AAO v Republic (Criminal Appeal E033 of 2024)
[2025] KEHC 6700 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6700 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E033 OF 2024

FR OLEL, J

MAY 20, 2025

BETWEEN

AAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction dated 10.09.2024 and subsequent sentence delivered on 24.09.2024delivered by Hon Kombe Larry Matawi (RM) in Moyale PMCR (SO) No E001 of 2024)

JUDGMENT

A. Introduction.

1. 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 particulars of the offence were that on 10th day of January 2024 at around 12.30 hours at Tabaka Location in Mandera west sub county within Mandera county intentionally and unlawfully caused his penis to penetrate the Anus of SAA a child aged 10 years old.

2. 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. The particulars of the offence were that on 10th day of January 2024 at around 12.30 hours at Tabaka location in Mandera west sub county within Mandera county intentionally touched the Anus of SAA a child aged 10 years old with his penis against his will.

3. The Appellant took plea and denied the charges faced. The prosecution called four witnesses, and on being placed on his defence, the Appellant opted to remain silent despite being warned by the court of the gravity of the penalty he faced should he be convicted of the said offence. The trial magistrate considered the evidence proffered and found the Appellant culpable of the offence of defilement

contrary to section 8(1) as read with section 8(2) of the *sexual offences Act* No. 3 of 2006. He proceeded to convict him and sentenced him to serve life imprisonment.

B. Evidence At Trial.

4. PW1 SAA underwent voire dire examination and gave sworn evidence. He testified and stated that he was a grade 4 pupil at [Particulars Withheld] Primary School and vividly recalled what occurred on 10.01.2024. On the said date, he was from school enroute home for lunch break at about 12:30 p.m. when he met the accused, who asked him to accompany him to his house. The appellant was his taekwondo teacher and thus a person well known to him.

5. While enroute, the appellant turned on him, held him by his waist, took him into a bush, removed his clothes and started to do "bad manners" on him from behind, by inserting his penis into his buttocks. During the sexual assault, the appellant told him to keep quiet and, after he was done, threatened and warned him not to tell anyone or else he would harmkill him. Later during the day he noticed that he was bleeding from his anus and informed his friends, who in turn advised him to inform his mother of what had occurred and was taken to Madera West Hospital for treatment.

6. PW1 concluded his evidence in chief by positively identifying the appellant in court and reaffirmed that the appellant was his taekwondo teacher and was a person well known to him. Under cross-examination, PW1 confirmed that he was walking from school alone when he was confronted by the appellant, who took him to some bushes next to the road and proceeded to defile him. He did try to shout for help, but the appellant threatened to harm him, and that explained why nobody heard him shout for help.

7. After the appellant was done, he met his friends and narrated what had transpired, and they advised him to go report to his parents and he was later take to the hospital.

8. PW2 DIE confirmed that PW1 was her child, aged 10 years. She recalled that on 10.01.2021, PW1 had arrived home from school looking very weak, and was walking with his legs apart. Upon inquiry, he opened up and narrated what had earlier transpired. She immediately took action and sought medical intervention for PW1 at Tabaka Hospital. She confirmed that the appellant was well known to her family as he was PW1's taekwondo teacher. Under cross-examination, she confirmed PW1's trousers smelled of sperm, though the complainant did not notice the same as he was still a child, and further on her part, she did not notice any blood stains on her child's clothes.

9. PW3 Charles Kabaka, confirmed that he was a qualified clinical officer based at Tabaka Hospital and had 11 years of practice under his belt. On 10.01.2024, he examined PW1, who gave a history of being sexually assaulted. He was composed but complained of pain in his stomach and private parts.

10. On examination, he noted that PW1 wore a green pant which was dirty and had sticky fluid. He further noted that he had pain in the anus area, which had a fresh laceration injury and tear. The laceration was between superficial and deep in extent at 6 O' clock of the anal opening. There was also stool that appeared to be mixed with mucus emanating from the anal region. The abdominal pain and difficulty in walking were a result of inflammation of the rectum.

11. Anal mucosa laboratory examination was done, but the results were not availed to him. He prescribed medication to prevent the transmission of STD, and from the observations made, he was convinced that PW1 had been sodomized and advised PW2 to immediately seek police intervention. He also produced as Exhibits the treatment notes and P3 form filled. The Appellant opted not to cross-examine PW3.

12. PW4 Cpl Erick Odat testified that on 12.01.2024, the complainant and his mother made a report of defilement at Tabaka police station, and he was assigned to investigate the complaint. Upon inquiry, PW1 narrated to him how the appellant, who was his Taekwondo teacher, had sodomized him on 10.01.2024, and upon completion of his heinous act, told him that he would give him Kshs.200- to buy his silence.

13. He recorded the relevant witness statements and issued PW1 with a P3 form to be filled at Tabaka sub-county Hospital. He also requested the doctor to undertake an age assessment report as the minor did not have a birth certificate, and after completion of his investigations, he arrested the appellant, whom he identified as the accused present before the court.

14. Subsequently, PW2 also supplied him with PW1's birth certificate, which indicated that PW1 was born on 20.08.2014 and was about 9 years of age at the time of the incident. He produced both the age assessment report and the birth certificate as Exhibits before the court. The Appellant similarly opted not to ask PW4 any questions in cross-examination.

15. The prosecution closed their case, and the appellant was put on his defence. He opted to keep quiet and stated that " I will not defend myself. I will let the court decide". The trial magistrate warned the accused of the gravity of the sentence he faced based on his decision of not to defend himself, but the appellant was still adamant and stated that he would wait for the court to make its decision.

16. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and, after mitigation, sentenced the Appellant to serve life in prison.

C. The Appeal.

17. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal that;

    a. THAT the learned trial magistrate erred in law and fact by failing to appricate the fact that the appellant was not fit to stand trial.

    b. THAT the learned magistrate erred in law and fact by failing to appricate the fact that the appellant did not understand the charges against him.

    c. THAT the learned magistrate erred both in law and fact by entering a plea of guilt against the appellant

    d. THAT the learned magistrate erred both in law and fact by proceeding with a matter illegally, wrongfully, and unprocedurally.

    e. THAT the learned magistrate erred in law and fact by failing to appreciate that there was no sufficient evidence to put the Appellant on his defence.

    f. THAT the learned magistrate erred in law and fact by convicting the Appellant.

    g. THAT the learned trial magistrate erred in both law and fact by sentencing the Appellant.

    h. THAT the learned magistrate erred in law by delivering a judgment and sentence that is capricious and full of mala fides.

    i. THAT the learned Magistrate acted with bias by denying the Appellant a right to be heard as provided by the law

    j. THAT the learned Magistrate erred in law and fact by delivering a sentence that was illegal.

k. THAT the learned Magistrate erred in law and fact be delivering a judgment that was against the weight of evidence.

l. THAT the learned Magistrate erred in law and fact by delivering a judgment and sentence that had no legal basis and was against a plethora of authorities andor precedents available to support the Appellants case.

D. Analysis & Detrmination.

18. The being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See Okeno versus Republic (1072) EA 32, Pandya versus Republic (1957) EA 336) &Shantital M Ruwala versus Republic (1957) EA 570, where the court of appeal set out the duties of the first appellant court.

19. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel and find that the following issues arise for determination;

a. Whether the ingredients of the offence of defilement were proven.

b. Whether the Appellants rights under Article 50 (2) of *the constitution* of Kenya 201O were breached.

c. Whether the sentence passed should be interfered with.

(A)Whether the ingredients of the offence of defilement were proven.

20. In criminal cases, the burden of proof lies with the prosecution and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, and consequently to have the case established and judgment given in their favour. See Miller vs. Ministry of Pensions (1947) 2 All ER, 372 , Republic Vs Edward Kirui (2014) eKLR, and Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688

21. Section 8 (1) and (2) of the sexual offence *Act No 3 of 2006* provides that;

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

2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

22. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

i. Age

23. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think

that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added)

24. From the evidence on record the age of the minor was proved by the birth certificate (Serial No 0716630) produced as Exhibit 4 and the Age assessment report produced as Exhibit 3 by PW4. The minor was born 20.08.20214 and as at the time of the offence was nine (9) years old.

ii. Penetration

25. The second element is the second ingredient is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

26. The same section defines "genital organs" to include;

> " the whole or part of male or female genital organs and for purposes of this Act includes the anus."

27. The minor in his evidence in chief did testify and confirmed that the Appellant was his Taekwondo teacher and as he walked home for lunch did approach him and dragged him into a roadside bush and proceeded to sodomise him. He stated that, "He removed my cloths, he was at my back, he inserted his private parts, his penis and inserted in my buttocks where I use for long calls. I saw blood coming out".

28. PW1 did report this incident to his mother on the same day and was rushed to Tabaka Sub county Hospital, where PW3 examined and treated him. PW3 observed that the PW1 had fresh injuries lacerations tear to the anal region which was between superficial and deep in extent at the 6 O'Clock of the anal opening. He further observed that the complaint had excreted stool that appeared to be mixed with mucus emanating from the anal region and had pain in the abdominal region due to inflammation of the rectum.

29. The trial Magistrate did assess the complainant's evidence and the corroborating evidence of PW2 and PW3. When the Appellant was given an opportunity to defend himself, he opted to keep quiet. The evidence adduced was overwhelming and the trial magistrate cannot be faulted for arriving at the finding that indeed penetration had been proved.

iii. Identification.

30. On identification, PW1 knew the appellant who was his Taekwondo teacher and this incident occurred at 12.30 p.m. as he was going back home for lunch This therefore was a case of recognition as the victim knew the appellant by name and the incidence of defilement was confirmed to have occurred during day time.

31. In James Murigu Karumba vs. Republic [2016] eKLR, it was held by the Court of Appeal based, on Suleiman Juma alias Tom – v- R (2003) eKLR; (2003) KLR 386 that:

> " Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value."

32. PW1 was not mistaken about the identity of the person who sodomized defiled him. Considering the totality of the evidence adduced, I do find that the prosecution did ably discharge the burden of proof, and find the Appellant's conviction to be safe.

Whether the Appellants rights under Article 50 (2) (g) of *the constitution* of Kenya 2010 were breached.

33. The Appellant's counsel submitted that the trial court had failed to appreciate that the Appellant did not understand the charge he faced andor plea taken and as a result he had failed to follow the trial proceedings and failed to cross examine crucial witnesses. Further, the appellant was mentally unfit and that affected his ability to understand the proceedings that were ongoing. This had greatly compromised the proceedings undertaken and rendered the same to be nugatory for being in breach of provisions of Article 50(2) of *the Constitution*, which called provided for fair hearing of all matters.

34. First and foremost, the issue raised in submission's that the Appellant is mentally challenged is an afterthought and is not supported by any evidence placed before the trial court andor this court.

35. Secondly, the appellant took plea using Boran language, a language he stated he understood. Both PW1 and PW2 also testified using the same language, the Appellant understood their evidence and cross examined both of the said witness extensively. Even as regards the evidence of PW3 and PW4, the same were translated to him and when given a chance to cross examine, he opted not to ask any questions.

36. Finally, when placed on his defence, the Trial Magistrate did take his time and explain to the Appellant the provisos of Section 211 of the criminal procedure code, giving him the three different optionsmode of conducting his defence. The Appellant spurned that opportunity and opted to keep quiet, despite being expressly warned that the offence he faced carried severe sentence.

37. The law is that, a person ought to be given an opportunity to defend himself andor should not be condemned unheard, but where such a person has been given an opportunity and he has spurned it, which occurred in this instant, he has to blame himself for the misfortune that befalls him once the hammer falls.

38. The Court in David Ochieng Aketch vs Republic [2015] eKLR observed that;

> " The Appellant on being put on his defence he opted to keep quiet. The right to keep quiet is a constitution right enshrined in Article 50 (2) (1) of *the Constitution* of Kenya 2010. It is one of the components of a fair trial neither should failure to testify be taken as an admission of guilty on an accused part. The trial Court is under a duty in such situation to evaluate the prosecution's evidence and ensure that the prosecution has proved its case beyond any reasonable doubts. The burden of proof do not shift to the accused by his opting to keep quiet. The appellant's Counsel urged that the trial Magistrate did not appreciate the appellant's silence and observed that the appellant opted to keep silent. That though the Court did not evaluate the prosecution's evidence but reiterated what the evidence was all about, the fact that the accused opted to remain silent it is not correct for the appellant to imply that his right as enshrined under Article 50 (2) (1) of *the constitution* of Kenya 2010 was infringed and that the burden of proof shifted to the appellant. The learned trial Court had not in her judgment showed displeasure or lack of appreciation of the appellant's exercise of his constitutional right to keep quiet. The appellant's submissions that the trial Court did not appreciate his exercise of option as provided by *the constitution* under Article

50 (2) (1) of *the constitution* which ensures an accused person has a fair trial is misplaced and without any support."

39. I do therefore find that the Appellant was a literate adult, who fully understood and appreciated the trial court proceedings. At no time during the said proceedings did he ask to be assisted with a counsel nor did he intimate to court that he did not understand the proceeding and therefore was unable to cross examine all witnesses andor also call his own witnesses in defence. He cannot late in the day allege to have been prejudiced, when he did not raise these issues during trial. This ground of Appeal fails.

(iii)Sentencing

40. As regards the sentence, the Appellant was charged with defilement contrary to sections 8(1) and 8(2) of the *sexual offences Act* No 3 of 2006. Further, the said Section 8(2) of the said *sexual offences Act* expressly provides that a person found guilty of defilement of a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

41. The trial court upon conviction called for a pre-sentence report, allowed the Appellant to mitigate, and proceeded to sentence the Appellant to serve a life sentence.

42. The Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR stated;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly highexcessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

43. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017)eKLR also cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of the appropriate sentence."

44. Whereas previous jurisprudence based on the decision of Francis Kariuki Muruatetu & Another Vrs Republic (2021) Eklr, gave the trial court latitudediscretion in sentencing, the Supreme court has

recently held otherwise In Republic vs Joshua Gichuki Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), where the Supreme Court reiterated its decision in Muruatetu II that the sentences in the *Sexual Offences Act* were legal and went on to overturn a reduction of sentence imposed by the Court of Appeal. The said Court held;

> " In the Muruatetu case, the Court solely considered the mandatory sentence of death under section 204 of the *Penal Code* as it was applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that applied for example to capital offences, were vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the legislature, took into consideration a number of issues including deterrences of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities. Stern sentences ensured that prejudicial myths and stereotypes no longer culminated in lenient sentences that did not reflect the gravity of sexual offences."
>
> ".....However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in he special circumstances of a declaration of unconstitutionality, the process is reversed."

45. This decision was followed in Shitula v Republic [2025] KECA 12 (KLR) by the Court of Appeal recently, (January 2025) based on the above Supreme Court decision, held that life imprisonment imposed by court was a legal sentence and upheld it. It observed that;

> " The Supreme Court has spoken clearly through the Gichuki case (supra) and we are bound by that decision-age, rehabilitation and remorse notwithstanding, the minimum life sentence meted out was legal and must be upheld, as we hereby do. The appeal thus fails in its entirety and is dismissed".

46. This court hands are tied by the doctrine of stare decisis and finds that the sentence passed against the Appellant was lawful.

Disposition.

47. The upshot, having considered the evidence adduced at trial and submissions made, I do find that the Appeal against both Conviction and sentence fails and the same is dismissed.

48. Right of Appeal 14 days

It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 20TH DAY OF MAY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 20th Day of MAY, 2025.

In the presence of:-

Mr. Halakhe for Appellant

Mr. Otieno - For O.D.P.P

Mr. Jarso - Court Assistant