to be established, three ingredients being the age of the victim, penetration and positive identification or recognition of the offender had to be proved. The accused was charged with defilement contrary to section 8(1) as read with section 8(3) of the Act. Section 8 (1) of the Act stated that any person who committed an act which caused penetration with a child was guilty of an offence of defilement. In the Children's Act no. 8 of 2001, a child was defined in the as any human being under the age of eighteen years.
2. The importance of proving the age of the victim of defilement under the Act by cogent evidence could not be gainsaid. It was not in doubt that the age of the victim was an essential ingredient of the offence of defilement and formed an important part of the charge because the prescribed sentence was dependent on the age of the victim.
3. Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim was a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That had to be so because dire consequences flew from proof of the offence under the said section 8(1).
4. Section 2 of the Act defined penetration as the partial or complete insertion of genital organs into the genital organs of another person. An important ingredient of the offence of defilement was that there had to have been penetration. Penetration or act of sexual intercourse had therefore to be proved to sustain a charge of defilement.
5. The act of sexual intercourse or penetration could be proved by direct or circumstantial evidence. Usually, the sexual intercourse was proven by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable, it was not a hard and fast rule that the victim's evidence and medical evidence had to always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution could wish to adduce, to prove its case, such evidence had to be such that it was sufficient to prove the case beyond reasonable doubt.
6. Section 36 (1) of the Act empowered the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision was not couched in mandatory terms. Decisions of that court abound which affirmed the principle that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved.
7. The presence of spermatozoa alone in a woman's vagina was not conclusive proof that she had sexual intercourse nor was absence of spermatozoa in her vagina proof of the contrary. What was required to prove that sexual intercourse had taken place was proof of penetration, an essential fact of the offence of rape.
8. Evidence of visual identification in criminal cases could bring about miscarriage of justice and it was of vital importance that such evidence was examined carefully to minimize that danger. Whenever the case against a defendant wholly depended or to a great extent on the correctness of more identifications of the accused which he alleged to be mistaken, the court had to warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.
9. If the quality of identification evidence was good and remained good at the close of the accused's case, the danger of mistaken identification was lessened; but the poorer the quality, the greater the danger. When the quality was good, as for example when the identification was made after a long period of

Sigei v Republic

observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury could safely be left to assess the value of the identifying evidence even though there was no other evidence to support it; provided always, however that an adequate warning had been given about the special need for caution.

10. For evidence of recognition to be relied upon, the witness claiming to recognise a suspect had to establish circumstances that would prove that the suspect was not a stranger to him and thus to put a difference between recognition and identification of a stranger. He had to show, for example, that the suspect had been known to him for some time, was a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge needed not be for a long time but had to be for such time that the witness, in seeing the suspect at the time of the offence, could recall very well having seen him earlier on before the incident.
11. The defence of existence of a boundary dispute was an afterthought. The explanations put forward by the accused and his three witnesses were insufficient, contradictory and without basis. That defence did not cast doubt on the prosecution case.
12. The principle had long been accepted that an accused person who wished to rely on a defence of *alibi* had to raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the *alibi*. If a person was accused of anything and his defence was an *alibi*, he should bring forward that *alibi* as soon as he could because, firstly, if he did not bring it forward until months afterwards there was naturally a doubt as to whether he had not been preparing in the interval, and secondly, if he brought it forward at the earliest possible moment it would give prosecution an opportunity of inquiring into that *alibi* and if they were satisfied as to its genuineness, proceedings would be stopped.
13. The defence of *alibi* was raised at the defence hearing and not at the beginning of the trial. Besides, it did not shake the prosecution evidence which clearly placed the appellant at the scene. The defence of *alibi* failed as an afterthought. Indeed, the entire defence did not cast doubt on the prosecution case. The court was granted power to convict on a lesser charge where the evidence so disclosed even if an accused was not charged with it. Section 179(2) of the Criminal Procedure Code, Cap 75 stated that when a person was charged with an offence and facts were proven which reduced it to a minor offence, he could be convicted of the minor offence although he was not charged with it. The evidence disclosed the lesser charge of attempted defilement. The court substituted the initial charge of defilement with that of attempted defilement under section 9(1) as read with section 9(2) of the Act. The appellant was convicted accordingly.
14. Sentence was a matter that rested in the discretion of the trial court. Similarly, the sentence had to depend on the facts of each case. On appeal, the appellate court would not easily interfere with sentence unless, that sentence was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court felt that the sentence was heavy and that the appellate court might itself not have passed that sentence, those alone were not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated was shown to exist.
15. The court considered the appellant's mitigation, in which he pleaded for leniency stating that he had young children who depended on him and that his youngest child was unwell. The court however would be failing in its duty if it did not avail children the protection of the law against those minded to prey on their innocence.

Appeal partly allowed.

Orders

- i. Conviction set aside for the offence of defilement and a conviction entered for the offence of attempted defilement.
- ii. The sentence of 20 years' imprisonment set aside and substituted with a sentence of 10 years' imprisonment which should run from the first date of conviction and sentence.

Cases**East Africa**

1. *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & CO Advocates* [2013] eKLR – (Explained)
2. *Adam Dakitari Konoye v Republic* [2019] eKLR – (Explained)
3. *Bassita v Uganda* SC Criminal Appeal No 35 of 1995 – (Explained)
4. *Benjamin Mwangi & another v Republic* [1984] eKLR – (Explained)
5. *Bernard Kimani Gacheru v Republic* [2002] eKLR – (Explained)
6. *Erick Onyango Odeng v Republic* [2014] eKLR – (Explained)
7. *GOA v Republic* [2018] eKLR – (Explained)
8. *Hadson Ali Mwachongo v Republic* [2016] eKLR – (Explained)
9. *Kaingu Elias Kasomo v Republic* Criminal Appeal Case No 504 of 2010 – (Explained)
10. *Mark Ouiruri v Republic* [2013] eKLR – (Explained)
11. *Mark Ouiruri v Republic* [2013] eKLR – (Explained)
12. *Peter Musau Mwanza v Republic* [2008] eKLR – (Explained)
13. *Republic v Sukha Singh s/o Wazir Singh & others* [1939] 6 EACA 145 – (Explained)
14. *Robert Mutungi Mumbi v Republic* Criminal Appeal No 52 of 2014; [2015] eKLR – (Explained)
15. *Victor Mwendwa Mulinge v Republic* [2014] eKLR – (Explained)

United Kingdom

1. *Miller v Minister of Pensions* [1974] 2 All ER 372-373 – (Explained)
2. *R v Turnbull* [1977] QB 224 – (Explained)

Statutes**East Africa**

1. Children Act, 2001 (Act No 8 of 2001) section 2 – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 179(2); 333(2) – (Interpreted)
3. Evidence Act (cap 80) section 64, 66 – (Interpreted)
4. Penal Code (cap 63) sections 38 – (Interpreted)
5. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 8(1)(2); 9(1)(2); 11(1) – (Interpreted)

Advocates

None mentioned

Kibara v Republic**17. Prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose. fell afoul of article 28 of the Constitution**

Significance: The case examines the need for the prosecution to only call enough witnesses to establish a charge beyond the required standard of proof and the age of a minor being a critical component of a defilement charge. The decision further states that prescribed mandatory minimum sentences fall afoul of article 28 of the Constitution on the right to dignity.

Kibara v Republic [2022] KEHC 15412 (KLR)

Criminal Appeal No E075 of 2022

High Court at Meru

TW Cherere, J

November 10, 2022

Criminal Law – sexual offences – defilement – where the appellant was charged with defilement against a child aged 13 – whether the age of a minor was a critical component of a defilement charge and the consideration for its proof beyond reasonable doubt – Sexual Offences Act, No 3 of 2006, sections 2 and 8.

Criminal Law – sexual offences – defilement – where the appellant was charged with defilement against a child aged 13 – where the witness who had attended the complainant at first was not called – whether failure to call the clinical officer that first attended the complainant was fatal to the prosecution case – Sexual Offences Act, No 3 of 2006, sections 2 and 8; Evidence Act, Cap 80, section 124.

Brief facts

The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No 3 of 2006 (the Act). The offence was allegedly committed in the month of October, 2019 against MK a child aged 13 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. It was alleged that on the same day and place, he unlawfully and intentionally touched the vagina and breasts of MK a girl aged 13 years. AK, the complainant stated that she was born on July 18, 2006 as shown on her certificate of birth.

She testified that on a date she could not recall in October, 2019, she was preparing lunch in her mother's kitchen when the appellant who had been contracted to build a cow shed for her uncle who lived in the same compound with them attacked her, covered her head with his t-shirt and defiled her right there on the kitchen floor. Subsequently, she started feeling unwell and her mother GK escorted her to hospital and upon being examined was found to be pregnant and that was when she revealed that she had been defiled by the appellant. A clinical officer examined the complainant on April 20, 2020 and found that the complainant was 25 weeks pregnant. The case was reported to police on April 14, 2019. PC Kitilit arrested appellant on January 7, 2021 and handed him over to CPL Chepkoech who investigated the case and caused appellant to be charged.

The trial court convicted and sentenced the appellant to serve 20 years' imprisonment. Dissatisfied with both the conviction and sentence, appellant lodged the instant appeal.

Issues

- i. Whether the age of a minor was a critical component of a defilement charge and what were the considerations for its proof beyond reasonable doubt.
- ii. What number of witnesses were enough for the prosecution to establish the required standard of proof.

Held

1. The age of a minor was a critical component of a defilement charge and it was an element which had to be proved by the prosecution beyond reasonable doubt. That complainant was 13 years old in 2019 was proved by a certificate of birth that revealed that she was born on July 18, 2006. Section 2 of the Act defined penetration to entail partial or complete insertion of a genital organ of a person into the genital organ of another person. The P3 form revealed that complainant was 25 weeks pregnant when she was examined on April 20, 2020.
2. As a general rule of evidence embodied in section 124 of the Evidence Act, an accused person should not be liable to be convicted on the basis of the evidence of the victim unless such evidence was corroborated. The proviso to that section made an exception in sexual offences that where in a criminal case involving a sexual offence the only evidence was that of the alleged victim of the offence, the court should receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court was satisfied that the alleged victim was telling the truth.
3. Whereas the prosecution was obliged to call all witnesses who were necessary to establish the truth in a case; even though some of those witnesses' evidence could be adverse to the prosecution case the prosecution was not obliged to call excess of witnesses but only such witnesses as were sufficient to establish the charge beyond any reasonable doubt. Failure to call the clinical officer that first attended the complainant was not fatal to the prosecution case.
4. The Act prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose. That fell afoul of article 28 of the Constitution of Kenya, 2010 which provided that every person had inherent dignity and the right to have that dignity respected and protected.

Appeal partly allowed; conviction upheld but the 20-year sentence substituted with a 10 year imprisonment term from the date of arrest on January 7, 2021.

Cases***East Africa***

1. *Alfayo Gombe Okello v Republic* Cr App No 203 of 2009; [2010] eKLR – (Mentioned)
2. *Bukenya & others v Uganda* [1972] EA 549 – (Mentioned)
3. *CWK v Republic* [2015] eKLR – (Mentioned)
4. *Donald Majiwa Achilwa & 2 others v R* [2009] eKLR – (Mentioned)
5. *Hadson Ali Mwachongo v Republic* Criminal Appeal No 65 of 2015; [2016] eKLR – (Mentioned)
6. *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010 – (Mentioned)
7. *Kiilu & another v Republic* [2005] 1 KLR 174 – (Applied)

Statutes***East Africa***

1. Constitution of Kenya, 2010 articles 28
2. Evidence Act (cap 80) sections 24, 143 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(3); 11(1) – (Interpreted)

Advocates

None mentioned

Oloo v Republic

18. In sexual offences, the evidence of the victim is enough to convict the accused person as provided in section 124 of the Evidence Act, if that evidence is found by the trial court to be soundly credible and believable

Significance: The case discusses the need for the court to consider the evidence adduced as a whole and not selectively and also it had to decide whether inconsistencies and contradictions were minor, or whether they went to the root of the matter.

Oloo v Republic [2022] eKLR

Criminal Appeal No E026 of 2021

High Court at Siaya

RE Aburili, J

March 23, 2022

***Criminal Law** – sexual offences – defilement – where the appellant was charged with the offence of defilement – what were the ingredients of defilement – Sexual Offences Act, No. 3 of 2006, section 8.*

***Criminal Law** – sexual offences – defilement – where the appellant was charged with the offence of defilement – where the accused faced an alternative charge of indecent act with a child – where the appellant had pleaded not guilty for both charges – where the matter proceeded to hearing and the trial court after considering the evidence of the prosecution witnesses and that of the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict and sentence the appellant to serve life imprisonment – whether in sexual offences, the evidence of the victim was enough to convict the accused person as provided in section 124 of the Evidence Act, if that evidence was found by the trial court to be soundly credible and believable – Sexual Offences Act, No 3 of 2006, section 8; Evidence Act, Cap 80, section 124.*

Brief facts

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 No 3 of 2006 (the Act). Particulars of the offence being that on February 18, 2019 at in North Gem location within Siaya County, he intentionally caused his penis to penetrate the vagina of MA, a child aged 4 years old. The appellant further faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The place of alleged offence was the same as in the main charge.

The appellant pleaded not guilty to both the main charge and the alternative charge. The matter proceeded to hearing and the trial court after considering the evidence of the prosecution witnesses and that of the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict and sentence the appellant to serve life imprisonment.

Issues

- i. What elements needed to proven to sustain a conviction in a defilement charge?
- ii. Whether in sexual offences, the evidence of the victim was enough to convict the accused person as provided in section 124 of the Evidence Act, if that evidence was found by the trial court to be soundly credible and believable.

Held

1. Article 50(2)(c) of the Constitution of Kenya, 2010 (Constitution) guaranteed every accused person the right to have adequate time and facilities to prepare his/her defence. That meant that every accused person had the right to a fair trial which included the right to have adequate time and facility to prepare his or her defence. The aforementioned right could not be met if the accused was not given the evidence that the prosecution intended to rely on during the trial so as to enable him/her prepare his/her defence. The appellant claimed that he was not given adequate time to prepare for his trial.
2. To sustain a conviction in a defilement charge, certain elements had to be proven beyond reasonable doubt. The first element was whether there was penetration of the complainant's genitalia; the second was whether the complainant was a child and of what age; and finally, whether the penetration was done by the appellant.
3. The court found no ground upon which to differ with the trial court's finding of fact that the complainant was firm in her identification of the appellant even though she testified that the appellant was not known to her prior to the defilement. On whether the element of penetration was proven beyond reasonable doubt, it was worth noting that in sexual offences, the evidence of the victim was enough to convict the accused person as provided in section 124 of the Evidence Act, if that evidence was found by the trial court to be soundly credible and believable. The complainant vividly testified of how the appellant lured her into his house claiming that he was to give her a banana before proceeding to defile her on his bed behind the curtain. The complainant was firm even in cross-examination despite the fact that the trial court noted that she was scared of the appellant.
4. The offence the appellant was charged with carried a life imprisonment sentence upon conviction. In his mitigation, which the trial court considered, the appellant stated that he had a wife and 3 children with one child who was disabled. He further stated that he had a mother whom he was her caretaker. The appellant reiterated that he did not commit the offence and urged the trial court to set him free. The trial court called for a presentencing report which was filed. She applied herself to the lengthy report which revealed how the appellant was a very violent person and how upon his arrest, his relatives invaded the home of the victim and threatened her family until her mother had to relocate to Nairobi.
5. The court had to consider the evidence adduced as a whole and not selectively and the victim's age and ability to recollect in a concise form ought to be factored in. In evaluating discrepancies, contradictions and omissions, it was undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court had to decide whether inconsistencies and contradictions were minor, or whether they went to the root of the matter.
6. Sentence was a matter that rested in the discretion of the trial court. Sentence had to depend on the facts of each case. On appeal the appellate court would not easily interfere with sentence unless, that sentence was 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 felt that the sentence was heavy and that the appellate court might itself not have passed that sentence, those alone were not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated was shown to exist.
7. Having found that the trial court exercised its discretion correctly and judiciously and meted out a lawful sentence, the court saw no reason to interfere with the sentence meted out on the appellant considering the circumstances of the case. The appellant therein methodically set out to lure the complainant, a minor of 4 years at the time of the offence with a banana, before defiling her. The traumatic effect of the incident on the complainant was far reaching and life changing as was similarly noted by the trial court.

Oloo v Republic

8. Contrary to the submissions by the appellant that the mandatory nature of the sentence passed against him was contrary to the ruling in the Muruatetu case, it was noteworthy that on July 6, 2021, the Supreme Court in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR issued directions to the effect that Muruatetu 2017 as it stood was inapplicable to other offences that carried mandatory sentences other than section 204 of the Penal Code, for the offence of murder. The sentence of life imprisonment as provided for in section 8(2) of the Act remained legal and constitutional.

Appeal dismissed; conviction and sentence imposed by the trial court upheld.

Cases***East Africa***

1. *Simon Kipkurui v Republic* [2019] eKLR – (Explained)
2. *Okeno v Republic* [1972] EA 32 – (Mentioned)
3. *Mohamed Rama Alfani & 2 others v Republic* Criminal Appeal No 223 of 2002 – (Mentioned)
4. *Charles Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 – (Mentioned)
5. *SOO v Republic* Criminal Appeal No 37 of 2017 – (Followed)
6. *Bernard Kimani Gacheru v Republic* [2002] eKLR – (Explained)
7. *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR – (Applied)

Statutes***East Africa***

1. Constitution of Kenya, 2010 articles 28, 50(2)(c)(p) – (Interpreted)
2. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2)(3); 11(1) – (Interpreted)

Advocates

None mentioned

19. The evidence of the offence of defilement or sexual assault can only be given by the victim

Significance: The decision addresses the ingredients of defilement and whether the evidence of the defilement or sexual assault given by the victim only is sufficient.

Murimi v Republic [2021] eKLR

Criminal Case No E061 of 2021

High Court at Meru

EM Muriithi, J

November 8, 2021

Criminal Law – sexual offences – defilement – where the appellant was convicted and sentenced to imprisonment for the offence of defilement – what ingredients of the charge of defilement did the prosecution need to prove to sustain a conviction for the offence – Sexual Offences Act, No 3 of 2006, section 8.

Evidence Law – evidence-evidence in defilement – witness evidence – admissibility in evidence – sexual offences – defilement – where the prosecution called 5 witnesses and when the appellant was put on his defence, the appellant gave sworn evidence without calling a witness – whether it was only a victim of defilement who could give sufficient evidence of the offence. – Sexual Offences Act, No 3 of 2006, section 8.

Brief facts

The appellant was on December 18, 2020 convicted and sentenced to imprisonment for the offence of defilement as charged, contrary to section 8(1) as read with 8(3) of the Sexual Offences Act No 3 of 2006 (the Act). The particulars of the offence were that the appellant had on diverse dates between August 1, 2019 and August 7, 2020 at a village in Miciimikuru sub-location, Tigania Central Sub-County within Meru County unlawfully and intentionally caused his penis to penetrate the vagina of WK, a child aged 16 years old. There was an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act.

The prosecution called 5 witnesses and when put on his defence, the appellant gave sworn evidence without calling a witness. The court had considered the written submissions of the appellant and the DPP. The appellant lodged an appeal against his conviction and sentence.

Issues

- i. What ingredients of the charge of defilement did the prosecution need to prove to sustain a conviction for the offence?
- ii. Whether it was only a victim of defilement who could give sufficient evidence of the offence.

Held

1. The evidence of the prosecution in a case of defilement contrary to section 8(1) of the Act had to prove the ingredients of the offence which were the minor age of the victim as charged, the fact of penetration, partial or complete and the identification of the accused as the perpetrator. The defence evidence, therefore, was that, if there was any penetration, the same could only have been by his colleague who he said was the boyfriend of the victim.
2. Although charged as defilement of a child aged 16 years, the evidence led by the clinical officer PW2 was to the effect that the girl was assessed on the basis of her dental formula at 14 years. The offence was also described as defilement contrary to section 8(1) as read with 8(3) of the Act which applied to defilement in cases of a child in the age bracket of between 12 and 15 years, instead of section 8(4)

Murimi v Republic

- which applied to the bracket of between 16 and 18 years of age. However, whether 16 or 14 years of age, penetration of the child completed the offence of defilement under section 8(1) of the Act.
3. The appellant was not prejudiced in any way by the error in the statement of the offence charged as falling under section 8(3) of the Act because the particulars of the offence were clear that the offence was the one provided for under section 8(4) of the Act and which in any event carried a lesser imprisonment term of a minimum of 15 years as opposed to the 20 years under section 8(3) as charged. The error in misstatement of the offence in the charge was curable under section 382 of the Criminal Procedure Code.
 4. The age of the child was, however, crucial in determining the sentence to be imposed upon the offender. If the appellant was convicted for the offence of defilement of a child aged 16 years as charged in the charge sheet, the applicable sentence would be the minimum of 15 years under section 8(4) of the Act and not the minimum of 20 years prescribed under section 8(3) of the Act for a child aged 14 years as indicated of the child therein by the age assessment document.
 5. The age of a victim could be determined by medical evidence and other cogent evidence. Although the age assessment on the basis of dental formula placed the age of the victim at 14 years, the child herself gave her age as 16 years during *voir dire*, and that was the same age given in the child's treatment notes and medical examination form P3. It was the age consistent with the age of the complainant as charged in the charge sheet. The court accepted the evidence of the victim girl's age as 16 years rather than the 14 years' assessment on the basis of dentures.
 6. It was immaterial that as highlighted by the appellant it was the minor who used to visit the accused's house. The implication of consensual sex was unfounded as a child was pursuant to section 43(1) (c) and (4)(f) of the Act incapable of appreciating the nature of the act and to give consent to sexual intercourse. Any sexual intercourse with a child was intentional and unlawful because it was in respect of a person who was incapable of appreciating the nature of the act which caused the offence.
 7. The medical evidence led by PW2, the clinical officer who examined the complainant was that her hymen was torn and a pregnancy test was positive leading him to the conclusion that the complainant had been defiled. Although, there were no tears and the hymen was not freshly torn, it would support the complainant's evidence of sexual intercourse with the appellant. In the complainant's own evidence penetration was testified to, in that they slept together and had sex with him. They even had sex on other occasions. When she went home and was asked where she had been she lied and said she slept at another girl's home.
 8. Those were the words of a 16-year old, and the court accepted that a 16 year old was able to understand the meaning of sex and when she said they had sex which had to mean what they said that she had had sexual intercourse with penetration within the meaning of the Act. A child of 14 and over was not a child of tender years and there was technically no requirement under section 19 of the Oaths and Statutory Declarations Act and section 124 of the Evidence Act to conduct a *voir dire* examination on such a child. The trial court, however, was in excessive caution when it conducted a *voir dire* (mini-hearing within a trial to find out the truth) on the 16-year old and whether they understood what was an oath and she should give sworn testimony. In any event, the *voir dire* examination was for the benefit of the accused in ensuring only competent witnesses testified.
 9. The evidence of the defilement or sexual assault could only be given by the victim. The other witnesses only testified as to the circumstances surrounding the relationship between the appellant and the complainant PW1 and the aftermath. The court found the provisions of section 124 of the Evidence Act to specifically apply to the case before the court. Even if the complainant had given evidence unsworn, the court would still be entitled to convict on her evidence uncorroborated, if the court considered, for recorded reasons, that she was telling the truth. The 16-year old complainant gave

sworn evidence and her evidence technically did not require corroboration.

10. The only witness as to the alleged defilement, was therefore, the 16-year-old victim of the sexual offence herself, the complainant PW1 who upon a *voir dire* gave sworn evidence and was therefore not subject to the requirement of corroboration in accordance with the authorities. However, the trial court, which saw and heard the witness believed her as a witness of the truth in terms of section 124 of the Evidence Act.
11. The court found that the appellant was guilty for the offence of defilement contrary to section 8(1) as read with 8(4) (applicable to cases of defilement of children of between 16 and 18 years of age) and not 8(3) of the Act as charged and convicted in the trial court. As regards the sentence, it would appear that the trial court sentenced the appellant to imprisonment for 20 years under the minimum sentence for defilement for a child aged between 12 and 15 years under section 8(3) of the Act. That had to, therefore, be corrected to match the minimum sentence under section 8(4) of the Act.

Appeal partly allowed.

Orders

- i. *The appellant's appeal on conviction for the offence of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act was allowed, to the extent that the conviction under section 8(1) as read with 8(3) was substituted with section 8(1) as read with 8(4) of Sexual Offences Act which was the correct provision for the particulars and evidence presented.*
- ii. *The appellant's appeal on the sentence was allowed to the extent that the sentence of twenty (20) years was set aside and substituted with a sentence of imprisonment for fifteen (15) years, in accordance with the minimum sentence under section 8(4) of the Sexual Offences Act.*
- iii. *As the appellant was on bail during trial, the sentence of imprisonment for fifteen (15) years would commence from the date of sentence in the trial court on December 18, 2020.*

Cases

East Africa

1. *Francis Omuroni v Uganda* Criminal Appeal No 2 of 2000 – (Mentioned)
2. *JWA v Republic* [2014] eKLR – (Explained)
3. *Joseph Kiet Seet v Republic* [2014] eKLR – (Followed)
4. *Julius Kiunga M'birithia v Republic* Criminal Appeal No 111 of 2011 – (Explained)
5. *Kibangeny arap Kolil v Republic* [1959] EA 92 – (Applied)
6. *Isaac Nyoro Kimita v Republic* Criminal Appeal No 187 of 2009 – (Explained)
7. *Maitanyi v Republic* [1986] KLR 198 – (Explained)
8. *Mohamed v Republic* [2005] 2 KLR 138 – (Explained)
9. *Ndege Maragwa v Republic* (1965) EACA 22 – (Explained)
10. *Ndungu Kimanyi v Republic* (1976-80) KLR 1442 – (Explained)
11. *Okeno v Republic* [1972] EA32 – (Applied)
12. *Okethi Okale & others v Republic* (1965) EA 555 – (Explained)
13. *Ouma v Republic* [1986] KLR 619 – (Explained)

Statutes

East Africa

Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(3)(4); 11(1); 43(1)(c)(4)(f) – (Interpreted)

Texts and Journals

Judiciary, 2018. *Criminal Procedure Bench Book 2018* paras 94-96

Advocates

None mentioned

SOA v Republic

20. A lenient sentence at the discretion of the court cannot be meted out considering lenient sentence is not allowed considering the circumstances of the offence and the age of the complainant who is left traumatized

Significance: The case discusses giving of lenient sentences by a court once the circumstances of a case and the age of the complainant are considered giving of discretionary lenient sentence by the court after considering the circumstances of the offence and the age of the complainant.

SOA v Republic [2022] eKLR

Criminal Appeal No E025 of 2021

High Court at Siaya

RE Aburili, J

March 15, 2022

Criminal Law – offences – defilement – where the appellant was charged with two counts of offences, defilement and indecent act with a child – where the appellant was charged with the offence of threatening to kill in both charges – where after a full trial, the appellant was found guilty and convicted on both counts and sentenced to serve twenty (20) years imprisonment on the first count of defilement and one (1) year imprisonment on the second count of threatening to kill – whether a lenient sentence at the discretion of the court could be given out considering the circumstances of the offence and the age of the complainant who was left traumatized – Sexual Offences Act, 2006, section 8; Penal Code, cap 63, section 223.

Brief facts

The appellant was charged with two counts of offences under the Sexual Offences Act. In the first count, 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. The particulars of the offence were that on diverse dates between March and August 2020 at Nyangoma sub-location in Siaya sub-county within Siaya County, intentionally caused his penis to penetrate the vagina of SAO a child aged 12 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. The complainant was the same as that in the main count.

In count two, the appellant was charged with the offence of threatening to kill contrary to section 223 (1) of the Penal Code. The particulars were that on diverse dates between March and August 2020 at Nyangoma sub-location in Siaya sub-county within Siaya County without lawful excuse he uttered the words, ‘Abonegou’ while armed with a panga and threatened to kill the minor SAO.

After a full trial, the appellant was found guilty and convicted on both counts and sentenced to serve twenty (20) years imprisonment on the first count of defilement and one (1) year imprisonment on the second count of threatening to kill. The trial court ordered that the sentences run concurrently. Aggrieved by his conviction and sentence, the appellant filed that appeal.

Issue

Whether a lenient sentence at the discretion of the court considering the circumstances of the offence and the age of the complainant who was left traumatized.

Held

1. The ingredients of the offence of defilement were identification or recognition of the offender, penetration and the age of the victim. The prosecution was under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof did not shift to the accused person who was under no duty to adduce or challenge evidence adduced by the prosecution witnesses.
2. The issue of identification of the perpetrator was clear. The complainant's evidence was that of recognition. The complainant and her sister testified that they lived with their father who was the appellant therein in Kogelo and the appellant confirmed that he lived with the two children. That was after their mother left home after what appeared to be a disagreement with the appellant. The children knew that their mother, PW1 had gone to look for work in Nairobi. The complainant knew the appellant as her father very well and there was no dispute that on the date when the offences charged were allegedly committed, she was in full custody of her father, the appellant herein.
3. Regarding the age of the complainant, PW1, the complainant's mother testified that the complainant was 12 years old. An age assessment report dated February 1, 2021 was produced in evidence by the investigating officer indicated that the complainant's age was 12 years old. According to the investigating officer, the appellant refused to surrender the child's birth certificate hence the child's age had to be ascertained medically. The complainant's age was proved beyond reasonable doubt.
4. The next element was proof of penetration. Penetration was defined under section 2 of the Act to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The complainant testified that she was defiled. The question was whether that evidence required corroboration.
5. The evidence of the complainant on the fact of her being defiled was corroborated by that of the clinical officer (PW5) who stated that there was partial penetration of the child's genitalia, and the fact was noted in the P3 form and post rape care reports produced as exhibits, which also confirmed that. The partially torn hymen was evidence of penetration. The child's younger sister, PW4 who was aged 8 years also testified that on the material night, her and the complainant were told to sleep with their father, the appellant on his bed and as they slept, she was woken up by the complainant's screaming only to see her father with a vest and naked in his lower part of the body. That evidence proved beyond reasonable doubt that there was defilement as contemplated by the Act.
6. From the evidence on record, the appellant was availed with the requisite witness statements to enable him prepare for his defence and further as the trial proceeded the appellant did not make any indications that he was not in a position to put forth his defence. Further, from the record, the appellant was able to undertake his defence and it was evident from the trial record that he scrutinised the evidence presented by the prosecution through the art of cross-examination which was thorough.
7. It was settled that where one sought to prove constitutional infringement, he/she had to specifically set out the right infringed and set out with a reasonable degree of precision that of which he complained, the provisions said to be infringed, and the manner in which they were alleged to be infringed. The court was unable to find that any of the rights of the accused under article 50 of the Constitution of Kenya, 2010 were violated.
8. The appellant claimed in his grounds of appeal that the evidence tendered against him by the prosecution was shoddy and based on fabrication. Having set out the evidence hereinabove, it was worth noting that in sexual offences cases, the evidence of the complainant was enough on its own to convict the accused if the court believed that the complainant was telling the truth.
9. The complainant in the case was firm in cross-examination in insisting that it was the appellant who defiled her. Further, the complainant's evidence was corroborated by that of the clinical officer

SOA v Republic

PW5 as set out above. The defilement took place in the presence of PW4 who was an 8-year-old child but who from her testimony, and the testimony of PW2, there was nothing indicative of the two children being coached to frame the appellant with such a heinous offence.

10. Although the appellant's testimony was that his prosecution was as a result of his estranged wife trying to jail him, the appellant's defence was a mere denial. Further, the appellant did not disclose in what way he thought the investigation was shoddy. The investigations upon which his arrest and subsequent prosecution was based was manifest in the evidence adduced by the prosecution which as discussed herein was sufficient to sustain his conviction. The investigations carried out and the evidence adduced by the prosecution were sufficient to convict the appellant.
11. Having been convicted for the offence of defilement, the trial court considered the appellant's mitigation that he was an only child with another wife and children who depended on him. The trial court after considering the appellant's mitigation sentenced him to serve 20 years imprisonment on the first count of defilement and one (1) year imprisonment on the second count of threatening to kill. The trial court noted that the sentences would run concurrently. Sentencing was in the discretion of the trial court.
12. In the circumstances, the court found no reason to interfere with the sentence meted out on the appellant considering the circumstances of his case, that he wielded authority over his victims which he exploited to his own nefarious ends. The complainant was the biological child to the appellant. She trusted him and expected to be protected from any harm. The father turned out to be the violator. The appellant did not deserve any discretionary lenient sentence, considering the circumstances of the offence and the age of the complainant who was left traumatized.

Appeal dismissed against conviction, save that the concurrent sentences would run from date of arrest on January 19, 2021 instead of January 20, 2021 when the appellant took the plea.

Cases***East Africa***

1. *Anarita Karimi Njeru v Republic* [1979] eKLR – (Mentioned)
2. *Bernard Kimani Gacheru v Republic* [2002] eKLR – (Explained)
3. *George Opondo Olunga v Republic* [2016] eKLR – (Explained)
4. *Hamisi Bakari v Republic* [1987] eKLR – (Explained)
5. *Mohamed Rama Alfani & 2 others v Republic* Criminal Appeal No 223 of 2002 – (Mentioned)
6. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR – (Mentioned)
7. *Okeno v Republic* [1972] EA 32 – (Mentioned)

Statutes***East Africa***

1. Constitution of Kenya, 2010 articles 50(2)(c) – (Interpreted)
2. Evidence Act (cap 80) section 124 – (Interpreted)
3. Penal Code (cap 63) sections 223(1) – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2)(3); 11(1) – (Interpreted)

Advocates

None mentioned

21. There are no confines or limits for sentencing an accused for the crime of defilement

Significance: The decision deals with whether there was a set formula for sentencing persons accused of the crime of defilement.

EKT v Republic [2022] eKLR

Criminal Appeal No E018 of 2022

High Court at Siaya

RE Aburili, J

October 24, 2022

***Criminal Law** – sexual offences – defilement – where the appellant was charged with the offence of defilement – what were the ingredients of defilement – Sexual Offences Act, No 3 of 2006, section 8.*

***Criminal Law** – sexual offences needed to prove the offence of defilement – defilement – where the appellant was charged with the offence of defilement – where after evaluating the prosecution and defence evidence adduced, the trial court found that the prosecution had proven its case against the appellant beyond reasonable doubt and convicted the appellant and subsequently sentenced him to serve 20 years’ imprisonment – whether there were limits or confines for sentencing an accused in commission of the crime of defilement – Sexual Offences Act, No 3 of 2006, section 8.*

Brief facts

The appellant EKT was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act, No 3 of 2006 (the Act). The particulars of the charge were that that on November 17-18, 2020 at Siaya County, the accused caused his penis to penetrate the vagina of LAO, a child aged 14 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The appellant pleaded not guilty to the charge and the matter proceeded to full trial with the prosecution calling 5 witnesses. Placed on his defence, the appellant gave sworn testimony.

After evaluating the prosecution and defence evidence adduced, the trial court found that the prosecution had proven its case against the appellant beyond reasonable doubt and he convicted the appellant and subsequently sentenced him to serve 20 years’ imprisonment.

Issues

- i. What were the ingredients of defilement and how could they be proved beyond reasonable doubt?
- ii. Whether there were limits or confines for sentencing an accused in commission of the crime of defilement.

Held

1. To prove the offence charged, the prosecution had to establish beyond reasonable doubt all the elements of defilement. The ingredients of an offence of defilement were: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof did not shift to the accused person who was under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.

EKT v Republic

2. It was not every trifling contradiction or inconsistency in the evidence of the prosecution witness that would be fatal to its case. It was only when such inconsistencies or contradictions were substantial and fundamental to the main issues in question and thus necessarily created some doubt in the mind of the trial court that an accused person would be entitled to benefit from it.
3. The assertions that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant. The prosecution proved the element of penetration beyond reasonable doubt. The appellant pleaded in his grounds of appeal that the investigations were shoddy and not enough to sustain a conviction. The court perused the evidence adduced by the prosecution witnesses and as earlier stated found that the investigations were properly carried out leading to the charge of defilement being preferred against the appellant.
4. When the case came up for the first time for hearing on March 3, 2021, the appellant stated that he was ready and on subsequent dates being May 31, 2021 and July 7, 2021, he stated that he was ready to proceed. Taking all the above into consideration, the court was satisfied that the appellant had sufficient time to prepare for his defence and therefore his complaint was devoid of any merit. On the whole, the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the Act and that the conviction of the appellant for the said offence was sound.
5. Sentencing was an important test in matters of crime. One of the prime objectives of criminal law was the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime was done. There was no set formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depended on the facts and circumstances of each case and the court had to keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.
6. The reasoning for the holding by the Supreme Court and the Court of Appeal in the *Francis Karioko Muruatetu & another v Republic* [2017] eKLR case was that the mandatory minimum or maximum sentences deprived the court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences failed to conform to the tenets of fair trial which were an inalienable right guaranteed under articles 50 and 25 of the Constitution of Kenya, 2010.
7. Although the decision above was a persuasive one to the court, and not binding the court, the court was in agreement that whereas mandatory minimum sentences could be lawful, they indeed deprived the trial court of the discretion in sentencing having regard to mitigations and circumstances of each case. That was not to say that there would be any justifiable cause for one to defile a child but that each case had to be considered on its own facts and circumstances. In any event, the offence of murder was one where there was deprivation of life yet the Supreme Court saw it wise to find that death sentence being mandatory deprived the trial court of the discretion to impose appropriate sentence having regard to mitigations and circumstances of the case.
8. The mandatory sentence provided in section 8(3) of the Act was lawful but not necessarily mandatory although the trial court could, having regard to the circumstances of each case, impose a death sentence, which sentence was lawful. For the above reasons, the court found accorded the appellant the opportunity to mitigate for the court to consider whether or not to reconsider the mandatory minimum sentence of 20 years' imprisonment meted out on him.
9. The appellant also submitted that the court ought to look at the time spent in custody in computing the length of his sentence in line with section 332 of the Criminal Procedure Code. The appellant was arrested on November 21, 2020 and although he was granted bond on the November 23, 2020, it appeared he was never released and he remained in custody till the conclusion of the case having failed to raise the surety. In the circumstances, the court found that in computing the sentence imposed on

the appellant, the prisons authorities would consider the period spent in custody by the appellant from the date of arrest until the date of sentencing which was 11 months and fourteen (14) days.

Appeal partly allowed; appeal against conviction dismissed.

Order

The appeal against sentence and re-computation of that sentence allowed to the extent that the appellant was allowed to mitigate for resentencing, which sentence should take into account the period that the appellant spent in custody during the trial, as stipulated in section 333(2) of the Criminal Procedure Code.

Cases

East Africa

1. *Christopher Ochieng v Republic* Criminal Appeal No 202 of 2011; [2018] eKLR – (Mentioned)
2. *Dismas Wafula Kilwake v Republic* [2019] eKLR – (Explained)
3. *Evans Wanjala Siibi v Republic* [2019] eKLR – (Explained)
4. *Evans Wanjala Wanyonyi v Republic* [2019] eKLR – (Explained)
5. *Francis Karioko Muruatetu & another v Republic* [2017] eKLR – (Explained)
6. *George Opondo Olunga v Republic* [2016] eKLR – (Explained)
7. *Hezron Kipkemoi Mutai v Republic* [2022] eKLR – (Explained)
8. *Jared Injiri Koita v Republic* [2019] eKLR – (Mentioned)
9. *Jared Koita Injiri v Republic* Criminal Appeal No 93 of 2014 – (Explained)
10. *Jared Koita Injiri v Republic* Criminal Appeal No 93 of 2014; [2019] eKLR – (Mentioned)
11. *Maingi & 5 others v Director of Public Prosecutions & another* Petition No E017 of 2021; [2022] KEHC 13118 (KLR) – (Explained)
12. *Margate Lima Tuje v Republic* [2016] eKLR – (Explained)
13. *Mark Oiruri Mose v Republic* [2013] eKLR – (Applied)
14. *Okeno v Republic* [1972] eKLR – (Explained)
15. *Okeno v Republic* [1977] EALR 32 – (Applied)
16. *Peter Musau Mwanza v Republic* [2008] KLR – (Explained)
17. *Rwichard Munene v Republic* [2018] eKLR – (Explained)
18. *Yawa Nyale v Republic* [2018] eKLR – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 2(6); 10(3); 25; 28; 50(2)(p) – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 333(2) – (Interpreted)
3. Penal Code (cap 63) sections 203, 204 – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 8(1)(3)(2); 11(1) – (Interpreted)

Advocates

None mentioned

Martin v Republic**22. Actions of a child below eighteen behaving like an adult and willingly engaging in sex do not amount to defilement.**

Significance: The case discussed that conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. More so when one considered the lengthy sentences imposed by the law for such an offence. The case further stated that it was unfair to send someone to 20 years' imprisonment yet the complainant was enjoying the relationship.

Charo v Republic

Criminal Appeal No 32 of 2015

High Court at Malindi

S Chitembwe, J

April 25, 2016

Criminal Procedure – offences – sexual offence – defilement – elements of defilement – whether an accused person could be charged for defilement for engaging in a consensual sexual relationship with a child under the age of eighteen years – Sexual Offences Act, cap 62A section 8(6).

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act. The particulars were that the appellant on diverse dates between December 2, 2011 and January 3, 2012 in Kilifi County within Coast Province intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ, namely vagina, of EN a girl aged 13 years. He was charged and subsequently convicted and sentenced to twenty years imprisonment.

The appellant appealed to the High Court setting the grounds of appeal that the charge sheet was defective and was at variance with the evidence. He also stated that section 200 of the Criminal Procedure Code was not complied with, that a crucial witness by the name Florence was not summoned to testify, that the case was not proved beyond reasonable doubt, the sentence was excessive and that the P3 form was irregularly produced by a person who was not the one who filled it.

Issues

- i. Whether an accused person could be charged with defilement for engaging in a consensual sexual relationship with a minor whose parents knew of the relationship between the two.
- ii. Whether the conduct of a minor whose actions were like that of an adult do not amount to defilement.
- iii. Whether section 200 of the Criminal Procedure Code on conviction on the procedure of evidence partly recorded by one magistrate and partly by another was complied with.

Held

1. Under the Sexual Offences Act, a child below 18 years old could not give consent to sexual intercourse. However, where the child behaved like an adult and willingly sneaked into men's houses for purposes of having sex, the court ought to treat such a child as a grown-up who knew what she was doing. The appellant was 23 years old when the incident occurred as per the pre bail report. It would be unfair to have the appellant serve 20 years behind bars yet complainant was after sex from him.
2. The evidence did not show that the appellant knew that the victim was a student or that the appellant took advantage of the victim being a young girl. It was clear that the victim started engaging in sex way before that date. It was possible that her brother saw the complainant enjoying sex with the

Appellant at 1.00 am.

3. The circumstances clearly showed that it was the complainant who went to the appellant's house to have sex and then went home. She even dodged her brothers. When her brothers went there at night to collect her, she opted to remain with the appellant. If she was a young girl then she would not have gone to the appellant's home to have sex.
4. The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagreed with their boyfriends. The conduct of the complainant played a fundamental role in a defilement case. One could easily conclude that the complainant was defiled after hearing her evidence. Several issues came into focus. Did the complainant report the defilement immediately after the incident? Was she threatened after the incident? How long did it take for her to report? Was there threat on her life? How long was the relationship? Were the parents aware of the relationship. All those issues led to the circumstances of the case as envisaged under section 8(5) of the Sexual Offences Act.
5. Where a child under 18 years who was protected by the law opted to go into men's houses for sex and then went home, the court could not conclude that such a person was defiled. Such behaviour was that of an adult and not of a child. Children were not meant to enjoy sexual intercourse. Whenever they did, then that became the behaviour of an adult. Although the public would frown upon an adult who engaged in sex with such a minor, it should not be forgotten that circumstances had changed. Minors engaged in sex at very young age. That was not out of defilement.
6. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. More so when one considered the lengthy sentences imposed by the law for such an offence. It was unfair to send someone to 20 years' imprisonment yet the complainant was enjoying the relationship.
7. The appellant fell within the defence under section 8(5) of the Sexual Offences Act. It was the complainant who behaved like an adult and engaged in sexual intercourse. The appellant was not expected to inquire from several people about the age of the complainant. The relationship continued for quite a long time to the extent that age became a non-issue.
8. The claim that the ground of appeal that section 200 of the Criminal Procedure Code was not complied with was misplaced. The proceedings of the trial court indicated that section 200 was explained to the appellant who opted to proceed with the case from where it had reached.

Appeal allowed, conviction quashed, sentence set aside; appellant released.

Cases

None referred to

Statutes

East Africa

1. Constitution of Kenya, 2010 article 50(1) – (Interpreted)
2. Criminal Procedure Code (cap 75) section 200 – (Interpreted)
3. Sexual Offences Act (cap 62A) sections 8(1)(3),(4),(5),(6) – (Interpreted)

Advocates

1. Mr Fedha for the respondent

23. Exposure of a child to pornography renders them in need of care and protection as it affects their social and mental development

Significance: In this case the court established that where there is no scientific evidence to prove the offence of defilement, the court is at liberty to believe the uncorroborated evidence of a child who is a victim of a sexual offence.

R v Wekesa

MCSO E004 of 2021

Chief Magistrate Court at Nairobi

EK Kimilu, SPM

April 27, 2022

Evidence Law – elements of the offence of defilement – where the complainant was a male minor aged 13 years old – where the accused was charged with the offence of defilement contrary to section 8(3) of the Sexual Offences Act – where the accused was charged with the offence of promoting a sexual offence with a child contrary to section 12(b) of the Sexual Offences Act – where the complainant was introduced to sexual intercourse by the accused – where the accused unlawfully displayed pornographic films to the complainant – where the accused touched the complainant inappropriately leading to them having sexual intercourse – whether the prosecution proved all the elements of the offence of defilement beyond reasonable doubt – Sexual Offences Act, No 3 of 2006 sections 8(1), 8(3) and 12(b).

Evidence Law – admissibility – admissibility of evidence of a minor who was a victim of a sexual offence – where the victim of a defilement was a male minor aged 13 years – where the medical evidence adduced before the court was inconclusive and failed to establish the offence of defilement – where the complainant being a male minor, had no injuries in his genitalia and specimen could not be extracted to prove defilement – whether the court could rely on the uncorroborated evidence of a minor who was a victim of defilement to convict the accused person – Evidence Act, cap 80 Laws of Kenya section 124.

Brief facts

The accused was charged with the offences of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act), and promoting a sexual offence with a child contrary to section 12 of the Sexual Offences Act. In the alternative, the accused was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

After a *voire dire* examination, the complainant who was aged 13 years old gave sworn evidence. He testified that the first instant of defilement had occurred in July 2020 when he together with the accused, and an infant were watching a Nigerian movie one afternoon. The complainant testified that the accused explained to him what sexual intercourse was and then proceeded to touch him inappropriately which led to them engaging in sexual intercourse for the first time. The complainant stated that the accused asked him not to tell anyone what had happened and that it would be their little secret.

Further, the complainant testified that he continued to have sex with the accused whenever they were left with the accused in the night to watch Nigerian movies as the other family members retired to bed. He stated that they had sex in the laundry room, the accused person's bedroom and the kitchen over the entirety of the period. It was the complainant's testimony that they had sex at least three times a week

Issues

- i. Whether the prosecution proved all the ingredients of the offence of defilement to wit:
 - a. The age of the complainant;
 - b. Penetration; and
 - c. The accused committed the alleged act of defilement.
- ii. Whether the court could rely on the uncorroborated evidence of a minor who was a victim of defilement to convict an accused person.

Held

1. The court was informed that the complainant was a minor and a birth certificate produced to establish that fact. The birth certificate showed that the complainant was born on April 11, 2007 and therefore was aged 13 years as of February 22, 2021 and therefore a minor as defined by section 8(3) of the Sexual Offences Act.
2. The complainant's testimony that the accused engaged in sexual acts with him seemed truthful as the details and the descriptions he gave seemed highly unlikely to be made up. He had no reason to set up the accused. It was without doubt that in sexual offence cases, an eye witness was not easy to avail. The act was performed in secrecy.
3. After considering the medical evidence adduced and presented before the court by the clinical officer, the court determined that it was not conclusive and failed in proving that defilement had indeed occurred. That was owing to the nature of the offence where the victim was a male minor. It was really difficult to prove scientifically that defilement had occurred. That however did not rule out the possibility of the commission of the offence. The court was at liberty to believe the truthfulness of the complainant where there was no scientific evidence to prove that the offence occurred.
4. Penetration in most cases was proved by production of medical evidence. traditionally, a medical officer would produce evidence to confirm presence of spermatozoa and discharge or injuries in the genitalia. All that could not be noticed when time had lapsed. The complainant gave a graphic narration of what transpired and taking all the circumstantial evidence into consideration, the court believed that he was telling the truth. The complainant being a male minor had no injuries in his genitalia and no specimen could be extracted to prove defilement. After conducting a *voire dire*, the court was satisfied that the victim knew that he had a duty to tell the truth. the court concluded that the complainant was truthful and penetration had occurred. The prosecution proved beyond reasonable doubt that the accused committed the offence she was charged with in the main charge.
5. The offence of child pornography was committed when it was proved that an offender had with the intention of encouraging or enabling a child to engage in sexual acts, knowingly displayed, showed, exposed or exhibited obscene images, words or sounds by means of print, audio-visual or any other media. A child could not consent to any form of abuse. Exposure of pornography rendered any child to be in need of care and protection, as it affected the child's mental and social development.
6. Although no pornography history search or review was retrieved from the accused mobile phone, the victim was clear that it was the accused who introduced him to the same. The victim confirmed that after viewing the pornography, they practiced the same hence the charge of defilement. The court found that the victim was truthful and the accused defence was just a mere denial. She claimed bad relations with her employer yet she never quit employment. The victim had to be enrolled to counseling sessions due to the sexual abuse and pornography exposure.
7. The court undertook a *voire dire* on the complainant and satisfied itself that the witness evidence was tenable. The accused was guilty of the main charge of defilement and the alternative charge of committing an indecent act with a child. The court convicted the accused under section 215 of the Criminal Procedure Code, cap 75 Laws of Kenya for the offence of defilement contrary to section 8

R v Wekesa

(3) of the Sexual Offences Act and indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

Cases***East Africa***

1. *BOO v Republic* [2018] eKLR – (Explained)
2. *JMM v Republic* [2020] eKLR – (Explained)
3. *JWA v Republic* [2014] eKLR – (Explained)
4. *Kionji, Geoffrey v Republic* Criminal Appeal No 270 of 2010; [2010] eKLR – (Cited)
5. *Ohiri, Denis Ogoro v Republic* [2014] eKLR – (Explained)

Statutes***East Africa;***

1. Children Act, 2022 (Act No 29 of 2022) section 119(1)(n) – (Interpreted)
2. Criminal Procedure Code (cap 75) section 215 – (Interpreted)
3. Evidence Act (cap 80) – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2(b); 8(1)(3); 11(1); 12(b); 24 – (Interpreted)

Advocates

None mentioned

B. RAPE

- 1. The state had an obligation to protect the fundamental rights and freedoms of victims of the Post-Election Violence 2007-2008.** Coalition on Violence Against Women & 11 others *v* Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*) Petition No 122 of 2013; [2020] eKLR
- 2. The Sexual Offences Act's section 7 offence is not an offence for the rape of a person with mental disabilities, which is the subject of an offence under section 146 of the Penal Code.** Tarus *v* Republic Criminal Appeal No E075 of 2021; [2023] KEHC 1315 (KLR)
- 3. Failure to charge the appellants jointly in one count for the offence of gang rape did not render the charge sheet fatally defective.** Kaunda & another *v* Republic Criminal Appeal No E1151 of 2021; [2022] eKLR
- 4. The prosecution needs to prove either complete or partial penetration to secure a conviction for the offence of rape.** Kimani *v* Republic Criminal Appeal No 32 of 2019; [2021] eKLR
- 5. A witness recalled for further cross-examination cannot be allowed to testify afresh.** Karisa *v* Republic Criminal Appeal No 43 of 2019; [2020] eKLR



Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)

1. The state had an obligation to protect the fundamental rights and freedoms of victims of the Post-Election Violence 2007-2008

Significance: This case is significant as it looks, *inter alia*, into the issue whether the failure by the police to investigate a rape report and make arrests amounted to a violation of the right to life, security of the person and protection from torture, inhuman and degrading treatment or punishment and right to appropriate remedy.

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*) [2020] eKLR

Petition No 122 of 2013

High Court at Nairobi

WK Korir, J

December 10, 2022

Constitutional Law – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to life, right to freedom and security of the person, freedom from torture and cruel, inhuman or degrading treatment or punishment and the right to appropriate remedy – claim that the police failed to investigate rape reports and also failed to make arrests during the 2007/2008 post-election violence period – factors to consider in determining a claim for violation of constitutional rights – factors to consider in determining whether the Government was liable for civil disorder – whether the failure to investigate and make arrests amounted to a violation of the victims constitutional rights – Constitution of Kenya, 2010, articles 23, 156, 157 and 165; Constitution of Kenya (Repealed) sections 70, 71 and 74; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, article 16; International Covenant on Civil and Political Rights, 1966, articles 6, 7 and 9; Universal Declaration of Human Rights, 1948, articles 3 and 5; African Charter on Human and People's Rights, 1981, articles 4, 5 and 6; Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa, 2003, article 4.*

Constitutional Law – *application of the Constitution – retrospective application of the Constitution – whether article 22 of the Constitution on the right to institute public interest litigation could apply retrospectively – whether the right to information under the Constitution of Kenya, 2010, could be applied to requests to information on the 2007/2008 post-election violence which predated the Constitution – Constitution of Kenya, 2010, article 22 and 35; Constitution of Kenya (Repealed) section 84.*

Constitutional Law – *fundamental rights and freedoms – freedom from torture and cruel, inhuman or degrading treatment or punishment – elements and the nature of torture – whether forced circumcision amounted to rape.*

Constitutional Law – *fundamental rights and freedoms – right to information – what were the factors to consider in determining a violation of the right to information – Constitution of Kenya, 2010, article 35.*

Civil Practice and Procedure – *res judicata – elements of res judicata – what were the elements required to prove that a case was res judicata.*

Brief facts

Following the announcement of results of the December 2007 general election, widespread violence and demonstrations ensued. During that period of unrest several women, men and children were subjected to

forms of sexual and gender based violence (SGBV). The petitioners brought the instant petition against the respondents for their failure to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV, and the failure to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th petitioners and other victims. The rights alleged to have been violated included; the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality before the law and freedom from discrimination; the right to information; and the right to remedy and rehabilitation.

The petitioners brought the instant action against the 1st and 4th respondents for among others the failure to train State security agents (police) in lawful methods of conducting law enforcement operations to prevent the commission of crimes by the police; failure to take adequate security measures, particularly the failure to plan and prepare law enforcement operations during PEV to protect victims from SGBV; and failure to supervise police and to prevent and punish crimes committed by police. It was claimed that the 5th and 6th respondents' staff and or employees failed to provide emergency medical services, particularly where the perpetrators were public officials such as police officers.

The petitioners contended that the 1st, 2nd, 3rd and 4th respondents had failed to investigate or take meaningful steps towards ensuring the redressing of gross human rights violations perpetrated against the victims. The petitioners therefore sought among others; a declaratory order to the effect that the right to life, the prohibition of torture, inhuman and degrading treatment, the right to security of the person, the right to protection of the law, the right to equality and freedom from discrimination, the right to information, and the right to remedy were violated in relation to the petitioners 5 to 12 (both inclusive) and other victims of SGBV during the PEV, as a result of the failure of the Government of Kenya to protect those rights.

Issues

- i. Whether article 22 of the Constitution of Kenya, 2010, on the right to institute public interest litigation could apply retrospectively.
- ii. What were the elements required to prove that a case was *res judicata*?
- iii. What were the elements and the nature of torture and whether forced circumcision amounted to rape?
- iv. What were the factors to consider in determining a claim for violation of constitutional rights to life and property by the Government?
- v. What were the factors to be considered in determining whether the Government was liable for civil disorder?
- vi. Whether the failure by the police to investigate a rape report and make arrests amounted to a violation of the right to life, security of the person and protection from torture, inhuman and degrading treatment or punishment and right to appropriate remedy.
- vii. Whether the right to information under the Constitution of Kenya, 2010, (Constitution) could be applied to requests to information on PEV which predated the Constitution.
- viii. What were the factors to consider in determining violation of the right to information?

Held

1. There was no equivalent of article 22 of the Constitution of Kenya, 2010 (Constitution), under the repealed Constitution and according to section 84 of that Constitution; proceedings could only be instituted for the violation of rights on behalf of a detained person. Moreover, the words used in article 22(1) did not contain suggestions of retrospectivity. The right to institute public interest litigation only existed in the context of the Bill of Rights of the Constitution. Therefore, article 22 and the right to institute proceedings on behalf of all victims of SGBV could not apply retrospectively.

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)

2. The elements required to prove that a case was *res judicata* were:
 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties or parties under whom they or any of them claimed.
 - c. The parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
3. From a perusal of the pleadings in Petition No 273 of 2011, the International Commission of Jurists-Kenya Chapter was a petitioner in the matter and the 1st respondent in the instant case was the 1st respondent therein. The interested party in the instant case was also the petitioner in that matter, hence it was not litigating under the same title.
4. There was no similarity of parties in the previous suit and the instant suit. The court was alive to the principle that parties could not evade the application of the doctrine of *res judicata* to their case by litigating under different names.
5. Beyond the issue of parties, *res judicata* was concerned with direct and substantive issues. Although the issue of SGBV was also pursued in the previous matter, it did not form the crux of the petition as it did in the instant petition. Furthermore, the subject matters of the two petitions differed since the previous petition was exclusively concerned with persons living in IDP camps, whereas the instant matter concerned persons who were generally victims of SGBV which occurred during PEV. The respondents had not averred nor proved that the claims specific to the 5th to 12th petitioners had been previously addressed by a court of competent jurisdiction. The instant matter was not *res judicata* and even though two of the parties were litigating under the same title, the issues in the instant petition were not directly or substantively in issue in the previous petition.
6. The right to life, the right to protection from torture and right to security of the person were guaranteed under sections 70, 71 and 74 of the repealed Constitution, and were also protected by articles 3 and 5 of the Universal Declaration of Human Rights (UDHR); articles 6, 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR); articles 4, 5 and 6 of the African Charter on Human and People's Rights (Banjul Charter); and article 4 of the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa (Maputo Protocol).
7. According to the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8, the State had an obligation to prevent violations by State actors and non-State actors. In other words, the State had to protect citizens from threats to their rights.
8. The State had to respect the right to life by refraining to engage in conduct which would arbitrarily deprive the right. Sexual violence was recognised as an infringement on the right to life under article 4 of the Maputo Protocol as it expressly stated that States, in protecting and realising the right of women to life, and the integrity and security of their person, should enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex.
9. Rape had elements of torture which were: the severe infliction of pain or suffering for a number of purposes including intimidation or discrimination. However, torture was perpetrated by State actors or with their acquiescence, consent or instigation. The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. 19 acknowledged that gender-based violence violated the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person.

10. There was no reason why the definition of torture should not be extended to cases of forced circumcision. The elements of inhuman and degrading treatment or punishment described in article 16 of the Convention of Torture were present in such a case.
11. Article 9 of the ICCPR placed an obligation on the State to protect the right to security of the person of non-detained persons. The 6th, 5th and 9th petitioners testified to having been raped by GSU officers. The 5th and 9th petitioners did not report the incidents to the police. However, they were certain that they identified their violators as GSU officers due to their uniform. Their testimonies demonstrated that State actors were involved in acts of sexual violence against the citizenry, and were directly responsible for the violations of their rights. The State could not escape liability, there was a violation of the right to life, protection from torture, inhuman and degrading treatment and right to security of the person of the 5th, 6th and 9th petitioners.
12. The 7th, 8th, 10th, 11th and 12th petitioners who were assaulted by members of the public had unfortunately not provided evidence to the effect that the persons who assaulted them did so with the instigation, consent or acquiescence of a public official or other person acting in an official capacity.
13. The police relinquished their responsibility to investigate the 8th petitioner's report fully and arrest all the three men who had raped her. That was a prime example of how the State could be liable for the violation of right by third parties as once the petitioner reported the rape, the police had a duty to investigate her claim and protect her from further harm. There was no averment by any of the respondents that the Director of Public Prosecutions (DPP) made a determination that the evidence provided to the police by the 8th petitioner was insufficient to mount a prosecution against the two suspects who were not arrested by the Police.
14. The State had a duty to maintain law and order including the protection of life and property. However, as a general rule, that duty was owed generally to the public at large and not specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights, it had to be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police had prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but failed to offer the required protection. In such cases, therefore the State could be held liable where violations of the rights protected and guaranteed in the Bill of Rights were proved even when those violations were occasioned by non-State actors provided that the duty of care was properly activated.
15. For the Government to be liable for civil disorder;-
 - a. the victim had to prove that the Government owed him a specific duty of care;
 - b. that the police ignored impeccable information of an impending attack against specific person(s);
 - c. that the police negligently or deliberately failed to offer protection to the victims and their property;
 - d. that the police or other Government agencies played a part in the creation of state of insecurity or did some acts that rendered the victims more vulnerable or increased their danger.
16. As evidenced by the statements of the victim-petitioners, the State did indeed take into account any intelligence that it could have received on impending violence and put in place police officers to maintain peace. The true magnitude of the 2007-2008 PEV could not have been foreseen or avoided, due to its sudden and drawn-out nature. It was impossible to have a police officer protect every Kenyan citizen from harm, particularly due to the low ratio of police officers to the population

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)

- of Kenya. As such, the State and the police did what they could to protect the population at large, even if the petitioners themselves did not benefit from that protection.
17. Regarding the 5th, 6th, and 9th petitioners who were assaulted by State actors, their rights to life, the security of the person, and protection from torture were infringed by the actions of the State actors which, in line with national, regional and international law, were regarded as actions by the State itself. Additionally, the 8th petitioner who was assaulted by non-State actors was owed a duty of care by the police to investigate her report and make arrests, and when they failed to do so they in effect violated her rights to life; security of the person; and protection from torture, inhuman and degrading treatment or punishment.
 18. The 7th, 10th, 11th, and 12th petitioners who were assaulted by non-State actors failed to show that the police failed to exercise reasonable diligence in the circumstances of their individual cases.
 19. The UDHR and ICCPR provided for the right to protection of the law in articles 6 and 16 respectively. The right to remedy from the High Court was guaranteed under section 84 of the repealed Constitution. That right was also protected under article 8 of the UDHR, article 3 of the ICCPR, and article 25 of the Maputo Protocol.
 20. The petitioners had failed to put forward any evidence to the effect that they were denied or precluded from accessing and benefiting from medical and psychological rehabilitative services provided by the respondents. The Government had not failed to provide the appropriate medical and psychological services to the petitioners. Indeed, where there was alleged denial of treatment by one public institution, the same was quickly availed by another public facility.
 21. To determine whether the petitioners' right to remedy was violated, one had to look at their individual cases. Because the 5th, 6th and 9th petitioners were violated by police officers and no investigations, arrests or prosecutions had been initiated, the State was liable for violating their right to appropriate remedy which in such cases would include compensation.
 22. The State was liable for the violation of the rights of the 8th petitioner who was violated by non-State actors, and the State failed to investigate her claim even though she identified her assailants. Therefore, the 8th petitioner was entitled to appropriate reparations from the State including compensation. Other victims of post-election violence were compensated without necessarily seeking court orders. For instance, those who lost their homes were resettled. There was no reason why those who suffered sexual violence and could establish that they were indeed violated could not as well be compensated.
 23. The 7th, 10th, 11th and 12th petitioners were assaulted by civilians and did not report their assaults to the police. The police could not be faulted for failing to investigate and prosecute cases of violence which they did not know of.
 24. The State owed a duty to the victims of 2007-2008 PEV to investigate the violations of their rights, prosecute the perpetrators, and provide appropriate remedies to the victims. The State fulfilled its obligations to some victims of PEV by investigating their claims and compensating them for their losses. However, for some of the victim-petitioners who were equally victims of PEV, their claims were not investigated fully and no prosecutions (where there was evidence) were carried out. There had been discrimination towards the 5th, 6th, 8th and 9th petitioners as they were owed a duty of care by the State to not only refrain from causing harm to them but also to pursue those whose acts or omissions caused them harm, and to compensate them appropriately.
 25. The right to information, although protected under the Constitution of Kenya, 2010, and international human rights law, was not guaranteed under the repealed Constitution. The events of the 2007-2008 PEV pre-dated the promulgation of the Constitution of Kenya, 2010, and therefore its provisions could not be applied retrospectively. Requests for information, if any, could have occurred after the coming into force of the Constitution of Kenya, 2010, hence making its provisions applicable.

26. None of the witnesses had raised any complaints against the State or Mbagathi District Hospital regarding the alleged denial of treatment records. The individual witnesses had not made any claim that they attempted to access information or medical documents from Mbagathi District Hospital and were not provided with their documents. In the absence of any proof that any Government medical facility withheld medical records from the 5th to 12th petitioners, there had not been a violation of the right to information.
27. Article 35(1) and (3) of the Constitution provided for the right to information. Additionally, article 232(1)(f) of the Constitution listed transparency and provision to the public of timely and accurate information as part of the values and principles of public service. There existed a right to information which was protected under the Constitution and regarded as an integral principle and value of public service.
28. The petitioners had not claimed nor produced evidence to the effect that they requested the Government to release any information or reports on the cases of SGBV during PEV. For that claim to succeed it would have been necessary for the petitioners to have made a request to the respondents for such information, and that the request was ignored or refused.
29. According to the Joint Declaration on Access to Information by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2004), States were required to pro-actively publish a range of information which was in the public's interest in the absence of a request. Additionally, according to paragraph 4 of the Intern-American Juridical Committee's Principles on the Right of Access to Information, public bodies were required to proactively and routinely disseminate information on their functions and activities including on activities which would affect the public. Those instruments provided an interesting perspective on the matter. They appeared to breathe life into the provisions of article 232(1)(f) of the Constitution.
30. The petitioners failed to provide proof that they sought information from the respondents and that their requests were denied or ignored. Therefore, they had not proven that their right to information was infringed by the acts or omissions of the respondents.
31. In the absence of any complaints made to the 3rd respondent by the victim-petitioners, and given the short period the 3rd respondent had to investigate those violations before the instant proceedings precluded it from doing so, the 3rd respondent had not failed to undertake investigations into claims of violation of human rights by police officers during the 2007-2008 PEV.
32. Sexual violation just like any other violation of human rights and freedoms should be compensated. Sexual violence carried with it both physical and mental pain.
33. The 1st and 2nd respondents were independent offices respectively established under articles 156 and 157 of the Constitution, and were not subject to the direction or control of any other person or authority. The 4th respondent was only subject to the instructions of the DPP. Although the court was granted jurisdiction under article 23 of the Constitution to enforce and uphold the Bill of Rights through the issuance of appropriate remedies, that jurisdiction should be exercised in compliance with the other provisions of the Constitution. The court was also alive to its jurisdiction under article 165 of the Constitution.
34. It had not been established that the respondents had failed to discharge their constitutional and statutory mandates to the other SGBV victims of PEV who were not before the court to warrant issuance of orders directing the respondents to perform their duties in a given manner. The remedies that would be provided to the successful victim-petitioners would be sufficient in the circumstances of the instant case.

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)

35. On the issue of the compensation for economic losses, the petitioners had failed to explain how they arrived at the figure presented, or any proof of their earnings before the PEV. Without any reference to how the petitioners had computed that amount, the claim could not succeed. The same position applied to the prayer for future medical treatment. No evidence was adduced to support the claim.
36. The general trend was to avoid award of exemplary or punitive damages in public law claims. That principle was grounded on two reasons namely that the State had improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. The court therefore declined to award the estate of the deceased exemplary or aggravated damages.

Petition partly allowed.

Orders

- i. A declaratory order was issued to the effect that the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence was a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5th, 6th, 8th and 9th petitioners.
- ii. A declaratory order was issued to the effect that the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy were violated in relation to the 5th, 6th, 8th and 9th petitioners during the 2007-2008 post-election violence, as a result of the failure of the Government of Kenya to protect those rights.
- iii. The 5th, 6th, 8th and 9th petitioners were each awarded Kshs. 4 million as general damages for the violation of their constitutional rights.
- iv. The 5th, 6th, 8th and 9th petitioners were awarded costs of the suit against the 1st and 4th respondents. The other parties were to meet their own costs of the proceedings.

Cases

East Africa

1. *Agricultural Development Corporation v Harjit Pandhal Singh & another* [2019] eKLR – (Explained)
2. *Attorney General of Jamaica & others v Dacres (Sheryl) Resident Magistrate's Civil Appeal No 2 of 2009* – (Explained)
3. *Beatrice Wanjiku & another v Attorney General & others* Petition No 190 of 2011 – (Explained)
4. *Bernard Wachira Waheire v Attorney General* Nairobi HCC No 1184 of 2003 – (Explained)
5. *Charles Murigu Muriithi & 2 others v Attorney-General* [2015] eKLR – (Explained)
6. *Charles Murigu Muriithi & 2 others v Attorney-General* [2019] eKLR – (Explained)
7. *Charles Murigu Murithii & 2 others v Attorney General* Petition No 113 of 2009 (Consolidated with Petition No 44 of 2009 and Petition No 48 of 2012) – (Explained)
8. *Charles Murigu Murithii & 2 others v Attorney-General* [2015] eKLR – (Explained)
9. *CK (A Child) (through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others* [2013] eKLR – (Explained)
10. *David Gachira v MWM* [2006] eKLR – (Explained)
11. *David Gitau Njau & 9 others v Attorney-General* [2013] eKLR – (Explained)
12. *Dominic Waweru v Occidental Insurance Company Ltd* [2015] eKLR – (Explained)
13. *Federation of Women Lawyers in Kenya (FIDA-Kenya) & 5 others v Attorney General & another* [2011] eKLR – (Explained)

14. *FIDA Kenya & 27 others v the Attorney General* Petition No 273 of 2011 – (Explained)
15. *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR – (Explained)
16. *Gitati Cyrus Muraguri v Attorney General* Misc. Case No 1185 of 2003 – (Explained)
17. *GMV v Bank of Africa Kenya Limited* [2013] eKLR – (Explained)
18. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR – (Explained)
19. *International Centre for Policy and Conflict v Attorney General & another* [2012] eKLR – (Explained)
20. *Irene Wangari Gacheru & 6 others v Attorney General* [2017] eKLR – (Explained)
21. *Jacob Ayiga Maruja & another v Simeon Obayo* Civil Appeal No 167 of 2002 – (Explained)
22. *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another* [2015] eKLR
23. *James Odemba Akong'o v Attorney General & 3 others* [2013] eKLR – (Explained)
24. *Jennifer Wanjira Ng'ang'a & another v Attorney General* [2017] eKLR – (Explained)
25. *Kenya Bus Services Ltd v Gituma* [2004] EA 91 – (Explained)
26. *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR – (Explained)
27. *Kenya Fluorspar Company Limited v William Mutua Maseve & another* Civil Appeal No 188 of 2010 – (Explained)
28. *Kenya Power and Lighting v Fridah Kageni Julius* [2014] eKLR – (Explained)
29. *Kenya Society for the Mentally Handicapped v Attorney General & 5 others* [2011] eKLR – (Explained)
30. *Kiambu County Tenants Welfare Association v Attorney General & another* [2017] eKLR – (Explained)
31. *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR – (Explained)
32. *Koigi Wamwere v Attorney General* [2015] eKLR and *Peter M Kariuki v Attorney General* [2014] eKLR – (Explained)
33. *Liza Catherine Wangari Mwangi v Attorney General* [2010] eKLR – (Explained)
34. *Mahira Housing Co Ltd v Mama Ngina Kenyatta & another (Suing as Trustees of Waunyomu Ngeke Ranch)* [2008] KLR 31 – (Explained)
35. *Maisha Nishike Limited v the Permanent Secretary, Ministry of Lands & 5 others* [2013] eKLR – (Explained)
36. *Mary Rono v Jane Rono & another*, Eldoret C.A. Civil Appeal 66 of 2002 – (Explained)
37. *Mawenzi Investments Ltd v Top Finance Co. Ltd & another* HCCS No 02 of 2013
38. *Mbaka Nguru & another v James George Rakwar* [1998] eKLR – (Explained)
39. *Michael Rubia v Attorney General* [2020] eKLR – (Explained)
40. *Mumias Sugar Company Ltd v Francis Wanalo* [2007] eKLR – (Explained)
41. *Mwaura Muiruri v Suera Flowers Limited* [2014] eKLR – (Explained)
42. *National Bank of Kenya v Lawrence Otweyo Gumbo* [2006] eKLR – (Explained)
43. *Njuguna Githiru v Attorney General* [2016] eKLR – (Explained)
44. *Obongo Orude & Stanley Mwangi v Municipal County of Kisumu* [1971] EA 91 – (Explained)
45. *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No 42 of 2015 – (Explained)
46. *POO (a Minor) v Director of Public Prosecutions & another* [2017] eKLR – (Explained)
47. *PO v Board of Trustees, AF & 2 others* [2014] eKLR – (Explained)
48. *Patrick Chege Kinuthia & 2 others v Attorney-General* [2015] eKLR – (Explained)
49. *Peter K Waweru v Republic* [2006] eKLR – (Explained)
50. *Peter M Kariuki v Attorney General* [2014] eKLR – (Explained)
51. *Raila Odinga v IEBC & 3 others* Election Petition No 5 of 2013 – (Explained)
52. *Ransa Company Ltd v Hatibu Abdalla Juma & 9 others* [2014] eKLR – (Explained)
53. *Republic v El Mann* [1969] EA 357 (K) – (Explained)
54. *Republic v Kenya National Examinations Council ex parte Gathenji & others* Civil Appeal No 266 of 1996 – (Explained)

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)

55. *Republic v Ministry of Interior and Coordination of National Government ex parte ZTE Corporation & another* [2014] eKLR – (Explained)
56. *Said Fondo Kalume v Attorney-General* [2013] eKLR – (Explained)
57. *Salim Awadh Salim & 10 others v Commissioner of Police & 3 others* Nairobi High Court Petition No 822 of 2008 – (Explained)
58. *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR – (Explained)
59. *Shah v Attorney-General (No 3) Kampala* HMC No 31 of 1969; [1970] EA 543. – (Explained)
60. *Silas Make Otuke v Attorney General & 3 others* [2014] eKLR – (Explained)
61. *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR – (Explained)
62. *Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others* [2016] eKLR – (Explained)
63. *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR – (Explained)
64. *Van Eeden v Minister of Safety and Security* Case No 176/2001 – (Explained)
65. *W. J. & another v Astarikoh Henry Amkoah & 9 others* [2015] eKLR
66. *Zacharia Waweru Thumbi v Samuel Njoroge* Civil Appeal No 445 of 2003 – (Explained)

India

1. *Bodhisattwa Guatam v Miss Subhra Chakraborty* 1996 AIR 922 – (Explained)
2. *Paschim Banga Khet Mazdoor Samity v State of West Bengal & another* 1996 SOL Case No. 169 – (Explained)
3. *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty* 1996 AIR 922 – (Explained)

United Kingdom

1. *Ansell v McDermott* [1993] 4 All ER 355 – (Explained)
2. *Alexandrou v Oxford* [1993] 4 All ER 328 – (Explained)
3. *Swimney v Chief Constable of Northumbria Police Force* [1997] QB 464 – (Explained)
4. *Anna v Merton LBC* [1978] AC 728 – (Explained)
5. *Mahon v Air New Zealand Ltd & others* [1984] 3 All ER – (Explained)
6. *DSD & NBV v Commissioner for Police Metropolis* [2014] EWHC 436 (QB) – (Explained)
7. *Korau v Chief Constable of Greater Manchester Police* [2015] EWCA Civ 646 – (Explained)
8. *Rookes v Barnard & 2 others* [1964] AC 1129 – (Explained)

South Africa

NM & others v Smith & others (Freedom of Expression Institute as Amicus Curiae) (CCT 69/05) [2007] ZACC 6) – (Explained)

Regional Court

1. *Aydin v Turkey* 57/1996/676/866, *Council of Europe; European Court of Human Rights*, 25 September 1997 – (Explained)
2. *Blanco v Nicaragua*, Communication No 328/1988, UN Doc CCPR/C/51/D/328/1988 (1994) – (Explained)
3. *Cas Romania (Cas Romania, European Court of Human Rights)* Application No 26692/05 – (Explained)
4. *Celebici Case* CC/PIU/364-E, 16 November 1998 – (Explained)
5. *Claude-Reyes et al. v Chile*, Judgement of September 19, 2006 – (Explained)
6. *CT & KM v Sweden* CAT/279/2005, 22 January 2007 – (Explained)
7. *Fatima Mehalli v Algeria*, Communication No 1900/2009, UN Doc CCPR/C/110/D/1900/2009 (2014) – (Explained)
8. *Fatima Yildirim (deceased) v Austria* (Communication No 6/2005) – (Explained)

9. *Interights v Egypt*, Comm 312/2005, 21st ACHPR AAR Annex II (2006-2007) – (Explained)
10. *Intern-American Juridical Committee's Principles on the Right of Access to Information* – (Explained)
11. *Jephtar & Sons Construction & Engineering Works Ltd v The Attorney General* HCT-00-CV-CS-0699-2006 – (Explained)
12. *Jessica Lenahan (Gonzales) et al v United States* (2011) – (Explained)
13. *Joint Declaration on Access to Information by the UN Special Rapporteur on Freedom of Opinion and Expression* – (Explained)
14. *Kolevi v Bulgaria* (Application No 1108/02), 5 November, 2009 – (Explained)
15. *Mahmut Kaya v Turkey* [2000] ECHR 129, 28th March 2000 – (Explained)
16. *McCann & others v United Kingdom* (21 ECHR 97 GC) – (Explained)
17. *McFarlane v Ireland* (Application No 31333/06) – (Explained)
18. *MSS v Belgium & Greece* Application No 30696/09 – (Explained)
19. *Osman v The United Kingdom* 87/1997/871/1083 – (Explained)
20. *Osman v United Kingdom* Case No 87/1997/871/1083 – (Explained)
21. *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T – (Explained)
22. *Prosecutor v Jean Paul Akayesu* ICTR-96-4-A – (Explained)
23. *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 – (Explained)
24. *Prosecutor v Kaing Guek Eav alias Duch* Case No 001/18-07-2007/ECCC/TC – (Explained)
25. *Prosecutor v Kunarac et al* Case No IT-96-23-T & IT-96-23/1-T 22 February, 2001 – (Explained)
26. *Prosecutor v Uhuru Muigai Kenyatta* No. ICC-01/09-02/11 – (Explained)
27. *Rodger Chongwe v Zambia* CCPR/C/70/D/821/1998, 9 November 2000 – (Explained)
28. *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, ACHPR, Comm. 279/03-296/05 – (Explained)
29. *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* No. ICC-01/09-02/11 – (Explained)
30. *Velásquez Rodríguez v Honduras* Resolution No 22/86, Case 7920, April 18, 1986 – (Explained)
31. *Zimbabwe Human Rights NGO Forum v Zimbabwe* Comm No 245/02 (2006) – (Explained)
32. *Zimbabwe Lawyers for Human Rights & the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*, 294/2004, 26th ACHPR AAR Annex (Dec 2008-May 2009) – (Explained)

Statutes

East Africa

1. Independent Policing Oversight Authority Act, 2011 (Act No 35 of 2011) In general – (Cited)
2. Constitution of Kenya (Repealed) sections 70, 83 – (Interpreted)
3. National Police Service Act, 2011 (Act No 11A of 2011) section 24 – (Interpreted)
4. Police Act, (Repealed) (cap 84) section 14(1) – (Interpreted)
5. Constitution of Kenya, 2010 articles 10, 19, 22, 25, 26, 27, 29, 35, 244; 245(1) – (Interpreted)

International Instruments and Conventions

1. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
2. Convention on All Forms of Discrimination Against Women, 1987
3. Declaration on the Elimination of Violence Against Women ('DEVAW'), 1993 article 4(2)
4. International Convention on the Elimination of all Forms of Racial Discrimination, 1981
5. International Covenant on Civil and Political Rights, 1966
6. Principles of Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), 2004

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*)

7. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 1995
8. Rome Statute of the International Criminal Court, 1998

Advocates

None mentioned

2. The Sexual Offences Act's section 7 offence is not an offence for the rape of a person with mental disabilities, which is the subject of an offence under section 146 of the Penal Code

Significance: This case clarifies the issue whether the Sexual Offences Act's section 7 offence was an offence for the rape of a person with mental disabilities.

Tarus v Republic [2023] KEHC 1315 (KLR)

Criminal Appeal No E075 of 2021

High Court at Mombasa

FG Mugambi, J

February 15, 2023

Criminal Law – sexual offences – rape – rape of a person with mental disabilities – where the appellant was charged with rape of the victim who had mental disabilities – where the appellant claimed that the victim had consented for sex hence not rape – where the appellant appealed wanting to be categorised under section 7 of the Sexual Offences Act where the person with mental disability was the spectator while in section 146 offence the person with mental disability, therein called an idiot or imbecile, was the victim – whether the Sexual Offences Act's section 7 offence was an offence for the rape of a person with mental disabilities – Sexual Offences Act, 2006, section 7; Penal Code, section 146.

Criminal Law – sexual offences – rape – rape of a person with mental disabilities – where the appellant was charged with rape of the victim who had mental disabilities – where the appellant claimed that the victim had consented for sex hence not rape – what were the ingredients of rape – Sexual Offences Act, 2006, section 7.

Evidence Law – evidence – evidence in rape – admissibility of evidence – where the victim of rape had mental disabilities – where the victim gave evidence that she had not consented to have sex with the appellant – where the appellant objected her submission saying she had mental disabilities and had consented to have sex with him – whether evidence for rape from a victim with mental disabilities was reliable – Sexual Offences Act, 2006, section 7; Penal Code, cap 63, section 146.

Brief facts

The appellant was charged, convicted and sentenced to 10 years' imprisonment for the offence of rape contrary to section 3(1)(a) and (c) read with section 3 of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on July 4, 2020 at [Particulars Withheld] area in Likoni sub county within Mombasa county he unlawfully and intentionally caused his penis to penetrate the vagina of SOA without her consent. He was also charged with an alternative charge of committing an indecent act contrary to section 11(a) of the Sexual Offences Act. The appellant appealed against the conviction and sentence as set out in the amended petition of appeal filed on September 5, 2022.

The appellant had singled out the following grounds of appeal-

- a. That the trial court erred in making a finding that the complainant was mentally challenged without the support of a psychiatric report;
- b. That the trial court erred by failing to note that the report of the clinician and the P3 form did not prove the offence of rape;
- c. That the sentence was manifestly harsh and excessive in the circumstances of the case;
- d. The trial court erred in failing to consider his defence.

Tarus v Republic**Issues**

- i. Whether the Sexual Offences Act's section 7 offence was an offence for the rape of a person with mental disabilities.
- ii. What were the ingredients of rape?
- iii. Whether evidence for rape from a victim with mental disabilities was reliable.

Held

1. Penetration was defined under the Sexual Offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The court did not think that the issue of penetration was denied by the appellant although the same was collaborated by the medical report. At page 7 of his submission, the appellant stated that the truth was that there was consent by the complainant to have sex with the alleged perpetrator and the allegations of rape only came after the alleged perpetrator refused to give the complainants employer, PW2, bus fare as requested, to go to Western.
2. The lack of consent was essential element of the crime of rape. The mens rea in rape was primarily an intention and not a state of mind. The mental element was to have intercourse without consent or not caring whether the woman consented or not.
3. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yielded through fear of death or through distress it was rape and it was not excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor was it any excuse that she consented after the fact.
4. PW1 recounted what transpired on the material date. It was important to point out that the trial court found the evidence by the complainant to be credible and found her to be believable despite the fact that she was mentally challenged. The trial court's proceedings showed that the learned trial magistrate found that she was in a lucid moment and understood proceedings. There was no need to therefore subject her to psychiatric examination as alleged by the appellant. It was her testimony that she had gone to the barber shop for a haircut. She was the last customer and after the hair cut the appellant suddenly pulled her and locked her in a room. She stated that she did not consent to the sexual activity and that the appellant threatened to harm her if she dared scream.
5. Her state of shock and fright after the act was corroborated by PW2 who stated that the complainant returned home crying and shaking and asked never to be sent back to the barbershop again. There was also the testimony from the investigating officer, PW5 that upon visiting the scene of crime the complainant appeared confused and wanted to go home. The state of the complainant after the incident in the court's view would point out to a person who was still scared and afraid of what had happened to her. That apprehension could only point out to the force, threats and intimidation under the appellant. The fact that there was no physical injury should not negate the assumption that there was no consent. The threats and intimidation did not have to arise from physical abuse and could also be mentally instigated. The evidence of the complainant in that regard was corroborated by the testimonies of PW2 and PW5 who gave evidence that was entirely consistent with the complainant's.
6. It was the appellant's case that had the mental state of the complainant been taken into account, the court would have found the charge sheet defective. He argued that he ought to have been charged under section 7 of the Sexual Offences Act which provided that a person who intentionally committed rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities was guilty of an offence and was liable upon conviction to imprisonment for a term which should not be less than ten years.

7. The section 7 offence was not an offence for the rape of a person with mental disabilities, which was the subject of an offence under section 146 of the Penal Code. Section 7 of the Sexual Offences Act proscribed the rape of or indecent act with another within the view of a family member, a child or a person with mental disability. In section 7 offence, the person with mental disability was the spectator while in section 146 offence the person with mental disability, therein called an idiot or imbecile, was the victim. Section 146 of the Penal Code provided that any person who, knowing a person to be an idiot or imbecile, had or attempted to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which proved that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, was guilty of a felony and was liable to imprisonment with hard labour for fourteen years.
8. The definition of person with mental disabilities under the Sexual Offences Act meant a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of the Act included a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was –
 - a. unable to appreciate the nature and reasonably foreseeable consequences of any act described under the Act;
 - b. able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
 - c. unable to resist the commission of any such act; or
 - d. unable to communicate his or her unwillingness to participate in any such act.
9. The court had already stated that the court had on its own assessment found the accused to be a credible witness with a clear grasp of what had happened to her and there was no evidence that she was being delusional. That evidence of her lucidity was corroborated by PW2, her employer of 7 years who stated that she was able to take care of the children. Under the circumstances, it was the court's finding that PW1 would not fall under the definition of an imbecile or person with mental disability as anticipated for purposes of section 7 of the Sexual Offences Act or section 146 of the Penal Code and that the charge was proper.
10. PW 1 was able to identify the perpetrator by recognition because it was the second time that she had gone to the barber shop and even if she did not know him well, she was able to recognize him also because she had been attended to by him. PW2 also corroborated the evidence of PW1. She knew the appellant well. The appellant in any case also confirmed having had sex with the complainant.
11. PW1 was raped on July 4, 2020 and there was intentional and unlawful penetration of her vagina without her consent; and she was subdued by means of force, threats and intimidation.
12. The appellant submitted that the sentence of 10 years was harsh and excessive under the circumstances. It was the respondent's submission that the court ought to interfere with the sentence only if it could be proved that the trial court applied wrong principles of sentencing.
13. It was settled law, following several authorities by the court and by the High Court, that sentence was a matter that rests in the discretion of the trial court. Similarly, sentence had to depend on the facts of each case. On appeal the appellate court would not easily interfere with sentence unless, that sentence was 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 felt that the sentence was heavy and that the appellate court might itself not have passed that sentence, those alone were not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated was shown to exist.
14. The trial court addressed itself to the circumstances of the case and took into account the mitigation

Tarus v Republic

by the appellant, his physical disability and the vulnerability of the complainant and considering that, sentenced the appellant to 10 years. The decision of the court did not seem to have been hinged on the prescribed minimum sentence which provisions had since evolved through emerging jurisprudence. The court therefore saw nothing to warrant a review of the sentence.

15. The court was in agreement with the trial court that all the ingredients necessary to satisfy a charge of rape were proved by the prosecution against the appellant.

Appeal dismissed; conviction and sentence of the trial court affirmed.

Cases***East Africa;***

1. *Bernard Kimani Gacheru v Republic* [2002] eKLR – (Explained)
2. *David Njuguna Wairimu v Republic* [2010] eKLR – (Explained)
3. *Njoroge Mungai v Republic* [2017] eKLR – (Explained)
4. *Njoroge v Republic* [1987] KLR 19 – (Applied)
5. *Okeno v Republic* [1972] EA 32 – (Applied)
6. *Republic v Oyier* Criminal Appeal No 158 of 1984 – (Explained)
7. *Shadrack Kipkoech Kogo v Republic* Criminal Appeal No 253 of 2003 – (Explained)

Statutes***East Africa***

1. Evidence Act (cap 80) sections 107(1) – (Interpreted)
2. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 3(1)(a)(c); 7; 8(1)(4); 11(1) – (Interpreted)
3. Penal Code (cap 63) sections 146 – (Interpreted)

Advocates

None mentioned

3. Failure to charge the appellants jointly in one count for the offence of gang rape did not render the charge sheet fatally defective

Significance: The case sets out the elements of the offence of gang rape that the prosecution is required to prove in order to sustain a conviction for that offence.

Kaunda & another v Republic [2022] eKLR

Criminal Appeal No E1151 of 2021

High Court at Nairobi

CW Githua, J

December 22, 2022

Criminal Law – charges – drafting of charges – where the appellants were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act – where the appellants were charged separately in 2 different counts for the offence of gang rape – whether charging the appellants separately with 2 different counts of gang rape rendered the charge sheet fatally defective – Sexual Offences Act, No 3 of 2006 section 10; Criminal Procedure Code, cap 75 Laws of Kenya section 136.

Constitutional Law – Bill of Rights-right to a fair trial-where the appellants contended that they were not furnished with witness statements by the prosecution – where the appellants claimed that they were not given adequate time and facilities to prepare for their defence-where the appellants contended that failure by the trial court to recall witnesses after taking over the case from the previous magistrate violated their right to a fair trial – whether failure to furnish the appellants with prosecution’s witness statement violated their right to a fair trial-Constitution of Kenya, 2010 article 50(2)(c) and (j); Criminal Procedure Code, cap 75 Laws of Kenya section 200(3).

Evidence Law – elements of gang rape-where the appellants were charged with the offence of gang rape – where the appellants contended that the prosecution did not prove the case of gang rape against them beyond reasonable doubt – whether the evidence adduced by the prosecution was sufficient to prove the offence of gang rape against the appellants beyond any reasonable doubt – Sexual Offences Act, No 3 of 2006 section 10; Evidence Act, cap 80 Laws of Kenya section 107.

Brief facts

The appellants were charged separately with the offence of gang rape contrary to section 10 of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act). The 1st appellant faced an additional charge of stealing contrary to section 268(1) as read with section 275 of the Penal Code, cap 63 Laws of Kenya. After trial, each appellant was sentenced to 15 years imprisonment for the offence of rape. In addition, the 1st appellant was sentenced to serve 1 year imprisonment for the offence of theft.

Aggrieved by the decision of the trial court, the appellants lodged an appeal to the High Court. They contended that the trial court erred in law in convicting them on defective charges and failing to observe the provisions of section 200 of the Criminal Procedure Code, cap 75 Laws of Kenya (CPC) after taking over the case.

Further, the appellants contended that the trial court failed to observe their right to a fair trial contrary to article 50(2)(c) and (j) of the Constitution of Kenya, 2010 (the Constitution). They argued that the trial court allowed the production of secondary evidence without any legal basis. They claimed that the sentence of 15 years imprisonment imposed on them by the trial court was harsh and severe.

Kaunda & another v Republic**Issues**

- i. Whether charging the appellants separately with 2 counts of gang rape rendered the charge sheet fatally defective.
- ii. Whether failure to furnish the appellants with prosecution's witness statements violated their right to a fair trial.
- iii. Whether the evidence adduced by the prosecution was sufficient to prove the offence of gang rape against the appellants beyond any reasonable doubt.
- iv. What were the elements of the offence of gang rape that the prosecution needed to prove in order to secure a conviction?
- v. Whether the sentence of 15 years imprisonment imposed on the appellants by the trial court was harsh and excessive.

Held

1. Given the essential ingredients for the offence of gang rape under section 10 of the Sexual Offences Act, and in view of the evidence adduced in support of the prosecution's case, it was evident that the two appellants ought to have been charged jointly in one count instead of being charged separately in two different counts. However, failure to charge the appellants jointly in one count did not render the charge sheet fatally defective. The use of the word "may" as opposed to "shall" in section 136 of the CPC showed that it was not a mandatory requirement to have a person specified therein charged jointly in one count and that failure to comply with that provision did not make a charge incurably defective.
2. The irregularity in drafting the charges against the appellants did not occasion them any prejudice as they knew the charges they were facing from the very beginning and they ably defended themselves against them throughout the trial. The irregularity was curable under section 382 of the CPC and could not be a basis for vitiating the appellant's convictions.
3. The trial court's record showed that on July 19, 2018 the court ordered that the appellants be furnished with witness statements. By the time the first prosecution witness testified, about 9 months later on April 23, 2019 and subsequently during the trial, the appellants did not complain that they had not been supplied with witness statements or documentary evidence to be relied on by the prosecution during the trial. The only inference drawn from that fact was that they had actually been supplied with the evidence the prosecution was relying on during the trial.
4. The claim that the trial court failed to comply with section 200 of the CPC when it took over the case from the previous magistrate thereby violating the appellants' right to a fair trial was unmerited. The record showed that when Hon L Gatheru (SRM) took over the case from Hon W Oketch (SRM) on November 21, 2018, no prosecution witness had testified. The case was not therefore partly heard by the previous magistrate to justify compliance with section 200(3) of the CPC.
5. The trial court's record showed that after delivery of the ruling on case to answer placing the appellants on their defence, the trial court specifically stated that it had complied with section 211 of the CPC and recorded the election made by each of the appellants and their co-accused regarding how they desired to prosecute their respective defences. The appellants were accorded a fair trial as none of their rights enshrined under article 50(2) of the Constitution were violated by the trial court.
6. For the prosecution to sustain a conviction for the offence of gang rape, it ought to prove beyond any reasonable doubt that the accused committed the offence of rape or defilement in association with one or more persons or with a common intention, the accused was in the company of one or more persons who committed the offence of rape or defilement. Also, the prosecution was to prove that the accused caused penetration with his or her genital organ without the victim's consent. Positive identification of the accused person as the culprit ought also to be proved.

7. Though the 1st appellant denied having had any sexual activity with PW1, when PW1 was medically examined in the evening of the same day, she was found to have swellings on her head and forehead and her vagina was reddish with scratches. This materially corroborated PW1's evidence that the 1st appellant had assaulted her to subdue and force her to have sexual intercourse with her on the date in question. The medical evidence supported PW1's assertions regarding penetration and lack of consent.
8. The 2nd appellant shared a common intention with the 1st appellant to commit the offence because besides locking the house from outside, he remained outside as the 1st appellant assaulted and raped PW1 and he made no attempt to stop him. Besides, after the act was done, he was the one who threw PW1 out of the house after slapping her. The whole sequence of events left no doubt that the two appellants were acting in concert.
9. The court was satisfied that the identities of the two appellants were not in question since they did not deny having interacted with the complainant on the material date and time. The 1st appellant conceded that they had known each other with PW1 since the year 2018; that they were good friends. Flowing from the foregoing, there was no doubt that the two appellants were properly convicted of the offence of gang rape. Their conviction was thus upheld.
10. Though the evidence showed that PW1 had left her phone, two sim cards, earphones and T-shirt in Princess's house after she was forced to leave without them, it was not clear who among the appellants and Princess moved the phone and sim cards to the house in which they were recovered. It was noteworthy that the house was shared by both appellants. According to PW5, the 2nd appellant told him that it is the 1st appellant who had taken the phone to the house. But that was accomplice evidence which without corroboration lacked any probative value. The evidence adduced by the prosecution did not prove the offence of theft as charged in count 2 beyond any reasonable doubt. The 1st appellant's conviction in count 2 was improper and unsafe. The conviction was quashed and the resultant sentence of one year imprisonment set aside.
11. Having weighed the aggravating against the mitigating factors in the instant case including the fact that the appellants were young men who were in college when they committed the offence, the court allowed their appeal against sentence and set aside the 15 year sentence imposed against each appellant by the trial court. The sentence was substituted with that of eight years imprisonment. The record showed that the appellants had spent eighteen (18) days in lawful custody before they were released on bond. In compliance with section 333(2) of the CPC, that period was to be taken into account when computing the appellants' substituted sentence.

Cases

East Africa

1. *OKeno v Republic* [1972] EA 32 – (Explained)
2. *Mwangi v Republic* [2004] 2 KLR 28 – (Explained)
3. *Mark Kiruri Mose v Republic* [2013] eKLR – (Explained)
4. *Republic v Oyier* [1985] eKLR – (Explained)
5. *Francis Matonda Ogeto v Republic* [2019] eKLR – (Explained)
6. *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015; [2016] eKLR

Statutes

East Africa

1. Criminal Procedure Code (cap 75) sections 134, 151, 200, 211, 333(2); 382 – (Interpreted)
2. Evidence Act (cap 80) section 77 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 3(1); 8(3); 10 – (Interpreted)
4. Penal Code (cap 63) sections 4, 20, 268(1); 275 – (Interpreted)
5. Constitution of Kenya, 2010 articles 25, 27, 28, 50(2)(c)(g)(j)(4); 159(2)(a) – (Interpreted)

Kaunda & another v Republic

Advocates

1. Ms Ondande for the appellant
2. Ms Oduor for the state

4. The prosecution needs to prove either complete or partial penetration to secure a conviction for the offence of rape

Significance: The court can convict an accused person on the sole evidence of the victim of sexual assault, if the court believes the victim is telling the truth.

Kimani v Republic [2021] eKLR

Criminal Appeal No 32 of 2019

High Court at Kajiado

EC Mwita, J

February 26, 2021

Evidence Law – *standard of proof-where the appellant was charged with the offence of rape contrary to section (1)(a) as read with section 3(1)(b) of the Sexual Offences Act – where the appellant was sentenced to 10 years imprisonment for the offence of rape-where the appellant argued that the evidence adduced by the prosecution was highly inconsistent and contradictory-whether the prosecution proved the case of rape against the appellant beyond reasonable doubt – whether there were inconsistencies and contradictions in the evidence adduced by the prosecution – Sexual Offences Act, No 3 of 2006 sections (1)(a) as read with section 3(1)(b); Evidence Act, cap 80 Laws of Kenya section 107.*

Brief facts

The appellant filed an appeal challenging the decision of the trial court which had convicted him for the offence of rape contrary to section 3(1)(a) as read with section 3(1)(b) of the Sexual Offences Act No 3 of 2006 (Sexual Offences Act). After a full trial, the trial court sentenced him to 10 years imprisonment. It was the appellant's contention that the trial court erred in law by failing to observe that the age of the victim was not established in accordance with the law and a DNA test was not conducted. He argued that his age at the time of commission of the offence was also not established.

The appellant claimed that the prosecution failed to prove the case of rape against him beyond reasonable doubt. He stated that investigation was not properly done and the evidence by the prosecution was highly inconsistent and contradictory.

Issues

- i. Whether the prosecution proved the case of rape against the appellant beyond reasonable doubt.
- ii. Whether there were inconsistencies and contradictions in the evidence adduced by the prosecution.

Held

1. The instant case being of rape, the prosecution was required to prove through cogent evidence that there was penetration, either through complete or partial insertion of the appellant's male organ into the female organ of the complainant. The complainant testified that the appellant went to the kitchen, wrestled her to the ground and raped her. She raised an alarm and PW2 went to her rescue. PW2 found the appellant running and arrested him with the help of the members of the public.
2. Except the complainant, the rest of the witnesses did not witness the appellant committing the offence. What they told the court was what the complainant told them. They all however

Kimani v Republic

found the appellant in the house. Therefore, the instant case was a case of a single witness on what really happened to her. Sexual offences ordinarily required corroboration. However, the proviso to section 124 of the Evidence Act allowed the court to convict an accused person on the sole evidence of the victim of the sexual assault, if the court believed that the victim was telling the truth.

3. The complainant stated that she was raped on October 20, 2014 and became pregnant. The medical evidence by PW4 confirmed that the hymen had been freshly broken, the labia had fresh lacerations and the complainant was already pregnant. Although PW4 was recorded to have stated that PRC form was filled on October 14, 2014, it was actually filled on October 20, 2014 the same day the complainant was assaulted.
4. The appellant did not deny that he was with the complainant on the material day. He did not explain what he was doing in the complainant's house on that day. He stated that he had a grudge with PW2 but stated that he fought with the complainant. He did not say why he fought with the complainant yet he had a grudge with PW2 and not the complainant. The fact that the appellant fought the complainant supported the complainant's evidence that he wrestled her to the ground to achieve his mission to rape her.
5. The appellant was sentenced to 10 years imprisonment on November 3, 2017. The section under which he was charged, prescribed a minimum sentence of 10 years. He was arrested on October 20, 2014 and was released on bond on November 6, 2014. The sentence of 10 years was reduced to 7 years to run from the date of conviction which was November 3, 2017.

Cases***East Africa***

1. *Kiilu & another v Republic* [2005]1 KLR 174 – (Explained)
2. *Okeno v Republic* [1972] EA 32 – (Mentioned)

Statutes***East Africa***

1. Criminal Procedure Code (cap 75) section 169(2) – (Interpreted)
2. Evidence Act (cap 80) section 111 – (Interpreted)
3. Oaths and Statutory Declarations Act (cap 15) section 19 – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 3(1)(a)(b); 124 – (Interpreted)

Advocates

None mentioned

5. A witness recalled for further cross-examination cannot be allowed to testify afresh

Significance: The case established that a witness who was recalled for purposes of further cross-examination could not give evidence in-chief.

Karisa v Republic [2020] eKLR

Criminal Appeal No 43 of 2019

High Court at Mombasa

N Njoki, J

June 19, 2020

Evidence Law – recall of witnesses – where the trial court made an order for recall of a prosecution witness for purposes of cross-examination – where the trial court allowed a witness who was recalled for further cross-examination to testify afresh – whether the trial court erred in allowing a prosecution witness who had been recalled for further cross-examination to give evidence afresh – Evidence Act, cap 80 Laws of Kenya section 146(4).

Evidence Law – identification of a suspect – where the appellant was convicted of the offence of rape and sentenced to 10 years imprisonment – where the prosecution failed to call two crucial witnesses – whether the appellant was properly identified as the person who raped the complainant – Criminal Procedure Code, cap 75 Laws of Kenya section 150.

Brief facts

The appellant lodged the instant appeal challenging the decision of the trial court which had convicted him of the offence of rape and sentenced him to 10 years imprisonment. It was the appellant's contention that the trial court erred in law and fact by admitting the evidence of a identification of a single witness which was not corroborated as required by law.

The appellant argued that PW4 was not a reliable witness and the trial court erred in admitting his evidence. he claimed that the prosecution failed to summon two crucial witnesses and also failed to consider his evidence which was reliable.

Issues

- i. Whether the trial court erred in allowing a prosecution witness who had been recalled for further cross-examination to give evidence afresh.
- ii. Whether a witness who had not testified in-chief could be recalled for cross-examination.
- iii. Whether the appellant was properly identified as the person who raped the complainant.

Held

1. Despite the fact that an order had been made for PW2 to be recalled for further cross-examination, when she came to court, she took an oath and went on to give evidence afresh. It was therefore apparent that at that stage the trial court lost sight of the order she had made for PW2 to be recalled for purposes of further cross-examination. The evidence given by PW2 on November 12, 2015 was very detailed. It was clear that she aimed at filling any gaps that she left out when she testified the first time. The court was at pains to decide which set of evidence it ought to consider in making a determination in the instant case due to the glaring variance in the two sets of evidence.
2. Having given an order for PW2 to be recalled for further cross-examination, the trial court ought not to have allowed PW2 to be taken through examination in-chief for the second time. The use of

Karisa v Republic

the words “*either for examination-in-chief or for cross-examination*” under section 146 of the Evidence Act, cap 80 Laws of Kenya (Evidence Act) denoted that once an order had been made for the recall of a witness for a specific purpose, the court ought to ensure that its order was complied with as it was in control of proceedings in its own court. It ought not to give leeway to the prosecution to take a witness through examination in-chief where the order granted was for cross-examination of a witness.

3. The other issue of concern to the court was the fact that the trial court allowed the prosecution to call Dr Hadija as PW6 to testify on the P3 form which had already been produced by PW3, Dr Daisy Juma on behalf of Dr Rukia. Dr Rukia had not testified at all and therefore the court erred when it made an order for the said Dr to be recalled for cross-examination. Since she had not testified in the first place, she could not be subjected to cross-examination. The testimony of Dr Hadija was superfluous as evidence touching on the P3 form had already been tendered by PW3 and the P3 form had been produced by the said doctor.
4. It was apparent that the proceedings in the trial court were not conducted in an orderly manner. What transpired in the trial court worked against the appellant’s right to a fair trial contrary to article 50(2)(k) of the Constitution of Kenya, 2010.
5. The trial court proceedings did not disclose if the trial court noted any signs of mental illness in the demeanor of PW1, who did not deny that she used to have mental problems. PW7 was the one who noted that PW1 was not of very sound mind as she kept on laughing when she was being interviewed during medical examination.
6. PW1 did not state in court that the person who raped her had dreadlocks and blue clothing. The two young men who arrested the appellant based on the dreadlocks and blue clothing were not called in court to give evidence as to the reasons why they arrived at the conclusion that the appellant was the one who raped PW1. In the circumstances of the instant case, failure to call the two men to testify in court weakened the prosecution’s case as the prosecution withheld material information from the court.
7. The identification of the appellant was shaky and ought not to have formed the basis of a conviction. Coupled with the fact that the appellant had not been given a fair trial, the appellant’s conviction was unsafe.

Appeal allowed.

Orders

- i. The conviction of the appellant by the trial court was quashed.*
- ii. The sentence of 10 years imprisonment imposed on the appellant by the trial court was set aside.*
- iii. The appellant was set at liberty unless otherwise lawfully held.*

Cases**East Africa**

1. *Achilwa, Donald Majiwa & 2 others v Republic* [2009] eKLR – (Explained)
2. *Changawa Karisa v Republic* [2018] eKLR – (Explained)
3. *Kiilu & another v Republic* [2005] 1 KLR 174 – (Explained)
4. *Mwangi, Zacharia Gachie v Republic* [2019] eKLR – (Explained)
5. *Rona v Republic* [1967] EA 538 – (Explained)
6. *Sangura Mbae v Republic* Criminal Appeal No 32 of 2004; [2005] eKLR – (Explained)
7. *Wamunga v Republic* [1989] KLR 424 – (Explained)
8. *Zacharia Gachie Mwangi v Republic* [2019] eKLR – (Explained)

Statutes

East Africa

1. Criminal Procedure Code (cap 75) section 146(4) – (Interpreted)
2. Evidence Act (cap 80) section 146(4) – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 7 – (Interpreted)

Advocates

Mr Muthomi, Prosecution Counsel for the State

C. Female Genital Mutilation

- 1. Court sentences a person who subjected herself to the practice of Female Genital Mutilation.** Ruto *v* Republic Criminal Appeal No E007 of 2022; [2022] KEHC 10191 (KLR)
- 2. Female genital mutilation was unlawful regardless of consent from the victim.** Kamau *v* Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) Constitutional Petition No 244 of 2019; [2021] eKLR
- 3. Absence of the premise owner was not a defence for allowing premises to be used for FGM.** Bett *v* Republic Criminal Appeal No 10 of 2017; [2018] eKLR
- 4. No appeal should be allowed in the case of an accused person who had pleaded guilty and had been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.** Chebet *v* Republic Criminal Appeal Case No E029 of 2021; [2021] eKLR



Ruto v Republic**1. Court sentences a person who subjected herself to the practice of Female Genital Mutilation**

Significance: The case illustrates a situation where in trying to deter the prevalence of the harmful and unlawful practice of FGM sentenced the appellant who had subjected herself to it.

Ruto v Republic [2022] KEHC 10191 (KLR)

Criminal Appeal No E007 of 2022

High Court at Narok

F Gikonyo, J

June 30, 2022

Criminal Law – offences – Female Genital Mutilation (FGM) – offences of procuring FGM and failing to report the commission of – where appellant subjected herself to FGM – where appellant was convicted on her plea – What was the appropriate sentence on a person, who had subjected herself to the harmful and unlawful practice of FGM, and had pleaded guilty to the offence - Prohibition of Female Genital Mutilation Act, 2011 (Act No 32 of 2011) sections 24 and 29.

Brief facts

The appellant along with another was charged with four counts. Count III and IV related to the appellant.

Count III: procuring Female Genital Mutilation (FGM) contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act No 32 of 2011. The particulars of the offence were that on October 3, 2020 at Ririk Village in Narok West Sub county within Narok County, being an adult and of sound mind procured or caused an act of female genital mutilation to be performed on her person.

Count IV: Failing to report the commission of female genital mutilation contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act No 32 of 2011. The particulars of the offence were that on October 3, 2020 at Ririk Village in Narok West Sub- County, within Narok County, being aware that an offence of female genital mutilation had been committed, failed to report to a law enforcement officer.

The appellant was convicted on her own plea of guilt. In mitigation, she asked for forgiveness. The court considered the mitigation and the pre-sentence reports but the offence was of public notoriety. Therefore, a deterrence sentence was needed to do away with the practice. She was sentenced to serve 2 years' imprisonment in count III and 1-year imprisonment in count IV. The sentences were to run concurrently from the date of the sentence.

Issue

What was the appropriate sentence on a person, who had subjected herself to the harmful and unlawful practice of FGM, and had pleaded guilty to the offence?

Held

1. The appellant having pleaded guilty, it was not open to her to raise grounds that touched on facts. She was estopped by section 348 of the Criminal Procedure Act from doing so as it provided that no appeal would be allowed in the case of an accused person who had pleaded guilty and had been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

2. After the appellant pleaded guilty to the two offences, the facts were read and she confirmed that they were correct. The procedure in plea taking was adhered to and the trial court could not be faulted. The plea was unequivocal.
3. The penalty for the offence was provided for under section 29 of the Prohibition of Female Genital Mutilation Act. It stated that a person who committed an offence under the Act was liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings or both. The trial court imposed a sentence prescribed in law.
4. Female genital mutilation as a cultural practice was a harmful practice to a person's mental and physical integrity. Despite the prohibition by the law, the practice was deeply ingrained in the minds of many in the society.
5. The appellant voluntarily submitted herself to the harmful and unlawful practice. And, prevalence of the offence could call for a deterrent sentence. However, the appellant was a first offender and she had children to take care of.

The appellant was ordered to serve a probation sentence for the period of the remainder of the prison term.

Order

The District Probation Officer, who would supervise the probation order should advise the appellant on the dangers of the practice and encourage her to attend seminars organized for eradication of female genital mutilation and education on the alternative rite of passage to adult hood for young girls. Such interventions would help.

Cases

East Africa

1. *Johana Nyagaka v Republic* Criminal Appeal No 40 of 2018 – (Mentioned)
2. *Adan v Republic* [1973] EA 445 at pg 446 – (Mentioned)

United Kingdom

1. *Miller v Minister of Pensions* 2 All ER 372-373 – (Explained)
2. *RvTurnbull & others* [1976] 3 All ER 549 – (Mentioned)

Statutes

East Africa

1. Prohibition of Female Genital Mutilation Act, 2011 (Act No 32 of 2011) sections 24, 29
2. Criminal Procedure Code (cap 75) sections 333(2) – (Interpreted)

Advocates

None mentioned

**Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties);
Katiba Institute & another (*Amicus Curiae*)**

2. Female genital mutilation was unlawful regardless of consent from the victim

Significance: This case is outstanding as it explores *inter alia* (among other things) whether the prohibition of female genital mutilation on consenting adult women violated their right to human dignity. It also ordered the Attorney General was ordered to forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of Female Genital Mutilation Act with a view to prohibiting all harmful practices of FGM as set out in the judgment.

Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (*Amicus Curiae*) [2021] eKLR

Constitutional Petition No 244 of 2019

High Court at Nairobi

LA Achode, K Kimonde & MW Muigai, JJ

March 17, 2021

Constitutional Law – *fundamental rights and freedoms – right to human dignity – prohibition of female genital mutilation (FGM) – whether the prohibition of FGM on consenting adult women violated their right to human dignity - whether FGM performed with consent was legal - Constitution of Kenya, 2010, article 28 and 44(1); Prohibition of Female Genital Mutilation Act, 2011, section 19.*

Constitutional Law – *national values and principles of governance – public participation - what was the nature of public participation – Constitution of Kenya, 2010, article 10.*

Constitutional Law – *constitutional petitions - form and content - particulars to be pleaded - requirement for the petitioner to set out with a reasonable degree of precision what he complained of, provisions claimed to have been infringed, and the manner in which they were alleged to be infringed - what was the effect of failure to state with specificity the provisions of the Constitution alleged to have been violated in a constitutional petition - Anarita Karimi Njeru v Republic.*

Constitutional Law – *fundamental rights and freedoms – limitation of fundamental rights and freedoms – factors to be considered in the limitation of rights – limitation of freedom of conscience, religion, belief and opinion - whether the rights relating to culture, religion, beliefs and language could be limited - whether a cultural practice could be deemed to be a national heritage – Constitution of Kenya, 2010, articles 11, 32, 44 and 259.*

Constitutional Law – *fundamental rights and freedoms – right to the highest attainable standard of health - what was the nature of the State's obligation with regard to the right to health – Constitution of Kenya, 2010, article 2(6) and 43.*

Constitutional Law – *fundamental rights and freedoms – equality and freedom from discrimination – claim that female genital mutilation (FGM) had been criminalized while male circumcision had not been criminalized - factors to be considered in deliberating upon an unfair discrimination claim - whether criminalization of FGM while allowing male circumcision amounted to unreasonable discrimination – Constitution of Kenya, 2010, article 27.*

Words and Phrases – *participation – definition of participation - the act of taking part in something, such as partnership - Black's Law Dictionary 10th Edition; Thomas Reuters, at page 1294.*

Words and Phrases – *harm – definition of harm - injury, loss, damage; material or tangible detriment - Black's Law Dictionary 10th Edition, page 832.*

Words and Phrases – *bodily harm – definition of bodily harm – physical pain, illness or impairment of*

the body - Black's Law Dictionary 10th Edition, page 832.

Words and Phrases – choice – definition of choice - an act of choosing; the right of ability to choose; a range from which to choose; something chosen- Concise Oxford English Dictionary, 12th edition.

Words and Phrases – freedom – definition of freedom - the power or right to act, speak, think freely; the state of having free will; the state of being free; the state of not being subject to or affected by (something undesirable) - Concise Oxford English Dictionary, 12th edition.

Words and Phrases – freedom of choice – definition of freedom of choice – unfettered right to do what one wants when one wants, and do so - excluded doing something that would harm one's self or another - Black's Law Dictionary, 2nd Edition.

Words and Phrases – discrimination – definition of discrimination - differential treatment - especially a failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured - Black's Law Dictionary, 10th Edition at page 1566.

Brief facts

The petitioner challenged the constitutionality of the Prohibition of Female Genital Mutilation Act (No 32 of 2011) and the Anti-Female Genital Mutilation Board formed thereunder (the impugned Act and the Board respectively). The petitioner pleaded that sections 2, 5, 19, 20 and 21 of the impugned Act contravened articles 19, 27, 32 and 44 of the Constitution of Kenya, 2010, (Constitution) by limiting women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and, by discriminating between men and women.

The petitioner contended that section 19(1) of the impugned Act expressly forbade a qualified medical practitioner from performing female circumcision, thereby denying adult women access to the highest attainable standard of health, including the right to healthcare. The petition sought among others orders that a declaration be issued that sections 5, 19, 20, 21 and 24 of the impugned Act were unconstitutional and thus invalid.

Issues

- i. Whether female genital mutilation performed with the consent of the person to whom the act was done was legal.
- ii. What was the nature of public participation processes carried out by the National Assembly to the public?
- iii. What was the effect of failure to state with specificity the provisions of the Constitution that were alleged to have been violated in a constitutional petition?
- iv. When could a cultural practice that was protected under the Constitution be deemed to be a national heritage?
- v. What were the factors to be considered in the limitation of rights and fundamental freedoms and whether the rights relating to culture, religion, beliefs and language could be limited?
- vi. What was the nature of the State's obligation with regard to the right to health?
- vii. What were the factors to be considered in deliberating upon an unfair discrimination claim?
- viii. Whether the criminalizing of female genital mutilation and allowing male circumcision amounted to unreasonable discrimination?
- ix. Whether the prohibition of female genital mutilation on consenting adult women violated their right to human dignity?

Held

1. The principles for interpreting the Constitution were well settled. The court should aim at promoting the purposes, values and principles of the Constitution and to advance the rule of law, human rights and fundamental freedoms in the Bill of Rights. The Constitution should be given a purposive interpretation where all provisions were read as a whole with each provision sustaining the other.

**Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties);
Katiba Institute & another (*Amicus Curiae*)**

2. Article 2(5) and (6) of the Constitution expressly recognized treaties ratified by Kenya as part of its domestic law but the treaties were subordinate to the Constitution. Despite some of the interested parties trying to expand the boundaries of the petition, the primary dispute remained as pleaded by the petitioner and as answered by the three respondents.
3. The evidential burden to prove that the impugned Act or some of its provisions were unconstitutional fell squarely on the petitioner. Furthermore, there was a rebuttable presumption of the constitutionality of statutes. Until the contrary was proved, a legislation was presumed to be constitutional. It was a sound principle of constitutional construction that, if possible, a legislation should receive such construction as would make it operative and not inoperative.
4. The court was alive to the guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people enshrined in article 10(2) of the Constitution. Public participation was a means by which citizens took part in the conduct of public affairs, directly or through their chosen or elected representatives. However, there were no fast and hard rules for public participation. The public could become involved in the business of the National Assembly as much by understanding and being informed of what it was doing by participating directly in those processes.
5. The petitioner failed to discharge the evidential burden to demonstrate that there was inadequate or no public participation. From the proceedings in the departmental committee and the debates by representatives of the people in the whole House, the court could not say that the Bill did not receive any public participation. The court was also alive to the general power to pass legislation delegated to Parliament by the people under article 94(1) and (5) of the Constitution.
6. The impugned statute re-defined female circumcision to the more graphic term of female genital mutilation (FGM) and to expand application to adult women. The proviso to section 19 of the impugned Act was a contradiction. It was not clear how a sexual re-assignment procedure that would totally alter the female genitalia be permissible or less invasive than Type I FGM as classified in section 2(a) of the impugned Act.
7. The impugned Act fell short of criminalizing Type IV FGM. According to the Inter-agency Statement by the World Health Organization, 2008, the reasons, context, consequences and risks of the various practices subsumed under Type IV varied enormously. Because the practices were less known than Types I, II, and III, examples included: pricking, piercing and scraping; stretching; cauterization, cutting into the external genital organs; and, the introduction of harmful substances. The World Health Organization (WHO) concluded that it was not always clear, however, what harmful genital practices should be defined as Type IV. Some of the practices omitted by the impugned Act included cosmetic surgeries, labiaplasty, piercing and burning of female genitalia with corrosive substances among others.
8. It was not an idle point that the impugned Act favoured a minuscule of the population who practiced aspects of Type IV FGM including women who could afford labiaplasty or the cutting favoured by some religious sects.
9. Section 3 of the impugned Act established the Board as a corporate entity with a seal and perpetual succession. It was composed of a chairperson appointed by the President; the principal secretaries of the ministries for the time being responsible for matters relating to gender, finance, health, education, youth affairs and three other members appointed by the Cabinet Secretary. The petition did not plead with specificity the element of the functions of the Board that were unconstitutional. The petitioner ought to have specifically set out the provisions of the Constitution that were alleged to have been violated; provided the particulars of the alleged violation; and, how the respondent had violated those rights.

10. It was instructive that the petitioner had named the Board as the 2nd respondent and stated that the Board served to infringe on the petitioner's rights and as such ought to be disbanded. However, no cogent evidence was placed before the court to demonstrate how the activities of the Board had infringed on the petitioner's rights.
11. It was not entirely true that a cultural practice could not be deemed to be a national heritage because article 11 of the Constitution posited that culture was the foundation of the nation and the cumulative civilization of the Kenyan people and nation.
12. The exception in section 19(3) of the impugned Act to a surgical operation on another person which was necessary for that other person's mental health had not been substantiated. Indeed, there was no evidence of a correlation between the circumcision of men or women and mental health. However, there was clear expert evidence that male circumcision had some health benefits including reduced rates of infection or reduced transmission of HIV.
13. There were some merits in the exception for that other person's physical health or in the course of childbirth under section 19(3)(b) of the impugned Act. However, therein also lay some gap that had been exploited by traditional circumcisers. From the evidence, FGM/C was often disguised and carried out on women during their labour. It was also carried out at a young age, sometimes as early as nine years.
14. There was a conflict between the impugned Act and the Constitution. However, the Constitution made certain exceptions and allowed derogation of rights in some cases. When it came to beliefs or personal faith, the court could only undertake a limited inquiry into the genuineness of a person's professed faith. However, the petitioner was unable to demonstrate a clear nexus between FGM and her right to manifest her religion or belief. The court was unable to impeach the offences created by sections 19, 20 and 21 of the impugned Act. The Board was properly created and its functions were in conformity with the Act and the Constitution.
15. FGM, female circumcision and female cut referred to all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs or any harmful procedure to the female genitalia for non-medical reasons. The Act defined FGM to comprise all procedures involving partial or total removal of the female genitalia or other injuries to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons.
16. The WHO included FGM Type IV which was unclassified or any other procedure involving genital pricking, piercing (and adorning with jewelry or other decorations), scraping, cauterizing, incising and stretching of the clitoris or labia (with tongs or scissors including razor blades).
17. The Penal Code defined harm as bodily hurt, disease or disorder whether permanent or temporary, while grievous harm meant any harm which amounted to a maim or dangerous harm, or seriously or permanently injured health, or which was likely so to injure health, or which extended to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense. It also defined dangerous harm as harm endangering life.
18. The phrase harmful cultural practice was not defined by Kenyan statutes. However, articles 53 and 55 of the Constitution referred to harmful cultural practices in the protection of children and the youth. The Maputo Protocol in article 1(g) defined harmful practices as all behavior, attitudes and/or practices that negatively affected the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity. Article 5 of the Maputo Protocol called for the elimination of harmful practices, by prohibiting and condemning all forms of harmful practices which negatively affected the human rights of women and which were contrary to international standards.
19. The definition of FGM/C and harm articulated the negative effect of harmful practices on women and girls' right to life, health, dignity, education and physical integrity. That underlined how the

**Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties);
Katiba Institute & another (*Amicus Curiae*)**

- commitment to eliminate harmful practices was linked not only to promoting the health and well-being of women but also to women's human rights.
20. The assumption was that anyone above the age of 18 years underwent FGM voluntarily. However, that hypothesis was far from reality, especially for women who belonged to communities where the practice was strongly supported. The context within which FGM/C was practiced was relevant as there was social pressure and punitive sanctions. Those who underwent the cut were involved in a cycle of social pressure from the family, clan and community. They also suffered serious health complications while those who refused to undergo it suffered the consequences of stigma. Women were thus as vulnerable as children due to social pressure and could be subjected to the practice without their valid consent. The rationale for FGM/C varied from one community to another.
 21. Medicalization of FGM/C did not mitigate the harm to the girl/woman as demonstrated by the FGM/C survivors who deposed affidavits and/or testified in court, they were consistent and had similar experiences after FGM/C.
 22. The Constitution was the most significant legal instrument in the legal system. It impacted on common law, international laws, traditional African religion and customary practices. Article 2(1) of the Constitution stated that the Constitution was the supreme law of Kenya and bound all persons and all State organs at both levels of Government. Under article 2(4) any law, including customary law that was inconsistent with the Constitution was void to the extent of the inconsistency and any act or omission in contravention of the Constitution was invalid.
 23. Some harmful cultural practices were valued as traditional cultural heritage in some communities. Cultural rights intertwined with human rights in certain social spaces and were not easy to separate but the Constitution offered the first most important standard against which the relevance of all other laws, religions, customs, and practices were to be measured. The Constitution also restricted customary law and religions through certain other provisions whose overall effect was to rid of harmful traditional practices.
 24. FGM/C was harmful to girls and women due to the removal of healthy genital parts. The FGM/C caused immediate, short term and long-term physical and psychological adverse effects. The purposes of FGM/C were community culture-centered and not individual benefit centered. The culture custodians in communities were clan/elders who determined when, where, how and for what FGM/C was conducted within the specific community.
 25. The preamble to the Constitution recognized the culture and customs of the Kenyan people. Articles 21 and 27(6) of the Constitution directed the State to take legislative measures to redress the disadvantages suffered by individuals or groups due to past discrimination. Articles 27, 28, 43, 53 and 55 of the Constitution protected all persons from all forms of discrimination and shielded the youth and children from harmful cultural practices. They also guaranteed the right to dignity and the right to the highest attainable standard of health and reproductive health.
 26. Article 25 of the Constitution prescribed fundamental rights and freedoms that should not be limited. The right to enjoy one's culture religion and belief as envisaged in articles 11, 32 and 44 were derogable. Article 24 of the Constitution prescribed that the right and fundamental freedom could be limited to the extent the limitation was reasonable and justifiable based on human dignity equality and freedom. The limitation should be proportionate to the legitimate aim. Despite the rights enshrined in articles 11, 32 and 44 of the Constitution relating to culture, religion, beliefs and language, the rights could be limited due to the nature of the harm resulting from FGM/C to the individual's health and well-being.
 27. Section 2 of the impugned Act defined FGM/C Type I, II and III but excluded Type IV which the WHO included as unclassified. The latter included any other procedure involving, genital pricking,

- piercing with tongs or scissors including razor blades, incising and stretching of the clitoris/labia. Section 19 of the impugned Act criminalized FGM/C except where it was a surgical operation for a person's physical and mental health or at any stage of labour or birth. It further provided that culture, religion, custom or practice or consent would not be a defence.
28. From the standpoint of criminal law, there was a lacuna created that hampered the effective enforcement of the impugned Act. The criminalization of the three types of FGM/C and not Type IV, which was unclassified, made it difficult to effectively enforce the Act. There seemed to be no objective or professional process to distinguish between the various types of FGM/C during investigation or prosecution.
 29. A reading of section 19(6) of the impugned Act revealed that it was no defence to a charge under the section that the person on whom the act involving FGM was performed consented to that act, or that the person charged believed that the consent had been given. The implication of that was FGM/C could not be rendered lawful because the person on whom the act was performed consented to that act. No person could licence another to perform a crime. The consent or lack thereof of the person on whom the act was performed had no bearing on a charge under the Act.
 30. Article 44(1) of the Constitution provided that every person had the right to use the language and to participate in the culture, of the person's choice. Freedom was therefore an underlying element of the exercise of one's right under the Bill of Rights, which included the right to participate in one's cultural life. From the evidence of the survivors and those who escaped the cut, they all confirmed the misinformation, deception and societal pressure they were subjected to, to undergo the cut.
 31. The right to the highest attainable standard of health which included the right to health care services, including reproductive health care for every person was provided under article 43 of the Constitution. The right to the highest attainable standard of health received mention in various international treaties and covenants which were part of the laws of Kenya by dint of article 2(6) of the Constitution.
 32. The State's obligation with regard to the right to health encompassed not only the positive obligation to ensure that her citizens had access to health care services and medication, but had to also incorporate the negative duty not to do anything that would in any way affect access to such health care services and medication. That included an obligation to ensure that women had access to reproductive health care. The right to health bore upon other rights enumerated in the Bill of Rights.
 33. Decisions on the violation of constitutional rights should not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of the violation of constitutional rights was not a mere technicality; rather, it was essential to a proper consideration of constitutional issues. Decisions on the violation of constitutional rights could not be based upon unsupported hypotheses.
 34. The general principle governing the determination of cases was that a party who made a positive allegation bore the burden of proving it. That was stipulated under section 107(1) of the Evidence Act. The onus was therefore on the petitioner to demonstrate that her ability to exercise the fundamental right had been infringed and that the infringement or conduct was not justifiable in a modern democratic state by dint of article 24 of the Constitution. The petitioner failed to do so.
 35. For differentiation of treatment to be unconstitutional and impermissible, it had to meet the threshold of article 27 of the Constitution which stipulated the grounds upon which discrimination was prohibited. It, therefore, followed that the principle of equality of the sexes was recognized, and discrimination on any basis prohibited under the Constitution and international and regional treaties to which Kenya was a party.
 36. In deliberating upon an unfair discrimination claim, the court had to interrogate:

**Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties);
Katiba Institute & another (*Amicus Curiae*)**

- a. Whether the provision differentiated between people or categories of people. If so, whether the provision bore a rational connection to a legitimate purpose. If it did not, then there was a violation of the Constitution. Even if it bore a rational connection, it could nevertheless amount to discrimination.
 - b. Whether the differentiation amounted to unfair discrimination. That required a two-stage analysis;
 - i. whether the differentiation amounted to discrimination. If it was on a specified ground, then discrimination would have been established. If it was not on a specified ground, then whether or not there was discrimination would depend on whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - ii. Whether the differentiation amounted to discrimination, and whether it amounted to unfair discrimination. If it was found to have been on a specified ground, then the unfairness would be presumed. If on an unspecified ground, unfairness would have to be established by the complainant. The test for unfairness focused primarily on the impact of discrimination on the complainant and others in his or her situation. If at the end of that stage of the inquiry, the differentiation was found not to be unfair, then there would be no violation.
 - c. If the discrimination was found to be unfair then a determination would have to be made as to whether the provision could be justified under the limitation clause.
37. Mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason was an unacceptable phenomenon. However, where there was a legitimate reason, then, the conduct or the law complained of could not amount to discrimination. Consequently, the law which promoted differentiation had to have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.
38. Whereas the evidence adduced pointed to discrimination, the discrimination was not unreasonable. The evidence of the medical experts confirmed the grim reality of the challenges posed by female circumcision ranging from difficulty in consummating marriages to difficulty in childbirth, and in certain instances, death of the victims.
39. The Constitution entrenched respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as its foundational values. Article 28 of the Constitution provided for the right to the inherent dignity and the right to have that dignity respected and protected. Human dignity was that intangible element that made a human being complete. It went to the heart of human identity. Every human had value. Human dignity could be violated through humiliation, degradation or dehumanization. Each individual had inherent dignity which the Constitution protected. Human dignity was the cornerstone of the other human rights enshrined in the Constitution. The impugned Act did not violate the Constitution or women's right to dignity.
40. The Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016 defined cultural heritage. Under that Act, intangible cultural heritage was defined as the practices, representations, expressions, knowledge and cultural spaces associated therewith communities, groups and, in some cases, individuals recognized as part of their social cultural heritage. Culture was dynamic and not static and would continue to grow to respond to new factors. It was also fluid

and changed from time to time. It was susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. However, there were certain aspects of culture that identified a particular group, their history, ancestry and way of life and that diversity was recognized and protected by the Constitution.

41. The Constitution granted the freedom to exercise one's culture. However, that freedom had to be carried out in line with the other constitutional provisions. Culture entailed various modes of expression. Therefore, what was limited was any expression that would cause harm to a person or by a person to another person. FGM/C fell into the latter category.
42. While the Constitution had a general underlying value of freedom, that value of freedom was subject to a limitation that was reasonable and justifiable. Additionally, it had not inscribed the freedom to inflict harm on one's self in the exercise of those freedoms. That was why the Penal Code prescribed offences such as attempted suicide in section 226 and abortion and allied offences in sections 158 to 160.

Petition dismissed; the Attorney General (1st respondent) to forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of Female Genital Mutilation Act (No 32 of 2011) with a view to prohibiting all harmful practices of FGM as set out in the judgment.

Cases

East Africa

1. *Ajuang, Joan Akoth & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others; Law Society of Kenya & another* Petition No 1 of 2020; [2020] eKLR – (Explained)
2. *Anarita Karimi Njeru v Republic* No 1 [1979] 1 KLR 154 – (Followed)
3. *ANN v Attorney General* Petition No 240 of 2012; [2013] eKLR – (Explained)
4. *Attorney General v Law Society of Kenya & 4 others* Civil Appeal No 426 of 2018; [2019] eKLR – (Followed)
5. *Baadi, Mohamed Ali and others v Attorney General & 11 others* Petition No 22 of 2012; [2018] eKLR – (Mentioned)
6. *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* Constitutional Petition No 40 of 2011; [2015] eKLR – (Explained)
7. *County Government of Nyeri & another v Cecilia Wangechi Ndungu* Civil Appeal No 2 of 2015; [2015] eKLR – (Followed)
8. *Dullu Kora Elisha v Kenya School of Law & another* Petition No 248 of 2017; [2017] eKLR – (Explained)
9. *Federation of Women Lawyers (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] eKLR – (Explained)
10. *Haki Na Sheria Initiative v Inspector General of Police & 3 others* Civil Appeal No 261 of 2018; [2020] eKLR – (Mentioned)
11. *In Re Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] 1 KLR 458 – (Followed)
12. *Institute of Social Accountability & another v National Assembly & 4 others* Petition No 71 of 2014; [2015] eKLR – (Followed)
13. *JK (suing on behalf of CK) v Board of Directors of R School & another* Petition No 450 of 2014; [2014] eKLR – (Explained)
14. *Kandie, Karen Njeri v Alassane Ba & another* Petition No 2 of 2015; [2017] eKLR – (Explained)
15. *Karani, Stephen Wachira & another v Attorney General & 4 others* Petition No 321 of 2017; [2017] eKLR – (Followed)
17. *Katet Nchoe & another v Republic* Criminal Appeals Nos 115 & 117 of 2010 (Consolidated); [2011] eKLR – (Explained)

**Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties);
Katiba Institute & another (*Amicus Curiae*)**

18. *Katiba Institute & another v Attorney General* Petition 209 of 2016 ;[2017] eKLR –(Mentioned)
18. *Kenya Human Rights Commission v Communications Commission of Kenya* Constitutional Petition No 86 of 2017; [2018] eKLR – (Mentioned)
19. *Leina Konchellah & others v Chief Justice of the Supreme Court of Kenya & others* Petitions Nos E291-E337 & Judicial Review No E1108 of 2020 (Consolidated); [2021] eKLR – (Followed)
20. *Martin Nyaga Wambora & others v Speaker of the Senate & 6 others* Petition No 3 of 2014; [2014] eKLR – (Mentioned)
21. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012; [2013] eKLR – (Explained)
22. *Mbugua, Simon & another v Central Bank of Kenya & others* Petitions Nos 210 & 214 of 2019; [2019] eKLR – (Mentioned)
23. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Consolidated); [2015] eKLR – (Mentioned)
24. *Munialo, Jack Mukhongo & 12 others v Attorney General & 2 others* Petition 182 of 2017; [2017] eKLR – (Followed)
25. *Munya v Kithinji & 2 others* [2014] 3 KLR 36 – (Followed)
26. *Muruatetu, Francis Karioko & another v Republic* Consolidated Petitions Nos 15 & 16 of 2015; [2017] eKLR – (Followed)
27. *Mutunga v Republic* [1986] KLR 16 –(Mentioned)
28. *National Super Alliance (NASA) v Independent Electoral & Boundaries Commission & others* Petition No 328 of 2017; [2017] eKLR – (Mentioned)
29. *Ndyanabo v Attorney General* [2001] EA 495 – (Followed)
30. *Okuta & another v Attorney General & 2 others* Petition No 397 of 2016; [2017] eKLR – (Mentioned)
31. *Olum & another v Attorney General (1)* [2002] 2 EA 508 – (Mentioned)
32. *Omare, Gideon v Machakos University* Petition No 11 of 2019; [2019] eKLR – (Explained)
33. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Petition No 159 of 2018; [2020] eKLR – (Explained)
34. *Republic v Kenya National Examinations Council & another ex parte Audrey Mbugua Ithibu* Judicial Review No 147 of 2013; [2014] eKLR – (Explained)
35. *Seventh Day Adventist Church (East Africa) Ltd v Minister for Education & 3 others* Civil Appeal No 172 of 2014; [2017] eKLR –(Mentioned)
36. *Trusted Society of Human Rights Alliance v Attorney General & 2 others* Petition No 229 of 2012; [2012] eKLR – (Mentioned)
37. *United Millers Limited & another v John Mangoro Njogu* Civil Appeal No 118 of 2011; [2016] eKLR – (Explained)
38. *Waweru, Peter K v Republic* Miscellaneous Civil Application No 118 of 2004; [2006] eKLR – (Explained)

African Commission on Human and Peoples' Rights

Purohit v Gambia Comm 241/2001, 16th ACHPR 49 AAR Annex VII (2002-2003) – (Explained)

South Africa

1. *Barkhuizen v Napier* [2007] ZACC 5 – (Explained)
2. *Doctors for Life International v Speaker of the National Assembly and others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) – (Followed)
3. *Harksen v Lane NO and others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 – (Explained)
4. *Hoffmann v South African Airways* 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD –

(Followed)

5. *King & others v Attorney Fidelity Fund Board of Control & another* (561) (2004); [2006] – (Followed)
6. *MEC for Education: Kwazulu-Natal and others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) – (Explained)

India

Keshavananda Bharati v State of Kerala [1973] 4 SCC 225 –(Explained)

Canada

R v Big M Drug Mart Ltd (1985) 1 SCR 295 – (Explained)

United Kingdom

1. *Pearlberg v Varty* [1972] 1 WLR 534 – (Followed)
2. *R v Coney* [1882] 8 QBD 534 – (Explained)
3. *R v Donovan* [1934] 2 KB 498 – (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 2(1)(4)(5)(6); 10(2)(b); 11(1)(2)(a); 19; 21(3); 23; 25(a)(b); 26; 27(1)(2)(3)(4); 28; 29; 32; 43(1)(a)(3); 44; 53; 55(d); 56; 57; 94(1)(5); 165(3)(b)(d); 259 – (Interpreted)
2. Constitution of Kenya (Repealed) section 82(3) – (Interpreted)
3. Children Act, 2001 (Act No 8 of 2001) sections 2, 14 – (Interpreted)
4. Evidence Act (cap 80) section 107(1) – (Interpreted)
5. Penal Code (cap 63) - In general – (Cited)
6. Prevention of Torture Act, 2017 (Act No 12 of 2017) - In general – (Cited)
7. Prohibition of Female Genital Mutilation Act (No 32 of 2011) sections 2, 3(2); 5; 19(1); 20; 21; 24 – (Interpreted)
8. Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Act No 33 of 2016) - In general – (Cited)
9. Sexual Offences Act, 2006 (Act No 3 of 2006) – (Interpreted)

Text and Journals

1. Black, HC., (Ed) (1995) *Black's Law Dictionary* Lawbook Exchange Ltd 2nd Edn
2. Garner, BA., (Ed) (2014) *Black's Law Dictionary* Thomson West 10th Edn p 1294
3. Stevenson, A., Waite, M., (Eds) (2011) *Concise Oxford English Dictionary* London : Oxford University Press 12th Edn

International Instruments and Conventions

1. African Charter on Human and People's Rights (Banjul Charter) [1981] articles 4, 5, 16, 17, 18
2. African Charter on the Rights and Welfare of the Child (ACERWC) 1990
3. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [1984] OHCHR
4. Convention on Elimination of All Forms of Discrimination against Women (OHCHR) 1979
5. Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)[1979] articles 1, 2, 5
6. International Conference on Population and Development Program of Action 1994 CORE
7. International Covenant on Economic, Social and Cultural Rights [1966] (OHCHR) articles 3, 12;
8. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) [2003] articles 2, 3, 5
9. Universal Declaration of Human Rights (UDHR) (1948) articles 18 , 22 (1948)

Advocates

None mentioned

Bett v Republic**3. Absence of the premise owner was not a defence for allowing premises to be used for FGM**

Significance: FGM was prohibited by law because of the harm it did to women, and more so to young girls who could not have the choice-if one could call succumbing to social pressure.

Bett v Republic [2018] eKLR

Criminal Appeal No 10 of 2017

High Court at Kericho

M Ngugi, J

June 13, 2018

Criminal Law – Female Genital Mutilation (FGM) – use of premises to perform female genital mutilation – where appellant claimed that she was not present in the premises when the offence took place – where witness gave evidence that appellant had the keys to the house where the women who underwent female genital mutilation were found – whether the actual physical presence or absence of the owner of a premise, where female genital mutilation had taken place, was a defence against a charge for the offence of knowingly allowing premises to be used for the purpose of performing female genital mutilation – Prohibition of Female Genital Mutilation Act, No 32 of 2011, section 22 as read with section 29.

Brief facts

The appellant was charged with the offence of knowingly allowing premises to be used for the purpose of performing female genital mutilation contrary to section 22 as read with section 29 of the Prohibition of Female Genital Mutilation Act, No 32 of 2011, Laws of Kenya. The particulars of the offence were that on diverse dates between November 26 and 28, 2015 at Polywek sub-location within Kericho County and being responsible for a premises namely (a) house, knowingly allowed the premises to be used for the purpose of performing female genital mutilation. The appellant pleaded not guilty to the offence and was tried and was found guilty as charged. She was sentenced to pay a fine of Kshs 200,000 and in default 3 years' imprisonment on October 6, 2017. Dissatisfied with both the conviction and sentence, the appellant filed the instant appeal.

Issue

Whether absence of the owner of a premise was a defence for allowing premises to be used for FGM.

Held

1. The six women who had been circumcised had been locked inside the house. When the police asked for the owner, as testified by PW8, they were informed that the owner was the appellant, and she confirmed when asked by PW8 that the house was hers. She had the keys to the padlock with which the house had been locked, and she used it to unlock the house when required by the police to do so. Her defence was that the house was hers, but she was not in the premises. The evidence with regard to ownership of the premises, and the fact that the appellant was in control of the said premises and allowed them to be used for the purposes of Female Genital Mutilation was clear and was safely relied on by the trial court. The court was therefore unable to fault the decision of the trial court on that ground.
2. The trial court had the discretion to sentence the appellant, upon conviction, to a penalty higher than three years. It however, gave her the minimum sentence provided, which was a fine of Kshs 200,000 and in the alternative, imprisonment for three years. Secondly, while it was true that the appellant was undefended, it was clear from the record that she understood the charges that she faced, and

- conducted her own defence competently, including cross-examining witnesses to demonstrate that she was not present in the premises when the offence took place.
3. FGM was a cultural practice that, despite the prohibition by the law, was deeply ingrained in the minds of many in the society. What was notable was that all the six women who were circumcised in the appellant's premises voluntarily went to be circumcised. PW2 narrated in her statement that she wanted to undergo circumcision as she was discriminated against in her village because she was not circumcised.
 4. FGM was prohibited by law because of the harm it did to women, and more so to young girls who could not have the choice-if one could call succumbing to social pressure, as the witnesses in the case did, choice- but were put through a process that had been found to be harmful and was then prohibited by law. It was noteworthy that the Prohibition of Female Genital Mutilation Act was described as an Act of Parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation.
 5. The sentence imposed on the appellant was lawful and not excessive in the circumstances. Hopefully, it would act as deterrence to other women who, regrettably, could offer their premises to facilitate the perpetration of FGM against the express provisions of the law, and to the detriment of those who underwent the rite.

Appeal dismissed and the conviction and sentence upheld.

Cases

None referred to

Statutes

East Africa

Prohibition of Female Genital Mutilation Act, 2011 (Act No 32 of 2011) sections 22, 29 – (Interpreted)

Advocates

None mentioned

Chebet v Republic**4. No appeal should be allowed in the case of an accused person who had pleaded guilty and had been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence**

Significance: The case explains whether an appeal should be allowed in the case of an accused person who had pleaded guilty of the offence of failing to report the commission of female genital mutilation contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act, and had been convicted on that plea by a subordinate court. The court in the instant case reiterated that section 348 of the Criminal Procedure Act provided that no appeal should be allowed in the case of an accused person who had pleaded guilty and had been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

Chebet v Republic [2021] eKLR

Criminal Appeal Case No E029 of 2021

High Court at Kilgoris

F Gikonyo, J

December 7, 2021

Criminal Law – offences – female genital mutilation – sentencing of criminals of female genital mutilation – where the offenders pleaded guilty – mitigation of sentencing of criminals of female genital mutilation – where the offenders were charged, convicted and sentenced for failing to report the commission of female genital mutilation that had been committed on them – where they were sentenced to three years in prison – where the appellant had sought the sentence to be reviewed and non-custodial sentence to be considered or a reasonable fine for the reasons that; she was remorseful, a mother of three children of tender age and a bread winner; she single handedly maintained her children – whether an appeal would be allowed in the case of an accused person who had pleaded guilty, of the offence of failing to report the commission of female genital mutilation contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act, and had been convicted on that plea by a subordinate court – Prohibition of Female Genital Mutilation Act No 32 of 2011, section 29; Criminal Procedure Act, section 348.

Brief facts

The appellant along with two others were charged with the offence of failing to report the commission of female genital mutilation contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act No 32 of 2011. The particulars of the offence were that on September 4, 2020 at Sachagwan Village in Transmara West Sub-County, within Narok County, jointly being aware that an offence of female genital mutilation had been committed on them, failed to report to a law enforcement officer.

The appellant had sought the sentence to be reviewed and a non-custodial sentence to be considered or a reasonable fine for the reasons that; she was remorseful, a mother of three children of tender age and a bread winner; she single handedly maintained her children.

Issue

Whether an appeal would be allowed in the case of an accused person who had pleaded guilty, of the offence of failing to report the commission of female genital mutilation contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act, and had been convicted on that plea by a subordinate court.

Held

1. On September 4, 2020 the three accused persons headed to the home of Geoffrey and Zeddy Mutai for the purpose of undergoing FGM. They arrived there at 9 pm. and found the person who was to do said activities there. They all underwent FGM. After the cut they were left under the care of Zeddy Mutai and the husband until September 16, 2020.
2. On September 16, 2020 at 2 pm police officers who had been informed arrived and arrested the three ladies together with the house owners. The ladies were taken to Angata H/Centre where P3 forms were filled. They were taken to Angata police station. P3 form and Treatment note, P Exh 3 a, and b.
3. The appellant in her oral submissions prayed for leniency. That she would not repeat it. That she had a child and her parents were not able to take care of the child. She requested to be pardoned and her sentenced be reduced.
4. The appellant having pleaded guilty, it was not open to her to raise grounds that touched on facts. She was estopped by section 348 of the Criminal Procedure Act from doing so. It provided that no appeal should be allowed in the case of an accused person who had pleaded guilty and had been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
5. After the appellant pleaded guilty to the offence, the facts were read and she confirmed that they were correct. The procedure in plea taking was adhered to and the learned trial court could not be faulted. The plea was unequivocal. The penalty for the offence was provided for under section 29 of the Act that a person who committed an offence under the Act was liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings or both.
6. Female Genital Mutilation as a cultural practice was a harmful practice to a person's mental and physical integrity. It was also prohibited by law. It was clear that, the Prohibition of Female Genital Mutilation Act was an Act of Parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation.
7. Many violated the law and continued with the harmful and prohibited practice. All the three women voluntarily submitted themselves to the harmful and unlawful practice. Those facts portend prevalence of the offence and called for a deterrent sentence. The appellant had been in prison for over 1 year. She was a mother and first offender.

Appeal partly allowed; the appellant should serve a probation sentence for the period of the remainder of the prison term.

Order

The District Probation Officer, who would supervise the probation order would advise the appellant on the dangers of FGM practice and encourage her to attend seminars organized for eradication of female genital mutilation. Such interventions would help.

Cases**East Africa**

1. *Adan v Republic* [1973] EA 446 – (Applied)
2. *Njoroge v Republic* [1987] KLR 19 – (Applied)

Chebet v Republic

3. *Okeno v Republic* [1972] EA 32 – (Applied)

Statutes***East Africa***

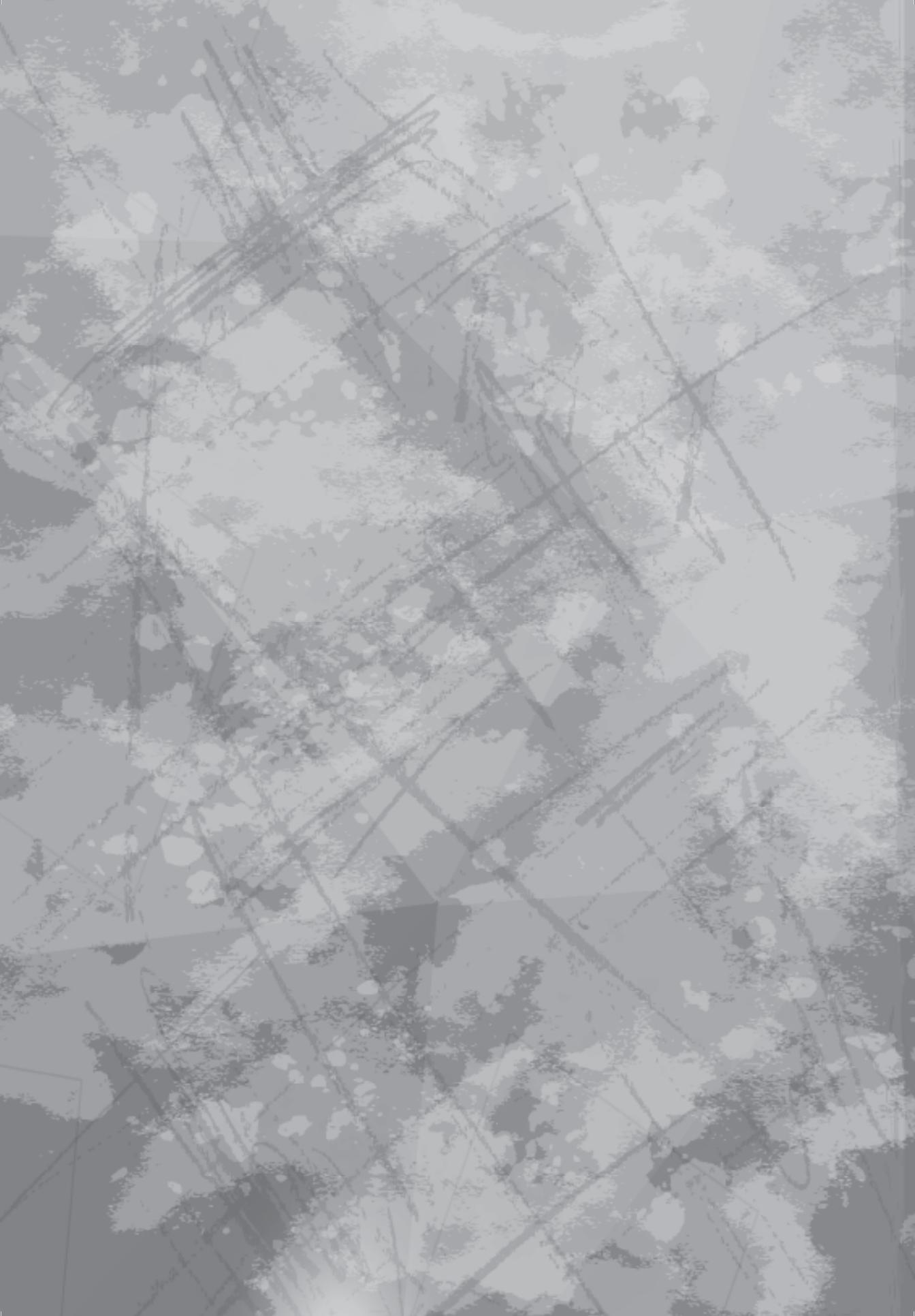
1. Criminal Procedure Code (cap 75) sections 207, 348 – (Interpreted)
2. Prohibition of Female Genital Mutilation Act, 2011 (Act No 32 of 2011) sections 24, 29

Advocates

None mentioned

D. Domestic Violence

- 1. The scope and nature of the element of malice aforethought for it to be proved.** *Namachanja v Republic* Criminal Appeal No E025 of 2021; [2021] eKLR
- 2. The words of the deceased in hospital that she had been assaulted by her husband, the accused, amounted to a dying declaration and was admissible in court.** *Republic v Ekirapa* Criminal Case No E013 of 2022; [2023] eKLR
- 3. Probation is commendable instead of imprisonment for a pregnant child charged with manslaughter because the child offender is a child in need of care and protection.** *Republic v BC* Criminal Case No E061 of 2022; [2022] eKLR
- 4. The doctrine of recent possession in relation to murder case resulting from sexual gender based violence.** *Republic v Mucheru & another* Criminal Case No 45 of 2018; [2021] eKLR
- 5. Supreme Court issues guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the *Muruatetu* [2017] case.** *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition Nos 15 & 16 of 2015; [2021] eKLR
- 6. The scope of domestic violence.** *Republic v Mbugua* Criminal Case No 3 of 2018; [2020] eKLR
- 7. Section 26 of the Sexual Offences Act is constitutional and does not violate or limit the rights of persons living with HIV under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution.** *EM & 6 others v General & another; HIV Justice Worldwide & another (Amicus Curiae); National Aids Control Council (Interested Party)* Petition No 447 of 2018; [2022] eKLR
- 8. Court sentences the accused to life imprisonment for the murder of the deceased after being charged with the offence of defiling them.** *State v FAO* Criminal Case No 4 of 2020; [2021] eKLR



Namachanja v Republic

1. The scope and nature of the element of malice aforethought for it to be proved

Significance: The decision talks about the circumstances a court of appeal could interfere with a trial court's sentence in crimes of murder and the elements that make up malice aforethought for it to be proved.

Namachanja v Republic [2021] eKLR

Criminal Appeal No E025 of 2021

Court of Appeal at Kisumu

W Ouko, J Mohammed and S ole Kantai, JJA

July 9, 2021

***Criminal Law** – offences – murder – elements of murder – malice aforethought – what was the scope and nature of the element of malice aforethought for it to be proved.*

***Appeals** – reasons for appeal – where an appellant in a murder case alleged that a sentence was harsh and excessive – circumstances a court of appeal would interfere with a trial court's decision.*

Brief facts

The appeal was a first from the judgment of the High Court convicting the appellant for the charge of murder contrary to section 203 as read with section 204 of the Penal Code and sentencing him to death.

Issues

- i. Whether the prosecution proved the charge of murder beyond reasonable doubt and whether the sentence could be interfered with on grounds that it is manifestly harsh and excessive.
- ii. What was the nature and scope of the element of malice aforethought?

Held

1. An appellant on a first appeal was entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court had to itself weigh conflicting evidence and draw its own conclusion. It was not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it had to make its own findings and draw its own conclusions. Only then could it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses.
2. To prove the charge of murder beyond reasonable doubt, the prosecution was required to prove the death of the deceased, that the death of the deceased was caused by the person accused and that the accused had malice aforethought in committing the murder.
3. Having considered the evidence on record afresh, the prosecution established the death of the deceased through the evidence of PW2 who was with the deceased when she died and reported the death to the police, PW3 who identified the deceased's body for the post mortem examination and PW5 who conducted the post mortem examination and produced the post mortem report. The appellant did not dispute the fact of the deceased's death.
4. On the complaint about the discrepancies on the dates of death, those were minor and of no consequence to the appellant's conviction. In any trial there were bound to be discrepancies. An appellate court in considering those discrepancies had to be guided by the working of section 382 of the Criminal Procedure Code, *viz* whether such discrepancies were so fundamental as to cause

- prejudice to the appellant or they were inconsequential to the conviction and sentence.
5. The prosecution established that the death of the deceased was caused by the unlawful acts of the appellant. The appellant challenged that finding on grounds that there was no evidence that he hit the deceased on the head and that PW1 testified that when he witnessed him beating the deceased, he did not have a weapon. There was no merit in that contention as there was evidence by PW2 that the deceased informed her that the appellant hit her on the head, ribs and legs.
 6. Section 33(a) of the Evidence Act provided that statements by a deceased person were admissible when relating to cause of death. When the statement was made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death came into question. Such statements were admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever could be the nature of the proceeding in which the cause of his death came into question.
 7. Under section 33(a) of the Evidence Act, a dying declaration was admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who was dead were admissible where the cause of his death was in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements were admissible whether the person who made them was or was not expecting death when he made the statements. While it was not the rule of law that a dying declaration had to be corroborated to found a conviction, nevertheless, the trial court had to proceed with caution and get the necessary assurance that a conviction founded on a death declaration was indeed safe.
 8. In the instant appeal, it was clear that PW2's evidence that the deceased informed her that the appellant hit her on the head, ribs and legs was a dying declaration. In determining the cause of death, the trial court relied on both the dying declaration and the evidence of PW1 who witnessed the appellant chasing and beating her and during the incident noted that the deceased had already sustained a head injury to lead to the conclusion that the death of the deceased was caused by the appellant. The trial court relied on the deceased's dying declaration with the proper caution.
 9. The following factors were to be considered in determining whether malice aforethought had been established;
 - a. The nature of the weapon used;
 - b. the manner in which it was used;
 - c. the part of the body targeted;
 - d. the nature of the injuries inflicted either a single stab/wound or multiple injuries; and
 - e. The conduct of the accused before, during and after the incident.
 10. In the instant appeal, malice aforethought was established by the prosecution. The appellant intended to cause the deceased grievous harm by hitting her on the head and by continuing to beat her when she was on the ground until they were separated by PW1. The prosecution proved the offence of murder beyond reasonable doubt as correctly held by the trial court.
 11. The court did not alter a sentence unless the trial court had acted upon wrong principles or overlooked some material factors. To that, a third criterion would be added namely, that the sentence was manifestly excessive in view of the circumstances of the case. To guarantee the accused person's right to fair trial, it was upon the court to determine what sentence would meet the ends of justice on a case by case basis.
 12. Sentencing was an important task in the matters of crime. One of the prime objectives of the criminal law was imposition of an appropriate, adequate, just and proportionate sentence commensurate with

Namachanja v Republic

the nature and gravity of the crime and the manner in which the crime was done. There was no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depended on the facts and circumstances of each case and the court had to keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

13. It was only if the offense was of an exceptionally depraved and heinous character, and constituted on account of its design and manner of its execution a source of grave danger to the society at large, that the court could impose the death sentence.
14. In the instant appeal, the trial court sentenced the appellant to death as it was the only sentence prescribed by law at the time of sentencing. The sentence was passed before the *Muruatetu* case and the trial court did not take the appellant's mitigation into account. Thus, the court was inclined to interfere with the sentence.
15. The court took into account the mitigation advanced by the appellant that he was remorseful; that he was a first offender; and that he was a father of four children. The court also considered the circumstances under which the offence was committed as well as the need to deter domestic violence and the commission of the offence of murder. The appeal against conviction was dismissed while the appeal against sentence was allowed.

The sentence of death was set aside and in substitution the appellant was sentenced to 30 years imprisonment with effect from October 9, 2017 when he was sentenced.

Cases

East Africa

1. *Francis Karioko Muruatetu & another v Republic* Petition Nos 15 & 16 of 2015; [2017] eKLR – (Explained)
2. *HSJ v Republic* Criminal Appeal No 28 of 2016 – (Explained)
3. *Joseph Maina Mwangi v Republic* Criminal Appeal No 73 of 1992 – (Followed)
4. *Kariuki Karanja v Republic* [1986] KLR 190 – (Mentioned)
5. *Ogolla slo Owuor v Republic*, (1954) EACA 270 – (Explained)
6. *Okeno v Republic* [1972] EA 32 – (Followed)
7. *Philip Nzaka Watu v Republic* [2016] eKLR – (Explained)
8. *Republic v Tumbeere slo Ochen* (1945) 12 EACA 63 – (Explained)

India

1. *Alister Anthony Pareira v State of Maharashtra* [2012] 2 SCC 648 para 69 – (Explained)
2. *Bachan Singh v The State of Punjab (Bachan Singh)* Criminal Appeal No 273 of 1979 AIR (1980) SC 898 – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 50(2)(c) – (Interpreted)
2. Evidence Act (cap 80) section 33(a) – (Interpreted)
3. Penal Code (cap 63) sections 203, 204, 206 – (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2)(3); 11(1) – (Interpreted)

Advocates

None mentioned

2. The words of the deceased in hospital that she had been assaulted by her husband, the accused, amounted to a dying declaration and was admissible in court

Significance: The case highlighted the admissibility of the dying words of a deceased (wife) after she was taken to hospital after an assault by her husband that resulted in her death. In addition, the court illustrated a circumstance where a charge of manslaughter could be preferred instead of murder

Republic v Ekirapa [2023] eKLR

Criminal Case No E013 of 2022

High Court at Busia

JR Karanja, J

February 14, 2023

Criminal Law – offences - murder vis-à-vis manslaughter – where criminal act of assault committed against deceased by the accused during a domestic marital scuffle - where the accused took the deceased to hospital – where deceased died after being taken hospital- whether conduct of a person who could not have intended the death of a deceased changed the charge established against the accused from murder to manslaughter - Penal Code, sections 202(1), 203 and 204

Evidence Law – dying declaration – admissibility of – where deceased told PW4 that she had been assaulted by her husband - whether the words of the deceased in hospital that she had been assaulted by her husband, the accused, amounted to a dying declaration – Evidence Act, section 33(a).

Brief facts

The accused faced a charge of murder, contrary to section 203 as read with section 204 of the Penal Code, in that, on July 28, 2022 at Apatit village, Teso South, Busia county, murdered Pamela Emase.

Issues

- i. Whether conduct of a person who could not have intended the death of a deceased changed the charge established against the accused from murder to manslaughter.
- ii. Whether the words of the deceased in hospital that she had been assaulted by her husband, the accused, amounted to a dying declaration.

Held

1. An accused person, in normal circumstances assumed no burden to establish his defence. It was the court to consider whether on consideration of all the evidence before it, the prosecution had established the guilt of an accused person beyond all reasonable doubt.
2. In the instant case, with regard to the cause of death, there was sufficient and credible evidence from PW3 establishing that the deceased died from raised pressure in the brain occasioned by bleeding due to blunt trauma.
3. That was clearly and exhaustively documented in the post mortem report (PEx1) thereby proving beyond reasonable doubt that the cause of death was attributable to the criminal act of assault occasioned by an individual rather than to natural causes such as illness or disease of the human body. It was therefore not a coincidence that the deceased passed on a few weeks after she had been assaulted.
4. She succumbed to a severe injury suffered by herself after being assaulted. The doctor's evidence overruled natural causes and/or illness as the immediate and probable cause of death and implied that the severe headache experienced by the deceased was occasioned by an act of assault occasioned

Republic v Ekirapa

upon her with a blunt object.

5. The accused vehemently denied that he was responsible for any form of assault against the deceased. However, the evidence by PW1 indicated that a domestic dispute, quarrel or altercation occurred between the deceased and the accused inside their house on the material night and on the following day the deceased complained of a terrible headache attributing it to an assault against her by the accused. That therefore strongly implied that the deceased was assaulted by the accused as they were alone in their house on the material night.
6. PW2 corroborated PW1 in indicating that there was indeed a domestic scuffle and/or disagreement between the deceased and the accused inside their house on the material night. PW2 stated that he heard the deceased scream and shouting words to the effect that “whatever happens, I will not leave this home”.
7. Although PW1 and PW2 did not witness the accused actually assaulting the deceased, their respective evidence strongly suggested that he had to have gone physical with her by assaulting her and underestimating the degree of injury he may have inflicted on her. That had the effect of rebutting and discrediting his denial of having assaulted the deceased in any manner.
8. Further, there was the evidence of PW4 which indicated that when he visited the deceased in hospital after being taken there on a second occasion, she told him that she had been assaulted by her husband i.e. the accused. That in itself amounted to a dying declaration which under section 33(a) of the Evidence Act, was a statement made by a deceased person relating to his/her death and was admissible in evidence.
9. The deceased died, as could be borne by the prosecution’s cogent and credible evidence, as a result of a criminal act of assault committed against her by the accused during a domestic marital scuffle. The accused’s defence was in the circumstances clearly resulted and discredited. However, the accused underestimated the degree of injury he had caused upon the deceased. He did not comprehend or imagine that his unlawful action would lead to the death of his wife (deceased) of more than thirty (30) years.
10. According to his own evidence and that of PW4, the accused was instrumental in having the deceased medically attended to after her condition persisted and worsened. Such conduct of a person who could not have intended the death of the deceased. The accused caused the death of the deceased by his unlawful act, but of no malice aforethought.
11. The charge established against the accused by the prosecution beyond any reasonable doubt was not that of murder, but manslaughter, contrary to section 202(1) of the Penal Code. The accused was ultimately found guilty of manslaughter and was accordingly convicted.

Application allowed.

Cases

None referred to

Statutes***East Africa***

1. Penal Code (cap 63) sections 202(1); 203; 204 – (Interpreted)
2. Evidence Act (cap 80) sections 33(a) – (Interpreted)

Advocates

None mentioned

3. Probation is commendable instead of imprisonment for a pregnant child charged with manslaughter because the child offender is a child in need of care and protection

Significance- The case was not brought in by someone but one of the officers in a WhatsApp group who raised the issue. Also, it raises a serious concern on the urgent need for the creation of awareness amongst the child justice agencies of the new requirements of the law put there to enhance child protection for those who entered the criminal justice system.

Republic v BC [2022] eKLR

Criminal Case No E061 of 2022

High Court at Busia

TM Matheka, J

December 28, 2022

Criminal Law – offences – manslaughter – punishment for manslaughter – where the accused child had killed her child after trauma arising from a dysfunctional early marriage and a quarrel with her grandmother – where the accused was discovered to be five months pregnant in the Children Remand Home – where the court was concerned that the Children Remand Home was not conducive for the holding of a pregnant child, and in the event that she gave birth, it would not be conducive for a child mother and her baby – whether Probation was commendable instead of imprisonment for a pregnant child charged with manslaughter – Children Act, 2022, section 144; Criminal Procedure Code, section 137A; Penal Code, cap 63, sections 202 and 205.

Brief facts

The Nakuru Children Court Users Committee (CCUC) had a WhatsApp Group where members shared concerns over issues related to the administration of and access to justice for children in the child justice system. It was there that the representatives of the agencies raised issues of access to justice for children and those related to the administration of justice for children. Being a specialized CCUC, the membership was drawn from the Child Justice System, the Judiciary, The Rift Valley Law Society, the Children Remand Home, Probation & After Care Services, Directorate of Children Services, Nakuru County Teaching & Referral Hospital, Office of the Director of Public Prosecution, Kenya Police Service, Kenya Prisons Service, the County Government, Non-Governmental Organizations dealing with issues of children, *et al.*

On December 16, 2022 the volunteer children officer at the Children Remand Home, Nakuru, brought to attention, on the wall, that there was a child at the remand home facing a murder charge that her case had been scheduled for hearing on the March 15, 2023. The concern for the officer was that the child was five (5) months pregnant and it appeared to him that the court was not aware. The greatest concern was that the Children Remand Home was not conducive for the holding of a pregnant child, and in the event that she gave birth, it would not be conducive for a child mother and her baby. Noting that it was a High Court matter, and guided by the Constitutional Principle to always act in the best interests of the child, and that detention of a child ought to be the last resort, the court was of the view that there had to have been a mistake on its part. In any event, the court was still in the service month for children matters.

Republic v BC**Issue**

Whether Probation was commendable instead of imprisonment for a pregnant child charged with manslaughter.

Held

1. Taking into account the provisions of the Children Act, 2022, section 144 on the categories of children in need of care and protection section 144(r), a child who was pregnant, 144 (bb) a child who was in conflict with the law, the court was of the view that that child was not only in conflict with the law, but was also in need of care and protection.
2. Upon perusal of the file, the court found the mental assessment report, which indicated that she was 17 years old, 1st born of 8 siblings, separated from her husband with whom they had one child (the deceased) and was then pregnant with the 2nd child. That there was history of early childhood trauma as she had been married from the age of 15 years old. The psychiatrist formed the opinion that she was mentally fit to stand trial, but, in addition, she was psychologically traumatized and a victim of Gender Based Violence. He recommended that she required more psycho-social support and rescue from the situation she was in.
3. The charge sheet was dated November 14, 2022. She was charged with Murder Contrary to section 203 as read with 204 of the Penal Code, that on October 21, 2022 at Kapngorot Village, Taita Sub Location Kuresoi South Sub County within Nakuru she murdered MC.
4. It was evident that there was urgent need for the creation of awareness amongst the child justice agencies of the new requirements of the law put there to enhance child protection for those who entered the criminal justice system. The law required that a police officer who arrested a child ought to not only inform the parent/guardian, but also the Secretary Children Services or an authorized officer within 24 hours. Upon receipt of that information, the children officer was to carry out an assessment and submit that report to the police officer. The report should contain; information on the socio-economic and personal circumstances and the needs of the child with a view to safeguarding the welfare of the child.
5. That had not been done. The court therefore made the following orders:
 - a. That a Children Officer's Report be filed on the welfare of the children section 218(2), (3) and (4);
 - b. A pre-bail report by Probation and After Care Services with a view to securing a surety/fit person for her and her baby pending the hearing and determination of her case;
 - c. The child be escorted to hospital for ante-natal clinic/care.
 - d. In view of the psychiatrist's assessment on Gender Based Violence, the child be taken for counselling at the Gender Based Violence Recovery Center at the Provincial General Hospital Nakuru; and
 - d. The orders be served appropriately.
6. The plea agreement was recorded in accordance with section 137A to 137I and 137L of the Criminal Procedure Code, upon satisfying the court that the subject understood the nature of a plea agreement, and that she was competent to take the same.
7. She pleaded to the lesser charge of Manslaughter Contrary to section 202 as read with 205 of the Penal Code. The fact as given by the prosecution were simply that on the material date, the subject was at her grandmother's place. Her child M was missing. When the child showed up he appeared sad, he said he had eaten Mandazi, but was not well. On further questioning by her mother the accused revealed that she had fed the child poison. The mother called neighbours for help. The child was rushed to Kamwaura Health Centre, but was declared dead on arrival. The accused was arrested.

- A bottle of diazonal, the poison was recovered. The body of the child was taken to Molo Sub County Hospital Mortuary, samples examined by government analyst revealed cause of death to be poisoning. The subject pleaded guilty to the facts. The court made a finding of guilt on her own plea.
8. In mitigation, the lawyer for the accused told the court that her client was below 18 years, at the time of committing the offence was living with her grandmother because her family had neglected her. She was married off as a minor and was then pregnant with her second child. She had been chased away by the man who had married her. The counsel for the accused sought a lenient disposition from the court.
 9. The two reports the court had sought for had not been filed by Director of Children Services or Probation and After Care Services, as they had been expected on December 21, 2022. The court directed Probation and After Care Services to then present a Probation Officer's Report, and the Director of Children Services to avail the Children Officer's Report.
 10. First, the police ought to have opened and Protection and Care File even as the matter was pending investigations. There was a gap in time, which was not explained, from the date the child died to the date the subject was presented in court. That Protection and Care file would have enabled the Director of Children Services to begin other investigations. The Director of Criminal Investigations ought to have been involved because of the child marriage issue, which was obviously combined with defilement. Despite being aware that the child was a victim of early marriage and defilement, the police did nothing to follow up on that, and ODPP did not flag the two issues for follow up, everyone was more concerned about the killing of her own child without following up on the why, yet she was pregnant with another child.
 11. When she entered into a Plea Agreement the Director of Children Services was initially of the view that that was purely a matter for PACs as it involved a child in conflict with the law. In view of section 239 of the Children Act No. 29 of 2022, that was no longer the position. Children law recognized people's lived reality that more often than not the child offender was first a child in need of care and protection whose welfare ought to be taken into consideration even as the criminal charges were proceeding against that child. The child offender was a child in need of care and protection, who, should the circumstances dictate, would return to the hands of the Secretary Children Services who then had a role in dealing with the child who was in conflict with the law.
 12. They had filed the Children Officer's Report, where they found that the child was a victim of child marriage, and that her 'husband' sent her away when her child was one year two months. She went to her grandmother's in Tinnet, only for the grandmother to find out she was by then 3 months pregnant. The grandmother was not ready to take care of three extra mouths and told her to go back to her 'husband' who had by taken in a new wife. She decided to kill her child and then kill herself instead of going back. DCS had recommended that she be committed to Kisumu Rescue Centre pending the hearing of the case.
 13. Upon the plea agreement, the court sought a pre placement report (Pre-sentence report) from Probation and After Care Services Nakuru. It confirmed the factual back ground of the case. It then became inevitable to find an institution that would have both rehabilitative and reintegration programs, while at the same taking care of her pregnancy and new born when the time arose. The Probation Officer's Report recommended that the subject be placed on probation for three years at Siaya Girls Probation Hostel.
 14. Section 239 of the Children Act, 2022 provided that the court could make one oral combination of the methods set out there with respect to the child found guilty of an offence. A combination of the following methods would be appropriate for BC:
 - (c) make a probation order against the offender under the provisions of the

Republic v BC

Probation of Offenders Act;

- (h) place the child under the care of a qualified counsellor or psychologist; (i) order that the child be placed in an educational institution or vocational training programme;
- (j) order that the child be placed in a probation hostel under the provisions of the Probation of Offenders Act;

15. Taking into consideration the circumstances of the case, the court was persuaded that the Probation Hostel would be the appropriate institution where all those would be implemented. It would also be necessary that there be a follow up by the court upon her delivering her baby. The court ordered therefore that the subject be placed on probation supervision for three years to be served while committed to Siaya Probation Hostel. During her stay there and upon exist if necessary, she be accorded appropriate Counselling and Psychological support. She be accorded educational and /or vocational training support necessary for her reintegration and self-support. Probation and after care services were at liberty to seek extension of the order if necessary. A P& C able be opened, by the Deputy Registrar for purposes of progress report. The file to contain certified copies of the charge sheet, the two reports (COR and POR) and that judgment. Mention of the P& C file on the April 5, 2023 before the DR for progress report.

Orders

The orders to be served on Probation and After Care Services Nakuru for compliance were:

- i. The subject would be placed on probation supervision for three years;*
- ii. The subject would be and was thereby committed to Siaya probation Hostel for the period of the order. The Probation and After Services would be at liberty to seek extension of the order;*
- iii. The subject be accorded education and or vocational training necessary for herself sufficiency;*
- iv. The subject be accorded the counselling and psychological support in view of the circumstances of her case;*
- v. Due to her pregnancy the subject would be accorded all the necessary medical support for her and her baby when it would come;*
- vi. A P&C file would be opened for the baby for the appropriate order.*

Cases

None referred to

Statutes**East Africa**

1. Children Act, 2022 (Act No 29 of 2022) sections 144 (bb)(r); 218(2)(3)(4); 239(1)(d)(e)(h)(i)(l)(m) – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 137A, 137I, 137L – (Interpreted)
3. Penal Code (cap 63) sections 202, 205, 203, 204 – (Interpreted)

Advocates

Mr Kihara for the State

4. The doctrine of recent possession in relation to murder case resulting from sexual gender based violence

Significance: The case is vital as it explores whether a person found in possession of the shoes of the deceased in relation to murder case resulting from sexual gender based violence without explanation could be linked with the murder of the deceased.

Republic v Mucheru & another [2021] eKLR

Criminal Case No 45 of 2018

High Court at Nakuru

JM Ngugi, J

April 22, 2021

Criminal Law – murder – evidence for murder – doctrine of recent possession – doctrine of recent possession in relation to murder case resulting from sexual gender based violence – whether a person found in possession of the shoes of the deceased in relation to murder case resulting from sexual gender based violence without explanation could be linked with the murder of the deceased – Penal Code, cap 63, sections 203 and 204.

Brief facts

On Monday, November 7, 2016, the deceased was expected to pick up national examination papers at the Murang'a County Education Officer's offices at around 5:00am in the morning. He did not show up. That triggered a series of phone calls and consultations about his whereabouts. Eventually, the Ministry of Education officials reached his wife, the 1st accused person with the news.

After more than five days of searching, the body of the deceased was discovered. It was found at Karakuta Coffee Estate. It was discovered in a thicket, covered in soiled gunny bags, by a worker at the Karakuta Coffee Estate on November 11, 2016. The worker called the head of the local Police Post (Karamaini Police Post), Corporal Samuel Kabui and informed him of the grim finding. Corporal Kabui, who testified in the trial as PW14, went to the scene with his colleague, Richard Boit. He found the body of an African male lying on its back with gunny bags over his head and upper torso. The body was already decomposing. The body had no shoes on. There was a rope around the neck. The rope was tied to a tree. At the time, Corporal Kabui did not know that the body was that of the deceased. He called the Officer Commanding Police Station, Ruiru who sent a Police Vehicle to pick up the body and took it to the City Mortuary. It was only later - on November 16, 2016 - that Corporal Kabui came to learn, through the Ruiru OCS, that the body was that of the deceased.

Subsequently, investigators formed the opinion that the two accused persons together with one, Joseph Kariuki Njuguna (known by the popular alias "Karis" which will be used hereinafter) and Nelson Njiru Magati (who was a fugitive of justice referred to as "Njiru") jointly planned and executed the murder of the deceased. The two accused persons together with Karis were originally jointly charged with the murder of the deceased. However, subsequently, Karis accepted a plea agreement in which he pleaded guilty to the lesser crime of manslaughter. The two accused persons remained charged with the murder of the deceased.

Issue

Whether a person found in possession of the shoes of the deceased in relation to murder case resulting from sexual gender based violence without explanation could be linked with the murder of the deceased.

Republic v Mucheru & another**Held**

1. PW4 testified that the 2nd accused person took the shoes belonging to the deceased after strangling him. The pair of shoes was demonstrated conclusively to have belonged to the deceased through the evidence of PW14 and PW 17. That same pair of shoes was found in the possession of the 2nd accused person less than two weeks after the murder of the deceased.
2. The 2nd accused person had not been able to offer any credible explanation for his possession which was consistent with innocence. His only explanation, refuted by overwhelming evidence, was that the shoes belonged to him. He did not offer any details to show how, when and from where he acquired the pair of shoes. His explanation was, therefore, incredible. Under the permissible parameters of the doctrine of recent possession, the 2nd accused person was one of the assailants who murdered the deceased.
3. It was true that the 1st accused person did not physically strangle the deceased leading to the asphyxiation that ultimately killed the deceased. However, the evidence had demonstrated that the 1st accused person was the author of the plot and likely administered the Xylamine that rendered the deceased intoxicated hence more vulnerable to the strangulation, and delivered him for the eventual strangulation. It was clear from the evidence adduced at trial that the 1st accused person was the instigator of the plan to murder the deceased.
4. As the author of the plan, she entered into an agreement with the 2nd accused person and PW4 to carry out her intention to murder the deceased. The 2nd accused person killed the deceased pursuant to that agreement. That made both the 1st and 2nd accused persons, principal and joint offenders in the murder of the deceased.
5. Under the explicit definition of Principal Offenders in section 20 of the Penal Code, both the 1st and 2nd Accused Persons were principal offenders in the murder of the deceased.
6. The upshot was that, after due analysis of the evidence presented at trial, the court made the following findings:
 - a. That the deceased was killed on November 6, 2016 at Karakuta Coffee Estate.
 - b. That the killing of the deceased was principally instigated by the 1st accused person who procured the 2nd accused person (and PW4) to execute the homicide pursuant to an agreement where the 1st accused person promised to pay the two for the killing.
 - c. That the 2nd accused person caused the killing of the deceased pursuant to the agreement with the 1st accused person.
 - d. That the killing of the deceased was, therefore, caused by both accused persons.
 - e. That both accused persons had the malice aforethought as defined by law because they intended to cause the actual death of the deceased.
7. All the elements of murder had been established against both the 1st and 2nd accused persons. Both accused persons were guilty of the murder of the deceased contrary to section 203 as read together with section 204 of the Penal Code. ‘

Cases**East Africa**

1. *Waringa v Republic* [1984] KLR 617 – (Explained)
2. *Karanja & Another v Republic* [1990] KLR 234 – (Explained)
3. *R v Taibali Mohamedbhai* (1943) 10 EACA 60 – (Explained)

South Africa

1. *S v Phallo and others* 1999(2) SACR 558 (SCA) – (Explained)
2. *S v Shackell* (4) SA 1 (SCA) – (Explained) – (Explained)

United States

1. *Victor v Nebraska*, 114 S Ct, at 1244 (1994) – (Explained)
2. *Commonwealth v Webster*, 59 Mass 295, 320 (1850) – (Explained)
3. *Sandoval v California*, 4 Cal 4th 155 (1992) – (Explained)
4. *Commonwealth v Webster*, 59 Mass 295, 320 (1850) – (Explained)
5. *Holland v United States*, 348 US., at 140, 75 S.Ct. at 137 – (Explained)
6. *United States v Murphy*, 253 Fed. 404, 406 (NDNY 1918) – (Explained)

United Kingdom

Miller v Minister of Pensions [1947] 2 All ER 372 – (Explained)

Statutes

East Africa

Penal Code (cap 63) sections 203, 204 – (Interpreted)

Advocates

None mentioned

Muruatetu & another v Republic; Katiba Institute & 5 others (*Amicus Curiae*)**5. Supreme Court issues guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the *Muruatetu* [2017] case**

Significance: The case discusses *inter alia* (among other things) whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional, was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences.

Muruatetu & another v Republic; Katiba Institute & 5 others (*Amicus Curiae*) [2021] eKLR

Petition Nos 15 & 16 of 2015

Supreme Court of Kenya

MK Koome, CJ, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala,
I Lenaola, NS Ndungu & W Ouko, SCJJ

July 6, 2021

Constitutional Law – interpretation and application of the constitution – validity and consistency of statutes in accordance with the Constitution – the constitutionality of the mandatory nature of the death sentence – whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional, was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences – whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional, was an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the law – whether it was necessary for specific matters to be instituted before appropriate courts to determine the question as to whether the imposition of a mandatory death sentence for other capital offences including treason, robbery with violence and attempted robbery with violence was constitutional – Penal Code, section 204.

Jurisdiction – subordinate courts-magistrate's courts – hearings – re-hearing and revision of sentencing – whether magistrate's courts had jurisdiction to conduct a re-hearing on sentencing and to revise sentences that had been confirmed at the High Court and/or the Court of Appeal.

Brief facts

The appellants were convicted of murder and sentenced to death. They were challenging the legality of the mandatory nature of the death sentence imposed by the High Court and affirmed by the Court of Appeal. They also challenged the indeterminate nature of a life sentence and asked whether the court ought to assign a definite number of years of imprisonment, subject to remission rules, which would constitute life imprisonment.

The court issued a judgment dated December 14, 2017, which stated that it could not determine the issues related to the sentence of life imprisonment as they were not canvassed before the High Court or the Court of Appeal. In its judgment, the Supreme Court found that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional. However, that would not disturb the constitutionality of the death sentence as contemplated under article 26(3) of the Constitution of Kenya, 2010. The court ordered for the appellants' matter to be re-heard on the question of sentencing only on a priority basis. The court also ordered the Attorney General, the

Director of Public Prosecutions (DPP) and other relevant agencies to prepare a detailed professional review in the context of the judgment and order made with a view to setting up a framework to deal with sentence re-hearing of cases similar to that of the petitioners herein. The Attorney General was granted twelve (12) months from the date of the judgment to give a progress report to the Supreme Court in that regard.

In its judgment the court directed that the judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, urgently, for any necessary amendments, formulation and enactment of statute law, to give effect to the judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

The progress report on the framework proposed for the re-hearing of similar cases was not filed within 12 months as ordered by the court but it was filed on October 11, 2019. The reason for the delay in filing the progress report, offered by counsel for the DPP, was that there were no re-sentencing guidelines necessary to address the numerous pending matters on re-sentencing. On behalf of the 1st amicus curiae Katiba Institute, it was stated that the delay in filing the report resulted in the inability of the Supreme Court to confirm compliance with its orders and it compounded violations of the appellants' constitutional rights. It was stated that the absence of the anticipated guidelines had created inconsistency, confusion and uncertainty within the criminal justice system about the death sentence.

Issues

- i Whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional, was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences.
- ii. Whether Magistrate's Courts had jurisdiction to conduct a re-hearing on sentencing and to revise sentences that had been confirmed at the High Court and/or the Court of Appeal.
- iii. Whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional, was an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the law.
- iv. Whether it was necessary for specific matters to be instituted before appropriate courts to determine the question as to whether the imposition of a mandatory death sentence for other capital offences including treason, robbery with violence and attempted robbery with violence was constitutional.

Held

1. Contrary to the orders of the court, the appellants had not been afforded a re-sentencing hearing by the High Court.
2. As the progress report was being waited for, courts below the Supreme Court had embarked on their own interpretation of the judgment in question and had applied it to section 296(2) of the Penal Code and to sexual offences, while assuming that the decision was equally applicable to other statutes prescribing mandatory or minimum sentences. That assumption of applicability was never contemplated in the context of the decision in question.
3. The course that courts below the Supreme Court had taken had resulted in incertitude and incoherence in the sentencing framework in Kenya and it had given rise to an avalanche of applications for re-sentencing. Sentences that were confirmed at the High Court and the Court of Appeal, had been returned to the Magistrate's Courts by appellants and they had been revised. Magistrate's courts had entertained such applications for re-sentencing without jurisdiction. Additionally, some appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that were

Muruatetu & another v Republic; Katiba Institute & 5 others (*Amicus Curiae*)

pending hearing and determination, either in the High Court or the Court of Appeal, had also had their sentences revised by the Magistrate's Courts without disclosing the fact that pending appeals existed in superior courts.

4. There was no harmony when the revision of sentences was done by the courts. Sentences imposed after re-sentencing ranged from commutation to the period served, probation, reduction of sentences to some specific period, or the preservation of the maximum sentences.
5. The Supreme Court's decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. The decision was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution.
6. In paragraph 71 of its judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts had to impose the death sentence in all capital offences in accordance with the law. The nullified paragraphs were no longer applicable.
7. In respect of other capital offences such as treason under section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under section 297(2) of the Penal Code, a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached.
8. The recommendations of the Task Force report went beyond the terms of the orders of December 14, 2017, and dealt with, for example, matters that were within the legislative province of Parliament or in the court's exclusive jurisdiction and judicial discretion.
9. To obviate further delay and to avoid confusion, the court issued the following guidelines: -
 1. The decision of Muruatetu and the guidelines herein applied only with respect to sentences of murder under sections 203 and 204 of the Penal Code.
 2. The Judiciary Sentencing Policy Guidelines were to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
 3. All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.
 4. Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.
 5. In the re-sentencing hearing, the court had to record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on a suitable sentence.
 6. An application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which had jurisdiction to do so and not the subordinate court.
 7. In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court;
 - i. Age of the offender;
 - ii. Being a first offender;
 - iii. Whether the offender pleaded guilty;
 - iv. Character and record of the offender;
 - v. Commission of the offence in response to gender-based violence;
 - vi. The manner in which the offence was committed on the victim;

- vii. The physical and psychological effect of the offence on the victim's family;
 - viii. Remorsefulness of the offender;
 - ix. The possibility of reform and social re-adaptation of the offender; and,
 - x. Any other factor that the court considered relevant.
10. Where the appellant had lodged an appeal against the sentence alone, the appellate court would proceed to receive submissions on re-sentencing.
11. The guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They would also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.

Guidelines issued

Cases

East Africa

Muruatetu, Francis Karioko & another v Republic Petition No 15 & 16 of 2015 (Consolidated); [2017] eKLR – (Followed)

Statutes

East Africa

1. Criminal Procedure Code (cap 75) section 329 – (Interpreted)
2. Penal Code (cap 63) sections 40(3); 203; 204; 296(2); 297(2) – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) - In general – (Cited)
4. Constitution of Kenya, 2010 article 25 – (Interpreted)

Advocates

None mentioned

Republic v Mbugua

6. The scope of domestic violence

Significance: The case clarifies the meaning of domestic violence in instances where it resulted in murder.

Republic v Mbugua [2020] eKLR

Criminal Case No 3 of 2018

High Court at Nairobi

J Wakiaga, J

May 21, 2020

Criminal Law – sexual offences – domestic violence – domestic violence leading to murder – where the accused came home while drunk and started abusing the deceased in the presence of her daughter and her friend and her daughter – where the convict was initially charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code – where the said charges were subsequently withdrawn and substituted with the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code to which he pleaded guilty and was convicted on his own plea of guilty – what was the meaning of domestic violence in instances where it resulted in murder – Penal Code, cap 63, sections 202, 203, 204, and 205; Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, article 3(b).

Brief facts

The convict was initially charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of which were that on August 13 and 14, 2016 at Matopeni Area in Embakasi Central within Nairobi County murdered LWN to which he pleaded not guilty. By a plea bargain agreement dated January 28, 2020 voluntarily entered into between the accused and the prosecution, which was on February 19, 2020 accepted and recorded in court, the said charges were subsequently withdrawn and substituted with the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code to which he pleaded guilty and was convicted on his own plea of guilty.

Issue

What amounts to domestic violence?

Held

1. The convict and the deceased were living together as common law husband and wife. Their marriage though short lived was characterized with constant abuse. The convict was akin to what the court had in the past called a woman eater. He was living in the house of the deceased and contributed nothing rather than having sex with her, which he did even when he had killed her as seen through the condom found on her. He seemed to have been insecure and the only way to put the same down was to kill her.
2. Convention on Preventing and Combating Violence Against Women and Domestic Violence in article 3(b) defined domestic violence as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit between former or current spouse or partners whether or not the perpetrator shared or had shared the same residence with the victim.
3. The sentence meted out to the convict ought therefore to be commensurate with the gravity of the crime committed worth the purpose of the punishment being: -
 - a. Exerting a preventive influence on individual not to commit criminal offences.

- b. Preventing the perpetrators from committing additional offences and encouraging his/her rehabilitation and expressing the community's condemnation of the criminal offence and reaffirming the value of the law.
4. The court had said and continued to say that all married persons but women in particular had a right to choose their own destiny and until that message was spread and applied consistently at all levels of the justice system, more women would continue to die in the confines of their homes, where they expected love and comfort and the perpetrators would continue to thumb their nose at the law by evading appropriate sentence and the right to equal treatment guaranteed in the constitution would be but a mirage.
5. A deterrence sentence would be the most appropriate so as to send a warning that every person had a right to live and the menace of death as a result of domestic dispute and misunderstanding had to be curbed and checked at all cost so as to save the matrimonial homes from destruction.
6. The court had taken note of the conduct of the convict who after strangling the deceased put on the gas cylinder as if he intended that the house be set on fire when a match would be ignited. He then left the jurisdiction of the court and was at large for a period of one and half years before taking himself to the police at Naivasha. Whereas the convict pleaded for a non-custodial sentence, that was a matter where the same needed to be rehabilitated while in custody. There was no evidence tendered in court to show that his medical condition could not be handled while in prison.
7. The court had taken into account the fact that the same entered into plea bargain agreement with the prosecution and further the fact that the victim's daughter who was then aged ten was the first to recover the body of her mother who was half naked on bed, which experience she would live with for the rest of her life and that fact that the deceased had welcomed the convict into her home, her bed and body only for him to take her life away and was of the considered opinion that an imprisonment of fifteen (15) years would be the most appropriate sentence in the circumstances.

Cases

None referred to

Statutes***East Africa***

Penal Code (cap 63) sections 202, 204, 205 – (Interpreted)

International Instruments and Conventions

Convention on Preventing and Combating Violence Against Women and Domestic Violence, (Istanbul Convention), 2014 article 3(b)

Advocates

None mentioned

**EM & 6 others v General & another; HIV Justice Worldwide & another
(Amicus Curiae); National Aids Control Council (Interested Party)**

7. Section 26 of the Sexual Offences Act is constitutional and does not violate or limit the rights of persons living with HIV under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution

Significance: The case explains that section 26 of the Sexual Offences Act that provides for deliberate transmission of HIV or any other life threatening sexually transmitted disease is not unconstitutional.

**EM & 6 others v General & another; HIV Justice Worldwide
& another (Amicus Curiae); National Aids Control Council
(Interested Party) [2022] eKLR**

Petition No 447 of 2018

High Court at Nairobi

HI Ong'udi, J

December 20, 2022

Statutes – constitutionality of statutes – constitutionality of section 26(1) & 26(2) of the Sexual Offences Act – deliberate transmission of HIV or any other life threatening sexually transmitted disease – claim that section violated the rights of people living with HIV – whether section 26(1) of the Sexual offences Act was unconstitutional as it criminalized the spread or infection of HIV by persons living with the human immune deficiency Virus (HIV) – whether section 26(2) of the Sexual Offences Act that provided for a court to direct appropriate sample or samples be taken from an accused person, such place and subject to such conditions as the court may direct violated the rights of persons living with HIV – Sexual Offences Act, 2006, section 26; Constitution of Kenya, 2010, articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53.

Brief facts

The crux of the petition was premised on section 26 of the Sexual Offences Act No 3 of 2006. According to the petitioners, that section was vague and articulated in ambiguous language. Likewise, it failed to define the scope and specific acts attracting the criminal sanctions spelt out. In view of that it was asserted that that provision violated the rule of law which required that laws with criminal penalties ought to be clear. That was so as not to limit the understanding of their scope and avoid their arbitrary enforcement and prosecution.

It was further asserted that the purpose of the Sexual Offences Act which was stated to be prevention and protection against unlawful sexual acts ran contrary to section 26 of the Act. That was because the impugned section perpetuated discrimination, stigma and fear from testing for HIV and disclosing one's status. The impugned section unreasonably and unjustifiably limited the rights of persons living with HIV particularly under articles 27, 28, 29(f), 31, 43(1)(a), 45, 50(2), 53(1) (c, e) of the Constitution.

Issues

- i. Whether section 26(1) of the Sexual Offences Act was unconstitutional as it criminalized the spread or infection of HIV by persons living with the Human Immunodeficiency Virus (HIV).
- ii. Whether section 26(2) of the Sexual Offences Act that provided for a court to direct appropriate sample or samples be taken from an accused person, at such place and subject to such conditions as the court may direct violated the rights of persons living with HIV.

Held

1. The court was only required to ascertain whether a law confirmed with the set legal principles not the lacking of certain considerations in making of the law. The legislature in making laws was mandated to consider all the relevant factors such as those raised before enacting a law. The legislature was the law making organ and it enacted the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court could not question the wisdom of legislation or its policy object.
2. There were a number of principles that had been established to guide the court when interpreting an Act of Parliament. The first principle in determining the constitutionality of a statute or a provision was the general presumption that statutes were enacted in conformity with the Constitution as was highlighted in the parties' submissions. Until the contrary was proved, legislation was presumed to be constitutional. It was a sound principle of constitutional construction that, if possible, legislation should receive such a construction as would make it operative and not inoperative.
3. The purpose and effect of a statute were relevant in determining constitutionality of a statute either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. Further that one of the key elements in construing a statute was to ascertain the intention of Parliament as expressed in the Act.
4. It was critical to lay the article of the Constitution which was invoked beside the statute which was challenged to decide whether the latter squared with the former. It was as well imperative to make due consideration to the legislative history of a statute as it was presumed that the legislature understood the needs of the people and made laws directed at problems made manifested by actual experience. Lastly, in the absence of an expressed legislative intention to the contrary, the language of the statute had to ordinarily be taken as conclusive in its plain meaning.
5. For one to appreciate the context of the impugned provision, regard had to be had to the Sexual Offences Act as a whole as it revealed the legislature's intent in enacting the law. As per the preamble it was clear that the legislature in enacting that statute sought to delineate the acts that qualified as sexual offences and to establish a means of punishing offenders, in an effort to prevent such offences and to protect all persons from unlawful sexual acts. Evidently an examination of the legislative history made it plain that the legislature in enacting the Sexual Offences Act bore in mind the problems that the society was facing with reference to sexual offences that were not carefully covered under the criminal law.
6. The petitioners as detailed in the petition and submissions took issue with the impugned section for being vague and overly broad for acts considered criminal. That was opposed by the 1st respondent and interested party in their submissions where counsel noted that the impugned provision was clear.
7. A reading of the introduction of section 26(1) disclosed a number of things to which a plain meaning would be ascribed. First the person referred to had to have 'actual knowledge' of his/ her status. Secondly, the offense was deemed to be committed when that person 'intentionally, knowingly and willfully' did an act that infected another person with HIV or other sexually transmitted disease. The acid test upon which the impugned provision was anchored was set out very clearly.
8. That was supported by the fact that the ingredients required to instigate a criminal matter being the *mens rea* and *actus reus* were clearly provided for. One had to know of their status and proceed to act with intent to infect the victim or other person for it to be an offence. The language of the Act was clear with no ambiguity. That meant that a contrary interpretation or application other than its ordinary meaning would invoke an absurd interpretation of the provision which the principles of interpretation cautioned against.

**EM & 6 others v General & another; HIV Justice Worldwide & another
(Amicus Curiae); National Aids Control Council (Interested Party)**

9. One of the principles of interpretation was that a statute in its interpretation and application was presumed to adhere to the dictates of the Constitution. The impugned provision under section 26(2) of the Sexual Offences Act informed that once the alleged offender was charged the court could proceed to direct that an appropriate sample or samples be taken from the accused person. The wording of that portion did not indicate a compulsory application as adopted by the petitioners. That was because the legislature as could be discerned intended that where a court in its wisdom assessed a situation and deemed such an exercise necessary would require the same to be undertaken.
10. Since a statute enjoyed presumption of constitutionality the action by the court was done in line with the dictates of the Constitution in mind. Undoubtedly that presumption could only be rebutted by a person claiming otherwise. Appreciating the possibility of abuse of that provision, the legislature put that guideline as a safeguard in the application of the provision.
11. The 1st respondent and interested party disputed those assertions arguing that the allegation of violation of the constitutional rights was unfounded. In their view no particulars had been provided to show how the impugned provision amounted to violation adding that article 24 of the Constitution made room for limitation of rights that were not absolute in a manner that was reasonable and justifiable. The advanced argument by the petitioners in that regard was erroneous. That was so because they suggested that the impugned provision specifically targeted persons living with HIV and as such those persons lived in fear of being prosecuted under the impugned provision. Such an interpretation was in error because it implied that living with HIV was a crime in itself. That was not so, and there was no ground for stating so, as such.
12. A reading of that section made it plain that the object of that provision was to charge, prosecute and punish persons living with HIV or any other sexually transmitted disease who committed the crime of infecting their victims with the disease knowingly. Those were the offenders and not the general community of persons living with HIV. The provision in the same way did not criminalize being in a relationship with someone who was HIV positive. It could not therefore be said that the impugned provision violated and limited the petitioners' rights as submitted. The petitioners had explained how they had even gone for treatment and counseling. Their marriages had not been declared unlawful because one party had HIV. Nobody was looking down upon them. HIV had to be contained hence the provisions in the Sexual Offences Act.
13. From the foregoing the court was inclined to differ from the petitioners' notion that the impugned provision ran a foul the Constitution. The principles of interpretation gave clear guidance on that. Furthermore, the erroneous interpretation of the impugned provision by the petitioners in the end would lead to an incorrect conclusion of the meaning of the section. A reading of the impugned provision against the Constitution did not divulge any contradiction in relation to the alleged violations. The cumulative result of that was that the petitioners had not been able to rebut the presumption of constitutionality which that provision enjoyed. It was the court's humble finding therefore that section 26 of the Sexual Offences Act was constitutional and did not violate or limit the rights of persons living with HIV under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution.
14. The cry of the petitioners and persons living with HIV was that that section had been used to harass and charge them wrongfully as clearly showcased in the petitioners' affidavits. The implementing authorities remained accountable and were bound by the dictates of article 10(2)(c) of the Constitution. Where they failed to discharge their mandate in accordance with the dictates of the Act and the Constitution, an affected party was at liberty to seek redress in court. For example, where samples were taken for testing the impugned section clearly outlined what should be done and that had to be adhered to. That could not therefore be said to be unconstitutional.

15. More training ought to be done to ensure a greater understanding of HIV, by everyone whether infected or not. That was in light of the medical and scientific information advanced by the relevant bodies. That would assist in removal of any biases created by the lack of that knowledge in the minds of authorities and persons in the criminal justice system. In cases like children's matters, HIV related cases and divorce one's courts upon noticing any sensitivity of the matter had held such matters in camera to avoid exposure of the victim to the public. HIV positive results were not supposed to be announced in open court as that would demean the dignity of the person / persons concerned. That had however nothing to do with section 26 of the Sexual Offences Act. The impugned section did not in any way criminalize one for being HIV positive, neither did it allow publication of the results of a person who had been tested.

The petition was dismissed with each party to bear their own costs.

Cases

East Africa

1. *AIDS Law Project v Attorney General and 3 others* Petition No 97 of 2010 – (Explained)
2. *Wanjiku & another v the Attorney General & others* [2012] eKLR – (Explained)
3. *Law Society of Kenya vs Kenya Revenue Authority & another* [2017] eKLR – (Explained)
4. *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017) eKLR – (Explained)
5. *ANN v Attorney General* [2013] eKLR – (Explained)
6. *Dijaje Makuto vs State* Criminal Appeal No 31 of 1999 – (Explained)
7. *Peter K Waweru v Republic* [2006] eKLR – (Explained)
8. *Wahome vs Republic* [2005] eKLR – (Explained)
9. *Obbo and another v Attorney General* [2004] EA 265 – (Explained)
10. *In the Matter of Interim Independent Electoral Commission* Constitutional Application No 2 of 2011; [2011] eKLR – (Explained)
11. *Council of County Governors v Attorney General & another* [2017] eKLR – (Explained)
12. *Njoya & 6 others v Attorney General & another* [2004] eKLR – (Explained)
13. *Tinyefunza v. Attorney General of Uganda* Constitutional Petition No 1 of 1997; UGCC 3 – (Mentioned)
14. *Apollo Mboya v Attorney General & 2 others* [2018] eKLR 3 – (Mentioned)
15. *Adrian Kamotho Njenga v. Kenya School of Law* [2017] eKLR 3 – (Mentioned)
16. *Law Society of Kenya v. Kenya Revenue Authority & another* [2017] eKLR 3 – (Mentioned)
17. *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR – (Explained)
18. *Denish Gumbwe Osire v Cabinet Secretary, Ministry of Defence & another* [2017] eKLR – (Explained)
19. *Samwel Rukenyi Mburu v Castle Breweries Nairobi HCC 1119 of 2003* – (Explained)
20. *Peter K Waweru v Republic* [2006] eKLR – (Explained)
21. *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR – (Explained)
22. *Nelson Andayi Havi vs Law Society of Kenya & 3 others* Petition No. 607 of 2017; [2018] eKLR – (Explained)
23. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR – (Explained)
24. *Sony Holdings Ltd v Registrar of Trade Marks & another* [2015] eKLR – (Explained)
25. *Kenya Wildlife Service v Joseph Musyoki Kalonzo* [2017] eKLR – (Explained)
26. *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* [2014] eKLR – (Explained)
27. *Republic v Amos Kipyegon Cheruiyot* [2016] eKLR – (Explained)

**EM & 6 others v General & another; HIV Justice Worldwide & another
(Amicus Curiae); National Aids Control Council (Interested Party)**

28. *Republic v John Kithyululu* [2016] eKLR, – (Explained)
29. *R v Mark Lloyd Stevenson* Criminal Revision No 1 of 2016 – (Explained)
30. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR – (Explained)
31. *Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR – (Explained)
32. *Katiba Institute v Judicial Service Commission & 8 others* [2017] eKLR – (Explained)
33. *Ndyanabo v Attorney General* [2001] EA 495 – (Explained)
34. *Robert Murambi v Attorney General & 3 others* [2017] eKLR – (Explained)

South Africa

In Re Hyundai Motor Distributors (PTY) & others v. Social NO & others [2000] ZACC 12 2001 (1) SA 545 3 – (Mentioned)

United Kingdom

Tyne Foundry Pty Ltd v Ma'ara Shire Council (1948) 77 CLR 544 at 568 – (Explained)

India

Hamdard Dawakhana & another v The Union of India (Uoi) & others AIR 1960 SC554, 1960 CriLJ 671, (1960) IIMLJ 1 SC, 1960 2 SCR 671 – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 2(4)(5)(6), 19, 20, 22, 23, 24, 27, 28, 29, 31, 32, 43(1)(a); 45; 49(1)(d); 50(2); 53; 165; 258; 259 – (Interpreted)
2. HIV and AIDS Prevention and Control Act, 2006 (Act No 14 of 2006) section 24 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 26(1) – (Interpreted)

International Instruments and Conventions

1. International Covenant on Civil and Political Rights (ICCPR), 1966
2. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976
3. African Charter on Human and Peoples' Rights, 1998

Advocates

None mentioned

8. Court sentences the accused to life imprisonment for the murder of the deceased after being charged with the offence of defiling them

Significance: The case looks into the punishment for a person who committed murder of a victim he had defiled in a bid to hide evidence of his wrongdoing.

State v FAO [2021] eKLR

Criminal Case No 4 of 2020

High Court at Siaya

RE Aburili, J

November 23, 2021

Criminal Law – murder – where the accused murdered a minor whom he had defiled in a bid to hide evidence of his wrongdoing – what was the appropriate punishment for a person who committed murder of a victim he had defiled in a bid to hide evidence of his wrongdoing – Sexual Offences Act, 2006, section 11(1); Penal Code, cap 63, sections 203 and 204.

Brief facts

The accused had been found guilty of the offence of murder as charged and convicted under section 203 of the Penal Code. The accused was thus found culpable of unlawfully and with malice aforethought, killing MAW, a minor who was a victim and complainant in a sexual offence case pending before Bondo Law Courts in *Bondo SO* case No XXX/2019.

Issue

What was the appropriate punishment for a person who committed murder of a victim he had defiled in a bid to hide evidence of his wrongdoing?

Held

1. The evidence in the case showed that the convict was facing a defilement case *vide Bondo SO* case No XXX/2019 against the deceased complainant MAW when the accused executed her, and in a bid to hide evidence of his wrongdoing. Nothing much was forthcoming from the deceased's parents, according to the probation officer.
2. The charge sheet PEx13 showed that the convict was charged with defiling the deceased minor who was aged 15 years on diverse dates between September 16, to September 21, 2019 in Gem Sub County within Siaya County. He also faced the alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.
3. From the exhibits produced in evidence by the prosecution including a letter written on December 9, 2019 by the convict, the convict had purposed to eliminate the deceased on account that he could not withstand any other man having her and he pretended that he would also kill himself so that they meet in heaven. He, in the said letter which was found on the body of the deceased, threatened to kill the deceased's mother as well "*kwa kuleta ujinga*", that meant 'for being nasty.'
4. The deceased suffered from stab wounds which severed her abdomen leaving her intestines protruding and other very serious cut wounds in the neck, scapular, rib cage severing her jugular veins. That was a harrowing death suffered by a 15-year-old girl who could not be said to have deserved such painful death in the hands of a butcherer.
5. The convict wanted to completely eliminate the deceased as a witness in the defilement case against him. That was one of those cases that brought to the fore the need to protect witnesses in such serious

State v FAO

cases and the prosecution was implored to be sensitive in such cases so that such vulnerable witnesses were protected. The deceased was a naïve girl who believed that she was safe even after reporting her being defiled by the convict. She was lured to her death by her defiler who was hell bent to get away with the offence of defilement.

6. The case also brought to light the Sexual Gender Based Violence (SGBV) in the society. The convict eliminated the deceased after being charged with the offence of defilement and after he was released on bond pending trial. The deceased never lived to see justice. The convict indeed got away with the offence of defiling the deceased as the complainant was then dead. She was killed before she could testify against the convict. But he could not get away with the cold blooded murder of the deceased complainant.
7. Under section 204 of the Penal code, punishment for murder, upon conviction was death. However, the discretion in sentencing vested in the trial court because it had the opportunity to see and hear evidence from both the prosecution witnesses and the defence and therefore observe their conduct and behaviour. That discretion had to however be exercised judiciously and not capriciously.
8. The exercise of court's discretion was said to be judicial if the judge invoked the power in his capacity as a judge qua law. An exercise of discretionary power would be said to be judicial, if the power was exercised in accordance with the enabling statutes, discretionary power was said to be judicious if it arose or conveyed the intellectual wisdom or prudent intellectual capacity of the judge. The exercise had to be based on a sound and sensible judgment with a view to doing justice to the parties.
9. The right to life was sacred, basic to humanity itself and enjoying Constitutional protection. Children were entitled to play in the streets, especially just in front of their parental home. They had a legitimate claim to play peacefully on the streets, to enjoy their youth, to run around and enjoy the peace and tranquility of their homes and neighbourhood without the fear, the apprehension and the insecurity which constantly diminished the quality of their lives.
10. The convict was 23 years old and was a first offender. The offence was committed in response to gender based violence in that the deceased was the complainant in a defilement case where the convict was the accused and the said case was still pending hearing at Bondo Law Courts. The convict lacerated the body of the deceased to an extent that he tore her intestines and also stabbed her several times in other parts of the body using a sharp knife. The court did not see any remorse on the part of the convict who did not regret his actions and the consequences that followed. It followed that the possibility of the convict reforming and being rehabilitated were nil. He never asked for any leniency from the court.
11. Although the punishment for murder, upon conviction as stipulated under section 204 of the Penal Code was death, albeit the convict showed no real remorse for his actions and persisted that he was innocent, the court exercised discretion and imposed a less severe sentence and sentenced the accused/ convict FAO to serve life imprisonment for the cold blooded murder of MAW.

Petition granted.

Cases***East Africa***

Francis Muruatetu & another v Republic [2017] eKLR – (Explained)

South Africa

S v Montsho 2014 JDR 0743 (GNP) – (Explained)

New Zealand

African Continents Bank v Nuamani [1991] NWLI 486 – (Explained)

Statutes

East Africa

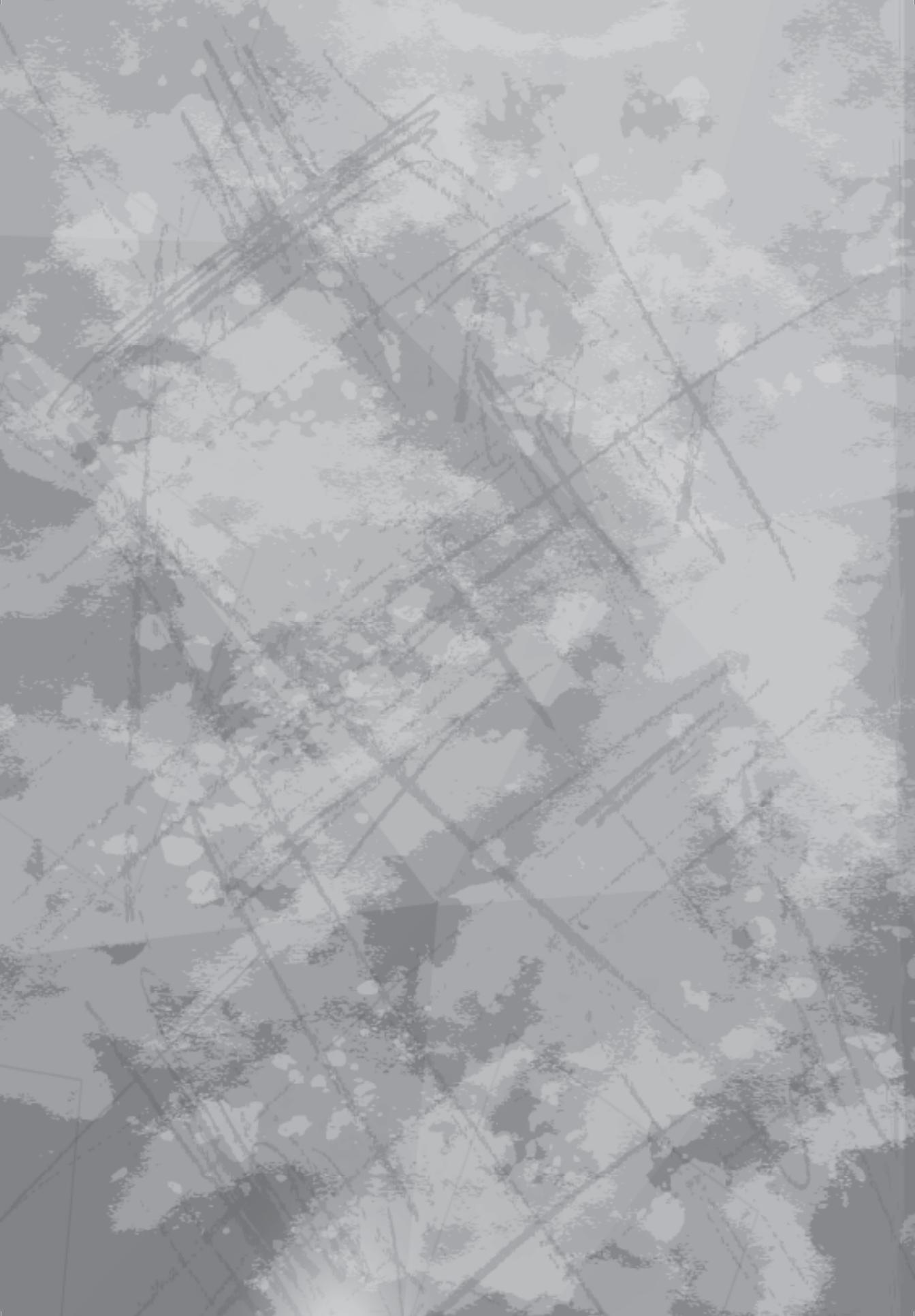
1. Penal Code (cap 63) sections 203, 204 – (Interpreted)
2. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 11(1) – (Interpreted)

Advocates

None mentioned

E. Incest

- 1. Section 22(2)(a) of the Sexual Offences Act, that defined ‘uncle’, was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultural definition of relatives.** JMN v Republic Criminal Appeal No 11 of 2020; [2021] eKLR
- 2. Critical elements/ingredients that have to be proved by the prosecution beyond reasonable doubt in an offence of incest.** JMN v Republic Criminal Appeal No 12 of 2020; [2021] eKLR
- 3. For the offence of incest to stand, the age of the victim, identity of the offender and penetration have to be proved by the prosecution beyond reasonable doubt.** JMM v Republic Criminal Appeal No E041 of 2022; [2023] eKLR
- 4. Sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.** PKS v Republic Criminal Appeal 56 of 2013; [2023] KEHC 373 (KLR)
- 5. A conviction for incest could not be converted into a conviction for defilement.** NAM v Republic Criminal Appeal No 3 of 2019
- 6. A man cannot commit the offence of incest with a male relative under the Sexual Offences Act.** JKM v Republic Criminal Appeal No 54 of 2018



JMN v Republic**1. Section 22(2)(a) of the Sexual Offences Act, that defined ‘uncle’, was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultural definition of relatives**

Significance: The judgment highlights the procedure for taking plea by an accused person and circumstances where a plea will be considered as unequivocal. The court also stated the ambiguity of section 22(2) (a) of the Sexual Offences Act in the definition of uncle and how it came in conflict with traditional African and Kenyan cultures definition of relatives.

JMN v Republic [2021] eKLR

Criminal Appeal No 11 of 2020

High Court at Garsen

R Nyakundi, J

March 18, 2021

Criminal Procedure – plea – plea taking – plea of guilty – recording of a plea of guilty – where the court record did not show that the accused person was given sufficient detail about the seriousness of the charge before plea taking -where accused person alleged that he pleaded guilty on account of intimidation and false promises of lenient sentence – where plea was taken virtually with accused in police custody – what was the procedure to be followed when an accused person pleaded guilty to a charge – whether failure to illustrate, in the plea taking record, whether all the ingredients of an offence were explained to an accused person and whether it was those ingredients that an accused acceded to raised doubts as to whether the plea was unequivocal– Constitution of Kenya, 2010, article 50(2)(b); Criminal Procedure Code (cap 75), section 207.

Brief facts

After pleading guilty, the appellant was convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act and sentenced to 10 years imprisonment. He was accused of having penetrated the vagina of MNM while knowing that she was his niece. The appellant filed an appeal in which he averred that the plea of guilty was not unequivocal. He explained that the plea was taken virtually while he was frightened at a police station in the presence of fierce looking uniformed police officers. He further stated that the plea was obtained through blackmail and false promises of a short probation sentence.

Issues

- i. What was the manner and procedure a plea of guilty ought to be recorded by a court?
- ii. Whether failure to illustrate, in the plea taking record, whether all the ingredients of an offence were explained to an accused person and whether it was those ingredients that an accused acceded to raised doubts as to whether the plea was unequivocal.
- iii. Whether section 22 (2)(a) of the Sexual Offences Act, that defined ‘uncle’, was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultural definition of relatives.

Held

1. The appellant was convicted on his own plea of guilty and the matter did not proceed for trial. The central question in the appeal was whether the plea was unequivocal. Under article 50(2)(b) of the Constitution of Kenya, 2010 (Constitution) an accused person had the right to a fair trial including the right to be informed of the charge with sufficient detail to answer to it. Section 207 of the Criminal Procedure Code also provided for matters related to plea taking.

2. The procedure and manner in which a guilty plea ought to be recorded by the trial court were: -
 - a. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understood.
 - b. the accused's own words should be recorded and if they were an admission, a plea of guilty should be recorded.
 - c. the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.
 - d. the accused did not agree to the facts or raised any question of his guilt in his reply it had to be recorded and change of plea entered.
 - e. If there was no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused's reply.
3. The proceedings at the trial court were conducted in Kiswahili. The appellant replied to the charge and to the particulars of the charge in Kiswahili language. He mitigated to the court in the same language. The appellant understood that language.
4. When the charges were read to the appellant, he responded that '*Ni Ukweli*', which meant 'it is true'. However, the record did not indicate exactly what the accused person was agreeing to. It was not clear whether all the ingredients of the offence were explained to him and whether it was those ingredients that he acceded to. That raised doubts as to whether the plea was unequivocal.
5. It was pertinent that the appellant have been made to understand the gravity of the charges facing him. A record that indicated that the accused was warned of the seriousness of the charge was not sufficient to show the extent to which the accused was informed of the charges facing him.
6. The plea was taken virtually with the accused person being at a police station. Under those circumstances, it was plausible that the accused was intimidated when he entered the plea of guilty. It would be unsafe to uphold the plea under the circumstances.
7. The circumstances of the case were such that the more appropriate approach would have been to engage the co-offenders in a traditional dispute resolution. The appellant was 22 years old and the co-offender was 20 years old - both were adults. The nature of the offence was incest and the degree of consanguinity was challenged on appeal. The appellant contended that he was an uncle of the second degree to the accused, being the cousin of the co-offender's mother. That degree of consanguinity was far removed as to allow for there to be a better resolution. After all, as aforesaid, the wording of section 22(2)(a) of the Sexual Offences Act was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultures definition of relatives.

Appeal allowed. Conviction quashed and sentence set aside.

Cases

East Africa

1. *Abdallah Mohamed v Republic* [2018] eKLR – (Explained)
2. *Adan v Republic* [1973] EA 445 – (Applied)
3. *Boit v Republic* [2002] eKLR – (Explained)
4. *Elijah Njihia Wakianda v Republic* [2016] eKLR – (Explained)
5. *Ismael Hassan Medza v Republic* Criminal Case No 111 of 2017; [2021] eKLR – (Followed)
6. *Kariuki vs Republic* [1954] KLR 809 – (Explained)
7. *Kinene v Republic* [2016] eKLR – (Explained)
8. *Mose v Republic* [2002] 1 EA 163 – (Explained)
9. *Olel v Republic* [1989] eKLR – (Explained)
10. *Pandya v Republic* [1957] EA 336 – (Followed)

JMN v Republic

11. *Paul Matungu v Republic* [2006] eKLR – (Explained)
12. *Republic v Mohamed Abdow Mohamed* [2013] eKLR – (Explained)
13. *Republic v Musili Ivia & another* Criminal Case No 2 of 2016; [2017] eKLR. – (Explained)
14. *Simon Gitau Kinene v Republic* Criminal Appeal No 9 of 2016; [2016] eKLR – (Followed)

Statutes***East Africa***

1. Constitution of Kenya, 2010 articles 50(2)(b); 159(2) – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 207(1) – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 20(1); 22(2)(a) – (Interpreted)

Advocates

None mentioned

2. Critical elements/ingredients that have to be proved by the prosecution beyond reasonable doubt in an offence of incest

Significance: The case discusses the critical elements for the offence of incest under section 20(1) of the Sexual Offences Act that have to be established, namely : indecent act or penetration, age of the victim and the perpetrator of the offence, that the prosecution have to prove beyond reasonable doubt.

JMN v Republic [2021] eKLR

Criminal Appeal No 12 of 2020

High Court at Nairobi

DO Ogembo, J

January 31, 2020

Criminal Law – sexual offences – incest – ingredients of incest – where the appellant had been charged of incest with her daughter – what were the critical elements/ingredients that had to be proven by the prosecution in an offence of incest? – Sexual Offences Act, 2006, section 20(1).

Criminal Procedure – witnesses – vital witnesses – claim that vital witnesses missed trial – where the appellant was charged of incest with his daughter in the absence of what he called vital witnesses – whether there was a requirement as to the number of witnesses required to prove a fact in court – Sexual Offences Act, 2006, section 20(1); Evidence Act, section 143.

Brief facts

The appellant, JMN, was charged of incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on diverse dates between January 5, 2016 and March 1, 2018 in Embakasi Sub-County, within Nairobi County, being a male person, he caused his penis to penetrate the vagina of TWM, a female Juvenile who was at his knowledge, his daughter. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No 3 of 2006. That on diverse dates between January 5, 2016 and March 1, 2018 in Embakasi Sub-County within Nairobi County, he intentionally touched the vagina of TMM, a child aged 11 years with his penis.

- a. After full trial, the appellant was convicted on the main count. He was subsequently sentenced to serve 30 years imprisonment. He filed the instant appealed both on the conviction and the sentence.

Issues

- i. What were the critical elements/ingredients that had to be proven by the prosecution in an offence of incest?
- ii. Whether there was a requirement as to the number of witnesses required to prove a fact in court.

Held

1. The definition in section 20(1) of the Sexual Offences Act disclosed the critical ingredients of the offence of incest were; i) Indecent act or penetration; ii) Age of the victim; and iii) Relationship of the victim and the perpetrator. From the evidence on record there is no doubt that the complainant herein, PW1 was a minor at the time of this incident. It is on record that she was born on November 4, 2008 and the relevant certificate of birth was produced in exhibit (Exh.5). She was therefore about 10-11 years old. There was also no doubt that the appellant was father of the complainant, a fact the appellant himself has admitted in his defence.

JMN v Republic

2. Direct evidence towards proof of how the incident occurred did not come out clearly from the prosecution witnesses. The complainant, PW1, at 11 years could not, for whatever reason, state clearly what exactly transpired. The trial court in fact had to stand her down in an attempt to make her comfortable to testify to little success. It was not until she was recalled, that she stated that her father had done “*tabia mbaya*” to her. PW2 her mother again offered no evidence, insisting that she had no knowledge of what had transpired.
3. PW3 and PW4 who interrogated the complainant both testified that PW1 confirmed to them that her father had defiled her. Apart from the evidence of PW1, 3 and 4, it was worth noting that when the complainant was examined by PW5, the findings were positive that there was evidence of penetration. The relevant treatment notes, post rape care form and P3 form were produced in court. In total therefore the oral evidence given by PW1 about her father doing “*tabia Mbaya*” to her, and the results of the medical examination of the complainant, left no doubt in the court’s mind that the element of penetration was proved by the prosecution.
4. PW1 testified as to the father doing *tabia mbaya* to her. She repeated the same statement to both PW3 and her teacher PW4 and even to the doctors who examined her. It was apparent that the complainant had to report to school late making the appellant call the school to give an explanation. That was indicative of the fact that the appellant knew well what he had done and was trying to pre-empt any suspicions that the school teacher and director could have about the condition of the child. It was also worth considering that the incident took place at night when the complainant was only with the appellant, removing any possibility of involvement of any third party. And had it been someone else, the appellant, being the father of the child would have been the one to report the incident. He did not.
5. The circumstances surrounding the case put together clearly pointed to the appellant as the one who defiled his own daughter and that was not a case of mere suspicion as submitted by the appellant. The appellant, in his defence, denied the charge and claimed that he had been framed up by PW4 over a rent dispute between his mother and the mother of PW4. With respect, the court did not believe or find merit in that defence. PW4 gave evidence in court and the appellant had the opportunity to and indeed cross examined the witness. He never raised that issue.
6. It was clear from the filed submissions that the appellant was well conversant with the provisions of section 143 of the Evidence Act, that no number of witnesses were required to prove a fact. The appellant had not specifically stated who those vital witnesses left out were, the nature of the evidence they could have and even how their evidence could probably have turned out negative to the prosecution’s case. That ground was therefore not valid.
7. The appellant was accorded the opportunity to offer mitigation which he did and which mitigation the court took into account. He was then sentenced to serve 30 years’ imprisonment which was the maximum sentence for the offence charged. The court found the sentence both legal and proper and had no reason to interfere with the same.

Appeal dismissed.

Cases***East Africa***

1. *Bukenya & others v Uganda* [1972] EA 549 – (Explained)
2. *Charles Wamukoya v Republic* Criminal Appeal No 72/2013 – (Explained)
3. *Fappyton Mutuku Ngui v Republic* Criminal Appeal No 296 of 2010 – (Explained)
4. *Juma Ngodia v Republic* [1982-88] KAR 454 – (Explained)
5. *JWA v Republic* [2014] eKLR – (Explained)
6. *Okeno v Republic* [1972] EA 32 – (Applied)

7. *Paul Kanja Gitari v Republic* [2016] eKLR – (Explained)

8. *Sawe v Republic* [2003] KLR 364 – (Explained)

United Kingdom

Woolmington v DPP [1935] AC 485 – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 49(1)(f)(i)(ii) – (Interpreted)

2. Evidence Act (cap 80) section 143 – (Interpreted)

3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 11(1); 20(1); 22(2)(a) – (Interpreted)

Advocates

None mentioned

JMM v Republic**3. For the offence of incest to stand, the age of the victim, identity of the offender and penetration have to be proved by the prosecution beyond reasonable doubt**

Significance: This case examines whether an alleged offender could be convicted and sentenced of incest in the absence of sufficient proof for identity and penetration.

JMM v Republic [2023] eKLR

Criminal Appeal No E041 of 2022

High Court at Makueni

GMA Dulu, J

February 10, 2023

Criminal Law – sexual offences – incest – ingredients of incest – where the appellant was charged with incest – where the magistrate court had convicted and sentenced the appellant of incest to 20 years – where age was proved – where identity and penetration were not sufficiently proved – where the appellant appealed – what were the necessary ingredients that needed to be proved beyond reasonable doubt in an offence of incest – Sexual Offences Act, 2006, section 20(1); Evidence Act, section 124.

Brief facts

The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between the month of January 2021 and March 9, 2021 at unknown time within Makueni county, being a male person caused his penis to penetrate the vagina of AKM a female child aged 13 years who was to his knowledge his daughter. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. After a full trial, he was convicted on the main count of incest, and sentenced to 20 years' imprisonment.

Dissatisfied with the conviction and sentence, the appellant filed the instant appeal.

Issue

What were the necessary elements that had to be proven by the prosecution beyond reasonable doubt in an offence of incest?

Held

1. In proving their case, the prosecution called four (4) witnesses. The appellant, on his part, tendered sworn defence testimony and did not call any additional witness. The elements of the offence of incest with a child were first, the age of the victim who should be below 18 years; secondly, the relationship between the victim and the accused; thirdly, the fact of sexual penetration; and lastly, the identity of the culprit.
2. With regard to the age of the complainant or victim, there was no dispute that she was born on May 25, 2007. The complainant PW1 AKM stated so. Her mother PW2 JKM also stated so. There was no contest raised on that evidence. The prosecution proved beyond reasonable doubt that the complainant was aged 13 years at the time of the alleged incident.
3. Evidence from PW1, PW2, and even the appellant himself was consistent. They were father and daughter. Thus the second element of the offence was proved. With regard to penetration of a sexual nature, the complainant PW1 stated that she was penetrated severally on different nights between

January and March 2021.

4. The clinical officer PW4 Eric Kasiamani stated that he examined PW1 and found that the hymen was broken, and thus concluded that there was sexual penetration. There was no medical evidence however, that the penetration was on the date or dates alleged. The fact that a hymen was broken was not *per se* evidence of sexual penetration. The hymen could be broken for other various reasons. The evidence of the complainant, PW1 did not satisfy the provisions of section 124 of the Evidence Act (cap 80), as there was no tangible reason why she could not inform the mother PW2 or any of her siblings about such alleged acts before going to the police. Here evidence was not believable, and the trial court should have treated it as such. The trial court should not have relied on PW1 evidence to find that penetration was proved.
5. With regard to the identity of the culprit, the evidence of the single alleged victim witness PW1 in the sexual offence case, was not believable. The first reason was that the sexual incidents were said to have occurred at night, and PW1 did not attempt to describe how she came to identify the alleged culprit to be the appellant, knowing that nights were usually times of darkness. The identification of the culprit was thus in doubt.
6. Again, her failure to inform any relative was very ominous. It created a doubt, which should have been given to the appellant. Thirdly, the defence of the appellant was clear that the report to the police by PW1, could be as a result of measures of home discipline which he was instilling on PW1 during corona virus curfew. It was also instructive that PW2, the mother of the complainant who lived in the same house, testified on oath that it was not possible for such an incident to have occurred without her getting to know, in view of how they lived and slept in that same house.
7. The prosecution did not prove beyond reasonable doubt that the appellant was the culprit. Thus the conviction could not stand. The sentence imposed would also have to be set aside.

Appeal allowed; conviction quashed and sentence set aside and the appellant to be set at liberty unless otherwise lawfully held.

Cases

East Africa

Okeno v Republic [1972] EA 32 – (Mentioned)

Statutes

East Africa

1. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 11(1); 20(1) – (Interpreted)
2. Evidence Act (cap 80) section 124 – (Interpreted)

Advocates

None mentioned

PKS v Republic

4. Sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to

Significance: The instant case highlights the developing jurisprudence regarding sentencing by courts where the law provides for prescribed mandatory minimum sentences.

PKS v Republic [2023] KEHC 373 (KLR)

Criminal Appeal No 56 of 2013

High Court at Eldoret

RN Nyakundi, J

January 27, 2023

Evidence Law – testimony evidence – corroborated testimony – where victim of incest was aged 10 years – where victim of incest gave voir dire evidence – where evidence was corroborated by medical report (P3 form) – where minor identified the accused/appellant – whether the corroborated testimony of a victim of sexual offence (incest), who was a minor aged 10, was enough to convict an accused person – Evidence Act, section 124.

Criminal Law – sentencing – prescribed mandatory minimum sentences – where appellant had been convicted of incest – where appellant was sentenced to life imprisonment prescribed by section 20(1) of the Sexual Offences Act – whether a court had discretion, in the sentencing of a convicted person charged with incest, to depart from the prescribed mandatory minimum sentences under section 20(1) of the Sexual Offences Act – whether an appellate court could interfere with a sentence issued by a trial court, where the law prescribed a mandatory minimum sentence, on the ground of it being harsh and excessive – Sexual Offences Act, section 20(1).

Brief facts

The appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the December 24, 2011, within Uasin Gishu County of the Rift Valley Province unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of MC, a child aged 10 years who to his knowledge was his niece. In the alternative, he was charged with the offence of committing an indecent act with a girl contrary to section 11(1) of the Sexual Offences Act. The court sentenced him to life imprisonment after considering his mitigation.

Issues

- i. Whether the corroborated testimony of a victim of sexual offence (incest), who was a minor aged 10, was enough to convict an accused person.
- ii. Whether a court had discretion, in the sentencing of a convicted person charged with incest, to depart from the prescribed mandatory minimum sentences under section 20(1) of the Sexual Offences Act.
- iii. Whether an appellate court could interfere with a sentence issued by a trial court, where the law prescribed a mandatory minimum sentence, on the ground of it being harsh and excessive.

Held

1. It was not in dispute that the accused person was the uncle to the complainant and that he was aware she was his niece. There was no evidence produced to the contrary and therefore that element was satisfied.

2. The evidence of Dr Cynthia Kibet, corroborated by the P3 form was conclusive proof that there was penetration. Section 124 of the Evidence Act allowed the court to convict on an uncorroborated evidence of a sexual offence victim if the court was convinced of the truthfulness and credibility of the complainant's evidence.
3. The trial court conducted a *voir dire* and was satisfied that the minor was intelligent and able to differentiate between a lie and the truth, thereby lending credence to the testimony of the complainant. The plurality of the evidence had the legal effect of establishing the guilt of the appellant beyond a reasonable doubt. That standard principle meant that the probability of the appellant's guilt was so high that it eliminated all reasonable doubt to warrant a conviction for the offence charged.
4. Proof beyond reasonable doubt was of such a convincing nature that even on appeal there were no significant errors of law or facts to interfere with the finding of the trial court. Going back to the defence tendered by the appellant on the elements of the charge it remained clear that the amount of evidence by the prosecution gave rise to the primary meaning of the standard of proof beyond reasonable doubt. Undoubtedly the appellant was properly convicted which the court affirmed on appeal.
5. Section 20(1) of the Sexual Offences Act provided for a sentence of life imprisonment if the complainant was a minor. The complainant was not only a minor but she was 10 years of age. In light of the new jurisprudence on mandatory sentences terming them as unconstitutional, specifically *Mainingi & 5 others v Director of Public Prosecutions & another* Petition No E017 of 2021; [2022] KEHC 13118 (KLR) the court was obliged to consider the sentence and whether the appellant was given an opportunity to mitigate.
6. 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. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences. The proceedings revealed that the appellant was given an opportunity to mitigate and did the same. In the premises, if the court were to uphold the life sentence the same would be within its mandate as it would be considered discretionary.
7. Struggles between broad penal policy and judicial discretion on mandatory minimum resentencing had recently emerged resulting into a new transformed jurisprudence. That amounted to the politics on minimum sentences and the rule of law in Kenya. Maybe the extreme form mandatory minimum sentencing reflected between the period of 2006 and 2017 with strict sentencing guidelines could have contributed to the near thinking by the judges. The judges had emphasized that the deepening in mandatory minimum sentences had the potential of disproportionate harsh effects on the offenders.
8. The judge considered *inter alia* that mandatory sentencing touched significant human rights concerned under Kenya's bill of rights as guaranteed in Kenya's Constitution 2010. The first principle was that the infliction of punishment was pre-eminently a matter for the discretion of the trial court. That courts should, as far as possible, have an unfettered discretion in relation to sentence was a cherished principle which called for constant recognition. Such discretion permitted of balanced and fair sentencing, which was a hallmark of enlightened criminal justice. The second, and somewhat related principle, was that of the individualization of punishment, which required proper consideration of the individual circumstances of each accused person.
9. The principle too was firmly entrenched in Kenyan law. A mandatory sentence ran counter to those principles. The court used the term *mandatory sentence* in the sense of a sentence prescribed by the legislature which left the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof. It reduced the court's normal sentencing

PKS v Republic

function to the level of a rubber stamp. It negated the ideal of individualization.

10. The morally just and the morally reprehensible were treated alike. Extenuating and aggravating factors both counted for nothing. No consideration, no matter how valid or compelling, could affect the question of sentence. Harsh and inequitable results inevitably grew from such a situation. Consequently, judicial policy was opposed to mandatory sentences as they were detrimental to the proper administration of justice and the image and standing of the courts.
11. The purpose and objective of sentencing as stated in the judiciary sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that met the end of justice and ensured that the principles of proportionality, deterrence and rehabilitation were adhered to. The complaint that the sentence imposed was harsh and excessive in valid though it was the only sentence available then. The court was therefore inclined to interfere with it. The court therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commended to the court was 25 years' imprisonment.
12. It was acknowledged in the sentencing regime that though deterrence was an important factor in the interest of society, it was not always the most critical nor the only factor to carry more weight than rehabilitation or reformation of the offender. Without attempting to lay down a general rule on minimum mandatory sentences, given the guiding principles stated above the court was persuaded to exercise discretion in interfering with the decision of the trial court in sentencing by substituting the life imprisonment with a definite custodial sentence of 40 years to balance the gravity of the crime and punishment for it. The aforesaid sentence commenced on the December 20, 2011 to give effect to the provisions of section 333 (2) of the Criminal Procedure Code. As a consequence, the committal warrant was to be so amended to reflect the variation and review order on sentence.

Appeal partly allowed.

Cases***East Africa***

1. *Okeno v Republic* [1972] EA 32 – (Mentioned)
2. *Mainingi & 5 others v Director of Public Prosecution & another* (Petition E017 of 2021) (2022) KEHC 13118 (KLR) – (Applied)
3. *Francis Karioko Miruateru & another vs Republic* [2017] eKLR – (Applied)

South Africa

S v Mahomotsa 2002 (2) SACR 435(SCA) – (Applied)

United Kingdom

1. *R v G* [2003] UKHL 50, [2004] 1 AC 1034 [2003] 4 All ER 765, – (Explained)
2. *Queen on the Application of HC (a child by his litigation friend CC) v Secretary of State for the Home Department & The Commissioner of Police of the Metropolis* [2013 EWHC 982 (Admin) – (Explained)

United States

State v Bruce (1990 SA 802 (A) – (Applied)

Statutes***East Africa***

1. Children Act, 2001 (Act No 24 of 2001) section 143(1) – (Interpreted)
2. Constitution of Kenya, 2010 article 28 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 11(1); 20(1) – (Interpreted)
4. Evidence Act (cap 80) section 124 – (Interpreted)

International Instruments and Conventions

United Nations Convention on the Rights of the Child, 1989 article 37(c)(d)

Advocates

None mentioned

NAM v Republic

5. A conviction for incest could not be converted into a conviction for defilement.

Significance: The decision brings out the issue of the need for policy makers to focus on the fact that incest was a more serious offence than defilement in order to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors were the victims.

NAM v Republic

Criminal Appeal No 3 of 2019

High Court at Kakamega

W Musyoka, J

May 21, 2020

Criminal Law – sexual offences – medical examinations – role of medical examinations in convictions – where the survivor of a sexual offence was not subjected to a medical examination – whether a court could convict an accused person of a sexual offence having not conducted a medical examination on the survivor of the sexual offence – Sexual Offences Act, section 20(1) and 36.

Criminal Procedure – pleas – plea taking process – role of the court in plea taking – where the plea did not include the sex of the accused and did not explain the severity of the sentence to the accused – whether such a plea was valid.

Evidence Law – witness testimony – cross examination – where the person to be cross examined was of tender age – whether the court infringed on the accused right to challenge evidence where the accused was not permitted to cross-examine a survivor of sexual assault who was of tender age – Criminal Procedure Code, section 211.

Words and Phrases – *tabia mbaya* – implication of the word when used by minors in sexual offence cases – whether the reference to the term ‘*tabia mbaya*’ (bad manners) by children of tender years could be inferred to mean sexual intercourse.

Criminal Law – incest – defilement – elements of incest and defilement – sentences of incest and defilement – where one was charged of incest but convicted of defilement – whether a conviction for incest could be converted into a conviction for defilement – whether there was an error in law considering the offence incest, with respect to minors, an offence lesser to defilement – Sexual Offences Act, section 8 and 20(1); Penal Code, section 20.

Brief facts

The appellant was charged and convicted of incest contrary to section 20(1) of the Sexual Offences Act (the Act) and was sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, the appellant appealed and raised several grounds of appeal. He averred that the trial court convicted him on the basis of a defective charge, his mitigation was not taken into account, the report recorded in the police occurrence book differed from the evidence placed before the trial court, the medical evidence was weak, the evidence was malicious fabricated uncorroborated and doubtful, the court did not consider that there was a strategy planned to implicate him, his fair trial rights were violated, age and penetration were not sufficiently proved, and the court convicted on the basis of hearsay evidence.

Issues

- i. Whether at the appellate court, an accused could challenge a charge by pointing the inconsistency of the facts in the occurrence book *vis-à-vis* the charge having not raised the same inconsistency

- before the trial court.
- ii. Whether a court could convict an accused person of a sexual offence having not conducted a medical examination on the survivor of the sexual offence.
 - iii. What was the role of the court in the plea taking process?
 - iv. Whether the court infringed on the accused right to challenge evidence where the accused was not permitted to cross-examine a survivor of sexual assault who was of tender age?
 - v. Whether the reference to the term '*tabia mbaya*' (bad manners) by children of tender years could be inferred to mean sexual intercourse.
 - vi. Whether a conviction for incest could be converted into a conviction for defilement?
 - vii. Whether there was an err in law considering the offence of incest, with respect to minors, an offence lesser to defilement.

Held

1. Being an appellate court, the instant court re-evaluated the evidence on record and drew its own conclusions whilst bearing in mind that the instant court did not have the benefit of observing the witnesses as they testified.
2. OB No. 02/06/12/2017 was not placed before the court. A trial court based the trial on the charge sheet and the evidence presented to prove the charges made. Since OB No. 02/06/12/2017 was not placed before the court, there was no basis for the trial court to have any regard to it. There wasn't any defect in the charge that the appellant faced. The appellant's plea for OB No. 02/06/12/2017 to be called up to see that the evidence tendered in support of the charge totally differed from what was recorded in that occurrence book should have been made before the trial court, and not on appeal.
3. The trial court took into account the appellant's mitigation, if at all what the appellant was recorded to have had told the court can be treated as mitigation. The appellant did not understand what mitigation was. It was nothing more than a plea by an accused person before the court, to be considered by the court, before plea. Mitigation followed after conviction, and, therefore, whatever was said in mitigation could not possibly affect the conviction, it could only be considered for the purpose of sentence. Secondly, the statement by the prosecution that the appellant could be treated as a first offender did not exonerate him of the crime. It merely meant that since the prosecution did not have previous records relating to the appellant's criminal history, the court could treat the conviction of December 7, 2018 as his first criminal record. In any event, all those factors were taken into account by the court, and, therefore, the issue should not arise.
4. The appellant had not elaborated on his argument that the medical evidence was weak. He had not sought to demonstrate the weakness of the medical evidence. PW1 was taken for medical examination and treatment three days after the alleged incident. The assault happened on April 15, 2018, and PW1 was taken to the health centre on April 18, 2018. PW2 did not testify as whether or not she had bathed the child in the intervening period, but PW3 did not address her mind to that. She did the examination, and came up with findings. It was not clear whether it was those findings that the appellant was raising issues with. He had opportunity to cross-examine her on the findings, he did pose questions to her. He had opportunity to engage his own medical expert to counter the opinion given by PW3 if he so desired.
5. A trial court could convict in the absence of medical evidence, so long as it was persuaded that the testimony of the minor victim was believable and reliable. In the instant case, there was corroboration. PW1 informed her mother PW2 of what transpired, the same day. Unfortunately, PW2 did not appear to have had examined PW1, or confirmed her story, or at least in her evidence in chief PW2 did not say whether or not she examined the child. Her story could not be compared or contrasted with the findings of PW3, relating to finding bruises, broken hymen and discharges, and detecting

NAM v Republic

- a foul smell from her vagina.
6. PW1 was only five or six years old, the appellant was said to be twenty years old or so. One would have expected blood from an encounter between the two. PW1 and PW2 did not talk about any. PW3 saw PW1 three days thereafter, she did not indicate whether or not the bruises were fresh or not, and if they were not, she did not estimate how old they were. That would have been critical since she was seeing PW1 three or so days after the alleged defilement. The appellant's misgivings with the medical evidence tendered, given the time that had lapsed before PW1 was medically examined. The child had been defiled, but the matter was handled in a rather inadequate manner, and the evidence gathered may not have sufficed to convict.
 7. Courts generally treated reference by children of tender years to *tabia mbaya* as meaning intercourse. The testimony of PW1 could be interpreted to mean that the appellant defiled her. However, the testimony was in a language that was rather vague, and which would have required other evidence to support it. At age six, one would have expected that any penetration of a vagina by a twenty-year-old's penis could cause tears and bruises that would lead to bleeding. Such encounter should have left PW1 with grave injuries if any penetration had happened. PW3 would have been expected to dwell on that. PW3's testimony was equivocal on whether or not there was penetration.
 8. It could not be said that the trial court convicted on the basis of hearsay evidence, where the court heard from the mouth of the victim herself.
 9. The plea taking process in the instant matter was ambiguous. It was not clear whether the accused person was male or female. There was also the issue of the severity of the sentence for the offence that he faced. The court taking plea must go the extra mile, of explaining to the accused person the consequences of being convicted of such an offence. The court equated the responsibility of the court in such circumstances to that of an educator. The court did not play that role. The appellant faced a charge whose penalty was mandatory life imprisonment. The trial court should have addressed the appellant on the seriousness of the charge.
 10. The appellant, after he was put on his defence, gave a sworn statement. He was, therefore, accorded the right to adduce evidence, after his rights under section 211 of the Criminal Procedure Code, were read to him. He took advantage of that opportunity. He could not be heard to complain in that regard. On the right to challenge evidence, the record was clear, he confronted all the witnesses presented by the prosecution, and cross-examined them extensively, except for PW1, the principal accuser. He had a constitutional right to cross-examine her, to challenge her testimony, her tender age notwithstanding. He did not appear to have had been accorded that right, and, therefore, his constitutional right to challenge evidence was violated.
 11. The other fair trial rights were observed. He was furnished with the prosecution evidence ahead of the actual trial. He was informed of his right to an advocate of his own choice. He was also informed of his right to an advocate at state expense for serious defilement cases such as the instant one. The court, however, did not appear to have had complied with section 43 of the Legal Aid Act, No. 6 of 2016, by informing the relevant authorities of the need to furnish the appellant with such an advocate.
 12. The inconsistency or contradiction of the date of the appellant's arrest did not go to the heart of the matter. It was not a mandatory requirement under section 36 of the Sexual Offences Act, that in all cases the accused ought to be subjected to such a medical examination. Medical evidence was not the only basis for determining whether or not defilement had occurred. The matter was reported to the police after three or so days had lapsed, and it was likely that such an examination would have yielded nothing.
 13. The appellant had initially been charged with defilement, before the charge was substituted with that of incest. Incest was committed where the offender was related to the victim of the offence

within the degrees of relationship stated in the provision, that was to say daughter, granddaughter, sister, mother, niece, aunt or grandmother. In the instant case, according to the charge, PW1 was a granddaughter of the appellant, which meant that the appellant was her grandfather. A grandfather of someone was the father of either the mother or father of that other. In the instant case, the appellant was not the father of either the father or mother of PW1. It emerged from the evidence on record that the paternal grandmother of PW1 was his sister. He was, therefore, not the grandfather of PW1, but her granduncle. She was therefore, not his granddaughter, and he could not possibly commit the offence of incest with respect to her. The offence of incest could only be committed against immediate relatives of the offender, and not distant relatives. The appellant was not an immediate relative of PW1. The charge could not, therefore, hold against him. The same ought not to have been preferred in the first place. The decision to substitute the charge, therefore, dealt a serious blow to the case.

14. Section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya, under which an accused person could be convicted of an offence other than that charged, so long as the facts disclosed that other offence, and that offence was cognate or predicate to the offence charged. Incest, with respect to a minor, was, strictly speaking, defilement, of the said minor. Yet, the language of section 20 of the Sexual Offences Act made it a lesser offence to defilement. Under the Sexual Offences Act, defilement, as defined in section 8, was subject to mandatory sentences, incest, with respect to minors, was not subject to similar mandatory sentences, the sentences prescribed were largely discretionary save for the minimum penalty of ten years. So for all practical purposes incest was cognate to defilement. Under the circumstances, section 179 of the Criminal Procedure Code could not be applied to it. A conviction for incest could not be converted into one of defilement.

15. The court did not quite understand the policy behind making incest, with respect to minors, an offence lesser to defilement. Yet, in the offence of incest, with respect to minors, two offences overlapped, defilement and incest. That alone should have made incest a much more serious offence compared to defilement. Secondly, incest happened largely within the home, between members of the same family, as opposed to general defilement which could happen between persons who were not related to each other or whose relationship was distant. It would mean in incest, with respect to minors, there was always that element of breach of trust. The person defiling the minor would be her elder relative, taking advantage of the familiarity between them to defile her under the cover of the family home, where she should be safest. The worst abusers of underage girls were their immediate relatives, who preyed on the underage girls under the safe cover of the home environment. It was usually difficult to have such crimes uncovered, because families made efforts to cover them up. No doubt, in those circumstances, incest, with respect to minors, ought to be a much more serious offence than defilement. It was about time that policy makers should direct their focus to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors were the victims.

Appeal allowed, conviction quashed, sentence against the appellant set aside and the appellant was set free unless he was otherwise lawfully held.

Cases

East Africa

1. *Okeno v Republic* [1972] EA 32 –(Followed)

2. *Wakianda, Elijah Njibia v Republic* Criminal Appeal No 73 of 2016; [2016]eKLR –(Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 article 50(2)(k) – (Interpreted)

2. Criminal Procedure Code (cap 75) sections 179,211 – (Interpreted)

NAM v Republic

3. Legal Aid Act, 2016 (Act No 6 of 2016) section 43 – (Interpreted)
4. Penal Code (cap 63) section 20 – (Interpreted)
5. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8,11(1); 20(1) – (Interpreted)

Advocates

Ms Omondi for the Prosecution

6. A man cannot commit the offence of incest with a male relative under the Sexual Offences Act

Significance: The case recommends that the Rules Committee reconsider section 20(1) of the Sexual Offences Act whether a man could commit incest on a male relative as a male person, who was a complainant, did not fall within the category listed in section 20(1) of the Act.

JKM v Republic
Criminal Appeal No 54 of 2018
High Court at Nyahururu
RPV Wendo, J
July 30, 2020

***Criminal Law** – sexual offences – incest – incest by a male person – elements constituting the offence of incest by a male person – whether a man could commit the offence of incest on a male relative – Sexual Offences Act No 3 of 2006, sections 20 and 22.*

***Criminal Law** – sexual offences – defilement and incest – where the charge of incest by a male person was substituted with that of defilement – where the accused had defiled a 9-year-old child – where both offences bore a similar sentence which was life imprisonment – whether it would be prejudicial to substitute the offence of incest by a male person to the offence of defilement under the Sexual Offences Act – Sexual Offences Act, No 3 of 2006, sections 8 and 20.*

***Jurisdiction** – jurisdiction of the High Court – appellate jurisdiction – role of the High Court as an appellate court.*

Brief facts

The appellant had been convicted for the offence of incest contrary to section 20(1) of the Sexual Offences Act (the Act) by the trial court. The particulars of the charge were that the appellant intentionally caused his genital organs to penetrate the genital organs of his son (the complainant) a child aged 9 years. In the alternative, the appellant was charged with the offence of indecent act with a child, contrary to section 11(A) of the Act in that he intentionally caused his genital organs to come into contact with the genital organs of the complainant. Upon conviction, the appellant was sentenced to serve 20 years imprisonment. The appellant was aggrieved by the judgment of the trial court and thus filed the instant appeal. The appellant prayed that the conviction be quashed and the sentence set aside.

Issues

- i. What were the elements that constituted the offence of incest by a male person?
- ii. Whether the offence of incest by a male person could be established if committed on a male relative under the Sexual Offences Act.
- iii. Whether it would be prejudicial to substitute the offence of incest by a male person to the offence of defilement under the Sexual Offences Act which bore similar sentence if convicted.

Held

1. The court had a duty to exhaustively examine all the evidence tendered in the trial court, evaluate and analyze it and arrive at its own findings and conclusions. However, the court had to make allowance for the fact that it neither saw nor heard the witnesses testify whereas the trial court had the opportunity to, and to assess the witnesses' demeanor.

JKM v Republic

2. The offence of incest by a male person was created by section 20(1) of the Sexual Offences Act. To establish a case under section 20, the prosecution had to prove the elements of the offence which were that there had to be;
 - a. an indecent act or an act that caused penetration; and
 - b. the victim had to be a female person who was related to the perpetrator in the degrees set out in section 22 of the Act.
3. There was overwhelming evidence on record that the complainant was aged about 8 years old. The complainant was a child of tender age and had undergone a *voire dire* examination. PW6 who examined the complainant, assessed his age at 8 years, at the time he was in nursery school.
4. There was no evidence on record as to suggest why the complainant, a child of tender age, could have framed the appellant with such a serious offence and given such candid details of the incident. The complainant was a truthful witness, he gave his evidence on oath and was subjected to cross-examination and his testimony was not shaken. The appellant was therefore the perpetrator of the offence that caused anal penetration of the complainant.
5. The complainant was a male person and did not fall within the category listed in section 20(1) of the Act. Under section 20(1), a male person committed the incest with a female relative. There was no provision in the Act where a male person was deemed to commit incest with a male relative. An offence of incest had therefore not been disclosed as no such offence existed under section 20(1).
6. The evidence on record disclosed an offence of defilement under section 8(1) as read with section 8(2) of the Act. The trial court erred in convicting and sentencing the appellant under section 20(1) of the Act. The appellant was thus guilty of the offence of defilement contrary to section 8(1) as read with section (2) of the Act.
7. The appellant would not suffer any prejudice for being found guilty for the offence of defilement because the sentence under section 20 of the Sexual Offences Act was similar to the sentence under section 8(1) and (2) which was, life imprisonment.
8. The appellant behaved like a beast. The complainant was a young boy of tender age, his own son upon whom he inflicted serious injuries by his bestial acts. Instead of being his protector, he was the molester until the young boy had to run for his life and find refuge in the bathroom. The appellant did not deserve mercy.
9. The Rules Committee needed to reconsider section 20(1) of the Sexual Offences Act, whether a man could commit incest on a male relative.

Appeal partly allowed; appellant sentenced to serve 30 years imprisonment under section 8(2) of the Sexual Offences Act which sentence would run from the date the appellant was sentenced.

Cases***East Africa***

1. *Okeno v Republic* [1972] EA 32 – (Followed)

Statutes***East Africa***

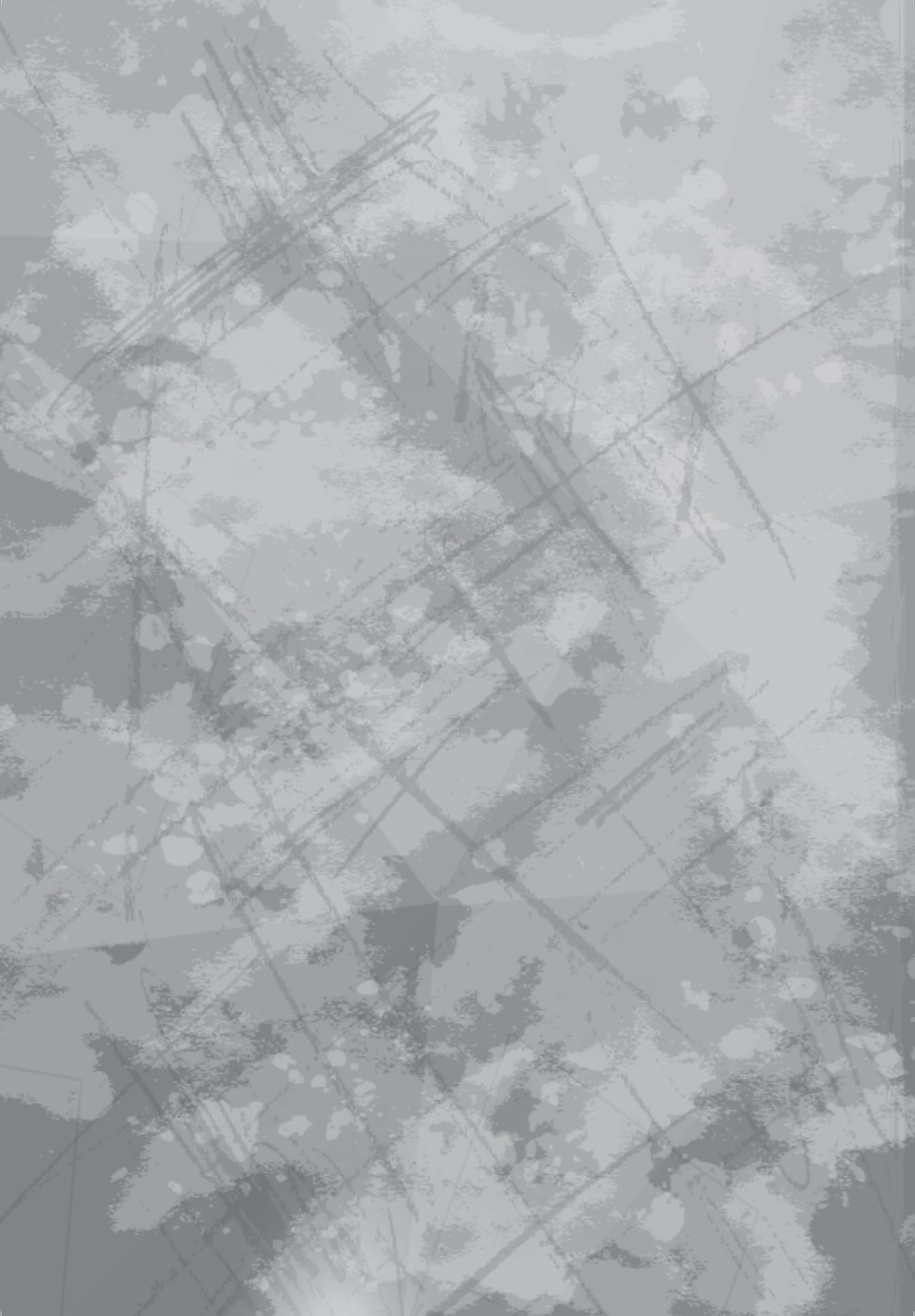
1. Constitution of Kenya, 2010 article 24(1); 50 – (Interpreted)
2. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 2, 8(1)(2); 11(A); 20(1); 22 – (Interpreted)

Advocates

None mentioned

F. Unnatural Offences

- 1. Factors a court took into consideration and had to balance before sentencing a convicted person.**
Kiombo v Republic Criminal Appeal No E067 of 2021; [2023] eKLR
- 2. Subjecting an accused person to anal medical examination so as to provide evidence of involvement in a sexual offence is a violation of the accused person rights to dignity and privacy.**
COI & another v Chief Magistrate Ukunda Law Courts & 4 others Civil Appeal No 56 of 2016; [2018] eKLR



Kiombo v Republic**1. Factors a court took into consideration and had to balance before sentencing a convicted person**

Significance: The case discusses in brief the factors a court would take into consideration and balance before sentencing a convicted person. In addition, the court discussed that the period of imprisonment that should be served by a convicted person, had to take into account the period in which the convicted person was held in custody during the trial.

Kiombo v Republic [2023] eKLR

Criminal Appeal No E067 of 2021

High Court at Mombasa

FG Mugambi, J

February 14, 2023

Criminal Law – sentencing – sentencing of defilement offenders – mitigation of sentences of defilement offenders – factors a court took into consideration – where the appellant was charged with the offence of defilement – where the offender was convicted and sentenced to 50 years in prison – where the trial court did not specifically state that it had taken into account the 9 years’ period that the appellant had been in custody what were the factors a court took into consideration and had to balance before sentencing a convicted person – whether in determining the period of imprisonment that should be served by an offender a convicted person, the court had to take into account the period in which the offender convicted person was held in custody during the trial – Constitution of Kenya, 2010, article 28; Sexual Offences Act, 2006, section 8; Criminal Procedure Code, section 24 and 332(1).

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on March 8, 2020 in Mombasa County, he intentionally and unlawfully caused his penis to penetrate the anus of DK, a child aged 6 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act on which the charge sheet alleged that on the same day and place, he intentionally and unlawfully touched the anus of DK a child aged 6 years old with his penis. The appellant was convicted on his own plea of guilty on the principal charge and was sentenced to 50 years’ imprisonment.

The appellant filed the instant appeal against the sentence as provided for under section 348 of the Criminal Procedure Code. Arguing that: the sentence of 50 years was harsh and excessive. and that the trial court in meting out the sentence failed to take into account the period that the appellant had already served in custody from his arrest in March 2020 up to conviction in March 2021, a period of approximately 1 year. In addition, the appellant argued that the trial court failed to consider the mitigation by the appellant as a first time offender and that a 50 years sentence against his current age which he alleged was 27 years of age would result to an excessively harsh sentence.

Issues

- i. What were the factors a court took into consideration and had to balance before sentencing a convicted person?
- ii. Whether in determining the period of imprisonment that should be served by a convicted person, the court had to take into account the period in which the convicted person was held in custody during the trial.

Held

1. 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 foul of article 28 of the Constitution of Kenya, 2010. However, the courts were at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.
2. In the same vein, sentencing was exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of that, the sentence was illegal or was so inordinately excessive or patently lenient as to be an error of principle.
3. Recent jurisprudence since *Francis Karioko Muruatetu & Another vs Republic* also pointed towards balancing more between retributivist and utilitarian theories of sentencing. Factors such as time served in custody, gravity of the offence, criminal history of the offender, character of the offender and the offender's responsibility over third parties should affect the sentence. There was a sound argument also for first-time offenders, for instance, who were not sex pests to be given another chance to make good their mistakes while still ensuring that the sentence was hefty enough to punish and deter others from the heinous crime.
4. The appellant was provided an opportunity to mitigate in the trial court where he stated that he was remorseful. However, the converse was also true, the appellant had committed a heinous crime, and occasioned severe trauma and suffering to a girl young enough to be his daughter. His actions had demonstrated that around him, young and vulnerable children could be in jeopardy. For the reasons stated above and so as to also give the appellant an opportunity to be re-integrated back into society and be a productive citizen, the court would set aside the sentence of 50 years and substitute it with a sentence of 35 years' imprisonment.
5. By proviso to section 333(2) of Criminal Procedure Code where a person sentenced had been held in custody prior to such sentence, the sentence should take account of the period spent in custody. The trial court did not specifically state that it had taken into account the 9 years' period that the appellant had been in custody. The appellant said that as at September 22, 2009 he had been in custody for ten years and one month. All those incidents ought to have been taken into account in assessing sentence.
6. The proviso to section 333(2) of the Criminal Procedure Code obligated 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 impacted on the overall period of detention which could result in an excessive punishment that was not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court had to take into account the period in which the offender was held in custody during the trial.

Appeal dismissed; conviction and sentence to the appellant to be changed from 50 years to 35 years' imprisonment from the date of arrest, being March 8, 2020 upheld.

Cases

East Africa

1. *Ali Abdalla Mwanza v Republic* Criminal Appeal No 259 of 2012 – (Mentioned)
2. *BW v Republic* Criminal Appeal No 313 of 2010; [2019] eKLR – (Mentioned)
3. *Christopher Ochieng v Republic* Criminal Appeal No 202 of 2011; [2018] eKLR – (Mentioned)
4. *David Njuguna Wairimu v Republic* [2010] eKLR – (Mentioned)
5. *Jared Koita Injiri v Republic* Criminal Appeal No 93 of 2014 – (Mentioned)
6. *Njoroge v Republic* [1987] KLR 19 – (Mentioned)

Kiombo v Republic

7. *Okeno v Republic* [1972] EA 32 – (Mentioned)
8. *Wilson Waitegi v Republic* [2021] eKLR – (Mentioned)

Statutes***East Africa***

1. Constitution of Kenya, 2010 articles 28 – (Interpreted)
2. Criminal Procedure Code (cap 75) sections 333(2); 348 – (Interpreted)
3. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1)(2); 11(1) – (Interpreted)

Advocates

None mentioned

2. Subjecting an accused person to anal medical examination so as to provide evidence of involvement in a sexual offence is a violation of the accused person rights to dignity and privacy

Significance: This case examines *inter alia* whether subjecting an accused person charged with unnatural offence under section 162(a) of the Penal Code to anal examinations and other medical examinations was a violation of the accused person's right to human dignity and right to privacy.

COI & another *v* Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR

Civil Appeal No 56 of 2016
Court of Appeal at Mombasa
A Visram, W Karanja & MK Koome, JJA
March 22, 2018

Constitutional Law – fundamental rights and freedoms – right to privacy – medical examinations issued against an accused person to prove an unnatural offence – whether subjecting an accused person charged with unnatural offence under the Penal Code to anal examinations and other medical examinations was a violation of the accused person's right to privacy – Constitution of Kenya, 2010 article 31; Penal Code section 162(a).

Constitutional Law – fundamental rights and freedoms – right to human dignity – medical examinations issued against an accused person to prove an unnatural offence – whether subjecting an accused person charged with unnatural offence under the Penal Code to anal examinations and other medical examinations was a violation of the accused person's right to human dignity – Constitution of Kenya, 2010 articles 20(4)(a), 24 and 28; Penal Code section 162(a).

Criminal Law – sexual offences – power to order for medical examinations on the accused person to prove a sexual offence – whether the power of the Court to direct examination of an accused person to establish his involvement in a sexual offence under the Sexual Offences Act could be extended to the sexual offences prescribed in the Penal Code or any other law that prescribed a sexual offence – Sexual Offences Act, 2006, section 36(1) and 36(6)(a); Penal Code section 162(a).

Constitutional Law – fundamental rights and freedoms – remedies – factors to be considered by a court – what were the factors to be considered by a court when granting a constitutional remedy for infringement/violation of a person's rights and fundamental freedoms.

Brief facts

The appellants were arrested in a bar in Diani as they were ordering their drinks on suspicion of engaging in gay activities as well as distributing pornographic material. They were arraigned in court and the prosecution applied for the deferment of the appellants' plea taking to pave way for further investigations. An order compelling the appellants to undergo necessary medical tests was also sought. The appellants were presented at Makadara General Hospital where blood samples were taken for purposes of HIV and Hepatitis B testing. They were also subjected to anal examination in line with the subordinate court's orders. The results derived from the examination, were admitted by the subordinate court.

The appellants first appealed to the High Court seeking declarations that the examinations they were subjected to violated their rights to human dignity, privacy and fair trial. The High Court upheld the decision of the Subordinate Court leading to the instant appeal to the Court of Appeal.

COI & another v Chief Magistrate Ukunda Law Courts & 4 others**Issues**

- i. Whether subjecting an accused person charged with unnatural offence under section 162(a) of the Penal Code to anal examinations and other medical examinations was a violation of the accused person's right to human dignity and right to privacy.
- ii. Whether the power of the court to direct examination of an accused person to establish his involvement in a sexual offence under section 36(1) & 36(6)(a) of Sexual Offences Act could be extended to the sexual offences prescribed in the Penal Code or any other law that prescribed a sexual offence.
- iii. What were the factors to be considered by a court when granting a constitutional remedy for infringement/violation of a person's rights and fundamental freedoms?

Held

1. The purpose of recognizing and protecting human rights and fundamental freedoms was to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The same was echoed in both the International Covenant on Civil, Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples Rights (ACHPR) which recognized that human beings had inherent dignity.
2. Echoed in the International Treaties, human rights instruments and jurisprudence in other jurisdictions. Regardless of one's status or position or mental or physical condition, one was, by virtue of being human, worthy of having their dignity or worth respected. The right to privacy particularly, not to have one's privacy invaded by an unlawful search of the person, was closely linked to the right to dignity. Those rights extended to a person not being compelled to undergo a medical examination.
4. The rights and freedoms under the Bill of Rights, subject to article 25 of the Constitution, 2010, could be limited under article 24 by written law and to the extent that was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Such a limitation, at least to the extent of compelled medical examination, was evident from the provisions of section 36(1) and 36(6)(a) of the Sexual Offences Act.
5. Regarding section 36 of the Sexual Offences Act, whereas a court was empowered to direct examination of an accused person to establish his involvement in a sexual offence, such discretion was subject to limitation. The court could only issue such an order with respect to an offence committed under the Sexual Offences Act and not any other. Further, in exercising that discretion, like any other discretion, the court was required to act judiciously within the confines of the law.
6. The purpose of the medical tests and examination in the instant case were geared towards establishing the offence under section 162(a) of the Penal Code. The appellants were not arrested in the act, there was no complainant, there was actually no reasonable explanation as to why they were suspected of having committed the offence. There was no proper basis laid before the court to necessitate the impugned order being made. The subordinate court acted beyond its mandate in granting the order in issue contrary to article 24 of the Constitution.
7. Whether or not the appellants, by themselves or through their counsel, consented to the examination was neither here nor there. Such consent could not validate an otherwise illegal order. The examination was not only unconstitutional but unreasonable, and totally unnecessary. In addition, the alleged consent could not qualify as one which was given voluntarily by the appellants taking into account the pertaining circumstances.
8. Under the Constitution pre-hearing investigations could not be unconstitutional unless they purported to obtain evidence in an unlawful manner or they infringed on the rule against self-incrimination or violated the right of silence or because of the manner they had been conducted they seriously eroded the presumption of innocence if and when the suspect was charged. Such evidence should

- be expunged from the proceedings.
9. On the issue of the appellants' treatment at the Kwale prison, the appellants neither pleaded nor sought any declaratory orders or damages in respect of the alleged violations in the petition. The primary purpose of pleadings was to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brought before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer.
 10. The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.
 11. A remedy in a Constitutional violation case was just and appropriate if it:
 - a. meaningfully vindicated the rights and freedoms of the claimants;
 - b. employed means that were legitimate within the framework of constitutional democracy;
 - c. be a judicial remedy which vindicated the right while invoking the function and powers of a court; and
 - d. be fair to the party against whom the order was made.

Appeal allowed

Orders

- i. *The judgment and decree given on June 16, 2016 was hereby set aside.*
- ii. *An order that the respondents' conduct in subjecting the petitioners to anal examinations violated the Petitioners' rights under articles 25, 27, 28 and 29 of the Constitution.*
- iii. *An order that the use of evidence obtained through anal examinations of the petitioners in criminal proceedings against them violated their rights under article 50 of the Constitution.*
- iv. *Costs of the appeal awarded to the appellants against the 4th respondent.*

Cases

East Africa

1. *Attorney General v Kituo Cha Sheria & 7 others* Civil Appeal No 108 of 2014; [2017] eKLR – (Followed)
2. *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* Civil Appeal No 22 of 2015; [2016] eKLR – (Explained)
3. *Mungai, Francis Mburu v the Director of CID & another* Miscellaneous Application No 615 of 2005 – (Followed)
4. *Ogendo, Richard Dickson & 2 others v Attorney General & 5 others* Petition No 70 & 92 of 2014 (Consolidated); [2014] eKLR – (Explained)

South Africa

1. *Dawood and another v Minister of Home Affairs and others* (CCT35/99) [2000] ZACC 8 – (Followed)
2. *Dendy v University of Witwatersrand, Johannesburg & others* [2006] 1 LRC 291 – (Followed)
3. *Mayelane v Ngwenyama & another* (CCT 57/12) [2013] ZACC 14 – (Followed)

Canada

1. *Doucet-Boudreau v Nova Scotia* (Minister of Education), 2003 SCC 62 – (Followed)

United States

1. *Rochin v California* 342 US 165 (1952) – (Explained)

COI & another *v* Chief Magistrate Ukunda Law Courts & 4 others**United Kingdom**

1. *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 – (Followed)

Statutes**East Africa**

1. Constitution of Kenya, 2010 articles 19(2); 24;25;27;28;29;49(1)(d); 50(1) – (Interpreted)
2. Penal Code (cap 63) sections 162(a) (c); 181(1)(a) – (Interpreted)
3. Sexual Offences Act, 2006(Act No 3 of 2006) sections 11(a); 26; 36 (6)(a)(7) – (Interpreted)

Texts and Journals

1. Black, HC., (Ed) (1990) *Blacks Law Dictionary* Definition of the Terms & Phrases of American & English Jurisprudence, Ancient & Modern St Paul Minnesota: West Publishes Company 6th Edn
2. *National Guidelines on the Management of Sexual Violence* in Kenya 3rd 2014
3. Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Punishment (2018) Human Rights Council (A/HR/31/57)

International Instrument and Conventions

1. International Covenant on Civil and Political Rights (ICCPR) 1966
2. International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966
3. African (Banjui) Charter on Human and People's Rights (IHRDA) 1981 articles 5

Advocates

1. Mrs Ligunya for the appellants
2. Mr Ngari for the 1st, 3rd & 5th respondents
3. Mr Ayodo for the 2nd and 4th respondents

G. Trafficking in person

- 1. In sex trafficking, the prosecution has to prove abduction for the purpose of exploitation.** Karuu v Republic Criminal Appeal No E004 of 2022; [2018] eKLR
- 2. The offence of trafficking in persons captured the entire trafficking continuum, and engagement in just one of those trafficking “stages” was sufficient.** Muhammad Asif v Republic Criminal Appeal No 82 of 2017
- 3. Intent to exploit as opposed to actual exploitation taking place was required in an offence of trafficking in persons.** Geoffrey Mutemi Manzi v Republic Criminal Appeal No 39 of 2020



Karuu v Republic**1. In sex trafficking, the prosecution has to prove abduction for the purpose of exploitation.**

Significance: The case sets out elements of defilement and the key ingredients of trafficking in persons for sexual exploitation.

Karuu v Republic [2018] eKLR

Criminal Appeal No E004 of 2022

High Court at Embu

M Ngugi, J

July 27, 2022

Criminal Law – offences – trafficking in persons for purposes of sexual exploitation – where the appellant abducted the complainant and transported her to a place where he defiled her – where the appellant was charged with the offence of trafficking in persons for the purpose of sexual exploitation – where the appellant was sentenced to 30 years imprisonment for the offence of trafficking in persons for sexual exploitation – whether the prosecution proved the offence of trafficking in persons for the purpose of sexual exploitation against the appellant beyond reasonable doubt – what were the requisite elements to prove the offence of sex trafficking – Counter-Trafficking in Persons Act, No 8 of 2010 sections 3(1)(b) and 3(5).

Criminal Law – offences – defilement – elements of the offence of defilement – where 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 – where the appellant was sentenced to 20 years imprisonment for the offence of defilement – whether the prosecution established all the elements of the offence of defilement against the appellant – what were the requisite elements to prove the offence of defilement – Sexual Offences Act, No 3 of 2006 sections 8(1) and 8(3).

Brief facts

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 (Sexual Offences Act). He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. On the 2nd count, the appellant was charged with the offence of trafficking in person for purposes of sexual exploitation contrary to section 3(1)(b) as read with section 3(5) of the Counter Trafficking in persons Act, No 8 of 2010.

After trial, the appellant was convicted and sentenced to serve 20 years for the offence of defilement and 30 years for the offence of trafficking in persons for the purposes of sexual exploitation. Aggrieved by the decision of the trial court, the appellant lodged an appeal against both his conviction and sentence. It was the appellant's contention that the trial court erred in convicting him on contradictory and inconclusive evidence. Further, the appellant argued that the trial court erred in failing to find that the ingredients of the offence of trafficking in persons for sexual exploitation were not proved to sustain a conviction.

Issue

i. What were the requisite elements proved by the prosecution?

Held

1. To sustain a conviction on a charge of defilement, the prosecution had to prove three elements beyond any reasonable doubt to wit; the complainant ought to be a child, proof of penetration and the positive identification of the assailant.

2. From the perusal of the court record, the birth certificate of the complainant was produced which indicated that she was 15 years at the time of the perpetration of the alleged offence. As such, that being the case, the trial court had the discretion of sentencing the appellant to 20 years imprisonment as provided for under the Sexual Offences Act.
3. Section 2 of the Sexual Offences Act deemed penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another. PW3 testified that on examining the complainant, he found that there was soreness and redness on the complainant's *labia minora*, that the hymen was torn, there was whitish discharge from the vagina and upon carrying out a lab test, sperm cells were found. The element of penetration was thus ably proved by the prosecution.
4. The material that was used to blindfold the complainant was a net and she was able to see the appellant. She testified that she sat with the appellant in the boot and the appellant was a person known to her. It was the complainant's evidence that she saw the appellant just before her eyes and mouth were covered and that she used to see the appellant visit PW1. The appellant also confirmed that he knew the complainant well given that previously he had an intimate relationship with PW1. Therefore, the circumstances were favourable for identification. In any case, the instant case was that of recognition given that the appellant was a person well known to the complainant and the alleged events happened in the broad daylight.
5. Contradictions would usually but not necessarily lead to the evidence of a witness being rejected. The court would ignore minor contradictions unless it was of the opinion that the contradictions pointed to deliberate untruthfulness or if they did not affect the main substance of the prosecution's case. The contradictions in the prosecution's case were minor and not grave and the same were not material to its case.
6. The prosecution had to satisfy the court that the ingredients of the offence of sex trafficking had been proved beyond reasonable doubt. In the instant case, it was material for the prosecution to prove that the appellant abducted the child for purposes of exploiting the child. The definition of exploitation included keeping a person in a state of slavery, subjecting a person to practices similar to slavery, involuntary servitude, forcible or fraudulent use of any human being for removal of organs or body parts, forcible or fraudulent use of any human being to take part in armed conflict, forced labour, child labour, sexual exploitation and child marriage.
7. Although there were no eye witnesses, the complainant and PW3 in their testimony confirmed the facts. The prosecution proved beyond reasonable doubt that the purpose for which the complainant was abducted was for sexual exploitation as testified by the complainant and corroborated by PW3. The record showed how the complainant was abducted, blindfolded, bundled into a motor vehicle and then transported from Gikuuri to Karurumo whereby the appellant defiled her.

Appeal dismissed; the conviction and sentence by the trial court were upheld.

Cases

East Africa

1. *Anjononi & others v Republic* [1989] KLR – (Explained)
2. *Benard Onyandi v Republic* [2018] eKLR – (Mentioned)
3. *Charles Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 –(Mentioned)
4. *Edwin Nyambaso Onsongo v Republic* [2002] eKLR – (Explained)
5. *Erick Onyango Ondeng v Republic* [2014] eKLR – (Explained)
6. *Francis Njuguna Kagunda & Another v Republic* [2022] eKLR – (Mentioned)
7. *Idah Nzisa Kikubi & another v Republic* [2021] eKLR – (Mentioned)
8. *Mohammed Asif v Republic* [2017] eKLR – (Explained)
9. *Mwangi v Republic* [1984] KLR 595 – (Explained)

Karuu v Republic

10. *Mwolongo Chichoro Mwanyembe v Republic* Mombasa Criminal Appeal No 24 of 2015 (UR) – (Mentioned)

11. *Odhiambo v Republic* Criminal Appeal No 280 of 2004; [2004] eKLR

12. *Okeno v Republic* [1972] EA 32 – (Applied)

13. *Stephen Nguli Mulili v R* [2014] eKLR – (Mentioned)

United Kingdom

Woolmington v DPP [1935] AC 462 – (Mentioned)

Statutes**East Africa**

1. Counter Trafficking in Person Act section 3(1)(b)(5) – (Interpreted)

2. Evidence Act (cap 80) section 143 – (Interpreted)

3. Sexual Offences Act, 2006 (Act No 3 of 2006) section 2, 8(1)(3); 11(1) – (Interpreted)

Advocates

None mentioned

Asif v Republic**2. The offence of trafficking in persons captured the entire trafficking continuum, and engagement in just one of those trafficking “stages” was sufficient**

Significance: The case outlines the constituent elements that have to be satisfied in an offence of trafficking in persons and that different persons or groups of people could be responsible for different aspects of the trafficking crime as engaging in just one of those trafficking “stages” was sufficient.

Asif v Republic

Criminal Appeal No 82 of 2017

High Court at Machakos

P Nyamweya, J

July 26, 2017

(An appeal arising out of the judgment and sentence of Hon. L. Kassan SPM in Criminal Case No. 414 of 2016 delivered on 1st July 2016 at the Senior Principal Magistrate’s Court at Mavoko)

Criminal Law – *re-trial* – principles governing whether or not a retrial should be ordered - where appellant was charged with offence of trafficking in persons – where prosecution concede that no evidence was brought forward for the offence - whether failure to read the charge(s) to an accused in court and record the plea taken was ground for a retrial.

Criminal Law – *trafficking in persons* – elements constituting the offence - what were the elements that constituted the offence of trafficking in persons under section 3(1)(d) and 5 of the Counter Trafficking in Persons Act No. 8 of 2010 – sections 2; 3(1)(d) and 5.

Brief facts

The appellant was charged with and convicted of the offence of trafficking of persons contrary to section 3 (1)(d), as read with section 5 of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars were that on May 30, 2016 at upper Kapiti estate in Athi river sub-county within Machakos County, he was willfully and unlawfully found trafficking a total of eleven adults. He was sentenced to serve five (5) years imprisonment or to pay a fine of Kshs 5,000,000 for the offence.

The appellant preferred the instant appeal on the following grounds that the trial court erred: in matters of law by convicting the appellant while relying on a section of law that did not warrant his conviction; in matters of facts by failing to observe that the appellant had only sublet to persons whom he had no business with except receiving the agreed rent, and that could not have been misconstrued as trafficking in persons; by failing to consider the fact that the appellant was a business man legally living in Kenya and that the evidence produced by his tenants did not link him with trafficking in persons; and by failing to put into consideration that the appellant was not conversant with the Kenyan law and was therefore entitled to representation in court.

whether the conviction and sentence of the Appellant for the offence of trafficking of persons was lawful and based on sufficient evidence.

Issues

- i. Whether failure to read the charge(s) to an accused in court and record the plea taken was ground for a retrial.
- ii. What were the elements that constituted the offence of trafficking in persons under section 3(1)(d) and 5 of the Counter Trafficking in Persons Act No 8 of 2010?

Held

1. The offence of trafficking of persons was defined in section 3(1) of the Counter Trafficking in Persons Act whereas the penalties for the offence of trafficking of persons were created by section 3(5) and (6). In addition, section 5 of the Act provided for the offence of promotion of trafficking of persons.
2. the day the plea was taken on May 31, 2016 the record did not indicate that any charge was read to the appellant, and what the appellant was responding to at the time of taking plea. To that extent, there was a defect in the procedure of taking plea before the trial court which could not sustain his conviction. That ground was sufficient to dispose of the appeal.
3. The principles governing whether or not a retrial should be ordered were enunciated in *Fatehali Manji v Republic* [1966] EA 343 by the East Africa Court of Appeal where it was held that in general, a retrial would be ordered only when the original trial was illegal or defective; it would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it did not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.
4. The instant case was not a proper case for retrial. The concession by the Prosecution was noted that no evidence was brought of the offence of trafficking in persons as against the appellant. In that regard, for a person to be charged under section 3(1)(d) and 5 of the Counter Trafficking in Persons Act No. 8 of 2010, the evidence should indicate that the accused person had:
 - a. recruited, transported, transferred, received, held, concealed, or harboured the victim, or exercised control, direction or influence over the movements of the victim; and
 - b. by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
 - c. done this for the purpose of exploiting the victim or facilitating their exploitation.
5. The offence of trafficking in persons captured the entire trafficking continuum, and engagement in just one of those trafficking “stages” was sufficient. Therefore different persons or groups of people could be responsible for different aspects of the trafficking crime. The offence was thus formulated in such a way as to capture the different actors along the trafficking continuum, including those who did not directly exploit the victim’s labour or services, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.
6. In the instant appeal the evidence of PW1, PW2, PW3, PW4 and PW6 was that the appellant kept eight persons in a rented house, for which each person paid him ten dollars a day for accommodation and food. That evidence pointed to the act of harbouring persons which was one of the elements of the offence of trafficking in persons. However, there was no evidence adduced as to any other purpose for which the appellant was harbouring the persons, and the witnesses PW1, PW2 and PW3 clearly indicated that the person who was to transport them to Brazil was one Kashif, and the purpose for which they were going to Brazil was also not shown. There was thus no evidence that demonstrated that the appellant personally intended to exploit any victims, or that he knowingly facilitated exploitation by another person.
7. A retrial was therefore inappropriate in the circumstances as it could serve the purpose of addressing the gaps in the prosecution case.

Appeal allowed.

Asif v Republic

Orders

- i. *The appellant's conviction was quashed for the offence of trafficking of persons contrary to section 3 (1)(d) as read with section 5 of the Counter Trafficking in Persons Act No. 8 of 2010.*
- ii. *The sentence of five (5) years imprisonment or payment of a fine of Kshs 5,000,000 imposed upon the appellant for the conviction was set aside.*
- iii. *The appellant was set at liberty unless otherwise lawfully held.*

Cases**East Africa**

1. *Fatehali Manji v Republic* [1966] EA 343 – (Applied)
2. *Mwangi v Republic* [1983] KLR 522 – (Explained)

Statutes**East Africa**

1. Counter Trafficking in Persons Act, 2010 (Act No 8 of 2010) sections 2, 3(1)(d); 5; 6 – (Interpreted)
2. Criminal Procedure Code (cap 75) section 207 – (Interpreted)

Advocates

None mentioned

3. Intent to exploit as opposed to actual exploitation taking place was required in an offence of trafficking in persons.

Significance: The case highlights the ingredients that have to be proved by the prosecution in an offence of counter-trafficking in persons and whether intent of exploitation as opposed to actual exploitation was required in proving the offence.

Manzi v Republic

Criminal Appeal No 39 of 2020

High Court at Nairobi

LN Mutende, J

June 30, 2021

(Being an appeal arising from the original conviction and sentence in Criminal Case No. 117 of 2018 at Principal Magistrates Court at JKIA by Hon. C. M. Njagi – RM on 29th January 2020)

Criminal Law – counter-trafficking in persons – elements to be proved – where appellant transported pw2-pw5 to JKIA airport – where victims did not have work permits or employment contracts - what were the required elements that were needed to be proven in an offence of Counter-trafficking in persons - Counter-Trafficking in Persons Act sections 2, 3(1)(d); 3(5) and 7

Criminal Law – counter-trafficking in persons – elements – exploitation – where more than one of constituent acts of trafficking in persons was committed - whether manifestation of intent to exploit as opposed to actual exploitation taking place was required in an offence of trafficking in persons - Counter-Trafficking in Persons Act section 2

Brief facts

The appellant was charged and convicted with three counts namely:

Count 1: trafficking in persons contrary to section 3(1)(d) as read with section 3(5) of the Counter-Trafficking in Persons Act No 8 of 2010 by jointly with others not before court harbouring or receiving four (4) Tanzanian aliens by means of deception for purposes of exploiting four(4) Tanzanians.

Count 2: trafficking in persons contrary to section 3(1)(d) as read with section 3(5) of the Counter-Trafficking in persons Act by receiving two Ugandan aliens by means of deception for purposes of exploiting the said two Ugandan aliens.

Count 3: facilitating and aiding to exit out of Kenya contrary to section 7 of the Counter Trafficking in Persons Act by facilitating and aiding four Tanzanian aliens to exit Kenya from Nairobi through Jomo Kenyatta International Airport (JKIA) by using a motor vehicle Registration No. KCH 318V Toyota Town ace for purposes of promoting trafficking of the said Tanzanian aliens.

Aggrieved, the appellant appealed on grounds that: the elements of the offence of counter-trafficking were not established and that the sentence was harsh considering that the appellant suffered from chronic diseases.

Issues

- i. What were the required elements that were needed to be proven in an offence of Counter-trafficking in persons?
- ii. Whether intent to exploit as opposed to actual exploitation taking place was required in an offence of trafficking in persons.

Manzi v Republic**Held**

1. The appellant was alleged to have engaged in human trafficking which was an offence as provided by the Counter-Trafficking in persons Act (Act), and in particular he was stated to have flouted section 3(1)(d)(5) of the Act. For human trafficking to occur, the offender must commit at least one of the acts envisaged for the offence against another individual, by using some means.
2. It was alleged that the appellant harboured or received two (2) Ugandan aliens by means of deception for purposes of exploitation. PW1 testified to have come to the country on an understanding that she would get some employment. That she was given the appellant's contact by her brother Ronald Kansime. She established the fact of being a foreigner and an adult who was in possession of an identity card. Having travelled on September 24, 2018 and arrested on the September 25, 2018, was evidence of having been received by the appellant
3. Although the appellant denied having lived at Tassia, the Prosecution adduced in evidence a tenancy agreement establishing occupation of the house PW1 identified as belonging to him. The second person stated to be NS, did not testify, but, at the time of being arrested or rescued as found by the trial court PW1 had not secured any employment.
4. For the offence to be proved, the purpose of harbouring PW1 had to be proved. The duty of proving it lay with the prosecution. According to PW1, upon arrival at the appellant's house, she was hosted, had lunch and supper and retired to sleep. She did not allude to any conduct that would have been interpreted as exploitation. The prosecution relied basically on evidence adduced by PW1. If the demeanor of the witness had been noted by the trial court, it would have expressed psychological signs that would have assisted in proving the offence. That having been what transpired, the case was not proved to the required standard.
5. On count 1, PW2, PW3 and PW4 were recruited by PW5 to go and work in the Sultanate of Oman. Upon arrival in Nairobi they were linked to an undisclosed guest house within the California area Nairobi where they stayed overnight. They did not allude to having met expenses for their stay which meant that it was facilitated by another or others including the mysterious lady at the guesthouse. Their transport to the airport was by taxi but the individual who carried them did not reach the destination, he handed them over to the appellant who transported them to the airport.
6. On their part, acting on intelligence information received, the police followed the appellant as he transported PW2-PW5 to the Airport and intercepted them. The definition of trafficking included transporting or transfer of the victim for purposes of exploitation. In that case the *actus reus* would be established. The appellant argued that he did not play the role of trafficking PW2-PW5 to the airport, but, was hired as a taxi driver. He adduced in evidence a business card for BEMM Importers & Exporters alleging that he did taxi business as well as clearing and forwarding.
7. As to the third element of the act having been committed for the purpose of exploitation, PW2-PW4 who were recruited by PW5, an accomplice of the traffickers and were destined for the Sultanate of Oman did not understand their rights. There was no indication whatsoever if they had any work permits, and they had not entered into any employment contract, that therefore left the possibility of abuse and established an element of deception. Therefore, they were victims subject to the vulnerability of abuse. The appellant posed as a taxi driver knowing very well he had information on the victims, that concealment of the information proved that he was aware of the illegality that was being committed, hence proof of his state of mind. (*mens rea*)
8. Section 14 of the Act provided for victim immunity from prosecution. The victims, aliens, entered the country unlawfully. They were however protected from being charged and made witnesses to safeguard their rights. Every vulnerable victim of exploitation would be protected by the criminal law, there was no victim, so vulnerable to exploitation, he somehow became invisible or unknown

to or somehow beyond the protection law.

9. Section 2 of the Act defined exploitation. The offence of trafficking did not require actual exploitation to take place, what was required was a manifestation of an intention to exploit the victims which was established by illegalities aforementioned. That was sufficient to prove that fact and it was established that the appellant committed more than one of the constituent acts of human trafficking. It had been argued that the victims consented to the act of being recruited to go and work in the Sultanate of Oman. The victims were vulnerable individuals who needed to work to earn a living; means having been established, their consent to what transpired was irrelevant.
10. On count 3, the appellant was indicted for facilitating and aiding the victims to exit Kenya through Jomo Kenyatta International Airport (JKIA) for purposes of trafficking. The appellant was in communication with the individuals who recruited the victims and the ones who were to receive them in the Sultanate of Oman. He received the victims at a designated Petrol Station and supported them hence making it easier by transporting them to JKIA using his motor vehicle Registration Number KCH 318V. That was facilitating their exit out of the country, an act that was thwarted by their arrest.
11. The sentence for the offence of trafficking in humans was stipulated in section 3(5) of the Act. The trial court opted to impose a fine instead of incarcerating the appellant without an option of fine. Although there was a minimum prescribed sentence of thirty million, the trial court used discretion and imposed a fine of ten million on each count. In sentencing, the court considered the gravity of the offence, mitigating factors, a pre-sentence report and the seriousness of the offence.

Appeal allowed partially.

Orders

- i. Appeal on count 2 was allowed.*
- ii. The conviction was quashed and sentence meted out was set aside. On counts 1 and 3, the court affirmed the conviction, sentences and further orders by the trial court, save that I set aside the order directing payment of part of the fine in an aggregate sum of Kshs15,000,000 to be deposited to the National Assistance Trust Fund for victims of Trafficking in persons under section 22 of the Act, in event of the fine being paid and substitute it with Kshs 10,000,000*

Cases

East Africa

1. *Mohammed Asif v Republic* [2017] eKLR– (Explained)
2. *Okeno v Republic* [1972] EA 32 - (Followed)
3. *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR – (Explained)
4. *Francis Karioko Muruatetu & another v Republic* [2017] eKLR – (Explained)
5. *Jared Koita Injiri v Republic* [2019] eKLR – (Applied)
6. *Bernard Kimani Gacheru v Republic* [2002] eKLR – (Applied)

United Kingdom

1. *Woolmington v DPP* (1935) AC 462 – (Applied)
2. *R.v Connors* (2013) EWCA Crim. 324 – (Explained)
3. *R v R* – (Explained)
4. *R v L* (2013) QB 279 – (Explained)

Manzi v Republic

Statutes

East Africa

1. Counter-Trafficking in Persons Act, 2010 (Act No 8 of 2010) sections 3(1)(d)(5); 7 – (Interpreted)
2. Penal Code (cap 63) section 204 – (Interpreted)
3. Constitution of Kenya, 2010 articles 25 (c); 28; 48; 50(1)(2)(q) – (Interpreted)

Advocates

Mr Mutuma for the state

H. Indecent Acts

- 1. Kissing and indecently touching another person against his/her will is not an offence under section 2 of the Sexual Offences Act.** Njoroge v Republic Criminal Appeal No 183 of 2014
- 2. Arrest, strip search and detention of a minor without considering the best interests of the minor violated article 53 of the Constitution of Kenya, 2010.** MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*) Constitutional Petition No 347 of 2015
- 3. Court sets aside the 7 years jail term and substitutes thereof 3 years under supervision of a probation officer and appellant to sensitize his congregants about the Sexual Offences Act at least one Sunday in a month.** Nzioka v Republic Criminal Appeal E058 of 2023



Njoroge v Republic**1. Kissing and indecently touching another person against his/her will is not an offence under section 2 of the Sexual Offences Act**

Significance: The case brings out the issue that the Sexual Offences Act does not provide for offences occasioned by when a person indecently touches another person against his/her will or other parts of the body other than those provided under section 2.

Njoroge v Republic

Criminal Appeal No 183 of 2014

High Court at Nairobi

G W Ngenye-Macharia, J

July 18, 2018

Statutes – interpretation of statutes – interpretation of section 2(1) of the Sexual Offences Act-definition of an offence that amounted to an indecent act – where an accused was convicted for kissing and holding a minor – claim that the evidence adduced did not disclose an offence – whether an accused person could be convicted of an indecent act that was not defined in the Sexual Offences Act – Sexual Offences Act, sections 2(1) and 11.

Brief facts

The appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act (the Act). He was charged with intentionally and unlawfully kissing on the mouth and holding the waist of MM, a child aged 13 years, with his hands. He was found guilty, convicted and sentenced to 10 years imprisonment.

The appellant's grounds for appeal was that; the trial court erred by introducing a new definition of what constituted an indecent act; that the definition was not founded in law; that the trial court erred in failing to appreciate and find that the particulars of the charge did not support the offence in question.

Issue

Whether an accused person could be convicted of an indecent act that was not defined in the Sexual Offences Act.

Held

1. What was in issue before the court was whether the evidence that was adduced disclosed the offence charged. The *Hilda Atieno v Republic* [2016] eKLR and *Zachariah Otieno Charles v Republic* [2011] eKLR cases could be distinguished from the instant appeal in that both cases the appellants had been charged under section 27(1)(b)(4) of the Alcoholic Drinks Control Act, 2010 and section 8(2) of the Sexual Offences Act respectively which provisions, as was argued, provided for penalties as opposed to defining the offences.
2. What constituted the offence of an indecent act was found at section 2(1) of the Sexual Offences Act. In the instant case, the evidence adduced in court according to PW2 was that the appellant held her by her waist, pulled her towards him and kissed her on the lips. Under the provision, an offence was constituted if the contact was between any part of the body with the genital organs, breasts and buttocks of another person or (unwilling) exposure or display of any pornographic material.
3. The complainant was categorical that the appellant only kissed her. There entirely lacked evidence that he touched her genital organ or buttocks or breasts with any of his body parts. No doubt the evidence did not disclose the offence charged. It was a case that ought not to have been filed.

4. It was unfortunate that the Act did not provide for offences occasioned by when a person indecently touched another person against his/her will or other parts of the body other than those provided under section 2. Probably it was the ripe time that such offences were provided as they offended the decency of a woman or a man.
5. The duty of the court was to do justice to the law. In as much as the complainant was offended by the acts of the appellant, the law as it was handed a total blow to the evidence adduced. Thus, the case was not proved beyond a reasonable doubt.

Conviction quashed, sentence set aside and the appellant to be set free unless lawfully held.

Cases

East Africa

1. *Atieno, Hilda v Republic* Criminal Appeal No 104 of 2015 – (Distinguished)
2. *Charles, Zachariah Otieno v Republic* Criminal Appeal No 179 of 2008 – (Distinguished)

Statutes

East Africa

1. Alcoholic Drinks Control Act, 2010 (No 4 of 2010) sections 27(1)(b)(4) – (Interpreted)
2. Penal Code (cap 63) (Repealed) section 144(1)(3) - (Interpreted)
3. Sexual Offences Act, 2006 (No 3 of 2006) sections 2(1); 8(2); 11(1) – (Interpreted)

Advocates

1. M/s Kigei H/B for Mr Muriuki for the appellant
2. Mr Sigei for the respondent

MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)

2. Arrest, strip search and detention of a minor without considering the best interests of the minor violated article 53 of the Constitution of Kenya, 2010

Significance: Conduct of traffic police officers while arresting students, where they stripped searched them and took naked photographs of the petitioner and published them. The case is important as it highlights what the police should consider while arresting children.

MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)

Constitutional Petition No 347 of 2015

High Court of Kenya

December 17, 2017

JM Mativo, J

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms children rights – where a child's best interest was not taken into consideration – where a minor was arrested, detained and subjected to a strip search – whether the minor's rights to dignity, privacy and the right not to be subjected to inhuman or degrading treatment was violated – Constitution of Kenya, 2010, articles 25, 28, 31 and 53(d), (f) and (2); Universal Declaration of Human Rights, 1948 articles 1, 5 and 12. Criminal Law – conviction – quashing of a conviction – where a petitioner's rights were declared to be violated after conviction – whether a conviction rendered by a competent court on a plea of guilty could be quashed by a declaration as opposed to a review or appeal. Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms children rights – award of damages – what were the factors to consider in awarding damages for violation of rights.

Brief facts

On August 5, 2015 the media was awash with news of a matatu that was intercepted by traffic police officers along Karantina/Nairobi Road carrying students. It was playing loud music; the students were allegedly intoxicated and it was alleged some were engaging in sex in the vehicle. The police commandeered the vehicle to the police post where they searched the students. They recovered cannabis sativa (bhang) hidden in the under garments of the first petitioner. She was detained at the police station overnight and charged in court the following day with the offence of being in possession of cannabis sativa. The 1st petitioner was then 18 years old and a form 4 student. She brought the petition seeking to vindicate her constitutional rights not to be subjected to degrading and inhuman treatment, to safeguard her right to privacy, rights of an arrested person and fair process and compensation for the violations.

Issues

- i. Whether the petitioners' rights to dignity, privacy and the right not to be subjected to inhuman or degrading treatment were violated by; a. police officers' action of arresting and detaining the petitioner without according her the best interest paramount under article 53 of the Constitution of Kenya, 2010; b. police officers subjecting the petitioner to a strip search without adhering to the statutory provision governing the search of women and children; and c. by taking naked photographs of the petitioner and publishing them.
- ii. Whether a conviction rendered by a competent court on a plea of guilty could be quashed by a declaration as opposed to a review or appeal.

iii. What were the factors to consider in awarding damages for violation of rights?

Held

1. Article 28 of the Constitution of Kenya, 2010 (Constitution) provided no definition of dignity. However, its role and importance as a foundational constitutional value had been emphasized. So important was the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under article 25 of the Constitution, it was one of the rights that would not be limited.
2. Article 31 of the Constitution provided for the right to privacy of the person, home or property searched. It had become established law, insofar as privacy was concerned, that the right became more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which came into legal play.
3. There was a connection between an individual's right to privacy and the right to dignity. Privacy fostered human dignity insofar as it was premised on and protected an individual's entitlement to a sphere of private intimacy and autonomy. The rights of equality and dignity were closely related, as were the rights of dignity and privacy.
4. The Constitution placed human dignity and equality as the central theme to Kenya's constitutional order. The determination of whether an invasion of the common law right to privacy had taken place was a single enquiry. It essentially involved an assessment as to whether the invasion was unlawful. The assertion had also been made that in the case of female prisoners' expectation of privacy, the courts had held that gender and gender differences had to matter because the courts imbued women with a sense of modesty and a greater need for privacy than men.
4. When a constitutional right was infringed, it was important to determine whether such infringement was justified in terms of article 24 of the Constitution which provided that the rights in the Bill of Rights would be limited only in terms of law and only to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.
5. The court was constitutionally obliged to consider the facts complained of through the lens of article 53(d),(f) and (2) of the Constitution to determine if the police officers considered the 1st petitioners' best interests, and if they did, whether they accorded the best interests paramount importance. Courts were enjoined when interpreting any legislation to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. That required courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the Bill of Rights. The courts were the guardians of the Constitution and the values it espoused.
6. In interpreting the law, courts had to infuse it with values of the Kenyan Constitution. Courts ought to have never shirked that constitutional responsibility. All courts, including the High Court, were enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting appropriate relief, just and equitable orders, and by developing the common law taking into account the interests of justice. In a constitutional democracy such as Kenya's, courts had to devise means of protecting and enforcing fundamental rights.
7. Article 2 of the Constitution proclaimed the Constitution to be the supreme law of the country. Importantly, it declared that law or conduct inconsistent with it was invalid, and further that the obligations it imposed had to be fulfilled. The Constitution was underpinned by a bill of rights that, according to article 19, was declared a cornerstone of Kenya's' democracy.
8. The Bill of Rights was an integral part of Kenya's democratic state and was the framework for social, economic and cultural policies. The rights and fundamental freedoms in the Bill of Rights belonged

MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)

- to each individual and were not granted by the State. Article 21 of the Constitution commanded the State, and every State organ including the police to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights subject to the limitations in article 24 or elsewhere in the Bill of Rights.
9. The police were also required to honour the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. That was crucial as the police were, in the daily execution of their duties, involved in instances that had the potential to affect people's rights to dignity, equality and freedom—which were foundational to Kenya's democracy. Kenya's people deserved a police service which was steeped in a culture of respect for human rights. That required them in all their dealings with society whilst executing their constitutional duties to be guided by respect for human rights and strict observance of the rights to human dignity, equality and freedom.
 10. An arrest was an invasive curtailment of a person's freedom. Under any circumstance an arrest was a traumatising event. Its impact and consequences on children might have been long-lasting if not permanent. The need for the Kenyan society to be sensitive to a child's inherent vulnerability was behind the provisions of article 53 of the Constitution which was broadly worded. The interests of children were multifarious. However, in the context of arrests of children, article 53 of the Constitution sought to insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child had to be arrested, his or her best interests had to be accorded paramount importance.
 11. Given the importance which Kenya's Constitution placed on the rights of children, meant that an arrest of a child would be resorted to when the facts were such that there was no other less invasive way of securing the attendance of such a child before a court. That required police officers to consider and weigh all the facts carefully and exercise a value-judgment whether an arrest could be justified. Invariably that positioned the police in an invidious position. A question could be asked on how the police executed their constitutional mandate to prevent and combat crime without falling foul of article 53 of the Constitution. It did not mean that children would not, under no circumstances, be arrested or detained for it was a fact that children did commit crimes. Even heinous crimes for that matter. Statistics could attest to that. Sad as it might have been, it was a reality of the times.
 12. The fact that article 53(2) of the Constitution demanded that the best interests of children be accorded paramount importance did not mean that children's rights trumped all other rights. All that the Constitution required was that, unlike pre-2010, and in line with Kenya's solemn undertaking as a nation to create a new and caring society, children ought to have been treated as children—with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they were in conflict with the law, the court would not permit the hand of the law to fall hard on them like a sledgehammer lest they were destroyed. The Constitution demanded that Kenya's criminal justice system ought to have been child-sensitive.
 13. Contrary to the position before the Constitution of Kenya, 2010, Kenya's constitutional dispensation had ushered in a new era – an era where the best interests of a child had to be accorded paramount importance in all matters affecting the child—an era where Kenya, as a society, was committed to raising, developing and nurturing Kenya's children in an environment that conduced to their well-being.
 14. In line with its constitutional obligation, the High Court was obliged to interpret police actions premised on provisions relating to arrest, detention and searching of children through the prism of article 53 of the Constitution to determine if the police officers had accorded the applicant's best interests paramount importance. That was a constitutional obligation imposed on them by article 53 of the Constitution. Therefore, when the constitutionality of the manner in which the Police conducted the search was challenged, the court ought first to have determined whether, through the application of all legitimate interpretive aids, the impugned action was capable of being read in a

- manner that was constitutionally compliant.
15. The court, in line with its constitutional mandate to promote and protect the values and ethos that underpinned Kenya's Constitution, would undoubtedly find and hold that an arrest, search and detention of a child that violated privacy and dignity of the child was unconstitutional. The thrust of that conclusion was that, because an arrest, search and detention constituted an infringement of a person's rights to his or her liberty, dignity and privacy, all of which were enshrined in the Bill of Rights, the actions had to be justifiable according to the dictates of the Bill of Rights. Consequently, in line with Kenya's nascent human rights culture, before every arrest, search and a detention of a child was executed, police officers had to consider whether there were no less invasive methods which might have been used to bring the suspect before court and to secure the evidence.
 16. Article 259 of the Constitution enjoined the courts, in interpreting the Constitution, to promote the purposes, values and principles of the Constitution, advance the rule of law, and human rights and fundamental freedoms in the bill of rights, permit development of the law and contribute to good governance. That required courts to interpret the 4th respondents' actions in line with those constitutional values. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. That approach had been described as a mandatory constitutional canon of statutory and constitutional interpretation. The duty to adopt an interpretation that conformed to article 259 of the Constitution was mandatory.
 17. It was sufficient that in arresting a child, police officers had to do it through the lens of the Bill of Rights and pay special attention to the paramount importance of the best interests of such a child. The Constitution demanded that of the police as a constitutive part of the State. A failure to do that would render such an arrest, search and detention inconsistent with the Constitution and consequently unlawful.
 18. The 1st petitioner was detained and arraigned before the court the next day. Article 53(2) of the Constitution demanded that a child ought only to have been detained as a measure of last resort. In its ordinary and grammatical meaning, the expression a measure of last resort meant that the detention of a child ought to have happened when all else had failed. That required police officers to investigate other less invasive methods which could satisfy their legitimate purpose without having to detain a child. That was because, first, a detention constituted a drastic curtailment of a person's freedom which Kenya's Constitution guarded jealously, and would only be interfered with where there was a justifiable cause. Secondly, detention had traumatic, brutalising, dehumanising and degrading effects on people and of course, worse on children.
 19. It was a known fact that Kenya's detention centres, be it police holding cells or correctional centres, were not ideal places. They were not homes; they were bereft of most facilities which one required for raising children. It was worse for children. The atmosphere was not conducive to their normal growth, healthy psycho-emotional development and nurturing as children. Evidence by the 1st petitioner, the mother and the doctor was that the 1st petitioner was psychologically affected. She was seriously traumatised by the experience. Her detention had left her with serious psycho-emotional problems. Wounds that were festering. Those were the deleterious effects of incarceration against which the Constitution sought to protect children. That was the reason why, even when a child had to be detained, article 53(2) of the Constitution stipulated that it ought to have been as a last resort and for the shortest appropriate time. There was no evidence that the Police considered other options such as bail which the parents said they were ready to provide or why the police failed to admit her into bail pending charge which was a Constitutional Right.
 20. The detention of the petitioner in the circumstances of the case was not justifiable as a measure of last resort because both her parents reported to the police station, were ready to provide bail,

MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)

and, importantly, it was not shown that she was a flight risk; nothing prevented the police officers from leaving the 1st petitioner in the custody of her parents with appropriate instructions to ensure her appearance in court. There being no evidence that the police considered her circumstances to determine if her detention was a measure of last resort, hence, it followed that her detention was in flagrant violation of article 53(2) of the Constitution and therefore unlawful.

21. A strip search was generally humiliating, uncomfortable, and of an invasive nature, and in the instant case affected the dignity of the girls and in particular the 1st petitioner. The photographs annexed to the petition attested to that. The right to dignity was at the heart of the Constitution. It was the basis of many other rights. The basis was that of recognizing that every person had worth and value and had to be treated with dignity. That was also highlighted in the international treaties Kenya had assented to.
22. The right to dignity was further relevant to the specific social context in Kenya. In many instances, past and present, children and women's basic rights had been violated within society. Women and children were vulnerable to violence and unjust treatment due to economic inequalities and gross abuse of power as was evident in the instant case.
23. A strip search constituted an interference with the privacy of the individual concerned. It was recognized that common law recognized the right to privacy as an independent personality right. Privacy was therefore, a valuable aspect of one's personality. The right to privacy was protected in terms of both common law and the Constitution of Kenya, 2010. The right was however not absolute as there were competing factors such as maintaining law and order that could bear a significant limitation on the right. A careful weighing up of the right to privacy and other factors was necessary.
24. In the case of a constitutional invasion of privacy the following questions needed to be answered:
 - a. Whether the invasive law or conduct infringed the right to privacy in the Constitution; and b.
 - if so, whether such an infringement was justifiable in terms of the requirements laid down in the limitation clause of the Constitution. The act of causing the 1st petitioner and her colleagues to strip naked in the presence of the 4th and 5th respondents and of one another and other persons was undeniably an invasion of their privacy. The search was unlawful in that it violated her constitutional right to privacy and dignity. Even if the court assumed that the 1st petitioner and her colleagues stripped naked without a request to do so, the presence of other persons while they did so, would also amount to wrongful conduct.
26. Searching of any person that involved the exposure of that person's naked body, and in particular the most private parts, to the gaze of another person, was degrading to the person being so exposed. The conduct of the 4th and 5th respondents with regard to the 1st petitioner and her colleagues was inherently inhumane, and amounted to a degrading assault upon their physical, emotional and psychological integrity.
27. Children needed special protection because they were among the most vulnerable members of society. They were dependent on others - their parents and families, or the State when those failed - for care and protection. As a result, the drafters of Kenya's Constitution made children's rights a priority - and stated that the best interests of a child were the overriding concern when it came to any matter affecting a child. Thus, the inclusion in the Bill of Rights of a provision on the rights of the child was an important development for Kenyan children, many of whom had suffered and continued to suffer long imprisonments and detention in harsh conditions.
28. The objective of the special protection was to ensure that the justice system treated every child in conflict with the law in a manner that recognized and upheld human dignity and worth, and instilled in the child respect for the fundamental rights and freedom of others. The rule considered the developmental age of the child and the desirability of the child's reintegration in and assumption

- of a constructive role in society in accordance with the principles of balanced and restorative justice.
29. The police were specifically required to search women within the limits provided under the law and had to uphold the values enshrined in the Constitution. In the Constitution of Kenya, 2010 constitutional dispensation, an unlawful interference with a person's right was a constitutional infringement. The police failed to exercise their duties in line with the law, the Constitution and uphold the Bill of Rights. In terms of article 53 of the Constitution, in all matters concerning children, including litigation or police investigations, their best interests were of paramount importance. Article 53 of the Constitution had to be interpreted so as to promote the foundational values of human dignity, equality and freedom. The reach of article 53 of the Constitution extended beyond those rights enumerated in the Bill of Rights, it created a right that was independent of the other rights specified in the Bill of Rights. It established a set of rights that courts were obliged to enforce.
 30. The ambit of the provisions was undoubtedly wide. The comprehensive and emphatic language of article 53(d), (f) and (2) of the Constitution indicated that just as law enforcement had to always be gender-sensitive, it had to always be child-sensitive; those statutes had to be interpreted and the common law developed in a manner which favoured protecting and advancing the interests of children; and that courts had to function in a manner which at all times showed due respect for children and their rights.
 31. The inclusion of a general standard, the best interest of a child, for the protection of children's rights in the Constitution would have become a benchmark for review of all proceedings in which decisions were taken regarding children. Courts and administrative authorities would be constitutionally bound to give consideration to the effect their decisions would have on children's lives.
 32. There existed in the case the reasonable privacy interest of the 1st petitioner who was depicted in the images. There was also a significant public interest in ensuring that no duplication or distribution occurred in the disclosure process. Those interests ought not to have been further compromised by the copying, viewing, circulation or distribution of the images beyond what was reasonably necessary to give effect to her constitutional rights.
 33. It was evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor was compelling and that a democratic society rested, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. The prevention of exploitation and abuse of children constituted a government objective of surpassing importance.
 34. The harm of child abuse was real and ongoing and the State was under a constitutional obligation to combat it. To hold otherwise would place the State in jeopardy of having to close the gate, as it were, after the horse had bolted and might have signaled a breach by the State of its obligation towards children. Children's dignity rights were of special importance. The degradation of children through publishing their nude images was a serious harm which impaired their dignity and contributed to a culture which devalued their worth.
 35. Society had recognised that childhood was a special stage in life which was to be both treasured and guarded. The State had to ensure that the lives of children were not disrupted by overzealous police officers who in total disregard of the law, the Constitution and children's rights engaged in acts as was witnessed. There was obvious mental and physical harm suffered by the victims of child abuse. The 1st petitioner and her colleagues were forced to pose naked for photographs to be taken. Even if the police desired to gather evidence, they ought to have done it within the confines of the law. The chief purpose of the statutory provisions prescribing the manner in which women were to be searched was to protect their dignity, humanity and integrity.
 36. A child whose nude images were circulated in the media had to go through life knowing that the

MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)

- image was probably circulating within the mass distribution network for the public to see. That experience could haunt him or her for long because it created a permanent record of the child's image. The psychological harm to the child was exacerbated if he or she knew that the photograph continued to circulate among viewers who might have used it to derive sexual satisfaction or other purposes. Maintaining the integrity of the administration of justice was also an important principle of fundamental justice. The principles of fundamental justice operated to protect the integrity of the system itself. The Constitution guaranteed individuals a fundamentally fair trial and not the fairest of all possible trials. A fair trial included a fair investigation and arrest process.
37. The photographing and publication of the child's images struck at the dignity of the child, it was harmful to the child, and it was potentially harmful because it invaded on her privacy and dignity. Dignity was a founding value of Kenya's Constitution. It informed most if not all of the rights in the Bill of Rights and for that reason was of central significance in the limitations analysis. The value of dignity in Kenya's constitutional framework could not therefore be doubted. The Constitution asserted dignity to contradict Kenya's past in which human dignity was routinely and cruelly denied. It asserted it to inform the future, to invest in Kenya's democracy respect for the intrinsic worth of all human beings.
38. Human dignity informed constitutional adjudication and interpretation at a range of levels. It was a value that informed the interpretation of many, possibly all, other rights. The court acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity was also a constitutional value that was of central significance in the limitations analysis. Dignity was not only a value fundamental to Kenya's Constitution; it was a justiciable and enforceable right that had to be respected and protected.
39. Article 1 of the Universal Declaration of Human Rights stressed the importance of human dignity. It stated that all human beings were born free and equal in dignity and rights. Children merited special protection by the State and had to be protected by legislation which guarded and enforced their rights and liberties. That was recognised in article 53 of the Kenyan Constitution. Children's dignity rights were of special importance. The degradation of children through illegal body search as had happened and taking nude photos was a serious harm which impaired the petitioners' dignity and devalued her worth.
40. The 1st petitioner was charged in a criminal court. She was convicted on her own plea of guilty by a court of competent jurisdiction. The petitioner ought to have challenged the conviction either by way of an appeal or by way of a revision as provided under the provisions of the Criminal Procedure Code. There was a well laid down statutory mechanism of challenging the said conviction. Therefore, it would have been inappropriate for the court to exercise its jurisdiction and quash the said decision.
41. The Constitution recognized the hierarchy of Kenyan courts and the appellate mechanism through which decisions of inferior courts were subjected to appeals to the higher courts. A holistic and purposive reading of the Constitution would have therefore entailed construing the unlimited original jurisdiction conferred on the High Court by article 165(3)(a) and article 23(3) of the Constitution in a way that would have recognized and upheld its appellate jurisdiction to hear and determine appeals from the lower court.
42. A party could not be heard to move a court in glaring contradiction of the judicial hierarchal system of the land on the pretext that an injustice would be perpetrated by the lower court. Courts of justice had the jurisdiction to do justice and not injustice. However, the law acknowledged that judges were human and were fallible hence the judicial remedies of appeal and review. A party could not in total disregard of those fundamental legal redress frameworks move the apex court.

43. A person's image constituted one of the chief attributes of his or her personality, as it revealed the person's unique characteristics and distinguished the person from his or her peers. The right to the protection of one's image was thus one of the essential components of personal development. It mainly pre-supposed the individual's right to control the use of that image, including the right to refuse publication thereof. Personality rights, generally speaking, consisted of two types of rights, the right to privacy and the right of publicity. The right of privacy was the right to keep one's image and likeness from exploitation without permission or compensation and generally applied to members of the general public. The right of publicity was the exclusive right of an individual to market his or her image, likeness or persona for financial gain.
44. Aggravated damages were the special and highly exceptional damages awarded against a defendant by a court, when his or her conduct amounted to tortious conduct subjecting the plaintiff to humiliating and malicious circumstances. Additional damages were also awarded in situations where a plaintiff was subjected to distress, embarrassment, or humiliation.
45. Aggravated damages were basically compensatory in nature and they were awarded for the aggravated damage that was caused to a plaintiff. Aggravated damages were determined on the basis of the intangible injury inflicted on a plaintiff. Intangible injury included the pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that were caused by the conduct of a defendant. When compared to punitive damages, aggravated damages required proof of injury. Aggravated damages could be attained as additional compensation if the injured established that a breach caused mental distress.
46. An award of compensation was an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation would, however, depend upon the facts and circumstances of each case. An award of damages entailed an exercise of judicial discretion which would have been exercised judicially and that meant that it had to be exercised upon reason and principle and not upon caprice or personal opinion.
47. Arriving at the award of damages was not an exact science. No monetary sum could really erase the scarring of the soul and the deprivation of dignity that some of those violations of rights entailed. When exercising that constitutional jurisdiction, the court was concerned to uphold, or vindicate, the constitutional right which had been contravened. A declaration by the court would have articulated the fact of the violation, but in most cases more would be required than words. If the person wronged had suffered damage, the court might have awarded compensation.
48. An award of compensation would go some distance towards vindicating the infringed constitutional right. How far it went would depend on the circumstances, but in principle it might have not sufficed. The fact that the right violated was a constitutional right added an extra dimension to the wrong. An additional award, not necessarily of substantial size, would have been needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All those elements had a place in helping the court arrive at a reasonable award. The court had to consider and have regard to all the circumstances of the case.
49. It was self-evident that the assessment of compensation for an injury or loss, which was neither physical nor financial, presented special problems for the judicial process, which aimed to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity were incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency was bound to be an artificial exercise.
50. There was no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it was a philosophical and policy exercise more than a legal or logical one. The award ought to have

MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (*Amicus Curiae*)

been fair and reasonable, fairness being gauged by earlier decisions; but the award ought to also of necessity have been arbitrary or conventional. No money could provide true restitution.

51. Although they were incapable of objective proof or measurement in monetary terms, hurt feelings were none the less real in human terms. The courts and tribunals had to do the best they could on the available material to make a sensible assessment, accepting that it was impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

Petition partly allowed; no orders as to costs.

Orders

- i. A declaration was issued that the 4th respondents' conduct of searching the 1st petitioner in the presence of male police officers and/or other students and members of the public and photographing her or allowing or permitting third parties to take her nude photographs was a gross violation of the law and an infringement of her constitutional rights to dignity, privacy and her right not to be subjected to degrading treatment.
- ii. A declaration was issued that the manner in which the police strip searched the 1st petitioner and the other students was a gross violation of the statutory provisions governing conduct of Police while searching women, a violation of article 53(d), (f) and (2) of the Constitution and the Children Act.
- iii. The order of judicial review seeking to quash the conviction and sentence of the 1st petitioner in Baricho Criminal Case No 1262 of 2015 refused on grounds that the law provided for right of appeal or revision against the said decision.
- iv. A declaration was issued that the 1st petitioner was entitled to damages for violation of her constitutional rights to dignity, degrading treatment and privacy.
- v. Judgement entered in favour of the 1st petitioner against the respondents jointly and severally for a global sum of Ksh 4,000,000 by way of general damages.
- vi. The above sums would attract interests at court rates from date of filing suit until payment in full.

Cases

East Africa

1. *Mbogo & another v Shah* [1968] EA 93 – (Explained)
2. *Ngoge v Kaparo* [2012] 2 KLR 419 – (Explained)
3. *Wamwere, Koigi v Attorney General* Civil Appeal No 86 of 2013; [2015] eKLR – (Applied)
4. *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others* Petition No 27 of 2014; [2014] eKLR – (Explained)

South Africa

1. *Bernstein and Others v Bester NO and others* 1996 (2) SA 751; [1996] ZACC 2; 1996 (4) BCLR 449 – (Applied)
2. *Centre for Child Law v Governing Body of Hoërskool Fochville & another* [2015] ZASCA 155; [2015] 4 All SA 571 – (Applied)
3. *Centre for Child Law v Minister for Justice and Constitutional Development and others* [2009] ZACC 18; 2009 (6) SA 632; 2009 (11) BCLR 1105 – (Explained)
4. *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 – (Explained)
5. *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 – (Applied)
6. *Kate v MEC for the Department of Welfare, Eastern Cape* [2005] 1 All SA 745 – (Applied)
7. *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 – (Explained)

8. *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232; 2007(2) SACR 539 – (Applied)
9. *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 – (Explained)
10. *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* [2013] ZACC 35; 2014 (2) SA 168; 2013 (12) BCLR 1429 – (Explained)

Canada

R v O'Connor [1995] 4 SCR 411; (1995) 33 CRR (2d) 1; 103 CCC (3d) 1 – (Explained)

France

Von Hannover v Germany (No 2) Grand Chamber Judgment of 7 February 2012 – (Applied)

United States

1. *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 – (Applied)
2. *Beard v Whitmore Lake School Dist.*, 402 F 3d 598, 601 (6th Cir, 2005) – (Followed)
3. *New York v Ferber*, 458 US 747 (1982) – (Explained)
4. *Osborne v Ohio*, 495 US 103 (1990) – (Explained)
5. *Palko v Connecticut*, 302 US 319, 325 (1937) – (Applied)

Texts and Journals

1. Currie, I., De Waal, J., (Eds) (2013) *Bill of Rights Handbook* Cape Town: Juta & Company Ltd 6th Edn p 295
2. Feldman, D., 1999. *Human Dignity as a Legal Value -Part I*, Public Law pp 682, 690-91
3. Jurado, R., 1998-1999. *The Essence of her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards* Journal on Gender, Social Policy and the Law Vol 7 p 4.
4. Lillich, RB., (Ed) (1984) *The Human Rights of Aliens in Contemporary International Law* Manchester: Manchester University Press Vol 41

Statutes

East Africa

1. Children Act, 2001 (Act No 8 of 2001) sections 4 (2); 13; 18; 19; 22; 76 – (Interpreted)
2. Constitution of Kenya, 2010 articles 2(5); 19; 21; 23(3); 24; 25; 28; 29; 31; 49(h); 52; 53(1)(d),(f), (2); 156, 157(4)(10)(11); 259; 260; 165(3)(a) – (Interpreted)
3. Criminal Procedure Code (cap 75) In general –(Cited)
4. Narcotic Drugs and Psychotropic Substances Act, 1994 (Act No 4 of 1994) sections 3(2); 39(1) – (Interpreted)
5. National Police Service Act, 2011 (Act No 11A of 2011) section 95(3) – (Interpreted)

International Instruments and Covenants

1. African Charter on Human and Peoples' Rights (ACHPR), 1981 article 2-5
2. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 article 16(1)
3. Universal Declaration of Human Rights (UDHR), 1949 article 1

Advocates

Mr Ashimosi for the 3rd respondent (DPP)

Nzioka v Republic**3. Court sets aside the 7 years jail term and substitutes thereof 3 years under supervision of a probation officer and appellant to sensitize his congregants about the Sexual Offences Act at least one Sunday in a month**

Significance: The case highlights the unique sentence imposed on the appellant in consideration of the circumstances and history of the matter.

Nzioka v Republic

Criminal Appeal No E058 of 2023

High Court at Mombasa

A Ong'injo, J

March 7, 2024

***Criminal Law** – sexual offences – indecent act with a child – ingredients to be proved - where appellant breached the Covid-19 protocols – where appellant breached the church regulations that children were not allowed to enter the parish house - whether the prosecution proved the offence of indecent act with a child beyond reasonable doubt against the appellant - Sexual Offences Act section 11(1)*

Brief facts

The appellant Dominic Muli Nzioka was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that Dominic Muli Nzioka on the day of September 28, 2020 at Mtopanga area, Mtopanga location in Kisauni Sub-County within Mombasa County intentionally and unlawfully touched the breast of S.W. a child aged 16 years with his fingers. The appellant was convicted and sentenced to serve 7 years in jail term. Being aggrieved by the conviction and sentence the appellant filed the instant appeal.

Issues

- i. Whether the prosecution proved the offence of indecent act with a child beyond reasonable doubt against the appellant.
- ii. Whether the trial court complied with section 200 of the Criminal Procedure Code.

Held

1. The ingredients for the offence of indecent act as provided above were the age of the complainant and proof of indecent act. The issue of the age of the complainant was not disputed. What was in dispute was the indecent act of touching the complainant's breasts by the appellant. It was also not in dispute that the complainant and the appellant were alone in the priest's house at St. James Mtopanga Parish.
2. The complainant, a high school student, was at home following the Covid-19 pandemic lockdown which resulted in institutions of learning being closed indefinitely. That was accompanied by curfews to minimize the viral infection spreading as a result of human interaction. The appellant either called the complainant to visit him or the complainant called the appellant. It was not clear who initiated the visit as the call logs and text messages from their phones were not investigated. Evidence however confirmed that the complainant left their house without telling her twin sister and her 12-year-old brother where she was going and when PW2 called the house and found she was not in, she suspected she had gone to the church but the appellant did not pick her calls.
3. Evidence was adduced by PW2, the mother of the complainant that she had warned the appellant against chatting with her daughter, the complainant in 2018. The appellant in response told PW2

that he was a counselor and it was the complainant's choice as she felt free talking to him about her personal issues. The appellant having been warned by the mother of the complainant to stop interacting with her, it was irresponsible for him to say that it was the complainant's choice that he counselled her without the parent's permission and without proof that he was a professional counselor. PW3, the parish priest, told the court that minors were not allowed to enter the parish house unless they were in a group.

4. The appellant having breached the Covid-19 protocols and having breached the church regulations that children were not allowed to enter the parish house as well as defying the complainant's mother that he should not interact with her daughter made the court believe that the trial court was proper in finding that the prosecution's evidence had been proved beyond reasonable doubt. The appellant did not only defy the protocols and rules but he was also only with the complainant in the parish house. The appellant stood in the position of a spiritual guardian to the complainant and encouraging the complainant to defy the parent was contrary to the 10 commandments that he should uphold and promote.
5. Hon Nelly Kariuki (PM) took over the conduct of the proceedings on June 30, 2022 and on November 15, 2022 it was indicated that the provisions of section 200(3) of the CPC were explained to the accused person and Mr. Kaburu for the accused person said the matter could proceed from where it had reached. The evidence of the Investigating officer, PW4, was taken and the prosecution's case closed. It was therefore not true that the trial court did not appreciate the provisions of section 200 of the Criminal Procedure Code. That the predecessor of Hon. Kariuki would have arrived at a different verdict was speculation on the part of the appellant's counsel.

Appeal partially allowed.

Orders

- i. *In consideration of the circumstances and history of the matter, including the Pre-Sentence Report dated August 10, 2023 filed in the trial court, the court set aside the 7 years jail term and substitutes thereof 3 years under supervision of a probation officer.*
- ii. *While on probation, the appellant was ordered to sensitize his congregants about the Sexual Offences Act at least one Sunday in a month. Upon completion of the period under supervision, the parish priest and the probation officer would file a report in court to confirm compliance.*

Cases

East Africa

David Njuguna Wairimu v Republic [2010] eKLR – (Applied)

Statutes

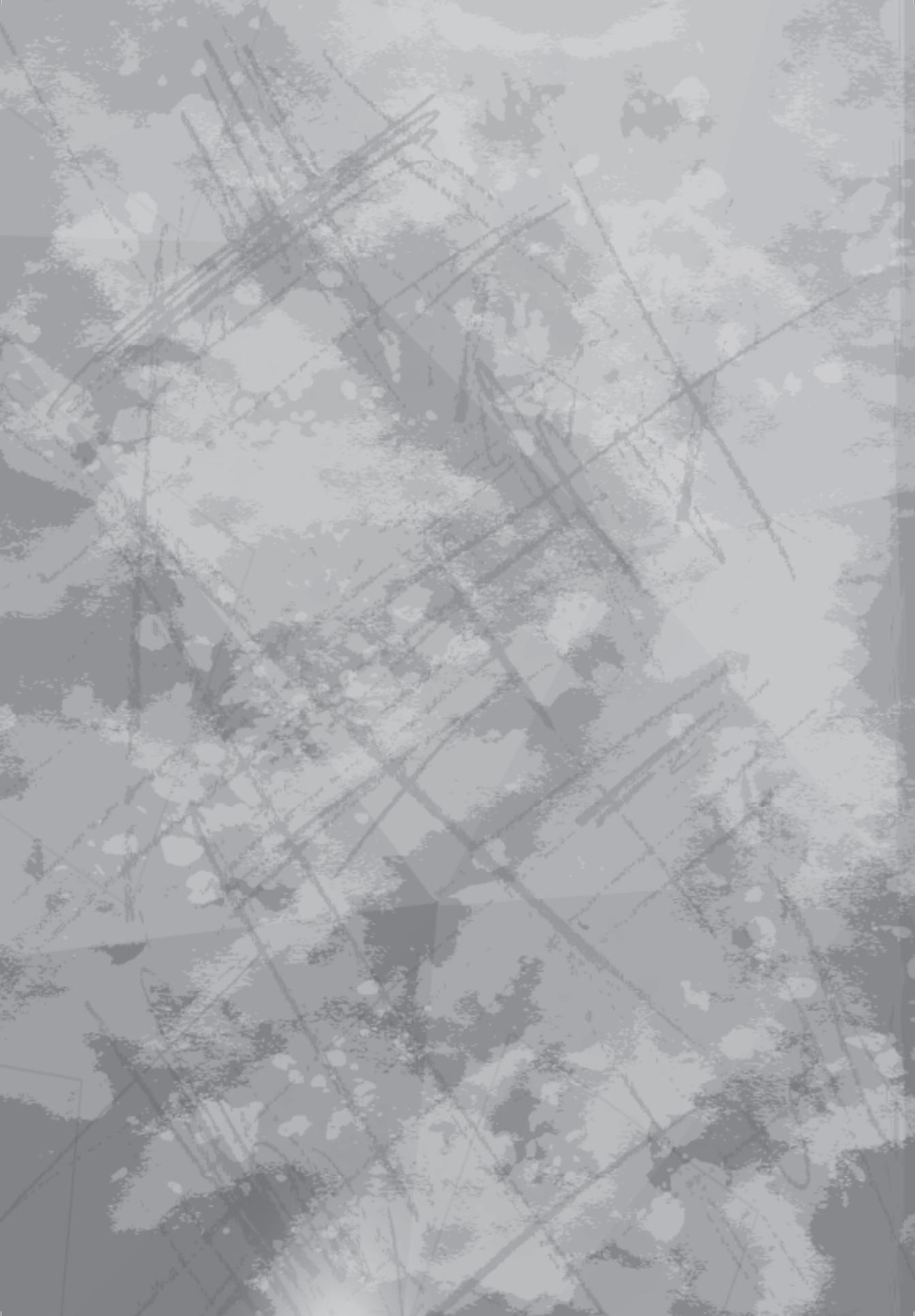
East Africa

1. Sexual Offences Act, 2006 (Act No 3 of 2006) section 11(1) – (Interpreted)
2. Evidence Act (cap 80) section 124 – (Interpreted)
3. Oaths and Statutory Declarations Act section 19 – (Interpreted)
4. Criminal Procedure Code (cap 75) section 200(3) – (Interpreted)

Advocates

None mentioned

I. Legislative and Administrative Gaps



Legislative and Administrative Gaps

Legislative and Administrative Gaps

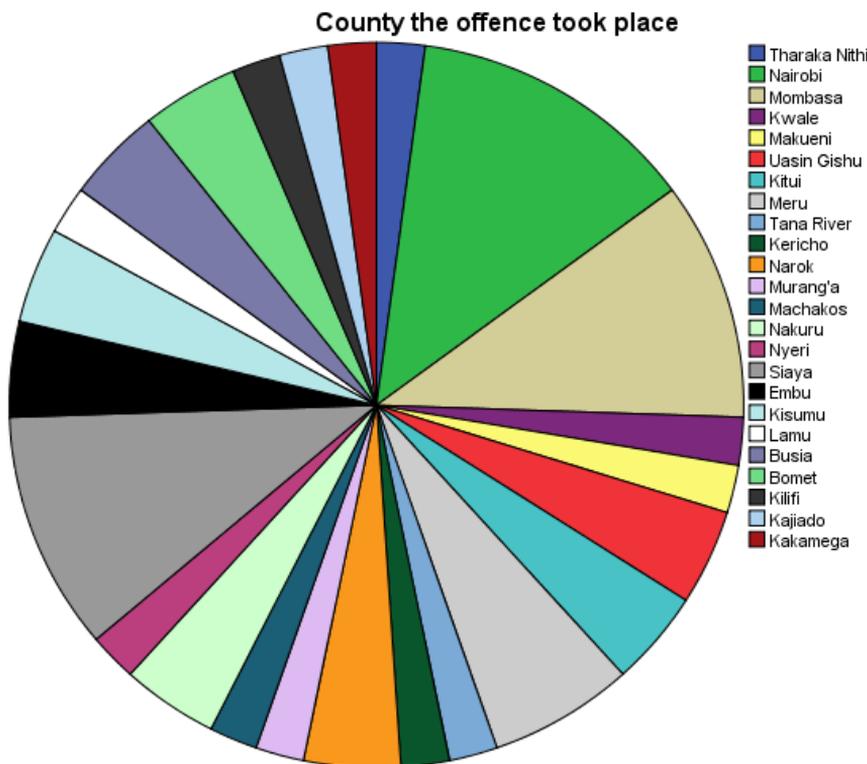
For assessing the constitutionality, validity, efficacy, and utility of statutory legislation as well as government administrative activities, judicial opinions are a crucial tool. The cases mentioned in the digest have revealed statements concerning a potential area of constitutional, statute, and administrative law reform. The process of administrative and legal reform is significantly influenced by law reform. The following are a few of the legislative and administrative shortcomings that have been found and brought to light by the cases resulting from various court rulings.

1. The court acquitted the appellant noting that even in the absence of express statutory provision it was always the duty of the court to ascertain the competence of a child to give evidence; it was not sufficient to ascertain that the child had enough intelligence to justify the reception of the evidence, but also that the child understood the difference between the truth and falsehood. *Ogola v Republic* [2023] eKLR; Criminal Appeal No 135 of 2017.
2. Court of Appeal recommends review of age of sexual consent under the Sexual Offences Act. *Eliud Waweru Wambui v Republic* [2019] eKLR; Criminal Appeal No 102 of 2016.
3. 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, fell foul of article 28 of the Constitution which provided that every person had inherent dignity and the right to have that dignity respected and protected. *Muriungi v Republic* [2023] KEHC 512 (KLR) (2 February 2023) (Judgment); Criminal Appeal No E091 of 2022.
4. Failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence was a violation of the positive obligation on the Kenyan State. *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* [2020] eKLR; Petition No 122 of 2013.
5. Court ordered the Attorney General to forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011) with a view to prohibiting all harmful practices of FGM as set out in the judgment. *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR; Constitutional Petition No 244 of 2019.
6. The Sexual Offences Act prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose. That fell afoul of article 28 of the Constitution of Kenya, 2010 which provided that every person had inherent dignity and the right to have that dignity respected and protected. *Kibara v Republic* [2022] KEHC 15412 (KLR)
 Also in the case of *Wilson Kipchirchir Koskei v Republic* Criminal Appeal No 333 of 2013 the court held that time had also come for Parliament to reconsider the provisions of the Sexual Offences Act particularly on the question of taking away or limiting judicial discretion on sentencing.
7. The Rules Committee needed to reconsider section 20(1) of the Sexual Offences Act on whether a man could commit incest on a male relative. *JKM v Republic* Criminal Appeal No 54 of 2018
 - 8a. Time had come for Kenya's criminal justice system to review sentencing, penal laws and policies and guidelines to determine which could be adjusted to reduce the elderly prisoner population without risking public safety;

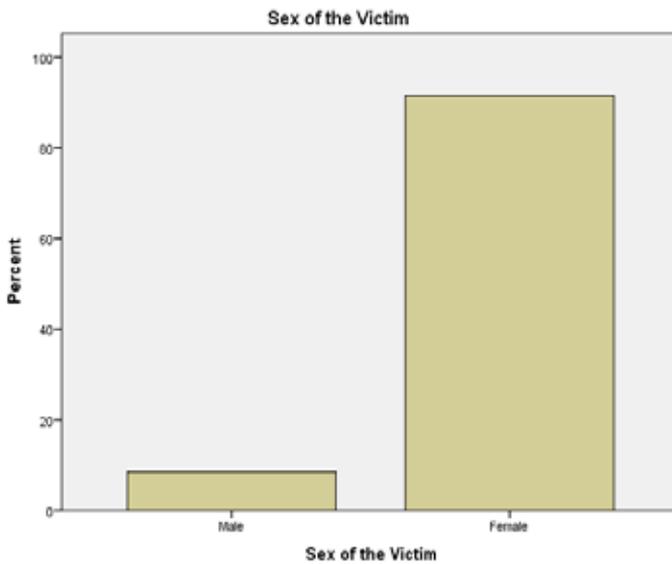
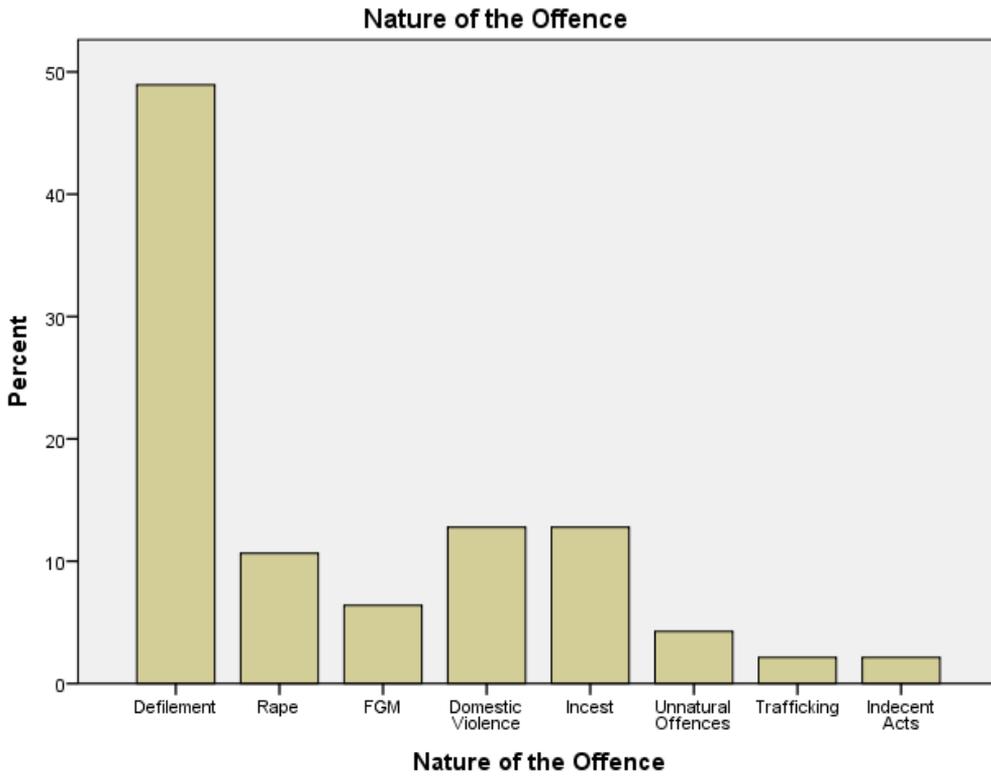
- b. Time had also come for Parliament to reconsider the provisions of the Sexual Offences Act particularly on the question of taking away or limiting judicial discretion on sentencing. *Wilson Kipchirchir Koskei v Republic* Criminal Appeal No 333 of 2013.
- 9. The Sexual Offences Act does not provide for offences occasioned by when a person indecently touches another person against his/her will or other parts of the body other than those provided under section 2. *John Kimani Njoroge v Republic* Criminal Appeal No 183 of 2014.
- 10. Policy makers need to focus on the fact that incest is a more serious offence than defilement to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors are the victim. *NAM v Republic* Criminal Appeal No 3 of 2019.
- 11. Court holds that there is a need to clearly set out the connecting threads to the provisions of the Children Act and the Victim Protection Act so as to ensure victims of crime, who are children, are protected. *Daniel Onyondi Moi v Republic* Criminal Case No 2 of 2017
- 12. There is need for review of the age of sexual consent under the Sexual Offences Act. *Martin Charo v Republic* Criminal Appeal No 32 of 2015

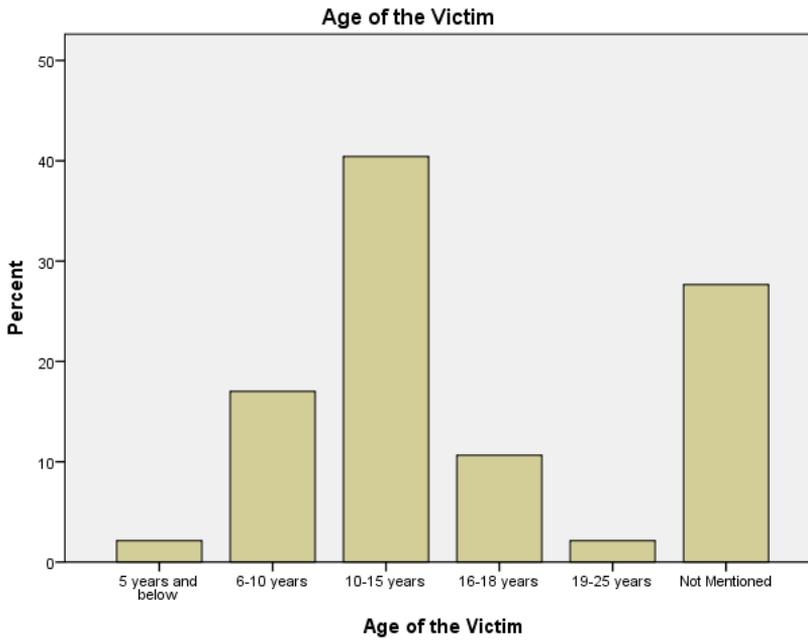
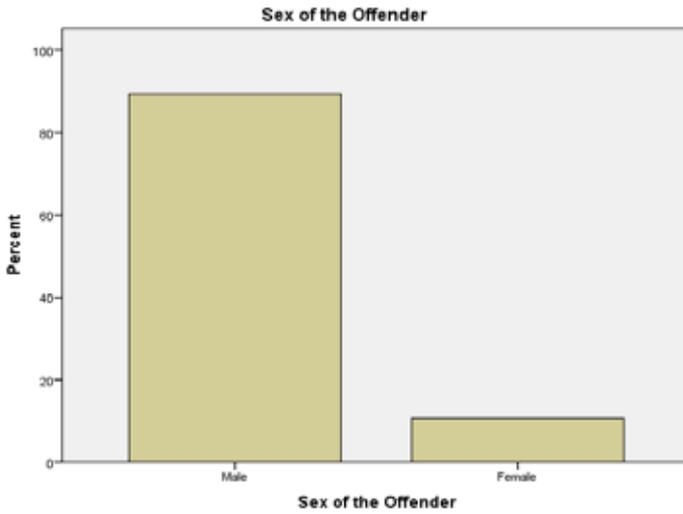
Trends in Sexual Gender Based Violence Cases

The Sexual Gender Based Violence is composed of seven thematic areas namely; defilement, rape, FGM, domestic violence, incest, unnatural offences and trafficking in person. From these themes, some trends that cut across them have been identified below, based on the cases handled in this case digest.

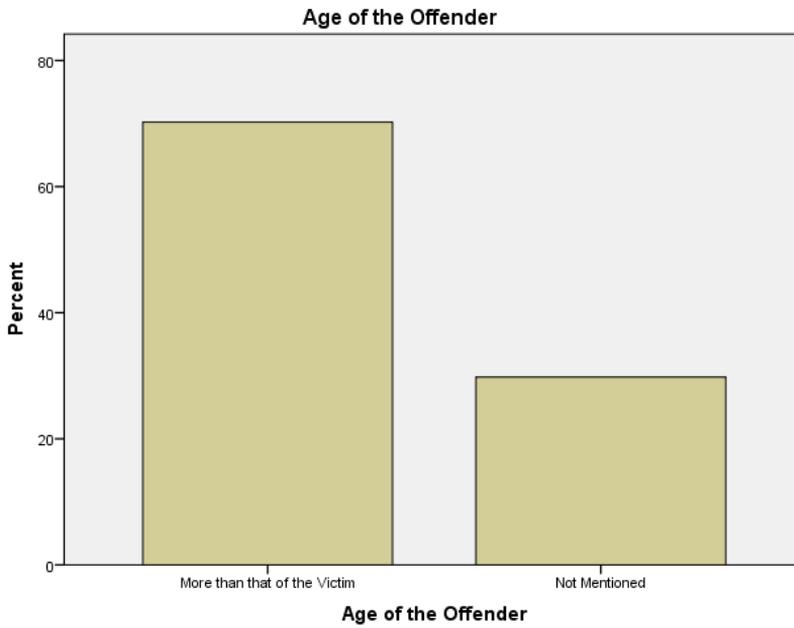


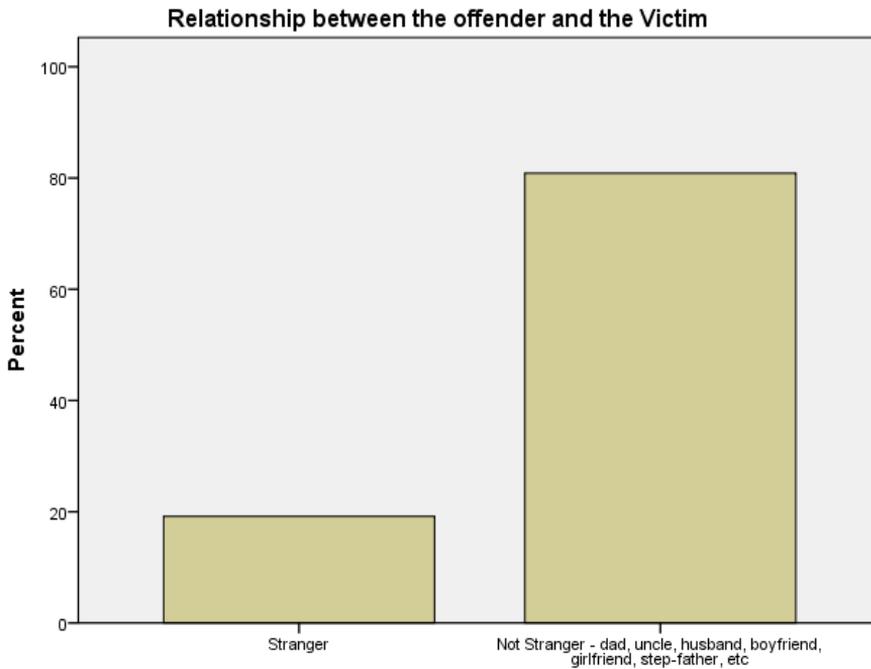
Legislative and Administrative Gaps



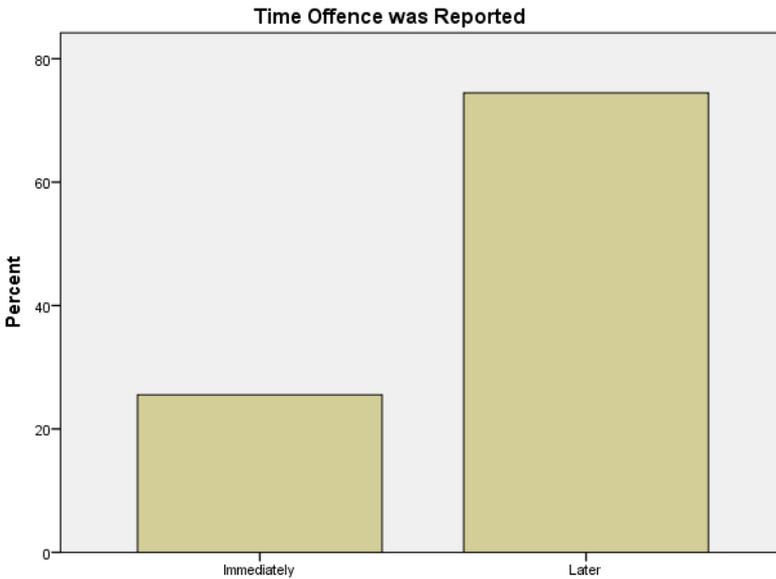


Legislative and Administrative Gaps



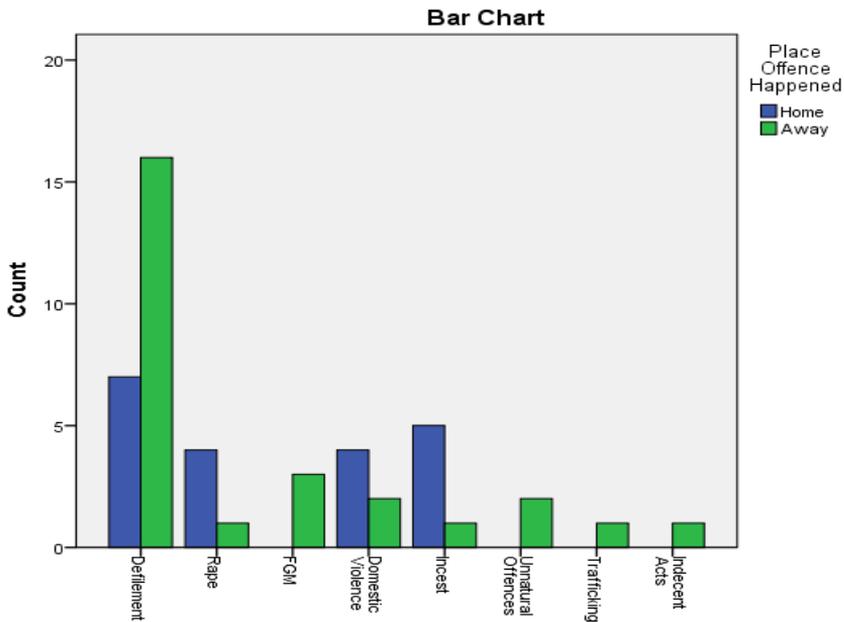


Relationship between the offender and the Victim

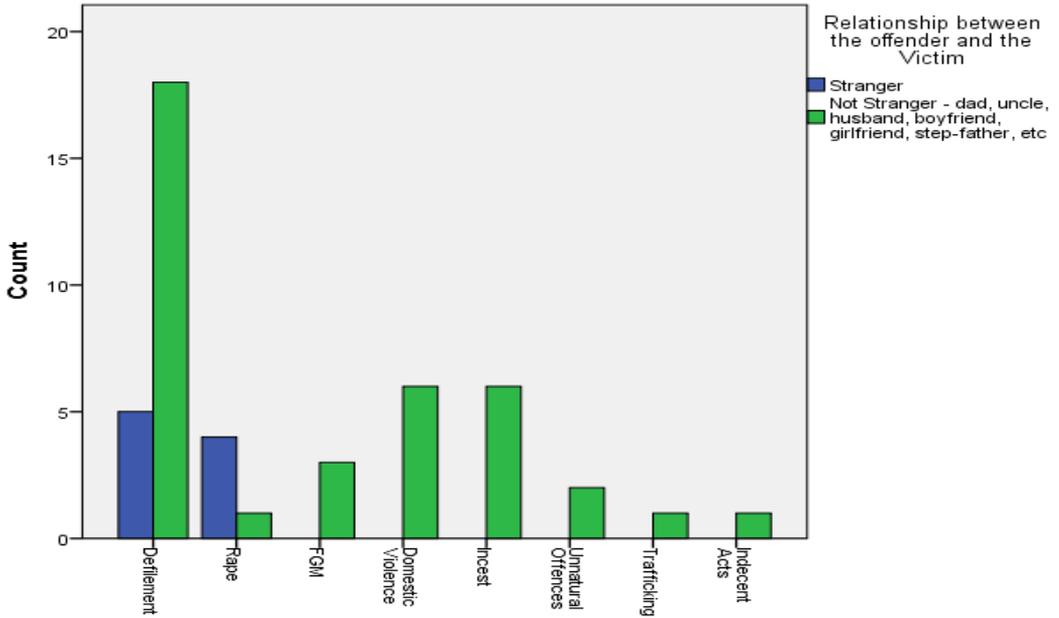


Time Offence was Reported

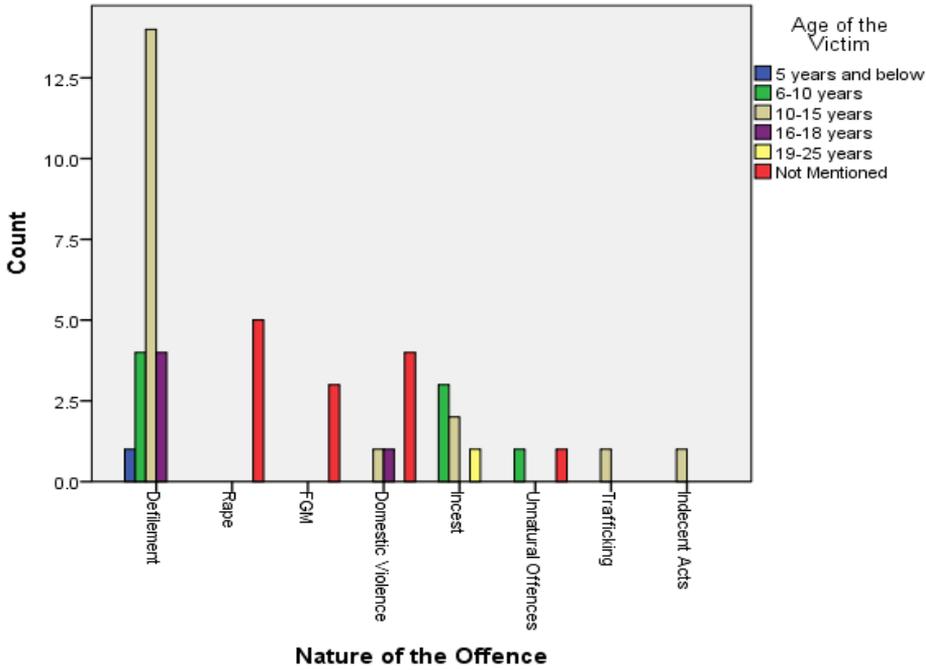
Legislative and Administrative Gaps



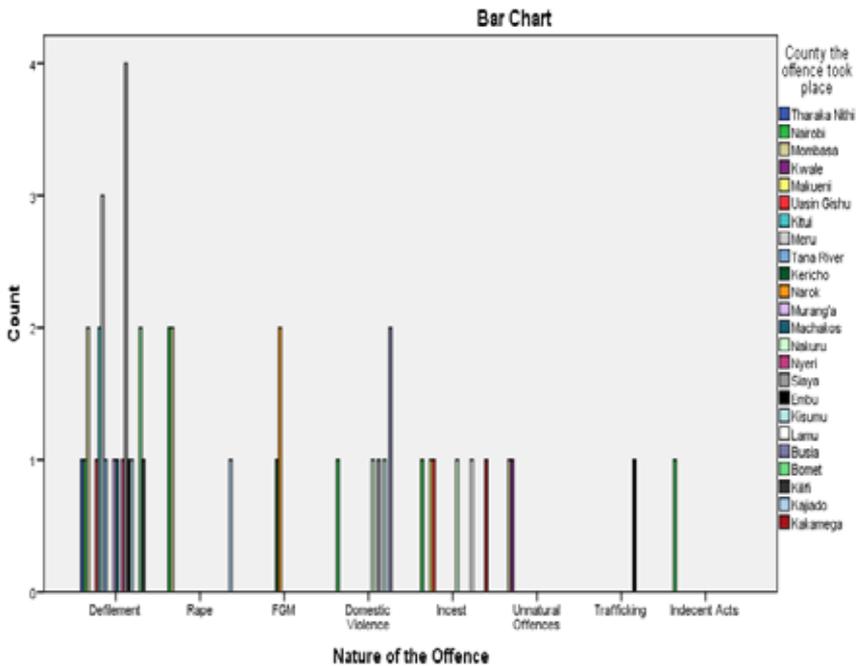
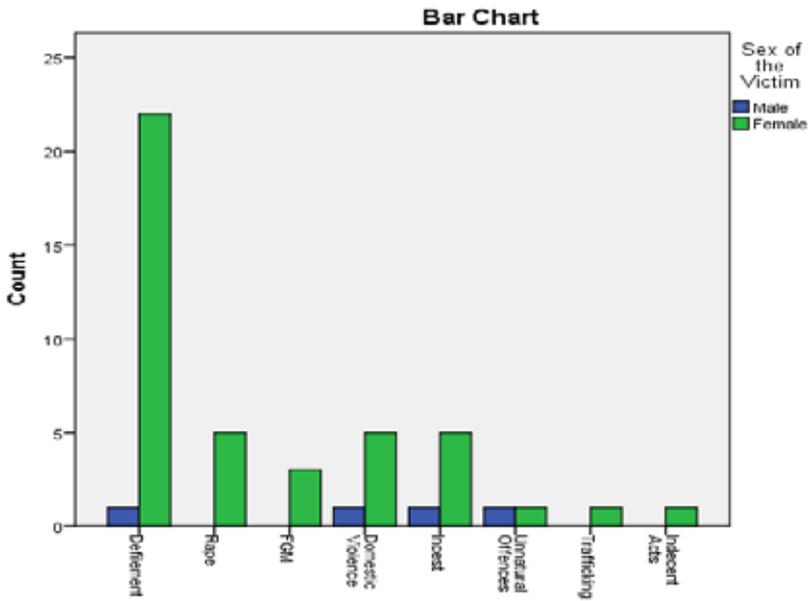
Bar Chart



Bar Chart



Legislative and Administrative Gaps



J. International Jurisprudence

United Kingdom

1. **The litigation process adopted by the Court of Appeal was flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm pursuant to the care orders made.** In the matter of H-W (Children); In the matter of H-W (Children) (No 2) [2022] UKSC 17
2. **In having capacity to decide to have sexual relations with another person, a person needs to understand that the other person's capacity to consent to the sexual activity discusses that before and throughout the sexual activity.** A Local Authority v JB (By his Litigation Friend, the Official Solicitor) [2021] UKSC 52

Canada

1. **Consent to one form of sexual touching or penetration was not agreement to any or all forms of sexual touching or penetration.** K v Her Majesty the Queen & 7 others 2022 SCC 33
2. **The relationship between consent and the capacity to give consent in a sexual offence case.** R v GF & RB 2021 SCC 20

Tanzania

1. **Mandatory pregnancy testing, detention and expulsion from school of pregnant and married girls with no chance of re-entry was a violation of their right to education and also amounted to cruel, inhuman and degrading treatment.** Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania 0012/Com/001/2019
2. **In proving sexual offences, the best evidence is that which comes from the victim but if the victim is a child, then he/she must be treated in accordance with section 127(2) of the Evidence Act during adducing of evidence.** Musa v Republic 1 of 2022

Zimbabwe

1. **An early complaint was admitted to show consistency by the complainant, not as proof of the sexual offence.** Baloyi v Republic HMA 14-18/HCA 11-17
2. **Crucial witnesses have to be called during trial in a sexual offence of rape to avoid the danger of false incrimination on the aspect of consent.** R v Dhlamini HMA 5-18/CRB MSVR 133/17

Sierra Leone

1. **What amounts to penetration in an offence of defilement?** R v Kamara CR No 6457 of 2020

Liberia

1. **Failure by a prosecution to prosecute an offence of rape, on account of failure of witness absence was an abuse of an accused person's right to fair and speedy trial.** R v Managbolor 2021



In the matter of H-W (Children); In the matter of H-W (Children) (No 2)

United Kingdom

1. The litigation process adopted by the Court of Appeal was flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm pursuant to the care orders made

Significance: There was no evaluation of the extent of the risk of significant harm by way of sexual harm, nor of any available means by which the risk might be reduced for each child.

In the matter of H-W (Children); In the matter of H-W (Children) (No 2)

[2022] UKSC 17

Supreme Court of the United Kingdom

Lord Hodge, DP and SCJ; Lord Kitchin, Lord Burrows, Lord Hughes & DS Keegan, SCJJ

June 15, 2022

Family Law – child custody – child protection and restraining orders – care orders – where care orders for the removal of three of the 1st appellant’s children into foster care were made without considering the safety of the children – whether it was necessary as a matter of law to assess the likelihood that, if left in the 1st appellant’s care, (a) the children would suffer sexual harm; (b) the consequences of such harm arising; (c) the possibility of reducing or mitigating the risk of such harm; and (d) the comparative welfare advantages and disadvantages of the options presented – European Convention on Human Rights, 1998, article 8; Children Act, 1989, sections 1(3)(4) and 31(2)(a).

Family Law – child custody – child protection and restraining orders – care orders – where care orders for the removal of three of the 1st appellant’s children into foster care were made without considering the safety of the children – whether the Court of Appeal erred in law by failing to make any proper assessment of the likelihood that, if left in the 1st appellant’s care, (a) the children would suffer sexual harm; (b) the consequences of such harm arising; (c) the possibility of reducing or mitigating the risk of such harm; and (d) the comparative welfare advantages and disadvantages of the options presented – European Convention on Human Rights, 1998, article 8; Children Act, 1989, sections 1(3)(4) and 31(2)(a).

Brief facts

The appeals concerned care orders made in relation to three children, who were referred to as C, D and E to preserve their anonymity. C, D and E were then aged fourteen, eleven and nine respectively. The appellants were the children’s mother, M, and her partner, F3. In addition to C, D and E; M had three other children. The eldest were A, aged 22, and B, aged 19; both of whom were independent and lived outside the family unit. M also had a young child with F3 who was referred to as F. The other children in the family unit had different fathers. C and D’s father was referred to as F1, whilst E’s father was F2. C, D and E lived at home with their mother and F3, who acted as their stepfather. F also lived in the family home.

The local authority began its involvement with the family when M herself was a child. She suffered from sexual abuse at the hands of E’s father, F2. Aside from F2 and issues of sexual risk, there had also been local authority involvement with the family over many years due to issues of neglect. Court proceedings for the removal of C, D and E from the family home were first attempted in March 2012. That was precipitated by F2 being found in the family home. At that time, the children were not removed from

the family home, although A (who was then a child) was made the subject of a care order. An injunction was also made against F2 to prevent him from visiting the family home. In October 2019, the family's case was closed by social services on the basis that the family had made considerable progress and the children were happy.

The instant proceedings were triggered by the conduct of A. He was a troubled young man and M was expected by social services to prevent A, from staying in the family home and being unsupervised around the children. Nevertheless, A visited the house for short periods. When A was at the house on November 18, 2019, he sexually abused E whilst M and F3 were distracted. That was not reported to social services until November 21, 2019. In March 2020, court proceedings were issued by the local authority seeking care orders, and removal from the home, not only of C, D and E, but also of F. The local authority's case against M and F3 was that they had failed to protect E and the other children from A and failed to notify the social services when he abused E in the home. The local authority's initial application for an emergency protection order to remove C, D and E was refused. However, a non-molestation order was also made against A which (among other things) prevented him from coming to the family home.

The proceedings came to court for hearing. The court made certain factual findings in relation to A's assault on E in November 2019 at the threshold criteria stage. Thereafter, a welfare hearing took place. On July 26, 2021, the court decided that care orders should be made for C, D and E but that the case of F should be adjourned. The Court of Appeal upheld the High Court's decision by a majority. M and F3 appealed.

Issues

- i. Whether it was necessary as a matter of law to assess the likelihood that, if left in the 1st appellant's care:
 - (a) the children would suffer sexual harm;
 - (b) the consequences of such harm arising;
 - (c) the possibility of reducing or mitigating the risk of such harm; and
 - (d) the comparative welfare advantages and disadvantages of the options presented?

Held

1. Where a court was considering whether to make a care order which was a part IV order, by virtue of section 1(4) of the Children Act, 1989, a court had to have regard to the welfare checklist and in particular to –
 - (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
 - (b) his physical, emotional and educational needs;
 - (c) the likely effect on him of any change in his circumstances;
 - (d) his age, sex, background and any characteristics of his which the court considered relevant;
 - (e) any harm which he had suffered or was at risk of suffering;
 - (f) how capable each of his parents, and any other person in relation to whom the court considered the question to be relevant, was of meeting his needs; and
 - (g) the range of powers available to the court under the Act in the proceedings in question.

In the matter of H-W (Children); In the matter of H-W (Children) (No 2)

2. There was no challenge to the court's findings of primary fact, nor could there be. Nor was there any appeal against the court's conclusion that the threshold criteria of section 31(2)(a) were met; there was and could be no quarrel with the court's assessment that a risk of sexual abuse existed, bringing with it a real possibility of significant harm, and that that was attributable to the parenting of M and F3 not being what could reasonably be expected of them – in particular M had a blind spot about A.
3. The effect of a care order was to vest parental responsibility for the child in the local authority. Thereafter, the parents could exercise their parental responsibility only to the extent that the local authority determined. As that court explained in *re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 (*In re B*), that intrusive power clearly engaged the article 8 rights of the parents and children of the European Convention on Human Rights, 1998.
4. It followed that a care order could only be made, even if the statutory threshold criteria under section 31(2) were met, if such an order was necessary in a democratic society for the protection of the child(ren)'s right to grow up free from harm. That meant that the order could be made only if it was proportionate to the needs of the situation. And it followed also that a judge considering a care order had an obligation not to act incompatibly with the article 8 rights involved. The obligation under article 8 of European Convention on Human Rights, 1998, so clearly recognised in *re B* did no more than restate the longstanding proposition of English childcare law that the aim had to be to make the least interventionist possible order, but the emphasis given to the issue in *re B* was overdue.
5. *In re B* the care order under consideration was one with a care plan for adoption of the children, so that if made it would result in a complete legal severance of the family relationship between natural parent and child. That was, no doubt, the most intrusive form of care order which the law knew. But a care order of the kind in question had consequences almost as far-reaching. It would break up the existing family and indefinitely so; it could be expected to last throughout the minority of the children. It would separate them from their parents and also from each other. The principles set out in *re B* as to necessity and proportionality clearly applied, *mutatis mutandis*, also to the instant case.
6. The very clear decision in *re B*, albeit by majority, was that the existence of the requirement of necessity and proportionality did not alter the near-universal rule that appeals in England and Wales proceeded by way of review rather than by way of re-hearing. It followed that it was not incumbent upon an appellate court to undertake a fresh evaluation for itself of the question of necessity and proportionality. If each appellate court were to undertake such a fresh evaluation, it would expose the parties, and the children, to the risk of successive investigations of the same issue, certainly two, and in some cases three or even four times. It would also mean that the appellate court was expected to undertake a task for which it was unsuited, having not heard the evidence or seen the parties for itself. A decision on paper was no substitute for the decision of a judge who had had the advantage of a face-to-face, bench-to-witness-box acquaintanceship with those who were under consideration as carers of the child(ren).
7. In a case where the trial court had adopted the correct approach to the issue of necessity and proportionality, the appellate court's function was accordingly, as explained in *re B*, to review its findings, and to intervene only if it took the view that it was wrong. In conducting that review, an appellate court would have clearly in mind the advantages that it had over any subsequent court.
8. The appeals boiled down to how the court assessed mitigations and options. The court was required to look at both. The local authority had rightly referred to the comprehensive papers which set out the various options filed on behalf of social services, in particular, by the main social worker. However, on close inspection the paragraphs previously referred to simply set out the options and there was in fact no analysis of the competing options and the issue of mitigation.

9. Of particular significance was the fact that the court did not mention the efficacy of the injunction against F2 and also the non-molestation order made against A. It was quite right to say that a court did not have to recite each and every piece of evidence in a case. However, a court did have to refer to the core elements of a case in order to reach a conclusion which was understandable and accorded with the law.
10. The difficulty was that one looked in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law required of a court at that stage. Whilst the court had identified the risk of sexual harm as satisfying the threshold criteria for intervention, there was no evaluation of the extent of the risk of significant harm by way of sexual harm, nor of any available means by which the risk might be reduced for each child. Nor was there any comparison of the harm which might befall the children if left at home with the harm which would be occasioned to them if removed, and separated not only from the parents but from each other.
11. It followed that the decision was insufficiently founded on the necessary analysis and comparative weighing of the options. In the absence of the evaluative analysis which was required the appellate court could not determine whether the orders made were proportionate and necessary. That being so, it was premature to ask, whether the order was one which he could say was right or wrong.
12. Rather, the process adopted by the Court of Appeal was flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm. The Court of Appeal did not state why the emotional damage that each of the very different subject children would suffer under a care plan which separated them from their mother, from their stepfather and no less importantly from their siblings, was proportionate to and necessitated by the identified risk of sexual harm from A, when no instances of harm had occurred since November 2019 and where a protective framework of non-molestation and interim supervision orders was in place.
13. During the oral argument, Mr Larizadeh applied most vigour to the suggestion that the court should consider substituting supervision orders for the care orders in relation to the three children. His argument was based on the need for certainty for the children and to avoid delay. Such a position was understandable. However, it could not prevail in that case for the simple reason that a court would need to scrutinize a revised plan and be satisfied itself as to any mitigations which might address the identified risks. The court was not equipped to conduct that exercise. The court would be stepping in to make its own proportionality assessment which was contrary to the line of authority the court approved emanating from: *In re B*. Therefore, the only realistic course to take in that case where, unfortunately, the Supreme Court had found that the Court of Appeal fell into error, was to remit the case for rehearing. It was better that a different judge should hear the case. It remained to be seen what the ultimate outcome would be. Given the amount of information already generated it was to be hoped that updating reports would not result in a lengthy process. The Supreme Court would also hope that it was feasible to have the remitted case relating to C, D and E and the outstanding case relating to F, heard together and concluded in the near future in order to settle arrangements for the entire family.

The appeals would be allowed; the case remitted for rehearing.

Cases

United Kingdom

1. *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 – (Explained)
2. *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146; [2014] 1 WLR 563 – (Explained)

In the matter of H-W (Children); In the matter of H-W (Children) (No 2)

3. *In re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965; [2013] 3 FCR 293 – (Explained)
4. *Piglowska v Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360 – (Explained)
5. *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079 – (Explained)

Statutes***United Kingdom***

1. Children Act, 1989 sections 1(3)(4); 8; 31(2)(a); 33; 38A – (Interpreted)
2. Family Law Act, 1996 – (Cited)

International Instruments and Conventions

European Convention on Human Rights, 1953 article 8(2)

Advocates

None mentioned

2. In having capacity to decide to have sexual relations with another person, a person needs to understand that the other person's capacity to consent to the sexual activity discusses that before and throughout the sexual activity

Significance: The case discusses that the evaluation of the appellant's capacity to make a decision for himself was in relation to the matter of his engaging in sexual relations. Information relevant to that decision included the fact that the other person had to have the ability to consent to the sexual activity and had to in fact consent before and throughout the sexual activity.

A Local Authority v JB (By his Litigation Friend, the Official Solicitor)

[2021] UKSC 52

Supreme Court of the United Kingdom

Lord Briggs, Lady Arden, Lord Burrows, Lord Stephens, Lady Rose

November 24, 2021

Criminal Law – capacity – mental capacity – capacity to consent to sexual activity – duration of maintaining the consent – approaches which could be taken in establishing capacity to decide to have sexual relations - where the information relevant to the decision to have sexual relations with another person needed to be established under section 3(1)(a) of the MCA – whether in having capacity to decide to have sexual relations with another person, a person needed to understand that the other person had to have the capacity to consent to the sexual activity and had to in fact consent before and throughout the sexual activity – Mental Capacity Act, 2005, sections 2(1), 3(1)(a) and 27(1)(b).

Criminal Law – capacity – mental capacity – capacity to consent to sexual activity – requirement that the civil (family) law and criminal law should adopt the same test for capacity to consent to sexual relations- whether lack of capacity of one party to consent to engage in a sexual relationship before and throughout the sexual activity) created an impermissible difference with the criminal law.

International Law – European Convention on Human Rights – right to respect for private and family life – interference by a public authority in protection of participants engaging in sexual activity – whether the Court of Appeal's test (that the other person had to have the ability to consent to the sexual activity and had to in fact consent before and throughout the sexual activity) for P's capacity to engage in sexual relations was inconsistent with article 8 – European Convention on Human Rights, 1950, article 8.

International Law – United Nations Convention on the Rights of Persons with Disabilities – persons with disabilities – equal recognition before the law – where it was alleged that there was a separate standard or test for persons with disabilities on capacity to engage in sexual relations – whether the Court of Appeal's test (that the other person had to have the ability to consent to the sexual activity and had to in fact consent before and throughout the sexual activity) for P's capacity to engage in sexual relations was inconsistent with article 12(2) – United Nations Convention on the Rights of Persons with Disabilities, 2006, article 12(2).

Brief facts

A Local Authority (respondent) commenced proceedings in the Court of Protection seeking declarations under the Mental Capacity Act, 2005 (MCA) as to JB's (appellant) capacity in various matters, including a declaration that the appellant lacked capacity to consent to sexual relations. A question arose as to whether, in assessing the appellant's capacity to consent to sexual relations, the trial court should have regard to whether he had capacity to understand that the other person involved had to give consent, and did in fact give and maintain consent throughout the act. The trial court found that that was not

A Local Authority v JB (By his Litigation Friend, the Official Solicitor)

relevant information for the purposes of determining if an individual had capacity to consent to sexual relations under the MCA.

The respondent appealed to the Court of Appeal. The Court of Appeal recast the relevant matter as whether the appellant had the capacity to engage in rather than consent to, sexual relations. The Court of Appeal found that in deciding whether a person had the capacity to engage in sexual relations, a court should have regard to whether that person could understand that the other person involved had to be able to consent and gave and maintained consent. The respondent's appeal was therefore allowed. The appellant, by his litigation friend, the official solicitor, appealed to the Supreme Court.

Issues

- i. Whether in having capacity to decide to have sexual relations with another person, a person needed to understand that the other person had to have the capacity to consent to the sexual activity and had to in fact consent before and throughout the sexual activity.
- ii. What were the three main approaches which could be taken in establishing capacity to decide to have sexual relations with another person?
- iii. How was the inability to make a decision to have sexual relations with another person to be established, under section 3(1)(a) of the MCA?
- iv. Whether the Court of Appeal's test (that the other person had to have the ability to consent to the sexual activity and had to in fact consent before and throughout the sexual activity) for P's capacity (person who lacked capacity, or who was alleged to lack capacity):
 - a) to engage in sexual relations created an impermissible difference with the criminal law;
 - b) to engage in sexual relations was inconsistent with article 8 of the ECHR;
 - c) to engage in sexual relations was inconsistent with article 12(2) of the United Nations Convention on the Rights of Persons with Disabilities..

Held

1. The three main approaches which could be taken to capacity were: the outcome approach, the status (or category) approach, and the function (or understanding) approach. Under the outcome approach, capacity was determined by the content of the individual's decision. A decision which was inconsistent with the views and values of the assessor, or rejected conventional wisdom was by definition incompetently made.
2. The status (or category) approach judged an individual's capacity according to his physical or mental status, such as age, place of residence or diagnosis, without any further inquiry into how membership of that category affected his competence as an individual. That could sometimes be a convenient method when a fairly arbitrary rule of thumb was required: for example, no-one under the age of eighteen was competent to vote in elections.
3. The function (or understanding) approach focused upon the personal ability of the individual concerned to make a particular decision and the subjective processes followed by him in arriving at the decision. In short, whether he understood the general nature and likely consequences of what he was deciding, and if he could communicate his decision. That was the broad approach adopted by the MCA, although understanding alone might not be enough to amount to capacity under the MCA. The MCA contemplated instances where a person could understand the nature and effects of the decision to be made, but the effects of his mental disability prevented him from using that information in the decision-making process.
4. As the assessment of capacity was decision-specific, the court was required to identify the correct formulation of the matter in respect of which it had to evaluate whether P (person who lacked

- capacity, or who was alleged to lack capacity) was unable to make a decision for himself. The correct formulation of the matter then led to a requirement to identify the information relevant to the decision under section 3(1)(a) of the MCA which included information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision.
5. The court had to identify the information relevant to the decision within the specific factual context of the case. In that way if the matter for decision related to sexual relations, but did not relate to a particular partner, time or place, so that it was non-specific, as in the case, because the appellant wished to engage in or consent to sexual relations with any woman, then the non-specificity of the matter would inform the information which was relevant to the decision.
 6. Where the matter related to sexual relations, it would ordinarily be formulated in a non-specific way because, in accordance with ordinary human experience, it would involve a forward-looking evaluation directed to the nature of the activity rather than to the identity of the sexual partner. To require the issue of capacity to be considered in respect of every person with whom P contemplated sexual relations would not only be impracticable but would also constitute a great intrusion into P's private life. Pragmatism did not require that consent to future sexual relations could only be assessed on a general and non-specific basis. Furthermore, such a restriction on the formulation of the matter was contrary to the open-textured nature of section 2(1) of the MCA on people who lacked capacity. A general and non-specific basis was not the only appropriate formulation in respect of sexual relations as even in that context, the matter could be person-specific where it involved, for instance, sexual relations between a couple who had been in a long-standing relationship where one of them developed dementia or sustained a significant traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who were mutually attracted to one another but who both had impairments of the functioning of their minds.
 7. If the formulation of the matter for decision could properly be described as person-specific, then the information relevant to the decision could be different, for instance depending on the characteristics of the other person or the risks posed to P by an individual who had been convicted of serious sexual offences. Moreover, the practicable steps which had to be taken to help P under section 1(3) of the MCA could be informed by whether the matter in relation to sexual relations could be described as person-specific. For instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where he would remain unable to understand the diverse responses of many hypothetical sexual partners.
 8. Furthermore, if the matter could be described as person-specific then the reasonably foreseeable consequences of deciding one way or another could be different. There could, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship where one partner had developed dementia. Finally, the potential for serious grave consequences could also differ. The information relevant to the decision included information about the reasonably foreseeable consequences of a decision, or of failing to make a decision. Those consequences were not limited to the reasonably foreseeable consequences for P, but could extend to consequences for others. That again illustrated that the information relevant to the decision had to be identified within the factual context of each case. In the instant case there were reasonably foreseeable consequences for the appellant of a decision to engage in sexual relations, such as imprisonment for sexual assault or rape if the other person did not consent. There were also reasonably foreseeable harmful consequences to persons whom the appellant might sexually assault or rape.
 9. The importance of P's ability under section 3(1)(a) MCA to understand information relevant to a decision was also specifically affected by whether there could be serious grave consequences flowing from the decision. Paragraph 4.19 of the Mental Capacity Act, 2005 Code of Practice provided that if a decision could have serious or grave consequences, it was even more important that a person

A Local Authority v JB (By his Litigation Friend, the Official Solicitor)

- understood the information relevant to that decision.
10. The function of section 27 of MCA was to identify certain decisions which were so personal to the individual concerned that no-one could take them on his behalf if he was unable to take them for himself. Section 27 did not speak to, nor did it define, the matter about which P potentially lacked capacity to make a decision for himself under section 2(1) of the MCA. Section 27 only made clear that where a court found that a person lacked capacity to consent to sexual relations, then the court did not have any jurisdiction to give consent on that person's behalf to any specific sexual encounter. Co-incidentally, in a particular case, a matter in section 27 could also be a matter within section 2(1), but as the Court of Appeal held, the list in section 27 did not purport to be a comprehensive list of the decisions in respect of which issues as to capacity would arise.
 11. Formulating the matter as engaging in, rather than consenting to, sexual relations better captured the nature of the issues in a case such as the instant one, where the appellant wished to initiate relations with others, rather than consent to relations proposed by someone else. The ability to choose whether or not to engage in sexual activity or intercourse was close to the Court of Appeal's formulation of engaging in sexual relations. It could be helpful to observe that the terminology of a capacity to decide to engage in sexual relations embraced both P's capacity to consent to sexual relations initiated by the other party and P's capacity to understand that, in relation to sexual relations initiated by P, the other party had to be able to consent to sexual relations and had to in fact be consenting, and consenting throughout, to the sexual relations.
 12. The information relevant to the decision included information about the reasonably foreseeable consequences of a decision, or of failing to make a decision, which consequences were not limited to the consequences for P. The consequences for other persons or for members of the public were therefore a part of the information relevant to the decision. As a public authority, the Court of Protection had an obligation under section 6 of the Human Rights Act 1998 not to act in a way which was incompatible with a right under the European Convention of Human Rights, as set out in Schedule 1 to the Act. Within the court, that obligation arose when considering the human rights of P, but it also extended to the rights of others.
 13. The court as a public authority, in determining what information was relevant to the decision, had to include reasonably foreseeable adverse consequences for P and for members of the public. In practice, by doing so, the court under the MCA protected members of the public. Although the Court of Protection's principal responsibility was towards P, it was part of the wider system of justice which existed to protect society as a whole. Finally, the protection of the public provided by the criminal justice system or by a sexual risk order could not detract from the protection which was provided in practical terms by including in the information relevant to the decision the reasonably foreseeable adverse consequences for P and for members of the public.
 14. A potentially incapacitous person was required to understand that the other person had to be able to consent and did in fact consent throughout. The only alteration that needed to be made to the summary of the information relevant to the decision to engage in sexual relations, set out by the Court of Appeal was to change the words 'had to have capacity to in (2)' to 'had to be able to'.
 15. There was no necessary requirement that the civil (family) law and criminal law should have adopted the same test for capacity to consent to sexual relations. There were already existing differences in relation to the application of the test for capacity which could have led to different conclusions in civil and criminal trials. Two such differences were as follows:
 - a) First, in relation to the application of the test there were different standards of proof. The criminal standard of proof applied in relation to the constituent elements of offences under the Sexual Offences Act 2003 (SOA), including the determination of capacity, and the civil standard applied under the MCA.

However, in respect of criminal proceedings for ill-treatment or neglect pursuant to section 44 of the MCA, the civil standard of proof applied to the question whether P lacked capacity.

- b) Second, the focus of the criminal law, in the context of sexual offences, was retrospective. It focused upon a specific past event. Any issue relating to consent was evaluated in retrospect with respect to that singular event. So, the material time in a criminal case was the time of the alleged offence and the question became, for instance, “did P have capacity to consent at that time?” But a court assessing capacity to engage in sexual relations under the MCA ordinarily needed to make a general, prospective evaluation which was not tied down to a particular time
16. The courts had emphasised the desirability that the civil and criminal jurisdictions should have adopted the same test for capacity to consent to sexual relations as there was no unnecessary inconsistency between the criminal and civil law. All else being equal, it was in principle desirable, though not necessary, that there should have been the same test for capacity in both the civil and criminal law. Even if the same test for capacity applied in the civil and criminal law, a jury would not be directed in strict accordance with the language used by, and steps to be adopted in accordance with, proceedings brought pursuant to the MCA.
 17. There were sound policy reasons why the civil and criminal law test for capacity should be the same as they both served the same important function: to protect the vulnerable from abuse and exploitation. Viewed from that perspective, X either had capacity to consent to sexual intercourse or she did not. It could not depend upon the forensic context in which the question arose, otherwise the law would be brought into disrepute. The civil law test for consent could not impose a less demanding test of capacity than the criminal law test.
 18. For the civil law to impose a different and more demanding test of capacity there were countervailing and overriding policy reasons that would support the clarification of the test for capacity under the MCA: namely, the protection of others and the protection of P. Those policy reasons would amply justify any differences that might arise between the civil and criminal law tests for capacity. As the Court of Appeal stated in the case, the fundamental responsibilities of the Court of Protection included the duty to protect P from harm. The protection given by the requirement that P should understand that P should only have sex with someone who was able to consent and gave and maintained consent throughout protected both participants from serious harm.
 19. Both the criminal law and the civil law served the same function in that context of protecting the vulnerable from abuse and exploitation that should not conceal the different purposes of the civil and criminal law and the different ways in which they carried out their functions. The primary purpose of the criminal law was the prosecution of behaviour that was classified as criminal and the punishment of offenders by the state. In civil proceedings under the MCA the courts had to balance the promotion of the autonomy of vulnerable persons with their protection from harm, as required by general principles of law and the court’s obligations as a public authority under the Human Rights Act 1998, having regard to the rights of others. Viewed in that way, the differences between criminal proceedings and civil proceedings under the MCA suggest that it could be permissible to adopt different tests of capacity in the civil and the criminal law.
 20. It was not clear under the ground of appeal whether the appellant was advancing an argument that the appellant’s article 8 of the European Convention on Human Rights (ECHR) rights had been breached and, if so, by whom or an argument as to how the MCA should have been construed compatibly with article 8. Neither argument was advanced at first instance or in the Court of Appeal, so the appellant required permission to bring them. There was no merit in the compatibility argument.

A Local Authority v JB (By his Litigation Friend, the Official Solicitor)

Permission to raise it should be refused. Information relevant to the decision under the MCA took into account not only the interests of P but also the interests of others and of the public. Furthermore, section 1(3) of the MCA provided that a person was not to be treated as unable to make a decision unless all practicable steps to help him to do so had been taken without success which ensured that the interference with article 8, if it was engaged, was proportionate. The operation of the MCA was compatible with article 8 of ECHR.

21. There was no separate standard or test for persons with disabilities. The fact that the other person had to have the ability to consent to the sexual activity and had to in fact consent before and throughout the sexual activity applied to everyone in society.
22. The evaluation of the appellant's capacity to make a decision for himself was in relation to the matter of his engaging in sexual relations. Information relevant to that decision included the fact that the other person had to have the ability to consent to the sexual activity and had to in fact consent before and throughout the sexual activity. Under section 3(1)(a) of the MCA, the appellant should be able to understand that information and under section 3(1)(c) of the MCA, he should be able to use or to weigh it as part of the decision-making process. Applying the test in section 2(1) of the MCA on the available information, the appellant was unable to make a decision for himself in relation to that matter because of an autistic impairment of his mind. Because that information was not fully considered or analysed during the hearings before the trial court, it would not be appropriate to make a final declaration that the appellant did not have capacity to make a decision to engage in sexual relations. The right course was therefore to remit the matter to the trial court for reconsideration in the light of the Supreme Court judgment.

Appeal dismissed.

Cases**United Kingdom**

1. *A Local Authority v H* [2012] EWHC 49 (COP); [2012] 1 FCR 590 – (Explained)
2. *A Local Authority v TZ* [2013] EWHC 2322 (COP) – (Explained)
3. *In re M (An Adult) (Capacity: Consent to Sexual Relations)* [2014] EWCA Civ 37; [2015] Fam 61 – (Explained)
4. *In re: MM; Local Authority X v MM* [2007] EWHC 2003 (Fam); [2009] 1 FLR 443 – (Explained)
5. *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 – (Explained)
6. *R v A (G)* [2014] 1 WLR 2469 – (Explained)
7. *R v B (MA)* [2013] EWCA Crim 3; [2013] 1 Cr App R 36 – (Explained)
8. *R v Cooper (Gary Anthony)* [2009] UKHL 42; [2009] 1 WLR 1786 – (Explained)
9. *X City Council v MB* [2006] EWHC 168 (Fam); [2006] 2 FLR 968
10. *York City Council v C* [2013] EWCA Civ 478; [2014] Fam 10 – (Explained)

Statutes**United Kingdom**

Mental Capacity Act, 2005 (the “MCA”) sections 1(3)(4)(5)(6); 2(1)(4); 3(1)(c)(4)(a); 15; 18(3); 27(1)(b) – (Interpreted)

Advocates

None mentioned

Canada

1. Consent to one form of sexual touching or penetration was not agreement to any or all forms of sexual touching or penetration.

Significance: The case looks into whether condom use formed part of the sexual activity to which a person could provide voluntary agreement.

K v Her Majesty the Queen & 7 others

2022 SCC 33

Supreme Court of Canada

Wagner, CJ & SCJ; Moldaver, Karakatsanis, Côté, Brown, Rowe,

Martin, Kasirer and Jamal, SCJJ

July 29, 2022

Criminal Law – offences – sexual assault – consent – where the complainant consented to sexual intercourse on condition that the accused wore a condom – where the complainant realized after intercourse that the accused failed to wear a condom – what analytical framework applied when a complainant agreed to sexual intercourse only if the accused wore a condom, and he instead chose not to wear one— whether condom use formed part of the sexual activity to which a person could provide voluntary agreement – whether condom use was always irrelevant to the presence or absence of consent, meaning that there was consent but it could be vitiated if it rose to the level of fraud – Criminal Code, R.S.C. 1985, sections 265(3)(c) and 273.1(1)(2).
Criminal Law – offences – sexual assault – stealthing – what was stealthing in relation to sexual offences.

Brief facts

The complainant testified that she and K met online and then in person to determine if they wanted to have sex with each other. The complainant made it clear to K that she would only agree to have sex with him if he wore a condom. Despite that, during their second episode of intercourse, K did not wear a condom. The complainant only realized that K had not been wearing a condom after he ejaculated inside her. Based upon those events, K was charged with sexual assault.

K applied to have the charge dismissed by bringing a no-evidence motion. He argued that the Crown failed to prove the absence of the complainant's consent based on the court's decision in *R v Hutchinson*, 2014 SCC 19, [2014] 1 SCR 346, which set out a two-step process for analyzing consent. Fraud under section 265(3)(c) required proof of the accused's dishonesty, which could include non-disclosure, and a deprivation in the form of significant risk of serious bodily harm from that dishonesty. K argued that the complainant's agreement to sexual intercourse was enough to establish consent to the sexual activity in question, as she consented to all the physical acts the parties engaged in, and there was no evidence that that consent was tainted by fraud. The trial court granted K's no-evidence motion and dismissed the sexual assault charge. The Court of Appeal unanimously allowed the Crown's appeal, set aside the acquittal and ordered a new trial. However, the Court of Appeal was split on the reasoning as to which Criminal Code provision applied in examining consent: section 273.1(1) or section 265(3)(c). K appealed to the Supreme Court from the setting aside of his acquittal.

K v Her Majesty the Queen & 7 others**Issues**

- i. Whether a complainant's consent to sex with a condom meant that an accused person violated the consent when he /she opted not to use the condom during sexual intercourse.
- ii. In relation to consent, whether an agreement to one form of sexual touching or penetration was not agreement to any or all forms of sexual touching or penetration.
- iii. Whether stealthing or the non-consensual condom refusal or removal amounted to sexual violence.

Held by majority

1. When consent to intercourse was conditioned on condom use, the only analytical framework consistent with the text, context and purpose of the prohibition against sexual assault was that there was no agreement to the physical act of intercourse without a condom. Sex with and without a condom were fundamentally and qualitatively distinct forms of physical touching. A complainant who consented to sex on the condition that their partner wore a condom did not consent to sex without a condom. That approach respected the provisions of the Criminal Code, the court's consistent jurisprudence on consent and sexual assault and parliament's intent to protect the sexual autonomy and human dignity of all persons in Canada.
2. Since only yes meant yes and no meant no, it could not be that no, not without a condom meant yes, without a condom. If a complainant's partner ignored their stipulation, the sexual intercourse was non-consensual and their sexual autonomy and equal sexual agency had been violated.
3. The complainant gave evidence that she had communicated to the appellant that her consent to sex was contingent on condom use. Despite the clear establishment of her physical boundaries, the appellant disregarded her wishes and did not wear a condom. That was evidence of a lack of subjective consent by the complainant — an element of the *actus reus* of sexual assault. The trial court erred in granting the appellant's no evidence motion.
4. In the early 1980s, parliament modernized and fundamentally restructured the Criminal Code provisions on sexual offences. It repealed discriminatory evidentiary rules and moved away from prior specific provisions, like the prohibition against rape, to instead adopt prohibitions grounded in the law of assault. That change reflected the shift away from categorizing sexual offences based on the nature of the sexual act and the perceived chastity of the victim, and toward an understanding that treated sexual assault much more like other crimes of violence.
5. The foundational nature of consent to the offence of sexual assault was demonstrated in its centrality to both the *actus reus* and the *mens rea* elements of the offence. The *actus reus* of the offence was unwanted sexual touching, while the *mens rea* was the intention to touch, knowing, being reckless of, or being willfully blind to a lack of consent from the person being touched. For the *actus reus*, the absence of consent was entirely subjective and dependent on the complainant's state of mind about whether they wanted the touching to take place at the time it occurred. There was no need to inquire into the accused's perspective at the *actus reus* stage.
6. The legal meaning given to the sexual activity in question could not be narrowly drawn or fixed for all cases. Like the consent of which it was part, it was tied to context and could not be assessed in the abstract; it related to particular behaviors and actions. Much would depend on the facts and circumstances of the individual case. Touching would be defined by the evidence and the complainant's allegations. The sexual activity in question would emerge from a comparison of what actually happened and what, if anything, was agreed to. That was bound to change in every case.
7. Condom use could form part of the sexual activity in question because sexual intercourse without a condom was a fundamentally and qualitatively different physical act than sexual intercourse with a condom. The physical difference was that intercourse without a condom involved direct skin-to-skin contact, while intercourse with a condom involved indirect contact. That difference, of a changed

- physical experience, was put forward by some men to explain why they preferred not to wear a condom.
8. Consent to a form of touching could depend on what was being used to touch the body because the law appreciated there was a physical difference between being touched by a digit, penis, sex toy or other object. It was also clear, for example, that the law saw different specific physical sex acts when a person who had obtained consent to touch a woman's chest over her clothing instead reached underneath her clothing to make direct skin to skin contact with her bare breast. Being touched by a condom-covered penis was not the same specific physical act as being touched by a bare penis. Logically and legally, direct and unmediated sexual touching was a different physical act than indirect and mediated contact.
 9. Parliament specified situations where no consent would be obtained in relation to sexual assault offences in section 273.1(2). Section 273.1(2)(d) and (e) in particular provided that there could be no consent if the complainant expressed, by words or conduct, a lack of agreement to engage in the activity or, having consented to engage in sexual activity, expressed a lack of agreement to continue to engage in the activity. While a complainant was not required to express her lack of consent for the *actus reus* to be established, when she did so it was directly relevant to whether or not there was subjective consent to the sexual activity in question and could also impact whether a mistaken belief in consent could be reasonable under the *mens rea* analysis.
 10. Voluntary agreement to sex with a condom could not be taken to imply consent to sex without one as consent could not be implied from the circumstances or the relationship between the accused and the complainant. Nothing substituted for the complainant's actual consent to the sexual activity at the time it occurred, which involved the conscious agreement of the complainant to engage in every sexual act in a particular encounter. A complainant had to agree to the specific sexual act since agreement to one form of penetration was not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body was not agreement to all sexual touching.
 11. An accused could not ignore limits or test the waters during a second episode of intercourse to see if the complainant then consented to sex without a condom as consent had to be specifically renewed and communicated for each and every sexual act. Implying consent revived the mythical assumptions that when a woman said 'no' she was really saying 'yes', 'try again', or 'persuade me'.
 12. Placing required condom use outside the core definition of consent under section 273.1 would undercut those principles and undermine parliament's goals. Too narrow a reading of sexual activity would deem a complainant to have consented in law when they did not subjectively agree to sex without a condom in fact. For some people —the difference between using a condom or not meant the difference between subjectively agreeing to the activity or refusing it. To ignore express physical boundaries when defining consent under section 273.1 effectively repealed the need for subjective and affirmative consent.
 13. Deeming the complainant's consent to intercourse without a condom, after she had specifically rejected that form of touching, came close to reinstating the rejected doctrine of implied consent. Recognizing that when the complainant agreed to sexual intercourse with a condom, she was not agreeing to the different physical act of direct skin to skin contact without a condom was precisely what the court protected when it stated that having control over who touched one's body, and how, lay at the core of human dignity and autonomy.
 14. Non-consensual condom refusal or removal involved a range of conduct employed to avoid using a condom with a partner who wanted to use one. That included the refusal to use a condom in the first place, whether the accused informed the complainant of their refusal or not. It also covered cases of stealthing, where the accused pretended to have put on a condom or secretly removed

K v Her Majesty the Queen & 7 others

- it. There were many forms of condom use resistance and they could involve using physical force, manipulation, threats and deception to obtain unprotected sex.
15. Non-consensual condom refusal or removal was experienced as and recognized as a form of sexual violence which generated various forms of harm. There were clear physical risks, but the psychological consequences were also very real. Women who had experienced non-consensual condom refusal or removal had been found to develop negative self-perception about their sexual agency and sometimes themselves.
 16. Victims of non-consensual condom refusal or removal described it as a disempowering, demeaning violation of a sexual agreement, a violation of consent, a betrayal of trust, a denial of autonomy, and an act of sexual violence. As with other forms of sexual coercion, the risk of experiencing non-consensual condom refusal or removal was not distributed equally throughout the population. The power dynamic it rested on was exacerbated among vulnerable women, including women living in poverty, racialized women, migrant women, and among people with diverse gender identities and sex workers.
 17. The sexual activity in question, properly interpreted, was sufficiently broad to capture physical aspects that were crucial to the complainant's agreement to the specific touching in the first place. The determination of whether no consent had been given to the distinct physical act of unprotected skin-to-skin sex should not depend on the manner in which a person's consent had been violated. In cases of condom refusal or removal, the fraud analysis drew attention away from the foundational principles of consent, focused attention elsewhere, and created gaps in coverage antithetical to parliament's intention to address the rights, realities and harms of sexual violence.
 18. *R v Hutchinson* 2014 SCC 19, [2014] 1 SCR 346, (*Hutchinson*) was a classic case of deception in which the accused deliberately made holes in the condom hoping that pregnancy would result. It simply held that cases involving condom sabotage and deceit should be analyzed under the fraud provision rather than as part of the sexual activity in question in section 273.1. Read properly, and consistently with well-established principles for stare decisis, *Hutchinson* was chiefly concerned with the delineation of deception under the criminal law.
 19. *Hutchinson* did not establish the sweeping proposition that all cases involving a condom fell outside section 273.1 and could only be addressed, if at all, when the conditions of fraud were established. As the new case at bar demonstrated, condom use was not always collateral or incidental to the sexual activity in question. Conditioning agreement to sexual touching on condom use went to the heart of the specific physical activity in question and the existence or non-existence of subjective consent, and there was no need to resort to the doctrine of fraud and its stringent legal requirements in that circumstance. *Hutchinson* thus remained binding authority for what it decided, but it did not apply to when the accused refused to wear a condom and the complainant's consent had been conditioned on its use.
 20. Recognizing that condom use could be part of the sexual activity in question was not an expansion of section 273.1 and did not offend the principle of restraint in criminal law. Parliament had stated repeatedly that it was criminally reprehensible conduct to impose an unconsented-to sexual act on an unwilling or unwitting victim. Non-consensual condom refusal or removal was a form of sexual violence that generated harms and undermined the equality, autonomy, and human dignity of complainants. It was not simply undesirable behaviour.
 21. There were also no vagueness or certainty concerns if condom use, including non-consensual condom refusal or removal, was seen as part of the sexual activity in question. Asking whether a condom was required and if so, whether one was used had the necessary certainty to prevent over-criminalization. While restraint was an important criminal law principle, it did not override

parliament's countervailing imperative of enacting sexual assault laws that respected the rights and realities of those subjected to such violence. Excluding such physical aspects from the sexual activity in question would leave an avoidable and undesirable gap in the law of sexual assault, where certain violations of a complainant's physical integrity and equal sexual agency were demoted as less worthy of protection. That ran contrary to the fundamental principle that a complainant's motives for only agreeing to sex with a condom were irrelevant.

22. The complainant's evidence was clear that she would not consent to having sex with the appellant without a condom, but the appellant nevertheless chose to engage in sexual intercourse without one. Therefore, there was some evidence that the complainant did not subjectively consent to the sexual activity in question. The trial judge erred in concluding otherwise.

Per Wagner CJ & SCJ; Côté, Brown and Rowe SCJJ (Partly Dissenting)

1. *Hutchinson* squarely applied to the case at bar. It held that condom use was not part of the sexual activity in question contemplated in section 273.1(1) of the Criminal Code. When a person agreed to have sex on the condition that their partner wore a condom, but that condition was circumvented in any way, the sole pathway to criminal liability was the fraud vitiating consent analysis under section 265(3)(c). Applying *Hutchinson* to the instant case, there was some evidence that the complainant consented to the sexual activity in question, but a new trial was required to determine whether her apparent consent was vitiated by fraud.
2. Distinguishing *Hutchinson* on the basis of no condom versus sabotaged condoms obscured the bright line of criminality established in *Hutchinson*. By arguing that the *Hutchinson* majority referred only to effective condom use, the majority in the instant case introduced needless uncertainty into the criminal law. It followed from the foregoing that the majority's attempt to distinguish *Hutchinson*, in substance, effected an overturning of that precedent. *Hutchinson* conclusively determined the meaning of the sexual activity in question under section 273.1(1) as excluding all forms of condom use, not only condom sabotage.
3. Even if *Hutchinson* was unworkable or if its precedential foundation had eroded, there were at least two compelling reasons to uphold it. First, overturning *Hutchinson* would raise concerns regarding the retrospective expansion of criminal liability. Second, overturning *Hutchinson* could lead to unforeseeable consequences. Suddenly re-orienting the law to expand the scope of consent would be a major legal change engaging potentially wide-reaching policy issues. *Hutchinson* therefore governed the case at bar, such that the two-step fraud vitiating consent analysis under section 265(3)(c) was engaged, rather than the consent analysis under section 273.1(1).

Appeal dismissed; order of the Court of Appeal for British Columbia setting aside the acquittal and ordering a new trial upheld.

Cases

Canada

1. *R v Hutchinson* 2014 SCC 19; [2014] 1 SCR 346 – (Applied)
2. *R v Arcuri* 2001 SCC 54; [2001] 2 SCR 828 – (Explained)
3. *United States of America v Shephard* [1977] 2 SCR 1067 – (Explained)
4. *R v Monteleone* [1987] 2 SCR 154 – (Explained)
5. *R v Charemski* [1998] 1 SCR 679 – (Explained)
6. *R v Barros* 2011 SCC 51; [2011] 3 SCR 368 – (Explained)
7. *R v Ewanchuk* [1999] 1 SCR 330 – (Explained)
8. *R v Barton* 2019 SCC 33; [2019] 2 SCR 579 – (Explained)
9. *R v JA* 2011 SCC 28; [2011] 2 SCR 440 – (Explained)

K v Her Majesty the Queen & 7 others

10. *R v GF* 2021 SCC 20 – (Explained)
11. *R v Cuerrier* [1998] 2 SCR 371 – (Explained)
12. *R v Mabior* 2012 SCC 47; [2012] 2 SCR 584 – (Explained)
13. *R v LTH* 2008 SCC 49; [2008] 2 SCR 739 – (Explained)
14. *R v Park* [1995] 2 SCR 836 – (Explained)
15. *R v Goldfinch* 2019 SCC 38; [2019] 3 SCR 3 – (Explained)
16. *R v Olotu* 2017 SCC 11; [2017] 1 SCR 168, aff'g 2016 SKCA 84, 338 CCC (3d) 321 – (Explained)
17. *R v Poirier* 2014 ABCA 59 – (Explained)
18. *R v Flaviano* 2014 SCC 14; [2014] 1 SCR 270 – (Explained)
19. *Ontario Ltd v Pointes Protection Association* 2020 SCC 22 – (Explained)
20. *Moore v British Columbia (Education)* 2012 SCC 61; [2012] 3 SCR 360 – (Explained)
21. *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* 2011 SCC 37; [2011] 2 SCR 670 – (Explained)
22. *R v DAI* 2012 SCC 5; [2012] 1 SCR 149 – (Explained)
23. *R v Chartrand* [1994] 2 SCR 864 – (Explained)
24. *R v Gladue* [1999] 1 SCR 688 – (Explained)
25. *R v Lupi* 2019 ONSC 3713 – (Explained)
26. *R v Rivera* 2019 ONSC 3918 – (Explained)
27. *R v Kraft* 2021 ONSC 1970 – (Explained)
28. *R v Hutchinson* 2011 NSSC 361, 311 NSR (2d) 1 – (Explained)
29. *R v Hutchinson* 2013 NSCA 1, 325 NSR (2d) 95 – (Explained)
30. *R v Henry* 2005 SCC 76, [2005] 3 SCR 609 – (Explained)

Statutes**Canada**

1. Act to amend the Criminal Code (sexual assault), SC. 1992, c. 38, preamble, s 1 – (Interpreted)
2. Canadian Charter of Rights and Freedoms, ss 1, 7, 11(g), (i), 15 – (Interpreted)
3. Constitution Act, 1982 – (Cited)
4. Criminal Code, RSC 1985, c. C-46, ss. 265(1)(a), (3), 271, 273.1 [SC 2018, c 29, s 19(1), (2)], 273.2 – (Interpreted)

Texts and Journals

1. Ahmad, Marwa, et al. “You Do It without Their Knowledge.’ Assessing Knowledge and Perception of *Stealth* among College Students” (2020), 17:10 *Int. J. Environ. Res. Public Health* 3527 (online: <https://www.mdpi.com/1660-4601/17/10/3527/htm>; archived version: https://scc-csc.ca/cso-dce/2022SCC-CSC33_1_eng.pdf).
2. Arvey, Joseph J., Sheila M. Tucker and Alison M. Latimer. “*Stare Decisis and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?*” (2012), 58 *S.C.L.R* (2d) 61.
3. Ashley, Florence. “*Nuancing Feminist Perspectives on the Voluntary Intoxication Defence*” (2020), 43:5 *Man. L.J.* 65.
4. Benedet, Janine. “*Judicial Misconduct in the Sexual Assault Trial*” (2019), 52 *U.B.C. L. Rev* 1.
5. Bernstein, Elizabeth. “*Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*” (2010), 36 *Signs* 45.
6. Bingham, Tom. *The Rule of Law*. Toronto: Allen Lane, 2010. *Black's Law Dictionary*, 11th ed., by Bryan A. Garner St. Paul, Minn.: Thomson
7. Reuters, 2019, “*stare decisis et non quieta movere*”.
8. Boadle, Allira, Catherine Gierer and Simone Buzwell. “*Young Women Subjected to Nonconsensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions*” (2021), 27 *Violence Against Women*

- Women* 1696.
9. Brodsky, Alexandra. “Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017), 32 *Colum. J. Gender & L.* 183.
 10. Brown, Donald J. M., with the assistance of David Fairlie. *Civil Appeals*. Toronto: Thomson Reuters, 2022 (loose-leaf updated May 2022, release 2).
 11. Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham, N.C.: Duke University Press, 2008.
 12. Canada. House of Commons. *House of Commons Debates*, vol. VIII, 3rd Sess., 34th Parl., April 8, 1992, pp. 9505-7.
 13. Capers, I. Bennett. “The Unintentional Rapist” (2010), 87 *Wash. L. Rev* 1345. Craig, Elaine. “Personal *Stare Decisis*, HIV Non-Disclosure, and the Decision in
 14. *Mabior*” (2015), 53 *Alta. L. Rev* 207.
 15. Czechowski, Konrad, et al. “*That’s not what was originally agreed to*: Perceptions, outcomes, and legal contextualization of non-consensual condom removal in a Canadian sample, in PLoS ONE, 14(7), July 10, 2019 (online: <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0219297>; archived version: https://scc-csc.ca/cso-dce/2022SCC-CSC33_2_eng.pdf).
 16. Daly, Paul. “Introduction”, in Paul Daly, ed., *Apex Courts and the Common Law*. Toronto: University of Toronto Press, 2019, 3.
 17. Douglas, William O. “*Stare Decisis*” (1949), 49 *Colum. L. Rev* 735. Duxbury, Neil. *The Nature and Authority of Precedent*. New York: Cambridge
 18. University Press, 2008.
 19. Gibbens, R D. “Appellate Review of Findings of Fact” (1991-92), 13 *Advocates’ Q.* 445.
 20. Gotell, Lise, and Isabel Grant. “Non-Consensual Condom Removal in Canadian Law Before and After *R v Hutchinson*” (2021), 44 *Dal. L.J.* 439.
 21. Gruber, Aya. “A ‘Neo-Feminist’ Assessment of Rape and Domestic Violence Law Reform” (2012), 15 *J Gender Race & Just.* 583.
 22. Gruber, Aya. “Rape, Feminism, and the War on Crime” (2009), 84 *Wash. L. Rev* 581. Healy, Thomas. “*Stare Decisis* As A Constitutional Requirement” (2001), 104 *W. Va.*
 23. *L. Rev* 43.
 24. Johnston, Meagan. “Sisterhood Will Get Ya: Anti-rape Activism and the Criminal Justice System”, in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*. Ottawa: University of Ottawa Press, 2012, 267.
 25. Khan, Ummni. “Homosexuality and Prostitution: A Tale of Two Deviancies” (2020), 70 *U.T.L.J.* 283.
 26. Laskin, Bora. “The Role and Functions of Final Appellate Courts: The Supreme Court of Canada” (1975), 53 *Can. Bar Rev* 469.
 27. Latimer, Rosie L., et al. *Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia*, in PLoS ONE, 13(12), December 26, 2018 (online: <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>; archived version: https://scc-csc.ca/cso-dce/2022SCC-CSC33_3_eng.pdf).
 28. Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. Toronto: LexisNexis, 2018.
 29. Lévesque, Sylvie, and Catherine Rousseau. “Young Women’s Acknowledgment of Reproductive Coercion: A Qualitative Analysis” (2021), 36 *J. of Interpers. Violence* NP8200 (online: <https://journals.sagepub.com/doi/pdf/10.1177/0886260519842169>).
 30. Martin, Dianne L. “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform

K v Her Majesty the Queen & 7 others

- Strategies” (1998), 36 *Osgoode Hall L.J.* 151.
31. McInnes, John, and Christine Boyle. “Judging Sexual Assault Law Against a Standard of Equality” (1995), 29 *U.B.C. L. Rev* 341.
 32. Millar, Hayli, and Tamara O’Doherty. “Racialized, Gendered, and Sensationalized: An examination of Canadian anti-trafficking laws, their enforcement, and their (re)presentation” (2020), 35 *C.J.L.S.* 23.
 33. Mykhalovskiy, Eric, and Glenn Betteridge. “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada” (2012), 27 *C.J.L.S.* 31.
 34. Parkes, Debra. “Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent” (2016), 10:1 *McGill J.L. & Health* S123.
 35. Parkes, Debra. “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2006), 32 *Man. L.J.* 135.
 36. Phillips, Dana. “Let’s Talk About Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse” (2017), 54 *Osgoode Hall L.J.* 1133.
 37. Randall, Melanie. “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010), 22 *C.J.W.L.* 397.
 38. Rowe, Malcolm, and Leanna Katz. “A Practical Guide to *Stare Decisis*” (2020), 41 *Windsor Rev Legal Soc. Issues* 1.
 39. Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.
 40. Stuart, Don. Annotation to *United States of America v Sriskandarajah* (2013), 97 C.R (6th) 268.
 41. Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016. Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.:
 42. LexisNexis, 2014.
 43. United States. Congressional Research Service. “*The Supreme Court’s Overruling of Constitutional Precedent*”, by Brandon J. Murrill, September 24, 2018.
 44. Williams, Glanville, and ATH Smith. *Glanville Williams: Learning the Law*, 17th ed London: Sweet & Maxwell, 2020.

Advocates

None mentioned

2. The relationship between consent and the capacity to give consent in a sexual offence case

Significance: Where a complainant was incapable of consenting, there could be no finding of fact that the complainant voluntarily agreed to the sexual activity in question.

R v GF & RB

2021 SCC 20

Supreme Court of Canada

Wagner CJ; Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer, SCJJ

May 14, 2021

***Criminal Law** – offences – sexual assault – consent-capacity to consent – relationship between consent and capacity to consent in a sexual assault case – legal analysis of consent and capacity to consent in a sexual assault case -what was the relationship between consent and the capacity to give consent and whether the two could be analysed separately by a court deciding on sexual offence case.*

***Criminal Law** – offences – sexual assault – consent – subjective consent -what was the scope of subjective consent in cases of sexual offences?*

Brief facts

The respondent and RB were charged with sexually assaulting a 16-year-old during a camping trip. The issue at trial was whether the teenager who had consumed alcohol, had consented to sexual activity with the two adults. The victim and the respondent both testified and presented opposite versions of events. RB did not testify. The Crown prosecutor argued that the teenager's evidence clearly established incapacity due to intoxication and also that she had not agreed to the sexual activity. The respondent and RB claimed that the 16-year-old had not been as intoxicated as she claimed, and that she had agreed to engage in the sexual activity. The trial court convicted the respondent and RB of sexual assault.

The respondent and RB appealed the convictions to the Court of Appeal for Ontario. The Court of Appeal agreed that based on the evidence, the verdict was reasonable. However, the Court of Appeal said the trial court should have explained the factors it considered when assessing if the teenager was too intoxicated to consent. The Court of Appeal also found that the trial court failed to consider consent first and independently from the question of capacity to consent. As a result, the Court of Appeal concluded that a new trial was necessary for both the respondent and RB. The Crown appealed to the Supreme Court of Canada.

Issues

- i. What was the relationship between consent and the capacity to give consent and whether the two could be analysed independent of each other while a court was deciding a sexual offence case?
- ii. What was the scope of subjective consenting in sexual offences?

Held by majority

1. Consent and the capacity to give consent were inextricably joined, as subjective consent to sexual activity required both that the complainant be capable of consenting and did, in fact, consent. Trial courts were under no obligation to evaluate consent and capacity separately or in any particular order. In the present case, it was open to the trial court to find both that the complainant was incapable of consenting and did not agree to the sexual activity in question, and it did not err in addressing those issues together in its reasons.

R v GF & RB

2. Where a complainant was incapable of consenting, there could be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. The capacity to consent was a necessary but not sufficient precondition to the complainant's subjective consent. That was distinct from circumstances where a person could provide subjective consent that was not legally effective due to, for example, duress or fraud. Thus, when a trial court engaged both the issues of whether a complainant was capable of consenting and whether they did agree to the sexual activity in question, the trial court was not necessarily required to address them separately or in any particular order as they both went to the complainant's subjective consent to sexual activity.
3. There were two aspects to the overarching concept of consent. The first was subjective consent, which related to the factual findings about whether the complainant subjectively and voluntarily agreed to the sexual activity in question, and the second required that subjective consent also be effective as a matter of law. The Criminal Code set out a series of factors that would vitiate subjective consent in sections 265(3) and 273.1(2). However, those factors did not prevent subjective consent, but recognized that even if a complainant had permitted the sexual activity in question, there were circumstances in which subjective consent would be deemed of no force or effect.
4. The distinction between preventing subjective consent and rendering it ineffective was important, and the proposition that incapacity vitiated rather than prevented subjective consent had to be rejected for three reasons:
 - a) Subjective consent required a complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question, and it followed, as a matter of logic, that the complainant had to be capable of forming such an agreement.
 - b) Incapacity as a vitiating factor would be inconsistent with the structure of the Criminal Code, as incapacity under section 273.1(2)(b) deprived the complainant of the ability to formulate a subjective agreement.
 - c) Capacity as a precondition to subjective consent provided certainty because it was inextricably linked to what subjective consent required: contemporaneous voluntary agreement to the sexual activity in question.
5. As capacity was a precondition to subjective consent, the requirements for capacity were tied to the requirements for subjective consent. Capacity to consent required that the complainant had an operating mind capable of understanding the physical act, its sexual nature, and the specific identity of their partner, and that they had a choice of whether or not to engage in the sexual activity in question.
6. Subjective consent required a voluntary agreement and the complainant had to be capable of understanding that they had a choice of whether or not to engage in the sexual activity in question. At the very least, a voluntary agreement would require that the complainant exercised a choice to engage in the sexual activity in question. In order to voluntarily agree to the sexual activity in question, the complainant had to understand that saying no was an option. Consent required that the complainant had an operating mind at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it. Thus, an unconscious complainant could not provide contemporaneous consent. It followed that where the complainant was incapable of understanding that they had the choice to engage or refuse to engage, they were incapable of consenting. A complainant who was unable to say no, or who believed they had no choice in the matter, was not capable of formulating subjective consent.
7. In sum, for a complainant to be capable of providing subjective consent to sexual activity, they had to be capable of understanding four things:
 - a) the physical act;

- b) that the act was sexual in nature;
 - c) the specific identity of the complainant's partner or partners; and
 - d) that they had the choice to refuse to participate in the sexual activity.
8. The trial court did not err in its treatment of consent. Both the complainant's capacity to consent and agreement to the sexual activity were at issue. It was open to the trial court to accept the evidence of incapacity and the evidence that the complainant did not agree to the sexual activity. Both findings went to a lack of subjective consent and did not need to be reconciled with each other, nor approached in any particular order.
 9. Whether the complainant had a memory of events or not did not answer the incapacity question one way or another. The ultimate question of capacity had to remain rooted in the subjective nature of consent. The question was not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question was whether the complainant understood the sexual activity in question and that she could refuse to participate.
 10. The trial court's reasons were also sufficient. Trial reasons had to be both factually and legally sufficient. Factual sufficiency was concerned with what the trial court decided and why. Legal sufficiency required that the aggrieved party be able to meaningfully exercise their right of appeal. The task for appellate courts was not to finely parse the trial court's reasons in a search for error, but rather to assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explained what the trial court decided and why they decided that way in a manner that permitted effective appellate review.
 11. To succeed on appeal, an appellant's burden was to demonstrate either error or the frustration of appellate review, and neither was demonstrated by merely pointing to ambiguous aspects of the trial decision. Where ambiguities in a trial court's reasons were open to multiple interpretations, those that were consistent with the presumption of correct application had to be preferred over those that suggested error, as it was only where ambiguities, in the context of the record as a whole, rendered the path taken by the trial court unintelligible that appellate review was frustrated.
 12. The respondents received a fair trial. They were presumed innocent and held the Crown to its burden to prove their guilt beyond a reasonable doubt. They thoroughly cross-examined the complainant and mounted a multi-faceted defence against the charge. But fairness did not require perfection. The trial court accepted the evidence of the complainant that sexual activity began when she was unconscious and continued despite her pleas for the respondents to stop. The trial court's reasons revealed no error on a proper appellate reading. The respondents' convictions should not have been overturned simply because the trial court expressed itself poorly.
 13. A trial court's findings of credibility deserved particular deference. While the law required some articulation of the reasons for those findings, it also recognized that in the system of justice the trial court was the fact finder and had the benefit of the intangible impact of conducting the trial. Frequently, particularly in a sexual assault case where the crime was often committed in private, there was little evidence beyond the testimony of the complainant and the accused, and articulating reasons for findings of credibility could be more challenging. Such findings had to be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between credibility and reliability. Appellate courts should consider not whether the trial court specifically used the words credibility and reliability but whether the trial court turned their mind to the relevant factors that went to the believability of the evidence in the factual context of the case, including truthfulness and accuracy concerns.
 14. In the present case, the Court of Appeal did not conduct a functional and contextual reading of the trial court's reasons, but rather assessed those reasons removed from the context of the live issues

R v GF & RB

at trial. The trial court's reasons should not be read as equating any degree of intoxication with incapacity, as what was at issue was the extreme degree of intoxication to which the complainant testified. Similarly, the trial court's blending of consent and capacity revealed neither an error in law nor insufficient reasons. Capacity was not the only issue at trial, and the trial court's reasons could be read as finding both that the complainant was incapable of consenting and that she did not agree to the sexual activity. Those findings were not legally contradictory and both were available on the evidence.

15. The trial court's reasons were not perfect. They did not have to be. The trial court did not err in addressing consent and capacity together throughout its reasons. Capacity was a precondition to consent, and as such there was no need for the trial court to consider capacity separately from or after the issue of factual consent. It was open to the trial court to find that the complainant was both incapable of consenting and factually did not consent and convict the respondents on either or both routes. Nor did the trial court equate any degree of intoxication with incapacity. The trial court explained what it found and why, and what it found was that the respondents committed a sexual assault upon the extremely intoxicated complainant, who was passed out when the assault commenced. Their convictions were safe and the trial court made no error.
16. The difficulty was that, while it was clear that the trial court convicted on the basis of the complainant's incapacity to consent, his reasons did not disclose what standard he applied in deciding that the complainant was incapable of consenting. That was a critical omission, since the complainant's evidence was unclear as to capacity, and certainly did not lead unavoidably to a finding of incapacity. She did not testify, for example, that she was unable to understand the physical act, that the act was sexual in nature, the specific identity of the accused, or that she had the choice to refuse to participate in the sexual activity. Nor did she testify to unconsciousness during the sexual acts, such that a finding of incapacity necessarily followed. Rather, her testimony was that she was very intoxicated, and that her ability to resist the accused was correspondingly impaired.
17. The problem was that the evidence could also support the conclusion that the complainant had the cognitive capacity to consent throughout the interaction, notwithstanding her intoxication, and that the trial court's reasons were ambiguous as to the threshold it applied in determining that the complainant lacked capacity. Without any reference to the threshold for a finding of incapacity, or findings of fact that demonstrated an appreciation of that threshold, it remained possible and, indeed, from the trial court's reasons it was difficult to conclude otherwise that the trial court simply accepted that the complainant was intoxicated and ended its analysis at that point, without considering the further question of whether that intoxication was such as to result in incapacity. Not every instance of intoxication would result in incapacity. In order to convict the respondents, as it did, on the basis that the complainant was incapable of consenting, it was crucial that the trial court satisfy itself that the complainant was intoxicated to the point that she could not provide consent.
18. The trial court's reasons were insufficient to allow appellate review of its finding that the complainant did not have the capacity to consent. In view of the overwhelming evidence that the complainant did not consent to the sexual activity in question, however, no verdict other than guilt was possible.

Per Cote, SCJ (Dissenting Opinion)

1. It was the Criminal Code which established the requirement of a two-step analysis of consent to sexual activity. The first step in the statutory framework was to determine whether the complainant voluntarily agreed to the sexual activity in question or whether a reasonable doubt was raised in that regard. If so, the court should then turn to the second step and consider whether the agreement was obtained in circumstances vitiating consent. In the instant case, the trial court did not do so, which was an error of law.

2. While trial courts were presumed to know the basic legal principles with which they engaged on a regular basis, there had to be an intelligible foundation for their verdicts. The trial court's statement in the present case that s. 273.1(2)(b) on inability to consent to the sexual activity applied in instances where a complainant was intoxicated suggested that its view was that any level of intoxication was sufficient to vitiate consent, and it was not clear that that belief did not constitute the basis for its conclusion that there was no consent.
3. In accordance with the Criminal Code's provisions, the trial court was first required to determine whether the evidence established that there was no consent and then, if the complainant did consent or her conduct raised a reasonable doubt in that regard, whether her apparent consent was vitiated by incapacity. The trial court did not do so, which was an error of law. Its statement that the balance of the evidence at trial convincingly supported the conclusion that the respondents forced the complainant into having non-consensual sex was unclear as to whether the conviction could be sustained on the basis that the complainant did not consent, regardless of her capacity.
4. Although findings of incapacity or non-consent were not tainted by error simply because of the order in which they were made, the absence of analysis to substantiate the trial court's conclusory statement did not provide the basis for meaningful appellate review.
5. Applying the curative proviso as set out in s. 686(1)(b)(iii) of the Criminal Code was appropriate in two circumstances:
 - a) where the error was so harmless or trivial that it could not have had any impact on the verdict; or
 - b) where the evidence was so overwhelming that the trier of fact would inevitably convict.
6. The trial court's error could not be said to be so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial that any reasonable judge could not possibly have rendered a different verdict if the error had not been made. The complainant's incapacity was a live issue at trial, and acceptance of her evidence as credible was insufficient to ground a conviction.
7. The instant case was not an appropriate case in which to apply the curative proviso. The trial court's errors were not harmless or trivial, nor was the evidence so overwhelming that the trier of fact would inevitably convict. It was not possible to precisely gauge the impact of the error of law committed by the trial court. Its reasons were unclear as to whether it considered the issue of consent separately from the issue of capacity, and whether its incorrect view that any level of intoxication was sufficient to vitiate consent constituted the basis for its statement that there was no consent. The convictions could not be upheld based on the simple statement, prior to its analysis of the case that the complainant did not consent to the sexual activity and on a general conclusion that the balance of the evidence at trial convincingly supported the conclusion that the respondents forced the complainant into having non-consensual sex. Not only did the trial Crown not invite the trial court to convict on that basis, but those two statements did not make it clear that the trial court convicted the respondents on the basis of non-consent irrespective of incapacity.

Appeal allowed, the order of the Court of Appeal was set aside, and the respondents' convictions were restored.

Cases

Canada

1. *R v Hutchinson* 2014 SCC 19; [2014] 1 SCR 346 – (Explained)
2. *R v Sheppard* 2002 SCC 26; [2002] 1 SCR 869 – (Explained)
3. *R v Ewanchuk* [1999] 1 SCR 330 – (Explained)
4. *R v Chase* [1987] 2 SCR 293 – (Explained)
5. *R v Barton* 2019 SCC 33 – (Explained)

R v GF & RB

6. *R v JA* 2011 SCC 28; [2011] 2 SCR 440 – (Explained)
7. *R v Park* [1995] 2 SCR 836 – (Explained)
8. *R v Goldfinch* 2019 SCC 38 – (Explained)
9. *R v Cuerrier* [1998] 2 SCR 371 – (Explained)
10. *R v Lutoslawski* 2010 ONCA 207; 260 OAC 161 – (Explained)
11. *R v Jobidon* [1991] 2 SCR 714 – (Explained)
12. *Saint-Laurent v Héту* [1994] RJQ 69 – (Explained)
13. *R v GC* 2010 ONCA 451, 266 OAC 299 – (Explained)
14. *R v Snelgrove* 2019 SCC 16, [2019] 2 SCR 98 – (Explained)
15. *R v Al-Rawi* 2018 NSCA 10, 359 CCC (3d) 237 – (Explained)
16. *R v Daigle* (1997): 127 CCC (3d) 130; aff'd [1998] 1 SCR 1220 – (Explained)
17. *R v Gagnon* 2006 SCC 17; [2006] 1 SCR 621 – (Explained)
18. *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41; [2007] 3 S.C.R. 129 – (Explained)
19. *R v Dinardo* 2008 SCC 24; [2008] 1 SCR 788 – (Explained)
20. *R v RE.M* 2008 SCC 51; [2008] 3 SCR 3 – (Explained)
21. *R v Laboucan* 2010 SCC 12, [2010] 1 SCR 397 – (Explained)
22. *R v Vuradin* 2013 SCC 38; [2013] 2 SCR 639 – (Explained)
23. *R v Villaroman* 2016 SCC 33, [2016] 1 SCR 1000 – (Explained)
24. *R v Chung* 2020 SCC 8; *R v Burns* [1994] 1 SCR 656 – (Explained)
25. *R v McMaster* [1996] 1 SCR 740 – (Explained)
26. *R v Langan* 2020 SCC 33; rev'g 2019 BCCA 467; 383 CCC (3d) 516 – (Explained)
27. *R v CLY* 2008 SCC 2; [2008] 1 SCR 5 – (Explained)
28. *R v Morrissey* (1995) 22 OR (3d) 514 – (Explained)
29. *R v Kishayinew* 2020 SCC 34; rev'g 2019 SKCA 127; 382 CCC (3d) 560 – (Explained)
30. *R v Slatter* 2020 SCC 36; rev'g 2019 ONCA 807, 148 OR (3d) 81 – (Explained)
31. *R v HC* 2009 ONCA 56, 244 OAC 288 – (Explained)
32. *R v Harrer* [1995] 3 SCR 562 – (Explained)
33. *R v Mian* 2014 SCC 54; [2014] 2 SCR 689 – (Explained)
34. *R v Mehari* 2020 SCC 40 – (Explained)
35. *R v Howe* (2005): 192 CCC (3d) 480 – (Explained)
36. *R v Kiss* 2018 ONCA 184 – (Explained)
37. *R v Wanihadie* 2019 ABCA 402; 99 Alta. LR (6th) 56 – (Explained)
38. *R v JMS* 2020 NSCA 71 – (Explained)
39. *R v CAM* 2017 MBCA 70; 354 CCC (3d) 100 – (Explained)
40. *R v KP* 2019 NLCA 37; 376 CCC (3d) 460 – (Explained)
41. *R v Aird (A)* 2013 ONCA 447, 307 OAC 183 – (Explained)
42. *R v Gravesande* 2015 ONCA 774; 128 OR (3d) 111 – (Explained)
43. *R v Willis* 2019 NSCA 64; 379 CCC (3d) 30; *R v Roth* 2020 BCCA 240, 66 CR (7th) 107. – (Explained)

Statutes**Canada**

Criminal Code, RSC 1985, c. C-46, ss. 265, 273.1, 686(1)(b)(iii) – (Interpreted)

Texts and Journals

1. Benedet, Janine, and Isabel Grant. “*Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief*” (2007), 52 McGill L.J. 243.

2. *Black's Law Dictionary*, 11th ed by Bryan A Garner St Paul, Minn: Thomson Reuters, 2019, "credibility".
3. Ferguson, Gerry A., and Michael R. Dambrot. *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed. Vancouver: Continuing Legal Education Society of British Columbia, 2005 (loose-leaf updated November 2019).
4. *McWilliams' Canadian Criminal Evidence*, Vol 3, 5th ed by S Casey Hill, David M Tanovich and Louis P Strezos, eds. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2020, release 4).
5. Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Advocates

None mentioned

Legal and Human Rights Centre and Centre for Reproductive Rights
(on behalf of Tanzanian girls) v United Republic of Tanzania

Tanzania

1. Mandatory pregnancy testing, detention and expulsion from school of pregnant and married girls with no chance of re-entry was a violation of their right to education and also amounted to cruel, inhuman and degrading treatment.

Significance: States were required to take measures such as reviewing laws and policies that facilitated the expulsion of pregnant girls and ensure there were no restrictions on their return following childbirth..

Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania

0012/Com/001/2019

African Committee of Experts on the Rights and Welfare of the Child
Joseph N, CP; Anne M, VCP; Aboubekrine EJ, RC; Sidikou AM; Aver G,
Hermine GK, Moushira K, Robert DN, Theophane MX, Karoonawtee C, Wilson AA, MSC
April 1, 2022

Constitutional Law – Bill of rights – right against cruel, inhuman and degrading treatment – where the complainants had been subjected to forced pregnancy testing and expulsion from schools in events they were found pregnant or married – whether practices of mandatory pregnancy testing and expulsion and illegal detention of pregnant girls who were sometimes also survivors of sexual violence amounted to cruel, inhuman and degrading treatment – African Charter on the Rights and Welfare of the Child, 1999, articles 3 and 16; Maputo Protocol, 2003, 1(f).

Constitutional Law – Bill of Rights – right to education – where the complainants had been subjected to forced pregnancy testing and expulsion from schools in events they were found pregnant or married – whether the expulsion of pregnant and married girls from schools with no chance of re-entry violated article 11 of the Charter on the right to education – African Charter on the Rights and Welfare of the Child, 1999, article 11.

Criminal Law – offences – sexual violence-margin of appreciation doctrine in relation to sexual violence – where the complainants had been subjected to forced pregnancy testing and expulsion from schools in events they were found pregnant or married – whether mandatory testing and expulsion of pregnant and married girls could be justified by the doctrine of margin of appreciation – what was the meaning and scope of the margin of appreciation doctrine in relation to sexual violence – African Charter on the Rights and Welfare of the Child, 1990, articles 3 and 16; Maputo Protocol, 2003, 1(f).

Brief facts

The complainants alleged that primary and secondary school girls were subjected to forced pregnancy testing and expulsion from schools in events where they were found pregnant or married. Mandatory pregnancy testing was practiced in almost all public schools subjecting girls as young as 11 years of age to pregnancy testing. The testing did not follow any standard and sometimes painful methods, such as poking, were applied to check for pregnancy by school personnel. Pregnancy testing was undertaken without the consent of the girls and most often the results were not communicated to the girls but rather shared with school staff without the consent of the girls.

Girls were also required to take a pregnancy test when they enrolled in schools. The sexual reproductive health services available in the respondent state were not youth-friendly; hence, girls were not encouraged

to access such services even when available. Lack of information and services on sexual reproductive health resulted in unwanted and unplanned pregnancy of girls who were then forced to leave their education due to pregnancy. It was also increasing the number of unsafe abortions among adolescent girls, which was also exacerbated by the restrictive abortion law of the respondent state, hence the communication.

Issues

- i. Whether the practice of mandatory pregnancy testing and illegal detention of pregnant girls who were sometimes also survivors of sexual violence amounted to cruel, inhuman and degrading treatment.
- ii. Whether the expulsion of pregnant and married girls from schools with no chance of re-entry violated article 11 of the African Charter on the Rights and Welfare of the Child, 1999 on the right to education.
- iii. Whether a state's argument that education should be generally geared towards the preservation of African morals was good justification by a State to expel pregnant and married girls from schools with no chance of re-entry.
- iv. Whether a state's reliance on the doctrine of margin of appreciation to impose conditional access to the right to education was a violation of article 11 of the African Charter on the Rights and Welfare of the Child, 1990
- v. What was the meaning and scope of the margin of appreciation doctrine in relation to sexual violence?
- vi. What amounted to harmful practices against women and children that violated the rights of women and children?

Held

1. The state was responsible for acts that violated article 16 of African Charter on the Rights and Welfare of the Child, 1990 (the Charter) on protection against child abuse and torture which were perpetrated by private actors where the state had not acted to prevent or investigate such acts, so long as it could be shown that representatives of the state knew or had reasonable grounds about the occurrence of such acts.
2. The enforcement of pregnancy testing and expulsion had been employed throughout schools as part of the state's efforts to discourage children from having sexual relations. Whereas the respondent state alleged that it was not aware of the illegal detention of pregnant girls that had been occurring, it had been widely reported on and brought to the state's attention by the complainant and its national human rights institution. The police acted on behalf of and were employed by the state and its alleged conduct was, therefore, a matter of state responsibility. The state thus had reasonable grounds to believe those illegal detentions were occurring and had an obligation in exercise of its responsibilities to investigate that matter.
3. The African Commission endorsed the definition of cruel, inhuman, and degrading treatment as a treatment that caused mental or physical harm. Gender-based violence was a form of cruel, inhuman and degrading treatment and included physical and psychological acts committed against victims without their consent or under coercive circumstances. The Committee acknowledged the psychological harm and physical pain experienced by girls forced to undergo pregnancy tests as well as the humiliating manner in which many girls were subsequently expelled amounted to practices that were cruel, inhuman, and degrading treatment.
4. The respondent state had not respected its obligation to provide children with legal protection in conditions of freedom, dignity and security as far as it had failed to; properly investigate suspected illegal detentions, and to prevent such illegal detentions from occurring.
5. Sexual violence was itself a form of cruel, inhuman, and degrading treatment and a violation of article 16 of the Charter. Subjecting girls who were survivors of sexual violence to illegal detention was thus a continuation of the cruel, inhuman, and degrading treatment they had already suffered.

**Legal and Human Rights Centre and Centre for Reproductive Rights
(on behalf of Tanzanian girls) v United Republic of Tanzania**

- The forced pregnancy testing, expulsion of the pregnant girls, and their illegal detention was cruel, inhuman, and degrading treatment and subjected them to further trauma if those girls were survivors of sexual violence. The respondent state had violated article 16 of the Charter in all instances.
6. The right to education was an inherent right of all children, recognized under the African Charter on the Rights and Welfare of the Child (ACRWC) and other international and regional instruments. Article 11 of the Charter provided for the right to education of all children, and it set out the aim of education, states' obligation towards the realization of children's right to education as well as special measures that should be undertaken to support certain groups such as girls and gifted children.
 7. Article 11(6) of the Charter provided that states parties to the present Charter should have all appropriate measures to ensure that children who became pregnant before completing their education should have an opportunity to continue with their education based on their individual ability. The Committee noted that article 11(5) and (6) of the Charter provided for education for all with no condition being attached. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) indicated that the promotion of the enrolment and retention of girls in education and prevention of any exclusion from education, which amounted to discrimination in education was the obligation of states in fulfilling the right to education.
 8. States were required to take measures such as reviewing laws and policies that facilitated the expulsion of pregnant girls and ensure there were no restrictions on their return following childbirth. The Committee and the African Commission on Human and Peoples' Rights had stipulated that States had to undertake measures to encourage pregnant girls to continue with their education and, more specifically ensure that there was retention and re-entry of pregnant and married girls, and where they were unable to return to schools, to provide them with alternative education programs. The UN Committee on the Rights of the Child (UNCRC) had also provided that expulsion of girls from school based on pregnancy was a discriminatory act which should be prohibited and that adolescent mothers should be provided with an opportunity to continue with their education.
 9. The responsibility of states in realizing the right to education included the obligation to promote, respect, protect and fulfil education. The obligation of states to respect the right to education entailed that states should not interfere with the right to education of girls, rather they should provide enabling policies, allocate budgets and fulfil the right to education of girls. The education that was being provided by states should be provided with respect for human rights and fundamental principles set out in human rights instruments. Schools should be free from any kind of violence, abuse, and deprivation of rights. Any pre-condition set to access education that was not in line with human rights standards was a violation of the right to education as inherently the right to education was provided for every child.
 10. The respondent state's argument that its policy on pregnant and married girls being carried out was in line with article 11(2)(c) of the Charter which stipulated that education should be geared toward the preservation of African morals was not founded within the general principles of the Charter. Article 11(2)(c) vividly highlighted that only positive African morals, values and cultures should be strengthened through education. Positive African morals, values, and cultures were premised on tolerance, consultation and dialogue and were not to be interpreted to include practices harming the child and violating the Charter.
 11. Article 11(2)(c) of the Charter needed to be read in line with the whole context of article 11 whose aim was to accord all children the right to education and which also provided specific support to pregnant girls to continue their education under article 11(6). Article 11(2)(c) should also be read in line with the general principles of the Charter which included among others, the best interests of the child, and the principle of non-discrimination. The argument of the respondent state that sexual relations among children was not an African value and that the policy aimed to discourage

- sexual relations was not acceptable. The fact that no distinction was made among children who fell pregnant due to sexual abuse and exploitation was a manifestation that the policy's intent was not mainly aimed at discouraging sexual relations. The promotion of a certain value could not be achieved by establishing rules and policies that were not in conformity with the Charter.
12. The terminology of mandatory testing contained the same meaning as forced since the girls had no option of refusing the test to access education. The Committee was of the view that no proof was required as to an increase in drop-out of school to establish that forced pregnancy testing was a violation of the right to education. Any form of unlawful requirement to access and continue education and any violation of children's rights that occurred in schools and curtails education was, in and by itself, a violation of the right to education. Forced or mandatory pregnancy testing to access education was a pre-condition that was not aimed at fostering education, rather it violated the right to dignity, freedom from torture and the right to privacy of children. The Committee found that mandatory pregnancy testing was a violation of article 11 of the Charter.
 13. The doctrine of the margin of appreciation was provided for in the preamble to the European Convention on Human Rights (the Convention) as introduced by protocol 15 which amended the preamble to the Convention. The provisions required parties to the Convention to follow the principle of subsidiarity, to exercise their primary responsibility to secure the rights and freedoms in the Convention and the Protocols thereto, to engage in a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights. The margin of appreciation doctrine allowed states leverage in the fulfilment of their obligations under the human rights instrument in a manner that did not defeat the promotion and protection of the rights of an individual.
 14. The doctrine of the margin of appreciation entailed that states should have the discretion to interpret and apply some of the elements of the provisions of the European Convention on Human Rights in fulfilling their obligations therein. Article 10(2) of the Convention provided for a margin of appreciation for states in ensuring the right to freedom of expression as it provided for certain ground for the limitation of the right and certain conditions for the enjoyment of the right. It alluded to the fact that the margin of appreciation did not accord states unlimited power of appreciation but rather it was understood and implemented along with the European supervision. Any margin of appreciation that states had had to be applied for a legitimate aim and only if it was necessary for a democratic society.
 15. The Convention was the basis or the floor as the unqualified minimum guarantee of human rights which a state was not able to go below, an area which lay above the basis or floor, within which the state could elect to exercise discretion on condition that its decision was above the floor. The state party could exercise its margin of appreciation as long as it was not violating its obligations or the rights under the Charter.
 16. Elements of article 11 of the Charter in general and article 11(1) in particular left no room for limitation or condition in the application of the rights provided, hence the argument of the respondent state on the application of the margin of appreciation went against the protected right of education under the African Children's Charter. Article 11(3)(d)(e) and 11(6), provided clear obligations by requiring state to take special measures in respect of girls and prevent drop-out of school as well as to support girls who fell pregnant while in school.
 17. The respondent state had introduced policies and practices which excluded pregnant and married girls from public schools and had introduced mandatory pregnancy testing in schools the outcome of which results in expulsion with no re-entry. Those policies and practices were not contested by the respondent state but rather defended on the grounds of morality. No argument of morality or margin of appreciation could justify a policy and practice which was against the explicit provisions of the Charter. The Committee did not accept the justification of the respondent state based on the

**Legal and Human Rights Centre and Centre for Reproductive Rights
(on behalf of Tanzanian girls) v United Republic of Tanzania**

doctrine of margin of appreciation.

18. The expulsion and the prohibition of re-entry of pregnant and married girls was another form of the perpetuation of the negative societal attitude towards the same group of girls including stigmatization and segregation that was deeply entrenched in most African communities. Education should be used as a tool to address such negative attitudes and not perpetuate or conform to such attitudes. Providing education to such disadvantaged groups should have been part of the education strategy of the state party by providing them with the necessary support and affirmative action to overcome the disproportionate impact of their situations. The respondent state acted in violation of article 11 of the Charter through its policy of expulsion of pregnant and married girls from schools as well as introducing a condition of mandatory/forced pregnancy testing to be enrolled in schools. The re-entry policy of the respondent state was a violation of the right to education which required the states to make education accessible to all.
19. The prevention of sexual relations among adolescents was not an internationally recognized obligation of the State. Countries in Africa had different ages for sexual consent ranging from 12 to 18 years. Consensual and non-exploitative sexual relations among adolescents should be decriminalized. The exclusion of pregnant and married girls from schools with no opportunity for re-entry created a vicious cycle of gender-based discrimination as those girls would be excluded from the benefits of education.
20. Education was not only a substantive right, but the enjoyment of the right to education also facilitated the realization of other rights of children and the elimination of discrimination against girls. Article 1(f) of the Maputo Protocol provided that discrimination against women included any form of discrimination against women from the enjoyment of their rights regardless of their marital status. The expulsion of pregnant and married girls with no re-entry amounted to discrimination based on sex, marital status, and health status (pregnancy) within the meaning of article 3 of the Charter, and further entrenched gender-based discrimination.
21. Mandatory pregnancy testing was differential treatment on the ground of sex and interfered with the right to education, the right to privacy, and the health of girls among others. The mandatory pregnancy testing presumed that all girls who fell pregnant had committed an immoral act which was a perpetuation of structural gender-based discrimination which subjected girls to scrutiny on their sexuality although they were victims of sexual abuse. Mandatory pregnancy testing also amounted to discrimination. The detention of pregnant girls was discrimination based on their gender, age, and health status (pregnancy) as they were being targeted on those grounds while having committed no crime.
22. Article 21 of the Charter did not provide for a definition of harmful practices, it rather provided certain grounds for the prohibition of harmful practices. It stated that any practice that affected the welfare, dignity, development health, and life of the child and was discriminatory on prohibited grounds should be eliminated. Article 21(2) explicitly prohibited child marriage and betrothal of children. The Committee, in further elaborating article 21(1) of the Charter, adopted the definition of harmful practices provided by the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women. The two Committees had identified 4 criteria for defining harmful practices if:
 - a. They constituted a denial of the dignity and/or integrity of the individual and a violation of their human rights;
 - b. They constituted discrimination limiting the capacity of girls to fully participate in society;
 - c. They were practices that were prescribed and/or kept in place by social norms that perpetuated male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors; or

- d. They were imposed on women and children by family members, community members or society at large regardless of the victim's lack of or inability to consent.
23. The mandatory pregnancy testing of girls and their expulsion from school when found pregnant or married impaired the enjoyment of their rights under the Charter and that such practice was discriminatory within the ambit of article 3 of the Charter and violated the right to dignity, freedom from torture, and the right to privacy of girls, among others. The Committee stressed that schoolgirls who were married and fell pregnant were victims of a larger pattern of gender-based discrimination which the respondent state was required to address by taking the necessary safeguards through law and practice as well as providing redress to victims.
24. The failure of state parties to ensure compliance with the minimum age of marriage set at 18 was a violation of article 21 of the Charter. The policy and the practice of the respondent state subject victims to secondary victimization and hinder the apprehension of perpetrators of sexual violence by shifting the blame on the victims.
25. When children in situations where their health and well-being were implicated, they should be provided with adequate and appropriate information to understand the situation and all the relevant aspects concerning their interests, and be allowed, when possible, to give their consent in an informed manner. The complainants further submitted that the procedure was painful and traumatic for some girls, including some of the deponents of the affidavits. The practice of mandatory pregnancy testing had also been shown to involve publicly announcing results- in cases where the child was found to be pregnant-to shame the child concerned. Beyond mandatory testing being a clear violation of article 4 of the Charter, that practice was a violation of that provision at every point in the process through which mandatory pregnancy testing was undertaken, including the events before and after the test. The entire practice should thus be eliminated.

Orders

The Committee recommended for the respondent state to:

- i. Immediately prohibit mandatory pregnancy testing in schools and health facilities and publicly announce the prohibition;*
- ii. Review the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 GN No 295 of 2002 and in doing so remove wedlock as a ground of expulsion and provide an indication that the moral ground of expulsion should be interpreted narrowly and should not apply in cases of pregnancy of schoolgirls;*
- iii. Undertake concrete steps to prevent the expulsion of pregnant and married girls from schools including by providing laws and policies on the same;*
- iv. Remove any policy of non-re-entry of schoolgirls including girls who had dropped out of school due to pregnancy or wedlock;*
- v. Immediately re-admit schoolgirls who had been expelled due to pregnancy and wedlock and provide special support programmes to compensate for the lost years and ensure better learning outcomes for the returned girls;*
- vi. Provide clear guidance to school administrators that girls who dropped out of school due to pregnancy or wedlock with their preference were allowed to come back to school with no preconditions;*
- vii. Investigate the cases of detention of pregnant girls and immediately release detained pregnant girls who were being interrogated to reveal who impregnated them and stop such kinds of illegal arrests of pregnant girls;*
- viii. Provide sexuality education for adolescent children and provide child friendly sexual reproductive and health services;*
- ix. Undertake extensive sensitization of teachers, health care providers, police and other actors with regards to the protection that should be accorded to pregnant and married girls;*
- x. Undertake proactive measures towards the elimination of child marriage and other harmful practices*

**Legal and Human Rights Centre and Centre for Reproductive Rights
(on behalf of Tanzanian girls) v United Republic of Tanzania**

- that affected girls including by taking measures to address the underlying factors such as gender-based discrimination, poverty, and negative customary and societal norms;
- xi. Create a conducive reporting and referral mechanism for survivors of sexual violence including child marriage, and provide psychosocial support, rehabilitation and reintegration services for the survivors;
 - xii. Investigate and prosecute perpetrators of sexual violence and child marriage;
 - xiii. Take action against any actors who conducted forced pregnancy testing of any kind, or who discriminate against girls on the grounds of their pregnancy or marital statuses such as expulsion and detention;
 - xiv. Provide special support to pregnant and married girls to continue their education in a school of their choice and based on their consent.
 - xv. Report to the Committee on all measures taken to implement the decision of the Committee within 180 days from the date of receipt of the Committee's decision.

Cases

Regional Court

1. *Abdulaziz, Cabales and Balkandali v The United Kingdom* 15/1983/71/107-109, Council of Europe: European Court of Human Rights, 24 April 1985 – (Explained)
2. *Ahmed Bassiouny v Arab Republic of Egypt* ACERWC, Communication No 009/Com/001/2016 – (Explained)
3. *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* ACHPR Application No 046/2016 – (Explained)
4. *Celis Laureano v Peru* Human Rights Committee (HRC) Communication No 540/1993 – (Explained)
5. *Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* (Application No 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) – (Explained)
6. *Civil Liberties Organisation (in respect of the Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) – (Explained)
7. *Community Court of Justice of the Economic Community of West African States (ECOWAS)* – (Explained)
8. *Genie-Lacayo v. Nicaragua*, Merits Inter-American Court of Human Rights (IACtHR) – (Explained)
9. *Institute for Human Rights and Development in Africa (IHRDA) and other v Kenya* ACERWC, Communication 002/2009 – (Explained)
10. *Institute of Human Rights and Development in Africa and Finders Groups Initiatives on behalf of TFA v The Republic of Cameroon* ACERWC Communication No 006/com/002/2015, – (Explained)
11. *Minority Rights Group International and SOS-Eslaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, ACERWC, Communication No 007/Com/003/2015 – (Explained)
12. *Minority Rights Group International and SOS-Eslaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania*, ACERWC Communication No 007/Com/003/2015 – (Explained)
13. *Minority Rights Group International and SOS-Eslaves v the Republic of Mauritania*, ACERWC Communication No 007/com/003/2015 – (Explained)
14. *Mpaka-Nsusu v Zaire case and Interights v Eritrea and Ethiopia para 2*; HRC, Communication No 157/1983 – (Explained)
15. *Oršuš and others v Croatia* Application No 15766/03; European Court of Human Rights, 16 March 2010, para 181-185 – (Explained)
16. *Project Expedite Justice and others v The Sudan* ACERWC Communication No 0011/Com/001/2018 – (Explained)
17. *Sir Dawda K Jawara v The Gambia*, ACHPR, Communications 147/95 and 149/96 – (Explained)
18. *Sohaib Emad v Arab Republic of Egypt* ACERWC, Communication No 008/Com/002/2016 – (Explained)

19. *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense Des Droits de l'homme (Senegal) v The Government of Senegal* ACERWC Communication No 003/Com/001/2012 – (Explained)
20. *WAVES and CWS-SL v the Republic of Sierra Leone* Judgment No /ECW/CCJ/Jud/37/19, page 27-28 – (Explained)
21. *Zobra Madoui (represented by counsel, Nassera Dutour) v Algeria* HRC, Communication 1495/2006 – (Explained)

South Africa

Constitutional Court of South Africa, Government of the Republic of South Africa and others v Grootboom and others 2000 (11) BCLR 1169 (CC) 44 – (Explained)

Statutes

Zimbabwe

1. Constitution of Tanzania, 1977 articles 1, 3, 4, 10, 14, 16, 21 – (Interpreted)
2. Tanzania's Education (Expulsion and Exclusion of Pupils from School) Regulation 2002 GN No 295 of 2002 section 4, 7(b); 60A – (Interpreted)
3. Tanzania's Education (Imposition of Penalties to Persons who marry or Impregnate a School Girl) Rules 2003, G.N. No. 265 of 2003 – (Cited)

Texts and Journals

1. Frans Viljoen, 'International Human Rights Law in Africa,' 2012, 2nd ed, Oxford University Press, 321
2. H Onoria 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3
3. *African Human Rights Law Journal*, 5; ACERWC, Communication No 002/2009
4. S. Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights,' Council of Europe, 2000, 5.
5. Bruce Abramson, 'A Commentary on the United Nations Convention on the Rights of the Child: Article 2 The Right to Non-Discrimination,' Martinus Nijhoff Publishers, 2008, page 29
6. L.R. Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep structural principle of the European human rights regime' (2008) 19(1) *European Journal of International Law* 125
7. Nanima, RD (2018). *A critique of the jurisprudence of the African commission regarding evidence in relation to human rights violations: A need for reform?* (Unpublished University of the Western Cape PhD Thesis) 186-187.

International Instruments and Conventions

1. African Charter on the Rights and Welfare of the Child, 1999 article 11(2)(c)(3)(d)(e)(5) (6); 16; 21(1)(2); 4
2. African Commission on Human and Peoples' Rights, 1987 articles 2, 46
3. Article 1(g); 10; 14(2)(c) of the Maputo Protocol African Charter on Human and Peoples' Rights on the Rights of Women in Africa
4. Convention Against Discrimination in Education, 1960 article 1, 3
5. Convention on the Elimination of Discrimination Against Women, article 5(a)
6. European Convention on Human Rights (ECHR), 1953 article 10(2)
7. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, article 1(g)

Advocates

None mentioned

Musa v Republic

2. In proving sexual offences, the best evidence is that which comes from the victim but if the victim is a child, then he/she must be treated in accordance with section 127(2) of the Evidence Act during adducing of evidence

Significance: The case clarifies whether the evidence of a child as a victim of sexual offence was reliable in proving a sexual offence.

Musa v Republic

1 of 2022

High Court at Tanzania

EI Laltaika, J

October 3, 2022

***Criminal Law** – offences – rape – trial for a rape case – reliable evidence – where the appellant was accused of having carnal knowledge with the victim – where the appellant pleaded not guilty – where the appellant was found guilty of rape and sentenced to serve 30 years’ imprisonment – where section 127(4) of the Evidence Act defined who was a child of tender age to mean a child whose apparent age was not more than fourteen years – where the victim when testified was fourteen years old – whether the evidence was reliable in proving a sexual offence – what standard of evidence was sufficient in proving a sexual offence – Evidence Act, 1967, section 127(2); Penal Code, [Cap 16 RE 2019], section 130.*

Brief facts

The appellant was charged before the District Court of Lindi with the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code, [Cap 16 RE 2019]. The particulars that were laid in a charge indicated that on April 3, 2020 at Mnonela Village within the District and Region of Lindi the appellant had carnal knowledge of one ASM, the victim, a 14-year-old girl.

When the charge was read over and explained to the appellant, he pleaded not guilty hence the matter went to full trial. At the trial, the prosecution paraded three (3) witnesses, namely, the victim (PW1), Said Mohamed Salum (PW2) and Yohamna Zabron (PW3). The prosecution also tendered one (1) exhibit: Police Form No 3 (PF3) (Exhibit P1).

Having been convinced that the prosecution had proved their case at the required standard namely beyond a reasonable doubt, the trial court found the appellant guilty of the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code and sentenced him to serve a term of thirty (30) years imprisonment. Aggrieved, the appellant lodged a substantive petition of appeal.

Issue

Whether the evidence of a child who was a victim was reliable in proving a sexual offence.

Held

1. It was undisputed that the evidence of PW1 was taken without complying with section 127(2) of the Evidence Act. It was true that the victim when she testified was fourteen years old. Section 127(4) of the Evidence Act defined who was a child of tender age to mean a child whose apparent age was not more than fourteen years.
2. When the victim was testifying, she was fourteen years old. The victim deserved to be treated within

the dictates of section 127(2) of the Evidence Act during adducing her evidence. Unfortunately, it was true that the evidence of the victim was received without complying with section 127(2) of the Evidence Act. The way the trial court took the evidence of the victim, it was as if the victim was above fourteen years of age.

3. In proving sexual offences, the best evidence was that which came from the victim. Nevertheless, in certain circumstances, the offence could be proved despite the absence of evidence from the victim. Such evidence had to, however, be cogent enough such that it left no reasonable doubt that the charged person committed it.
4. The only other evidence worthy of the court's consideration was that of PW2, father of the victim who allegedly arrested the appellant in his homestead in the company of the victim. PW2, allegedly, arrested the appellant with the aid of his younger brother and his nephew. Unfortunately, those two persons who aided PW2 to arrest the appellant did not come to court to testify. No local government leader witnessed his arrest. That made the evidence of PW2 uncorroborated.
5. Upon the court's perusal of the evidence of the appellant and his witness, they both featured cogent and consistent evidence on the claim of the appellant of TZS 40,000/= against PW2 for work he assigned him at his salt harvesting farm. The record of the lower court showed that PW2 only paid the appellant TZS. 10,000 and when the appellant was making a follow-up for the remaining amount, PW2 told him that it would put him (the appellant) into trouble. The appellant did not raise the issue of his conflicts with PW2 belatedly. The appellant was right to raise such an issue during his defence and not before.
6. The evidence of the victim was so crucial to assist the prosecution to sustain the appellant's conviction. With no evidence of the victim, the court was of the settled position that the evidence of PW2 and PW3 left a lot to be desired. The court entertained no doubt whatsoever in its mind that the prosecution had failed to prove its case beyond reasonable doubt as required by law.

Appeal allowed; trial court's judgment quashed and set aside.

Order

The appellant be released forthwith from prison unless otherwise held for other lawful reasons.

Cases

Tanzania

1. *Masanja v Republic* Criminal Application No 378 of 2018 CAT – (Explained)
2. *Saidi Likubu v Republic* Criminal Appeal No 228 of 2020 CAT – (Explained)
3. *Julius Kadonga v Republic* Criminal Appeal No 77 of 2017 CAT – (Explained)
4. *Godfrey Wilson v Republic* – (Mentioned)
5. *Masoud Ngosi v Republic* Criminal Appeal No 195 of 2018 – (Mentioned)
6. *Selemani Makumba v Republic* [2006] TLR 379 – (Explained)
7. *Yusuf Molo v Republic* Criminal Case No 343 of 2017 – (Explained)
8. *Mbaraka Ramadhani @ Katudu v Republic* Criminal Appeal No 185 of 2018 – (Explained)

Statutes

Tanzania

1. Penal Code (cap 16 RE 2019) section 130(1)(2)(e); 131(1) – (Interpreted)
2. Evidence Act section 127(2)(4) – (Interpreted)

Advocates

Mr Enosh Kigoryo learned Senior State Attorney for the state

Baloyi v Republic**Zimbabwe****1. An early complaint was admitted to show consistency by the complainant, not as proof of the sexual offence**

Significance: A complaint in sexual assault cases had to be made freely and voluntarily, and without undue delay, to the first person to whom the complainant could reasonably be expected to have made it.

Baloyi v Republic

HMA 14-18/HCA 11-17

High Court at Zimbabwe

Mawadze & another; Mafusire, JJ

February 14, 2018

Criminal Law – offences – sexual offences – rape – where the appellant was convicted of indecent assault and physical abuse – where the appellant was alleged to have indecently assaulted his own biological daughter aged 17 – where the appellant was alleged to have assaulted his first wife, SS so severely that she fell unconscious – where there was a delay of fourteen months in reporting count one – where the appellant pleaded not guilty to both counts but after a full trial he was convicted of both – how was a rape report to be filed by a complainant in a rape case – Domestic Violence Act, cap 5:16, sections 3 and 4.

Criminal Law – offences – sexual offences – rape – where the appellant was convicted of indecent assault and physical abuse – where the appellant was alleged to have indecently assaulted his own biological daughter aged seventeen – where the appellant was alleged to have assaulted his first wife, SS so severely that she fell unconscious – where there was a delay of fourteen months in reporting count one – where the appellant pleaded not guilty to both counts but after a full trial he was convicted of both counts but after a full trial he was convicted of both – when could the aggravating circumstances far outweigh the mitigating factors in a sexual offence case – what was the penalty for an accused person proved to have indecently assaulted his own biological daughter and assaulted his wife as well – Domestic Violence Act, Cap 5:16, sections 3 and 4.

Brief facts

The appellant, thirty-eight [38] years of age at the time of his arrest, was a father of six children from two customary law wives. On February 15, 2017 he was convicted of the two counts by the Provincial Magistrate's Court sitting at Mberengwa in the Midlands Province. Count one was indecent assault, in contravention of section 67[1][a][i] of the Criminal Law [Codification and Reform] Act, Cap 9:23 [the Criminal Code]. The appellant was alleged to have indecently assaulted his own biological daughter, AB. She was seventeen [17] years old at the time. The incident happened at the family's village homestead in rural Mberengwa. The appellant allegedly smeared and applied some foul smelling and bitter tasting herbs onto her breasts and privates. That allegedly followed advice from a traditional healer, or *n'anga*, who had supplied the herbs. The whole gory business was so that the appellant could amass untold wealth.

Count two was physical abuse, in contravention of section [3][1][1][a], as read with section 4 of the Domestic Violence Act, Cap 5:16. The appellant was alleged to have assaulted his first wife, SS so severely that she fell unconscious. SS was pregnant at the time. He beat SS all over the body with clenched fists, booted feet and a switch. The reason for the assault was said to be SS's adamant refusal to share their matrimonial home with the appellant's new wife. The appellant pleaded not guilty to both counts. But after a full trial he was convicted of both. In count one he was sentenced to thirty-six

[36] months imprisonment. In count two he was sentenced to six [6] months imprisonment. Thus, the total period of imprisonment was forty-two [42] months. Nothing was suspended. No periods of imprisonment were ordered to run concurrently.

Issues

- i. How was a rape report supposed to be filed by the complainant in a rape case.
- ii. When could the aggravating circumstances far outweigh the mitigating factors in a sexual offence case?
- iii. What was the penalty for an accused person proved to have indecently assaulted his own biological daughter and assaulted his wife as well?

Held

1. The state witnesses' evidence was robust, straightforward and thoroughly incriminating. The grounds of appeal and counsel's submissions bore no relationship to the reality on the ground. The trial court dealt competently with the relevant issues. For example, it was not true that the court convicted on the evidence of a single witness, even though that would not have been a misdirection in itself. Both AB and SS gave evidence on count one.
2. The appellant argued broadly about the delay of fourteen months in count one. It was said AB's report was not made freely and voluntarily or timeously. A complaint in sexual assault cases had to be made freely and voluntarily, and without undue delay, to the first person to whom the complainant could reasonably be expected to have made it.
3. The appellant was misapplying those principles. In a sense, AB's report was not made immediately or voluntarily. But the circumstances under which it was made actually vindicated her sincerity. But for the turbulence in her marriage, the result of the trauma she was suffering by reason of the appellant's macabre conduct, she would not have reported the incident. As the court *a quo* correctly noted, her disclosure was not so that the appellant could be arrested. It was so that she could be assisted.
4. An early complaint in a rape case, or any other sexual offence, was admitted, not as proof of the rape or of the sexual offence. It was admitted, not to corroborate the complainant. Rather, it was admitted to show consistency by the complainant. It was admitted to negate a defence that the act was consensual.
5. There was not much in the form of a defence that the appellant himself proffered. He admitted virtually everything else surrounding the commission of the crime, except the intrinsic part forming the essential ingredient of the offence, namely his smearing of the herbs on AB's breasts and private parts. He said he merely gave AB the herbs to apply them on her body herself. But that was at night; with just himself and the vulnerable girl present; in the privacy of his own bedroom; when everyone else had gone to asleep; on a day SS was sleeping out, and for the furtherance of some occult ritual prescribed by some dubious practitioner of the nether world.
6. AB's evidence was quite graphic. It left nothing to imagination. Evidently, the appellant's singular intention was to rape her. The charade about smearing herbs on her body and asking her to drink some of them was evidently to numb her psyche and make it easy for him. Defence counsel said no *onus* rested on an accused person to convince the court of the truth of any explanation given by him. That was too sweeping. Not when the state had led such damning and incriminating evidence as to allow no other inference to be drawn, except that of guilty as charged. The evidential *onus* shifted to the accused. For him to fool around with a fanciful; whimsical; far-fetched, and inherently implausible explanation was to play Russian roulette.
7. Only the appeal against sentence made sense. But surprisingly, in the court below, it seemed neither the parties nor the court itself paid attention to the prescribed sentences. In count one, the sentence passed was incompetent, incidentally, a point not forming part of the appeal. As the state correctly

Baloyi v Republic

- conceded, the penalty provision for indecent assault in the Criminal Code, namely section 67[1][a] [i], prescribed a sentence of a fine not exceeding level seven [i.e. \$400], or imprisonment for a period not exceeding two years, or both. The court imposed thirty-six months' imprisonment. That was a manifest misdirection. As such, the court could interfere.
8. Defence counsel pressed for twenty months' imprisonment for count one, not because of the above misdirection, but on the grounds that the appellant was a first offender whose mitigatory circumstances the court *a quo* allegedly failed to take into account.
 9. In count two, defence counsel pressed for three months' imprisonment wholly suspended on condition he performed community service. The sentence of the court *a quo* was six months' imprisonment. The penalty provision in the Domestic Violence Act, namely section 4, prescribed a sentence of a fine not exceeding level fourteen [\$5 000], or imprisonment for a period not exceeding ten years, or both.
 10. Since the court *a quo* did not treat the two counts as one for the purposes of sentence, it ought to have considered such sentences as would have been appropriate for each individual count. It seemed the court's paltry six months' imprisonment for count two was influenced by the relatively staggering thirty-six months' imprisonment for count one. Apparently the court did not appreciate that, from the perspective of the prescribed sentences, count two was the more serious offence of the two.
 11. The mitigating circumstances of the appellant could be summed up in two short sentences. He was a first offender. He was a married man with heavy family responsibilities. But the aggravating circumstances far outweighed those mitigating factors. The appellant was self-centred. Both offences were committed for selfish benefit. He wanted to get rich quickly. So he got herbs to abuse his own flesh and blood. He wanted a second wife. So he pummelled his first wife to breakdown her resistance. He was not contrite. So he put forward a maladroitness defence. His actions in count one had far reaching effects. They destroyed, or threatened to destroy, his daughter's marriage. His actions in count two had to also have left nothing of what had been his marriage with SS.
 12. The appropriate sentence for count one should have been twenty-four months' imprisonment, of which four months could have been suspended on condition of good behaviour. In count two, the appropriate sentence also ought to have been twenty-four months' imprisonment, four of them also being suspended on condition of good behaviour. Both counts could have been made to run concurrently, leaving an effective twenty months' imprisonment.
 13. Suspending portions of prison sentences was a very useful tool at the disposal of a sentencing court to salvage multiple benefits out of a situation of criminality. Among other things, a suspension on condition of good behaviour was both deterrent and rehabilitative. For that period that the suspension order was operative, the accused knew that a sword was hanging over his head, and that it would strike if he should step his foot wrong again.
 14. For that period that the accused was kept out of jail, the pressure on the fiscus was necessarily reduced, for the state did not have to concern itself with his upkeep. The accused regained his responsibility or privilege to feed himself and his family. He avoided the full wrath of prison life, and the exposure to dangerous elements inside prisons.

Appeal partly allowed.

Orders

- i. *The appeal against conviction in count one was dismissed.*
- ii. *The appeal against sentence in count one was allowed.*
- iii. *The appeal against sentence in count two was dismissed.*
- iv. *The sentence of the court a quo in count one was set aside and substituted with the following:*
- v. *Twenty-four months' imprisonment of which four months' imprisonment was suspended for five years on*

condition that during that period the accused was not convicted of an offence of a sexual nature for which he was sentenced to imprisonment without the option of a fine.
vi. The sentence in count two should run concurrently with the sentence in count one.

Cases

Zimbabwe

1. *R v Petros* 1967 RLR 35 – (Explained)
2. *S v Banana* 2000 [1] ZLR 607 [S] – (Explained)
3. *S v Nyirenda* 2003 [2] ZLR 64 [H] – (Explained)
4. *R v Difford* 1937 AD 370 – (Explained)
5. *Zunidza v State* HH 778-15 – (Explained)
6. *S v Gadzai* HMA 51-17 – (Explained)
7. *S v Mugwenhe & another* 1991 [2] ZLR 66 [SC] – (Explained)

Statutes

Zimbabwe

1. Codification and Reform Act (cap 9:23) section 67(1)(a)(i) – (Interpreted)
2. Domestic Violence Act (cap 5:16) section 3(1)(a); 4 – (Interpreted)

Advocates

2. Mr J Makiseni for the appellant
3. Mr BE Mathose for the respondent

R v Dhlamini**2. Crucial witnesses have to be called during trial in a sexual offence of rape to avoid the danger of false incrimination on the aspect of consent**

Significance: The accused in a sexual offence ought to be given the benefit of the doubt in the circumstances.

R v Dhlamini

HMA 5-18/CRB MSVR 133/17

High Court of Zimbabwe

Mawadze and Masvingo, JJ

January 19, 2018

Criminal Law – sexual offences – standard of proof examination of witnesses in sexual offences – where the trial court had not examined all witnesses – where the complainant’s evidence illustrated inconsistent and contradictory actions after the alleged rape failure to call crucial witnesses in a case of rape presented a real danger of false incrimination on the aspect of consent – Criminal Law (Codification and Reform) Act [Chapter 9:23], section 65(1).

Brief facts

The 22-year-old accused was convicted after trial by the learned Regional Magistrate sitting at Masvingo for raping a 20-year-old complainant in contravention of section 65(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The offence was said to have been committed on September 23, 2015 at Chamakani Village, Chief Chikwanda, Gutu in Masvingo.

The accused and the complainant were fellow villagers and they fell in love in July 2015. The complainant who was an orphan stayed at her uncle’s homestead but was alone most of the time as the uncle and his wife would be away at work at some school where the uncle taught. The accused had therefore unlimited access to the complainant except over the weekends when complainant’s uncle would be at home. The complainant had completed her ‘O’ level but it was not clear when that was.

Issue

Whether failure to call crucial witnesses in a case of rape presented a real danger of false incrimination on the aspect of consent

Held

1. As per the medical report the complainant was examined on December 4, 2015 and found to be 3 months pregnant. Needless to state that her hymen was found to be not intact and that indeed penile penetration was confirmed. At the time the matter was tried the complainant had given birth to twins.
2. The issue which should have loomed large in the mind of the trial court was to exclude the possible danger of false incrimination in that case. That was so because the accused and the complainant were in love. The matter only came to light when the complainant fell ill and or was pregnant. No timeous report of rape was made. The date the report was made was not even clear. The accused gave a possible motive for the complainant to allege non-consensual sexual act. Those were the critical issues the court should have grappled with to ensure that the danger of false incrimination was eliminated.
3. The evidence of the complainant was rather unclear on why she did not make a timeous report. Her explanation was that she was staying alone at the homestead and the uncle she stayed with only came home with his wife during weekends. She said when her uncle came home during the weekends she

- could not reveal the rape for fear of being chased away from home as an orphan. She had nowhere else to go. Further she said she did not disclose the rape to Denis who had been given the keys by the accused as she was ashamed. In fact, the complainant said had it not been for the pregnancy she would not have revealed the rape since she thought she would be accused of misbehaving. She disputed that there were any arrangements made for her to marry the accused.
4. The victim testified that she was advised by the complainant's custodians at the rural home in Gutu that the complainant was ill. A decision was made that the complainant should proceed to Harare for possible treatment. Pettie said upon the complainant's arrival her husband suspected that the complainant could be pregnant as complainant would vomit after eating food. That prompted them to question the complainant. The complainant then disclosed that accused had raped her after he had chased away some two boys and locked her inside the bedroom.
 5. In fact, Pettie, contrary to the complainant's evidence said she was only rescued by one of the two boys after accused had locked her inside the bedroom and later gave the keys to one of those boys. Contrary to complainant's evidence Pettie said the complainant's report was that she cried out or called out for help during the rape hoping her neighbours could help her but apparently no one heard her distress call. As regards why she had not made a timeous report of the alleged rape the complainant's explanation to Pettie was that she was afraid that her uncle's wife would assault her.
 6. After the complainant disclosed the alleged rape they sent her back to rural Gutu where it was confirmed that she was pregnant at the local hospital. Again contrary to the complainant's evidence Pettie said the complainant was thereafter taken to the accused's home for possible marriage but apparently the accused was unwilling to take the complainant's hand in marriage and complainant was returned to her home. It was only after that that a report of rape was made to the police leading to the accused's arrest. Again Pettie was not probed why accused was being asked to marry the complainant if indeed he had raped her.
 7. It was abundantly clear from Pettie's testimony that the complainant did not make a voluntary report of rape. The complainant fell ill in rural Gutu and went to hospital where she got treatment as per her evidence. She did not disclose the rape. The illness remained unabated and still she decided not to disclose the alleged sexual assault. A decision was then made to take her to Harare for treatment but she still did not reveal anything. It was in Harare that Pettie's husband sensing that she could be pregnant as she vomited after taking food who questioned her if she was pregnant and that she should not waste resources as it were. It was only after that probing that she then revealed the sexual act between her and the accused in rural Gutu. In fact, the complainant herself stated that if she had not fallen pregnant (or ill) she had no intention to reveal the alleged rape. There lay the problem with her testimony. She had to be probed in order to reveal the alleged sexual assault.
 8. The complainant did not make a timeous report of the alleged rape. From the evidence led she could have made the report to Denis who brought to her the keys she said accused had taken that same night. She did not. Her explanation was that she was ashamed to disclose such an issue to Denis. The next day she did not disclose the alleged rape to any of her relatives or neighbours. Again when her uncle and his wife came home she made no report of the alleged rape. Even when she fell sick and was hospitalised she remained mum about what she alleged had been done to her. She had to travel from Gutu to Harare where she disclosed the alleged rape after being confronted that that she could be pregnant. A period of about two months had lapsed. To cap it all she gave various reasons as to why she did not make the report without undue delay. Those range from personal shame, fear of assault and her personal circumstances as an orphan.
 9. The complainant was not a toddler who did not fully appreciate what the accused had done to her. She was an adult girl who had long completed 'O' level. The explanations she gave for not disclosing

R v Dhlamini

the alleged rape timeously were not only implausible but unreasonable in the circumstances. The conduct of the complainant left much to be desired and negatively impacted on her credibility. It was not clear as to what she did with the alleged torn skirt. She decided to destroy the available evidence by washing the blood stained blankets.

10. The danger of false incrimination on the aspect of consent was very real in that case. The trial court should not only have been alive to such inherent danger but should have endeavoured to exclude it. All what the trial court did was to accept the complainant's evidence hook, line and sinker without appreciating the circumstances of the case that she was in love with the accused.
11. That was a poorly prosecuted case aided by the undiscerning mind of the trial court. The trial court should have been alive to the fact that that was an unrepresented rural accused person. Crucial witnesses in that matter were not called. Those included the complainant's custodian who could have shed light on their relations with the complainant and whether her fear was indeed well grounded. The two boys who were with the accused and the complainant on the night of the alleged rape were critical witnesses. The investigating officer was not even called to explain as to what happened to the torn apparel of the complainant.
12. The trial court should not simply draw an adverse inference from the accused's failure to raise certain points in cross examination when such points were apparent from the accused's defence outline. The trial court had a duty to assist an unrepresented accused to ensure that justice was done.
13. The trial court went on to convict the unsophisticated and unrepresented accused instead of giving him the benefit of the doubt in relation to the issue of consent. The doubt was created by the complainant's inconsistent and contradictory actions after the alleged rape. The court had no doubt that the trial Magistrate presided over a shoddy trial. That led to a miscarriage of justice. The danger of false incrimination on the aspect of consent was very real in that case. The accused ought to be given the benefit of the doubt in the circumstances. The conviction of the accused was clearly unsafe as the state failed to prove the rape charges against the accused to the required standard of proof in criminal matters.

Petition granted; conviction of the accused set aside and the sentence quashed and a warrant of liberation of the accused issued.

Cases**Zimbabwe**

1. *S v Banana* 2000 (1) ZLR 607 (S) at 616 A-C – (Followed)
2. *S v Zaranyinka* 1997 (1) ZLR 539 H at 555 B-C – (Explained)
3. *S v Ndhlovu* 1992 (2) ZLR 231 (S) at 232 E-F – (Explained)

Statutes**Zimbabwe**

1. High Court Act [Chapter 7:06] section 29(1)(c) – (Interpreted)
2. Criminal Procedure and Evidence Act, [Cap 9:07] section 232
3. Criminal Law (Codification and Reform) Act [Chapter 9:23], section 65(1)

Advocates

None mentioned

Sierra Leon**1. What amounts to penetration in an offence of defilement?**

Significance: The case presents the ingredients of defilement and explores whether penetration in defilement had to be by penis alone.

R v Kamara

CR No 6457 of 2020

High Court of Sierra Leone

Manuela, J

June 1, 2022

Criminal Law – sexual offences – defilement – ingredients for defilement – where the accused penetrated the victim with his fingers – what were the ingredients that needed to be proved in an offence of defilement? – what amounted to penetration in a case of defilement? – Sexual Offences Act, 2012, section 2.

Brief facts

The victim ZZ was eleven years old at the time of the incident. On a day in 2020, the victim and her sister were watching television when the accused entered their house and joined them in the parlour but since her father did not usually allow strangers to sit in the parlour with them, ZZ asked the accused to leave but he told her she was unable to drive away. As soon as her sister left to go on their grandmother's errands, the accused asked her to lie down on the same chair on which she was lying. She had answered the accused that there were two other long chairs in the parlour and he should go and lie there but the accused said that he was going to lie down on the same chair where she was and he lay on top of her and put his finger into her vagina. She resisted and asked the accused to stop but he refused and as her sister walked into the parlour, the accused quickly removed his fingers from her vagina and left the parlour.

PW1 recounted that another incident happened between the accused and her. She told the court that sometime during the year 2020 the accused had come again into the parlour. He had met some children in the victim's parlour and he had handed them his phone and asked them to go outside and use his phone to watch a movie, which the children did. As the children left the parlour, the accused lay on the parlour chair and pretended to be sleeping. When ZZ finished cleaning the veranda, she told her sister that she wanted to leave as she was tired from cleaning the veranda and as she moved near the chair where the accused was lying, he grabbed her saying that he had got her alone regardless of the noise she had been making before. As he spoke, he threw her on the chair, removed his pants, and had sexual intercourse with her. After the incident, she had reported the accused to her parents. She was taken to the hospital and medically examined.

Issues

- i. What were the ingredients that needed to be proved in an offence of defilement?
- ii. What amounted to penetration in a case of defilement?

Held

1. On Exhibit B, the accused in a voluntary caution statement said that he did not sexually penetrate the victim using his penis but his fingers. Penetration was not necessarily by the penis. Instead, it was any part of the body having the slightest penetration with the sexual organ of the victim or the

- victim's anus or an object having sexually penetrated the victim's sexual organ, anus or mouth.
2. Using a finger to penetrate the victim's sexual organ would not stand as a defence in a defilement case. Had the accused not admitted to having sexually penetrated the victim, the court's work in determining the accused's guilt would have been much lighter but there were certain elements of the offence to discuss.
 3. On the aspect of identity of the accused being established in the evidence, the accused told the court in his voluntary caution statement that he sexually penetrated the victim. Thus, no doubt that it was him who committed the offence of defilement upon the victim. The accused usually visited the victim's house. PW2 testified that the accused was his apprentice in his electronics business. The accused himself told the court that in his voluntary cautious statement which he relied on for his defence that he was an apprentice to the victim's father. The accused added that it was the victim who first sat on him, then it was the victim who pushed him onto the bed.
 4. PW4 one DPC 10483 tendered in evidence the victim's Birth Certificate as Exhibit C. Exhibit C clearly proved the victim ZZ was eleven years old at the time of the incident. She told the court during cross examination that the victim was born on August 25, 2009. That was also confirmed by Exhibit C the Birth Certificate of the victim. Exhibit A 1-3 which was the endorsed medical report also affirmed that the victim was eleven years old at the time of the incident.
 5. The victim was a child and thus lacked capacity to consent penetration pursuant to section 2 of the Sexual Offences Act of 2012 that defined consent to involve the freedom, choice and capacity to consent. The accused's defence that the victim had given consent for the penetration would not stand.
 6. Exhibit C that was the endorsed medical report of the victim stated under the genital findings that the victim's hymen was completely ruptured. The accused agreed that the ruptured hymen was as a result of the act of sexual penetration committed by the accused.
 7. The aggravating circumstances outweighed the mitigating circumstances. The aggravating circumstances was the age of the victim when juxtaposed with the age of the accused. The accused was twenty-seven years old and the victim was a minor who was eleven years old. Exposing a child at a tender age of eleven to sexual intercourse had damaging effects. It resulted to psychosocial effect to the extent that the victim in an African society was exposed to stigma and or ridicule by the society. The victim would also lack the confidence to mingle with her peers in the community.
 8. Sierra Leone like many African Countries used to be known as a country where a child could be raised not only by his/her parents but by the community one lived in. In the absence of parents or guardians, the neighbours took care of the children until the parents returned but due to sexual predators, that beauty of the African society was lost. Exposing children to sexual intercourse at an early age exposed them to teenage pregnancy leading them to be drop outs and thus impacting the growth and development of the society.
 9. The sentence had to serve as a deterrent not only to the accused but to future potential offenders. The accused was sentenced to life imprisonment.

Petition granted.

Orders

The accused was ordered to compensate the victim a sum of thirty million Leones pursuant to section 37 of the Sexual Offences Amendment Act of 2012 as amended for;

- i. Cost of necessary transportation temporary housing and child care. And*
- ii. Emotional distress pain and suffering incurred by the victim of the penetration.*

R v Kamara

Cases***United Kingdom***

Woolmington v DPP [1935] UKHL 1 – (Explained)

Statutes***Siera Leone***

1. Sexual Offences Amendment Act No 8 of 2018 section 42(2) – (Interpreted)
2. Sexual Offences Act No 12 of 2012 sections 2, 8 – (Interpreted)
3. Sexual Offence Amendment Act No 8 of 2018 section 4a(ii) – (Interpreted)

Advocates

None mentioned

Liberia

1. Failure by a prosecution to prosecute an offence of rape, on account of failure of witness absence, was an abuse of an accused person's right to fair and speedy trial

Significance: The case is important as it discusses whether failure of the appellant to proceed with the prosecution of the case had the tendency for any reasonable inference that the proof was not evident or the presumption was not great that the respondent committed statutory rape.

R v Managbolor

2021

Supreme Court of Liberia

FS Korkpor, CJ and J; JH Wolokolie, SNG Yuoh, JN Nagbe and YD Kaba

June 25, 2020

Constitutional Law – fundamental rights and freedoms – right to fair and speedy trial – where accused was indicted for the crime of statutory rape – where accused had been detained for about nine years without a trial – where appellant could not prosecute the case against the respondent because of the difficulty in bringing the witnesses to court – where it took the accused – whether failure by a prosecution to prosecute an offence of rape, on account of failure of witness to appear, was an abuse of an accused person's right to fair and speedy trial – Constitution of Liberia, 1986, article 21.

Criminal Law – criminal procedures – where the accused was indicted during the August Term, AD 2011 of the 16th Judicial Circuit, Gbarpolu County for the crime of statutory rape – where prior to the indictment the said circuit court ordered the arrest and detention of the accused based on a complaint filed by the Women and Children Protection Section of the Liberia National Police – where the accused made his first appearance before the trial court where he was acquainted with his fundamental rights as guaranteed under the Constitution (1986) and the statutory laws of the Republic – where the accused told the trial court that he was able to retain counsel of his choice – where the hearing was continued to September 2, 2011 to allow the accused to contact his counsel of choice – where the case was called on the September 2, 2011, and the accused informed the court that he had not contacted his counsel, the hearing was again continued until the September 6, 2011 – whether blame could be shifted to the appellee on account of the fact that it took the appellee two successive terms of court to retain a lawyer of his choice – Constitution of Liberia, 1986, article 21.

Brief facts

The accused was indicted during the August Term, AD 2011 of the 16th Judicial Circuit, Gbarpolu County for the crime of statutory rape. Prior to the indictment, on August 8, AD 2011, the said circuit court ordered the arrest and detention of the accused based on a complaint filed by the Women and Children Protection Section of the Liberia National Police. On August 30, AD 2011, the accused made his first appearance before the trial court where he was acquainted with his fundamental rights as guaranteed under the Constitution (1986) and the statutory laws of the Republic. The accused told the trial court that he was able to retain counsel of his choice. The hearing was continued to September 2, 2011 to allow the accused to contact his counsel of choice. When the case was called on the September 2, 2011, the accused informed the court that he had not contacted his counsel, the hearing was again continued until the September 6, 2011. For the third time, the accused failed to retain counsel of his

R v Managbolor

choice when the case was called.

The records revealed that there was no further hearing during the August Term, AD 2011. On December 2, 2011, now the November Term of Court of the 16th Judicial Circuit, the case was called with the noticed absence of the accused's counsel, that was approximately three months when the case was last called, presumably to give the accused sufficient time to retain counsel of his choice. The accused in response to the court's inquiry about retaining a counsel of his choice told the trial court that he wanted a different venue for the trial of the case.

Issue

Whether failure by a prosecution to prosecute an offence of rape/defilement, on account of failure of witness to appear, was an abuse of an accused person's right to fair and speedy trial.

Held

1. In spite of the fact that the state prosecutor who initially handled the instant case before the 16th Judicial Circuit for Gbapolu County made a serious allegation of a potential compromise between the accused and private prosecutrix's family, there was nowhere in the records showing that the appellant took measures to prevent or avert a compromise of a rape case involving a ten-year-old victim. What was replete in the records was the employment of procedural technicalities over substantive justice much contrary to numerous opinions of the court.
2. The transcribed records revealed an array of lawyers filing several different applications on behalf of the accused. The motion to admit to bail was filed on behalf of the accused by an attorney and resisted by the appellant, but, there was no evidence of a hearing on the motion. Then the first motion to dismiss indictment filed on behalf of the accused appeared not to have been heard.
3. The appellant alleged of an ongoing negotiation between the respondent representatives, who were not named, and the private prosecutrix's family. The appellant ought to have gone beyond mere allegation of collusion and should have taken measures such as praying the trial court for a writ of subpoena to compel the appearance of those witnesses. Better still, the appellant could have pressed charges against those it believed were obstructing the administration of justice by preventing witnesses from testifying. The appellant had appeared before the court to aver that the private prosecutrix along with her family had relocated to Sierra Leone indicative of its inability to proceed with the prosecution of the crime charged.
4. In the face of the fact as alleged by the appellant that it could not prosecute the case against the respondent because of the difficulty in bringing the witnesses to court, could it be said that the continued detention of the respondent for about nine years without a trial was violative of the respondent's right to a speedy, fair and impartial hearing. One could be tempted to shift blame to the respondent on account of the fact that it took the respondent two successive terms of court to retain a lawyer of his choice. However, a careful review of the records showed that since the transfer of the case to the First Judicial Circuit for Montserratado County in January of 2012, the appellant had been the one requesting for repeated continuance of the proceedings because it did not have the complete transcribed records or that the witnesses were not forthcoming to testify.
5. The respondent was presumed innocent until the contrary was proved beyond a reasonable doubt. Failure of the appellant to proceed with the prosecution of the cause had the tendency for any reasonable inference that the proof was not evident or the presumption was not great that the appellee committed statutory rape. It followed the dilemma that the case presented the interest of the private prosecutrix for justice considering the possible pain, trauma and stigma she could have endured or was enduring *vis-a-vis* the right of the appellee to speedy, fair and impartial hearing.

6. The court had repeatedly held that it was not a party to any suit, but that it existed to promote justice thereby serving public interest. The court had always maintained that the administration of justice had to be done with speed and care. The court could not therefore unreasonably or unjustly force the trial of a case to the detriment of the parties especially when the parties had expressed their unpreparedness to continue with proceedings on the merit for what the appellant, in particular, termed as difficulty to bring witnesses to court. However, the court should, as in the instant case, hold counsels to a proper appreciation of their duties to the public interest, to do justice. Lawyers had to therefore endeavour to demonstrate that duty to the public interest because a departure therefrom was sufficient to warrant ethics proceedings.
7. The court observed from a careful inspection of the records that the appellant by and through an array of government lawyers including the Solicitor General and the respondents counsel signed a joint stipulation of notice of voluntary discontinuance and filed same with the clerk of the court on November 8, 2019. The said joint stipulation being sound in law was approved on the self-same date, however, with the right reserved in the appellant to recommence the case against the respondent. The court therefore held that the joint stipulation for a voluntary withdrawal being consistent with the laws and practice was granted without prejudice to the appellant.

Petition granted.

Orders

- i. *The Notice of Voluntary Discontinuance and Withdrawal filed by the parties being consistent with the Revised Rules of the court, was granted.*
- ii. *The Clerk of the court was ordered to have the cause discontinued and stricken from the Docket.*

Cases

Liberia

1. *RL v Eid et al* 37 LLR 761 (1995) – (Explained)
2. *Sirleaf v RL* Opinion of the Supreme Court, March Term, AD 2012 – (Explained)
3. *Williams v RL* Opinion of the Supreme Court, March Term, AD 2014 2014 – (Explained)

Statutes

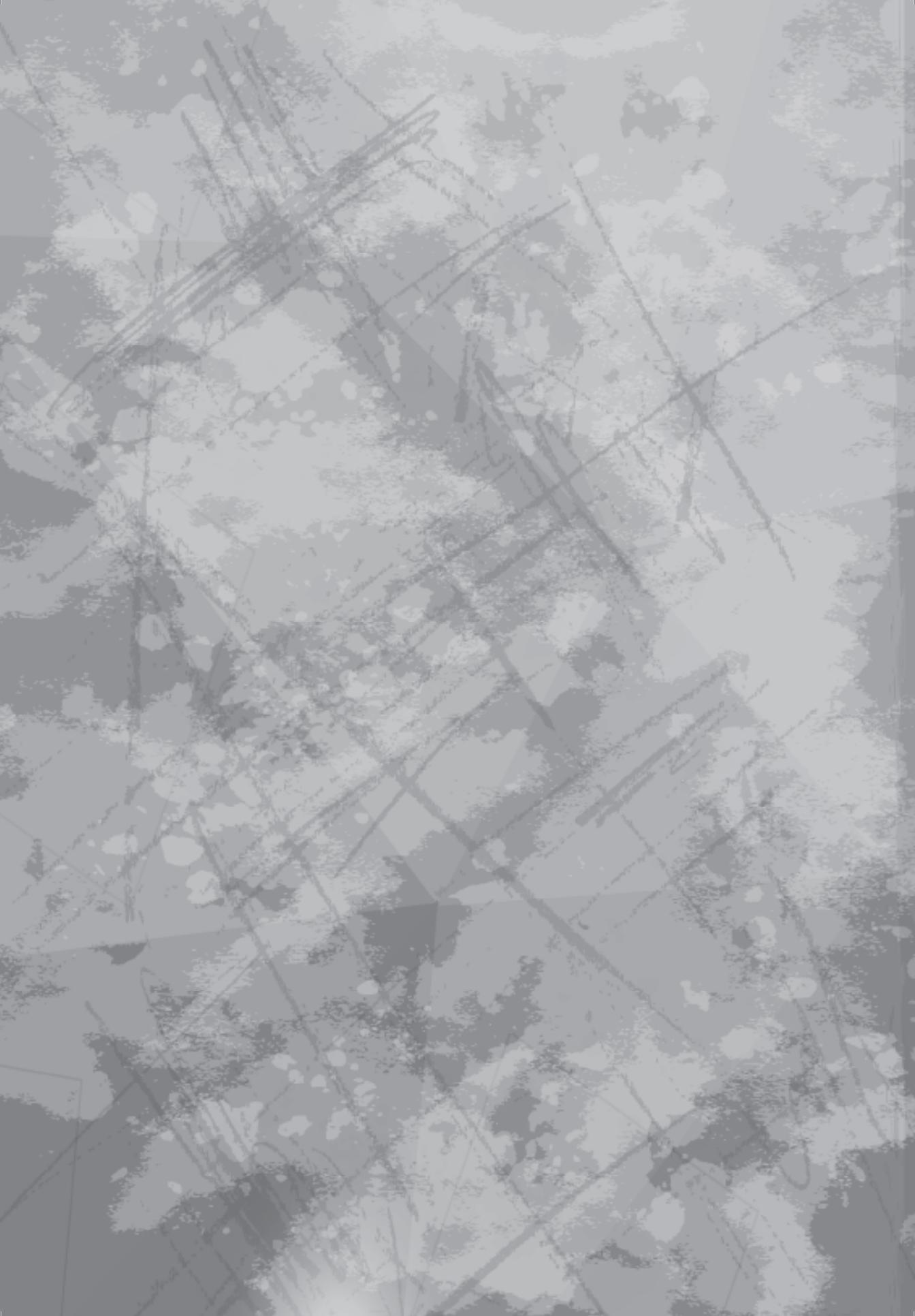
Liberia

1. Constitution of Liberia (1986) article 21(g) – (Interpreted)
2. 1LCLR Title 1, Chapter 10, section 10.4(1); 11.6(b) – (Interpreted)

Advocates

None mentioned

J. Lessons learnt from other jurisdictions



Lessons learnt from other jurisdictions

J. Lessons learnt from other jurisdictions

1. The state is responsible for acts that violate article 16 of the African Charter on the Rights and Welfare of the Child, 1990 (the Charter) on protection against child abuse and torture which are perpetrated by private actors where the state has not acted to prevent or investigate such acts. *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* 0012/Com/001/2019
2. Voluntary agreement to sex with a condom cannot be taken to imply consent to sex without one as consent cannot be implied from the circumstances or the relationship between the accused and the complainant. *K v Her Majesty the Queen & 7 others* 2022 SCC 33
3. In proving sexual offences, the best evidence is that which comes from the victim. Nevertheless, in certain circumstances, the offence can be proved despite the absence of evidence from the victim. *Musa v Republic* 1 of 2022
4. Where a court finds that a person lacks capacity to consent to sexual relations, then the court does not have any jurisdiction to give consent on that person's behalf to any specific sexual encounter. *A Local Authority v JB (By his Litigation Friend, the Official Solicitor)* [2021] UKSC 52
5. Failure by a prosecution to prosecute an offence of rape, on account of failure of witness to appear, is an abuse of an accused person's right to fair and speedy trial. *R v Managbolor*
6. An early complaint in a rape case, or any other sexual offence, is admitted, not as proof of the rape or of the sexual offence. It is admitted, not to corroborate the complainant. Rather, it is admitted to show consistency by the complainant. *Baloyi v Republic* HMA 14-18/HCA 11-17
7. Crucial witnesses have to be called during trial in a sexual offence of rape to avoid the danger of false incrimination on the aspect of consent. *R v Dhlamini* HMA 5-18/CRB MSVR 133/17
8. Penetration is not necessarily by the penis. Instead, it is any part of the body having the slightest penetration with the sexual organ of the victim or the victim's anus or an object having sexually penetrated the victim's sexual organ, anus or mouth. *R v Kamara* CR No 6457 of 2020

Feedback from Judge Cornelius Flomo Wennah from Liberia Sexual Offences Division Criminal Court "E" 9th Judicial Circuit, Bong County

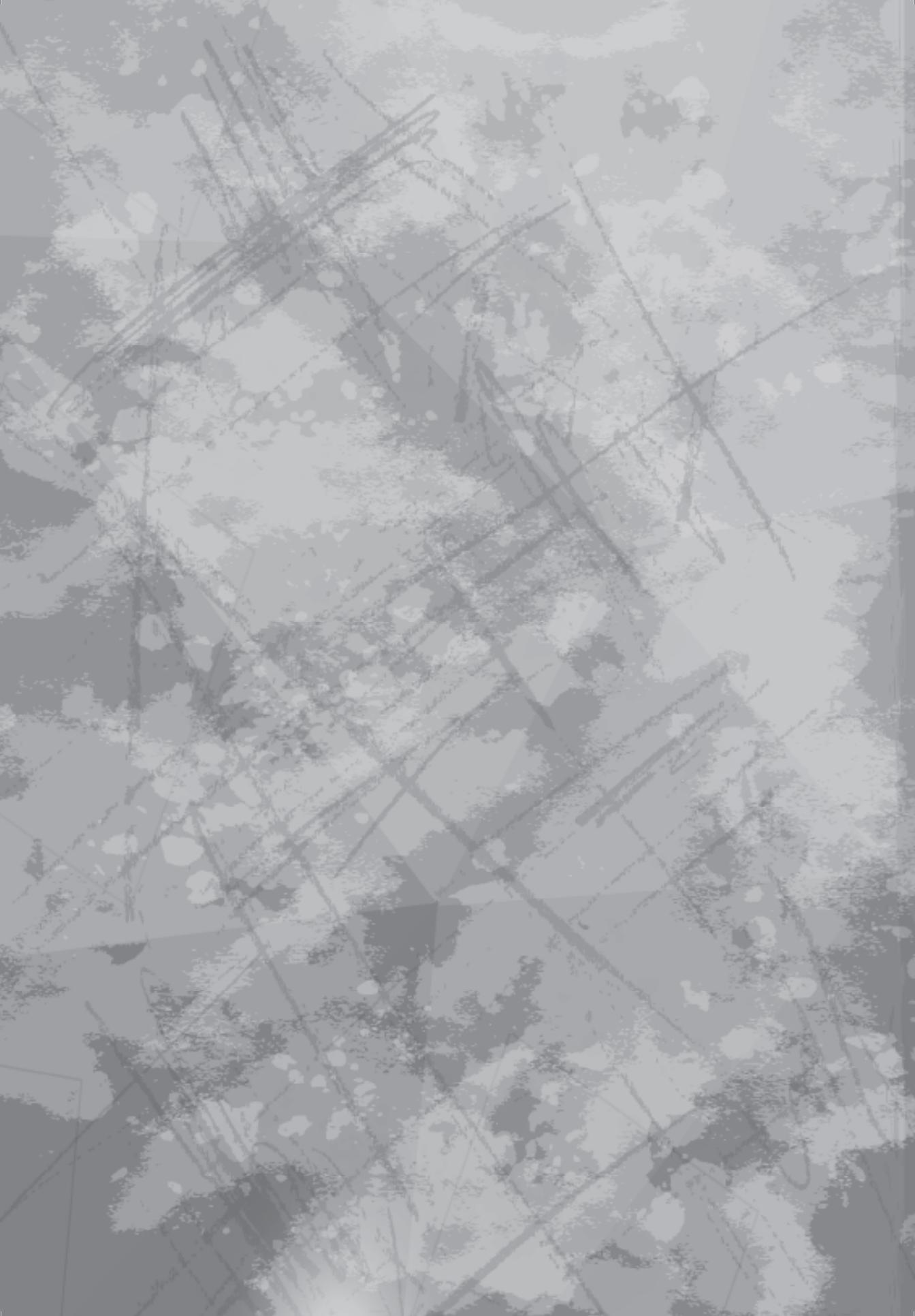
- The case *R v Managbolor* is analogous to several cases that have emerged nationwide that epitomize the witness procurement difficulties encountered by prosecutors and the courts while trying to ensure that justice is fairly dispensed in Liberia. This case also presents some of the legal technicalities employed by lawyers, especially defense and prosecuting attorneys in a bid to buy time or cause unnecessary delays. The problem of pre-trial detention which has become a national menace is considerably given rise to by circumstances characteristic of the instant case.
- This case is outstanding and exemplary of Liberia's prosecutorial hurdles which have financial, logistical as well as socio-cultural undertones that tend to impede the successful and expeditious prosecution of sexual offense cases. Prosecuting attorneys throughout Liberia have serious challenges when it comes to the availability of financial resources to have witness commute between their homes and the courts. Daily sustenance poses an even greater challenge as prosecutors are without the means to provide meals for witnesses who are called to testify for the state in courts. This has often led to victims of sexual offenses becoming disinterested in court processes and reverting to

compromising cases with either perpetrators or their families. Basic work implements are generally unavailable and seriously hinder the efficiency and effectiveness of prosecutorial staff which most often lead to the dismissal of cases that could be effectively prosecuted in the face of available resources.

- Under Liberian Law as found in Chapter 18 of the Criminal Procedure Law, courts are urged to dismiss cases against accused individuals if by the end of the next succeeding term of the finding of an indictment or arrest of an accused, the state fails to show good cause why it has not proceeded with said case or cases. Compromises between victims or their families and perpetrators, as alleged in the instant case are common as victims are not given the requisite care and protection needed to keep them out of the reach of people who may influence their decisions. Family or personal ties along with undue community influence are among several causes of frequent compromises of sexual offense cases. Prosecutors are often challenged with locating their witnesses at the commencement of trial as these witnesses opt to change their locations or migrate to distant localities after compromising with perpetrators or their families.
- Under the circumstances mentioned above, the problem of proof being evident and presumption of the perpetration of a crime being great become the basis for the dismissal of cases and the granting of bail. While suggesting some acts of dereliction and procedural lapses, the case *R v Managbolor* indicates that the Republic of Liberia became an appellant, after the court granted a motion to dismiss the indictment bringing the appellee under its jurisdiction primarily on grounds that the Republic made unsubstantiated claims of compromises between the victim and perpetrator without showing any diligent effort made to compel compliance on the part of the victim or her family to cooperate with the state, and also held the appellee protractedly in detention in a manner that grossly violated his constitutional rights.
- This case is significant for inclusion in the Kenyan Law Digest because it is exemplary of procedural and substantive lapses on the part of major justice actors and clearly exposes how the fundamental rights of those accused are sometimes violated in ways that are extremely gross. This case also gives guidance to legal practitioners on the length of time an accused can be held in custody without being tried as well as mandates that judicial accountability be ensured through records of courts establishing that legal applications made be adequately passed on and recorded in court's minutes.
- The facts portrayed by the case *R v Managbolor* are somewhat analogous to a case that was called during the just ended 42-day jury session of the Ninth Judicial Circuit for Bong County where the empaneled jury had to be disbanded because the Republic of Liberia having indicted the Defendant about a year ago, failed to produce a single witness at the call of the case despite the imposition of fines and the issuance of subpoenas on the state prosecutor and his witnesses. With these facts and circumstances persisting or re-occurring, the problem of prolonged detention which is a flagrant violation of the constitutional rights of accused persons will continue to go unabated. Courts should be urged to meticulously handle sexual offenses and all other criminal offenses within the statutory period or employ the legal remedies made available by law.



K. Comparative Analysis Between Kenya and International Jurisprudence



Comparative Analysis Between Kenya and International Jurisprudence

Comparative Analysis Between Kenya and International Jurisprudence

1. Defilement

1.1 Introduction

Section 8(1) of the Sexual Offences Act of 2006 defines defilement when it notes that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. The case of *Mwangi v Republic* Criminal Appeal No E001 of 2022 explains that for the offence of defilement to be proved, the prosecution has to prove identification or recognition of the offender, penetration, and age of victim beyond reasonable doubt.

1.2 Kenyan Jurisprudence on Defilement

Kenyan courts have dealt with the issue of defilement. For instance, in *KA v Republic* Criminal Appeal No E064 of 2021; [2023] KEHC 1514 (KLR) (14 February 2023) (Judgment), the appellant claimed that since the victim had not provided the birth certificate, the element of age was not proved beyond reasonable doubt. However, the court dismissed the appeal holding that conclusive proof of age in cases under Sexual Offences Act did not necessarily mean production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age were available and could be used in other cases.

In *BOO v Republic* [2018] eKLR where the appellant faced the charge of defilement and where some witnesses were not called to testify, the court 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 or circumstantial evidence.

Moreover, in *Chome v Republic* Criminal Appeal No 92 of 2022; [2023] KECA 69 (KLR) (3 February 2023) (Judgment), where the appellant had been charged for defilement and where the victim claimed to be aged 13 but had not produced the birth certificate nor the health card to prove age apart from medical evidence, age could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.

1.3 International Jurisprudence on Defilement

Courts in foreign countries have also in a number of instances been faced with cases in which defilement is involved. In the High Court of Sierra Leone in *R v Umar Bai Kamara* CR No 6457 of 2020 where the appellant had put his fingers in the vagina of the victim and later claimed that that was not penetration, the court held that penetration is not necessarily by the penis rather by any part of the body having the slightest penetration with the sexual organ of the victim or the victim's anus or an object having sexually penetrated the victim's sexual organ, anus or mouth.

2. Rape

2.1 Introduction

Section 4 of the Sexual Offences Act of 2006 highlights that any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life. However, in section 3, it categorically states that a person commits the offence of termed rape if - he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other

person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind.

2.2 Kenyan Jurisprudence on Rape

There are several cases in Kenya that have handled the crime of rape. To start with, the case of *Coalition on Violence against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (amicus curiae)* [2020] eKLR; Petition No 122 of 2013. The state was accused for failure to investigate rape allegations in the 2007 post-election violence. This case illustrates the fact that rape had elements of torture which were: the severe infliction of pain or suffering for a number of purposes including intimidation or discrimination. However, torture was perpetrated by State actors or with their acquiescence, consent or instigation.

Furthermore, the case of *Tarus v Republic* Criminal Appeal No E075 of 2021; [2023] KEHC 1315 (KLR) (15 February 2023) (Judgment) involved an appellant who claimed that the victim who had mental disabilities had actually consented for sex hence not rape. Dismissing the appeal, the court held the offence of rape of persons with mental disabilities was not provided for under section 7 of the Sexual Offences Act which was the subject of an offence under section 146 of the Penal Code.

2.3 International Jurisprudence on Rape

Rape has been dissected by international courts as well. The High Court of Zimbabwe in *R v Brian Dhlamini* HMA 5-18/CRB MSVR 133/17 handled a rape case where the accused was found guilty in the trial court where the crucial witnesses were missing, but the appellate court set the appellant free, holding that the crucial witnesses have to be called during trial in a sexual offence of rape to avoid the danger of false incrimination on the aspect of consent. According to the court it was saddening that the trial court went on to convict the unsophisticated and unrepresented accused instead of giving him the benefit of the doubt in relation to the issue of consent. The doubt was created by the complainant's inconsistent and contradictory actions after the alleged rape.

The Supreme Court of Liberia also treated rape in the case of *R v Moses Managbolor* where the accused was indicted during the August Term, AD 2011 of the 16th Judicial Circuit, Gbarpolu County for the crime of statutory rape. Granting the appeal, the court held that failure of the appellant to proceed with the prosecution of the cause has the tendency for any reasonable inference that the proof was not evident or the presumption was not great that the respondent committed statutory rape.

The Supreme Court of the UK addressed the question of consent in the case of *A Local Authority v JB (By his Litigation Friend, the Official Solicitor)* [2021] UKSC 52 that was raised by the appellant. The court clarified that, in having capacity to decide to have sexual relations with another person, a person needs to understand that the other person has to have the capacity to consent to the sexual activity and had to in fact consent before and throughout the sexual activity.

3. Domestic Violence

3.1 Introduction

Domestic violence is defined, *inter alia*, (among others) as follows in section 3 of the Protection Against Domestic Violence Act of 2015: (a) abuse, which includes (i) child marriage, (ii) female genital mutilation, (iii) forced marriage, (iv) forced wife inheritance, (v) interference from in-laws, (vi) sexual violence within marriage, (vii) virginity testing, and (viii) widow cleansing; The following actions against a person are prohibited: (b) destruction of property; (c) defilement; (h) harassment;

Comparative Analysis Between Kenya and International Jurisprudence

(i) incest; (j) intimidation; (k) physical abuse; (l) sexual abuse; (m) stalking; (n) verbal abuse; and (o) any other actions against a person where such actions endanger or may endanger the person's safety, health, or well-being.

The American Office on Violence Against Women also defines domestic violence as a pattern of abusive behaviour used by one spouse to seize or keep control over an intimate partner. It can occur in any type of relationship. Domestic violence can include any pattern of coercive behaviour that influences a person in an intimate partner relationship, whether it be physical, sexual, emotional, economic, psychological, or technical. Any actions that intimidate, manipulate, humiliate, isolate, terrify, coerce, threaten, blame, hurt, injure, or wound someone fall under this category.¹

3.2 Kenyan Jurisprudence on Domestic Violence

The court in *Republic v Cornelius Thuku Mbugua* [2020] eKLR where the accused had killed his wife and was convicted of murder, invoked the Convention on Preventing and Combating Violence Against Women and Domestic Violence in article 3(b) to define domestic violence as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit between former or current spouse or partners whether or not the perpetrator shared or had shared the same residence with the victim.

In the case of *State v FAO* [2021] eKLR, the accused had been found guilty of the offence of murder as charged and convicted under section 203 of the Penal Code. The accused was found culpable of unlawfully and with malice aforethought, killing MAW, a minor who was a victim and complainant in a sexual offence case pending before Bondo Law Courts. After noting that he was not remorseful of his actions, the court substituted the death sentence to a life sentence noting that when a convict shows no real remorse for his actions and persists that he is innocent, life imprisonment for the cold blooded murder is sufficient.

3.3 International jurisprudence on Domestic Violence

Domestic Violence has been dealt with at the international fora as well. The Supreme Court of Canada handled the case of *K v Her Majesty The Queen and 7 others* 2022 SCC 33 where the appellant had been accused of stealthing and in his appeal insisted that the victim had consented for sex. Dismissing the appeal, the court held that where condom use is a condition of the complainant's consent to the sexual activity in question, it will form part of the sexual activity in question and the consent analysis under section 273.1 of the Criminal Code of 1985 on aggravated sexual assault.

Also, the African Committee of Experts on the Rights and Welfare of the Child in *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian Girls) v United Republic of Tanzania* 0012/Com/001/2019 where the complainants had been subjected to forced pregnancy testing and expulsion from school held that forced pregnancy testing, expulsion of pregnant girls, and their illegal detention is cruel, inhuman, and degrading treatment and subjects them to further trauma especially if they were survivors of sexual violence.

Conclusion

This digest has brought forth significant areas for future intervention in relation to sexual gender based violence issues. The cooperation among society members to have the offenders reported, arrested and be accountable for their crimes. Moreover, this very collaboration among law enforcement agencies is necessary for the victims to get sufficient compensation and for the offenders to be exposed so as to curb

¹ Domestic Violence, *Office on Violence Against Women*. <https://www.justice.gov/ovw/domestic-violence> [June 17, 2023].

another possible occurrence of similar crimes. The delay in reporting sexual offences by offenders is a matter of concern that needs urgent attention. Briefly, the areas below have emerged as of importance for consideration:

i. Impediments in litigation of cases touching on sexual gender based violence:

Probation is commendable instead of imprisonment for a pregnant child charged with manslaughter because the child offender is a child in need of care and protection. This was evident in the case of *Republic v BC* Criminal Case No E061 of 2022 that was not brought in by someone but one of the officers in a WhatsApp group who raised the issue. Also, it raises a serious concern on the urgent need for the creation of awareness amongst the child justice agencies of the new requirements of the law put there to enhance child protection for those who entered the criminal justice system.

A number of cases involved child offenders in relation to sexual offences and these child offenders were charged and convicted as adults only the same to be overturned later upon appeal. This clearly shows that the provisions of the Children Act of 2022 need to be invoked always when handling matters of child offenders to avoid handling them contrary to the spirit of this Act that espouses care and protection of children before, during and after they have committed an offence.

ii. Future interventions in legal reforms and training:

The arrest and detention of child offenders, their conviction and sentencing has been often seen to disgrace from the spirit of the Children Act of 2022. In sexual offences where the offenders are children, they nonetheless need to be treated with care and protection as first they are children then offenders.

The ingredients of defilement and how to prove each of them is something that need to be shared to the public. For instance, the case of *Wanjiku v Republic* Criminal Appeal No E007 of 2022, the court held that age determination in defilement cases included direct observation and supportive documents.

Corroboration of evidence given by children who are victims is very sensitive because they can be shy as a result of trauma and vulnerability. The case of *Okoko v Republic* Criminal Appeal No E002 of 2022 noted that children who were victims of sexual abuse were likely to be devastated by the experience and given their innocence, they can feel shy, embarrassed and ashamed to relate that experience before people.

The case digest has highlighted instances where sexual offences like rape led to pregnancies. For example, in the case of *NMK v Republic* Criminal Appeal No E007 of 2021; [2023] KEHC 779 (KLR) (February 2, 2023) (Judgment) Criminal Appeal No E007 of 2021, the victim dropped out of school and was married to the appellant for five days. There needs to be civil education on the age of consent that is lawfully required in sexual relations.