



REPUBLIC OF KENYA



**Racha v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 10751 (KLR) (29 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E007 OF 2023
LW GITARI, J
AUGUST 29, 2024**

BETWEEN

YUSUF HODANA RACHA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appeal arises from the Chief Magistrate's Court at Isiolo Sexual Offence No. 8 of 2020. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#). The particulars were that on diverse dates between 28th day of August 2020 and 4th day of September 2020 in Merti Sub-County of Isiolo County within Eastern Region he caused his penis to penetrate the vagina of A.M.D a child aged fifteen (15) years.
2. The appellant denied the charge and a full trial was conducted. In the end he was found guilty, convicted and sentenced to serve ten (10) years imprisonment.
3. The appellant was dissatisfied with both the conviction and sentence and filed this appeal, initially raising nine (9) grounds but amended the grounds with supplementary grounds as follows:
 1. That the learned trial magistrate erred in law and fact by failing to note that the voir dire examination was not properly conducted since there was finding that the complainant PW1 understood the importance of giving evidence on oath.
 2. That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to required standards of proof as required by the law. Since the evidence of hymen broken is not prove of defilement.
 3. That the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under section 8 (4) of the [Sexual Offences Act](#) denies the



judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the Appellant is unlawful.

4. That the trial magistrate erred in both matters of law and facts by failing to note that the clinical report was questionable.
5. That the learned trial magistrate failed to take into consideration the defense of the appellant.
4. He urged the court to quash the conviction, set aside the sentence and set him at liberty. The respondent opposed the appeal and urged the court to dismiss the appeal.

The Prosecution's Case:

5. The complainant A.M.D. (PW1) testified she dropped out of school at class 7 and stayed at home for four years. After she was left at a relatives placed with one M. It was during that time that she met the appellant and they went to Chali area where they spent the night at a goats Manyatta and they engaged in sex the whole night. They lived together for a whole week during which time they continued to engage in sex. They decided to wed and they went to the Kadhi. Upon being interrogated by the Kadhi, he realized that the complainant was under age. He reported the matter to the police who went and arrested the appellant. The complainant was escorted to hospital where a P3 form was filled. She produced a birth certificate showing that she was born on 21/4/2005.
6. In cross-examination PW1 testified that the appellant never forced him into his life. That she told the appellant that she was not in school and he expressed interest to marry her as they had fallen in love.
7. RH (PW2) testified that she is the complainant's mother. On 3/9/2020 she took the complainant to a Herbalist Mama Boko for a hard dislocation. She left the complainant there under the care of a relative one M. Later she learnt that the complainant had left the house of M with a man. Later she was called to the police station where she met the complainant and the appellant. The two had appeared before the Kadhi to wed but he declined as the complainant was a minor.
8. Juho Sabla (PW3) is a clinical officer based at Merti Health Centre. He examined the complainant (PW1) on 14/9/2020 who had a history of defilement. On examination he found that the hymen was perforated but he scar was old. The labia majora had bruises which suggested that there was recent penetration. There was whitish vaginal discharge. There was no presence of spermatozoa. He concluded that there was evidence of recent penetration. He produced the P3 form as exhibit 1 and treatment notes as exhibit 1a.

In cross-examination, PW3 told the court that sexual penetration is not necessary sealed with ejaculation.

9. M A (PW4) testified that on 5/9/2020 at 7.00 pm she learnt that the complainant had been defiled. The complainant had gone to her home with her mother as she needed treatment of her hand by a herbalist. The complainant then left her house saying that she was going to her mother but she did not find out whether she went there or not.
10. No. 205773 Corporal Muchiri Mucheru (PW5) is a police officer attached at Merti Police Station. He testified that on 14/9/2020 at 10.30 pm he was called to the Kadhi's Court by the OCS and on going there, he found the appellant who was aged 28 years and the complainant and they intended to wed before the Kadhi. He established that the complainant was aged seventeen (17) years. He escorted the two to hospital where defilement was confirmed. He alerted the complaint's mother who took the



birth certificate to him showing that the complainant was aged fifteen (15) years. He produced the birth certificate in court as exhibits- The then charged the appellant with this offence.

Defence Case

11. The appellant gave unsworn defence and told the court that he never defiled the complainant.

The Appeal:

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

Appellant's Submissions:

13. The appellant submits that voire dire was not conducted. He relies on Macharia –v- Republic (1976) KLR 209 and Isaiah Gitonga –v- Republic Criminal Appeal No.E003/2021.
14. The appellant further submits that the charge was not proved beyond any reasonable doubts. He relies on the case of Woomington-v- DPP (1935) AC 462 and Miller –v- Minister of Pensions (1942) AC & Bakare –v- Sate (1985) 2 NWLR 465 (Nigerian.)
15. The appellant finally submits that the sentence imposed was harsh and excessive. He relies on Maingi & 5 Others-v- D.P.P. 2022 KLR.
16. Finally he submits that the learned Magistrate erred in failing to treat the minor as an adult.

Respondents submissions:

17. The submissions were filed by Grace Mukangu Senior Principal Prosecutions Counsel. Citing the case of Charles Wamukoya Karani- Republic, she submits that the respondents proved the three ingredients of the charged of defilement which are age of the victim, penetration and positive identification of the perpetrator.
18. On voire dire she submits that the age of the complainant was proved to be fifteen years old and was therefore not a child of tender years. That voire dire was not supposed to be done on the complainant. She submitted that the case of Isaiah Gitonga-v- Republic E003/2021 is distinguishable as the minor in the case was only 4 ½ years and therefore a child of tender years.
19. On the contention by the appellant that the trial magistrate failed to treat the minor as an adult, she submits that, firstly, the appellant has submitted that she was a minor in his second ground, secondly it was the obligation of the appellant to prove that he rightfully believed the complainant was an adult as contemplated under Section 8(6) of the Sexual Offences Act. That the fact that she had dropped out of school is not sufficient proof that she as an adults.
20. On the sentence, it is submitted that the trial magistrate exercised discretion and did not impose the mandatory sentence. That the appellant did not deserve mercy and that the sentence given was sufficient. She urged the court to be guided by the decision in Benard Kimani Gacheru –v- Republic (2002) eKLR, Court of Appeal.

Analysis & Determination:

21. I have considered the proceedings before the learned trial magistrate, the grounds of appeal and the submissions by the parties. The issues which arises for determination are:
 1. Whether the trial magistrate erred by failing to conduct voire dire examination.



2. Whether the learned trial magistrate erred by failing to treat the minor as an adult.
 3. Whether the sentence was harsh and excessive.
 4. Whether the charge was proved beyond any reasonable doubts.
22. This is a 1st appeal and this court has a duty to analyse the evidence, evaluate it and come up with its own independent finding. This court is however supposed to keep in mind that it did not have an opportunity to see the witnesses when they testified and given allowance for that. See *Okeno –v- Republic (1973) E.A 32*.

1. Whether the learned trial magistrate erred by failing to conduct voire dire examination

23. The term voire dire is used to refer to a pre-liminary examination which is supposed to be conducted by the trial Judge/Magistrate on witnesses to determine the competency of a witness to testify and whether the witness understands the meaning of the oath and the need to tell the truth and the consequences of not telling the truth. The examination is to determine whether the witness will be sworn or affirmed before giving evidence with regard to children of tender years, the examination is conducted in line with Section 19 of the [Oaths and Statutory Declarations Act](#) which provides as follows:-

“19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.”

24. This section states that voire dire examination is to be conducted on children of tender years. The threshold for conducting a voire dire examination has been settled in the binding decision of the Court of Appeal in the case of *Manipett Leonkomok- v- Republic (2015) eKLR* where the Court stated as follows. “Section 19 of the Oaths and Declaration Act is concerned with reception and admissibility of the evidence of a child of tender years. The section starts by declaring that where the child does not in the opinion of the court does not understand the nature of the Oath, his evidence may nonetheless be received though not given upon Oath. But that evidence shall only be received if again in the opinion of the court the child is possessed of sufficient intelligence to justify reception of the evidence and also if the child understands the duty of speaking the truth..... The question therefore is, who is a child of tender years. The [Sexual Offences Act](#) and the [Oaths and Statutory Declarations Act](#) are silent on the question. However, way back in (1959) in the celebrated case of *Kibageny arap Korir –v- Republic 1959 E.A 822*. The Court of Appeal for Eastern Africa held that the phrase. “ a child of tender years meant a child under the age of 14 years.” The only Statutory definition of a child of tender years is



Section 2 of the Children Act where it is defined to mean a child under the age of ten years. This court has recently in Patrick Kathurima –v- Republic Criminal Appeal No.137/2014 and Samuel Karimi Warui-v- Republic Appeal no. 16/2014 stated categorically that the definition in the children Act is not of general application, that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time honoured 14 years remains the correct threshold for voire dire examination.....”(Empasis added)

25. In his case the record is clear that the age of the complainant was proved to be fifteen years. The birth certificate which produced as exhibit 2- shows that the complainant was born on 21/4/2005 she gave evidence on 14/4/2021. As of that date she was well over fourteen (14) years old. The age that counts with regard to determination whether to conduct voire dire, is the date of the child at the time she is giving evidence. So if the child was below fourteen years and at the time of giving evidence she is over fourteen years, she shall be sworn without conducting voire dire examination.
26. In this case, the trial magistrate was not under a duty to conduct a voire dire examination as the complainant was over fourteen years. The ground cannot be sustained.

2. Whether the trial magistrate erred by failing to treat the complainant as an adult.

27. Section 8(5) & (6) of the Sexual Offences Act provides as follows:-

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

28. The section affords an accused person charged with defilement a defence that he believed the child was an adult. It is a defence that must be raised before the trial magistrate for it to be considered and determination given by the court. It cannot be raised on appeal if it was not raised as an issue before the trial court. The defence is twofold. Firstly, the person accused can plead that he was deceived by the complainant to believe that she was an adult. Secondly an accused person can raise a defence that he reasonably believed that the child was over eighteen years. In both situations, the accused must show the steps taken to ascertain the age of the girl. The appellant did not allege that the complainant stated that she was an adult. The defence of the appellant is a mere denial that he did not defile the complainant. In his submissions he submits that, it is true that under the Sexual Offences Act a child below 18 years cannot give consent to sexual intercourse. It was the obligation of the accused to show that he reasonably believed that she was an adult. This was not the case. Her age was proved to be fifteen years old. The Court of Appeal when considering this issue is the case of Eliud Waweru Wambui –v- Republic (2019 KECA 906 KLR, The Court of Appeal stated as follows:-

“We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of eighteen if the said child is in the age of bracket of 16 to 18 years



old, and that the closer to 18 years the child is, the more likely he deception and the more likely the belief that he or she is over the age of eighteen years.”

29. The appellant has urged the court to find that what the complainant told the court shows that she had expressed herself as an adult. I have considered this contention and find that the law exists to protect young girls from early child marriages and abuses by men over 18. It is clear from the record that there was interference with the minor which prompted the court to refer her for counselling. The court would be failing in its duty if it were to find that a child who was fifteen years could consent to sexual intercourse. I do not agree with the appellant that the complainant posed as an adult on the contrary the appellant took advantage of her innocence. His defence is a mere denial. This ground is without merits.

3. Whether the sentence imposed was harsh and excessive:

30. Section 8(1) (3) of the *Sexual Offences Act* provides as follows:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

31. The sentence provided under the section is a minimum of twenty years. Contrary to the assertion by the appellant, the learned trial magistrate did not impose the mandatory minimum sentence. She exercised discretion after the court considered his mitigation, that he is a first offender and that the offence was serious. In the case of *Benard Kimani Gacheru –v- Republic (2002) eKLR* .

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

32. I am guided by the binding authority and find that there is no room for me to interfere with the sentence. The learned magistrate was very lenient.

4. Whether the charge was proved beyond any reasonable doubts:

33. What the prosecution had to prove is the age of the victim, penetration and positive identification of the perpetrator. See *Charles Wamukoya –v- Republic Criminal Appeal No.72/2013* .The age of the complainant was proved to the required standard with the production of the birth certificate. The evidence is credible to prove the age beyond any reasonable doubts. See *Francis Omuroni-v- Uganda, Court of Appeal, 2/2000*.



Penetration:

34. Section 2 of the *Sexual Offences Act* defines penetration as-

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

35. In this case medical evidence by PW3 observed that the complainant had bruises on the genitalia which was suggestion of recent penetration. This evidence corroborates the testimony of the complainant that she had engaged in sexual intercourse with the appellant who had promised to marry her and took her to the Kadhi so that he could wed them. It is well settled that penetration is proved by the evidence of the victim and corroborated by medical evidence. The perforation of the hymen of the complainant which the doctor observed was an old scar does not rule out penetration by the appellant. The clinical officer stated in no uncertain terms that there was a recent penetration due to the presence of the bruises. Penetration need not be deep inside and this case it was proved to have taken place as it can be partial or complete. The doctor further explained that on the issue of absence of spermatozoa, “sexual penetration is not necessarily sealed by ejaculation”.

36. On the identity of the perpetrator, the appellant was identified by the complainant and her testimony was corroborated by her mother (PW2) who told the court that she found the appellant with the complainant at the Kadhi’s place where they had gone to be wedded only to realize that the complainant was a child. It was also corroborated by the testimony of PW5 the police officer who was called to the Kadhi’s court to go to arrest the appellant for trying to marry a child. The appellant had no defence as he merely denied the charge. I find that the prosecution proved beyond any reasonable doubts that the appellant was the perpetrator. In *woolmington –v-DPP (1935) AC 462* the court stated.

37. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does 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 is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with sentence, of course it is possible but not in last probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

38. In this case the prosecution proved the charge against the appellant beyond any reasonable doubts.

Conclusion:

39. The appeal lacks merits. It is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

29/8/2024

Appellant – present

The Judgment has been read out in open court.

L.W. GITARI

JUDGE



29/8/2024

