



**Kamwithu v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 11876 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E035 OF 2023
LW GITARI, J
SEPTEMBER 26, 2024**

BETWEEN

GEOFFREY KAMWITHU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment in the Principal Magistrate’s court Maua, Sexual Offences Case No. E011/2022 where the appellant was charged with the offence of defilement contrary to Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged in the particulars of the charge that on diverse dates between 18/1/2022 and 3/2/22 in Igembe Central sub-county within Meru County, intentionally and unlawfully caused his penis to penetrate the vagina of JK a child aged 13 years. He was also charged with an alternative charge committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act.
2. The appellant denied the charges and after a full trial he was found guilty on the charge of defilement, convicted and sentenced to serve Twenty (20) years imprisonment. He was aggrieved by this outcome of the trial and filed this appeal raising the following grounds:-
 1. That the learned trial magistrate erred in matters of law and also fact by failing to compromise the dints of Section 8(5) of the Sexual Offence *Act No. 2 of 2006*.
 2. That the learned trial magistrate erred in matters of law and also fact by failing to prove that the child deceived the appellant that she was 20 years old at time of commissioning of the alleged offence.
 3. That the trial court magistrate erred in both matters of law and also a fact where he failed to make findings that the minor behaved just like an adult.



4. That the learned trial court magistrate erred in both matters of law and also a fact where he rejected my cogent defense over mere denial.
5. That the learned trial court magistrate erred in both matters of law and also fact where he failed to note that the prosecution testimonies were contradicted thus unfair to safe conviction.
3. He prays that the appeal be allowed the conviction be quashed, the sentence be set aside and he be set at liberty. The respondent opposed the appeal. The court gave directions that the appeal be canvassed by way of written submissions.

The prosecution's Case.

4. The complainant, PW1 gave unsworn evidence after voire dire examination. She told the court that she used to fetch water where the appellant used to work. On one occasion she went to the house of the appellant and he ordered her to remove her clothes. The appellant also removed his and clothes and ordered the complainant to lay on the bed. He then inserted his penis in her vagina. The appellant did that to her on daily basis and she would then go home where she used to live with her grandmother. She then lived with the appellant as husband and wife. The parents came to know about it she was escorted to hospital where a P3 form was filled.
5. DK the complainant's mother testified that the complainant escaped from home and went to live with the appellant. She went to the house of the appellant and met the complainant there. PW3 Vincent Mwenda testified that he is a member of the community policing and on 18/01/22 the headteacher of Kirimukuu school called him and reported that a child had disappeared from school. He in turn reported to the area manager and they went to the house of the appellant where they found the complainant. They rescued the child so that she could go and do examination. The complainant was in the house of the appellant and they saw used condoms and the child's clothes.
6. The complainant was examined at Kangeta Hospital by a clinical officer Jackline Makumbi. She examined the complainant on 3/2/22 at 10:00pm, on examination she had no bruises on the genitalia but the hymen was missing. She alleged to have been married by the perpetrator. AM (PW5) I the complainant's sister she told the court that the appellant was arrested with her sister who had not come home for a month. She had gone to the house of the appellant and met the complainant on the appellant's bed. She went and informed her mother.
7. PW6 also gave evidence that he found the complainant in the house of the appellant and he rescued her and went to report at Kangeta Police Station. PW6 is PC Shadrack Manyika. The complainant reported that she was severely defiled by the appellant. He issued a P3 Form to the complainant. An age assessment by the doctor showed the complainant was thirteen (3) years old. She went to the house where the appellant used to stay with the complainant. She recovered a black skirt, white pant, jacket with red decorations belonging to the complainant who positively identified them as hers. The appellant signed an inventory, exhibit 4. The complainant was rescued from an early marriage. The appellant was aged Forty-Four (44) years old as per his identity card which was produced as exhibit 1. He was then charged.

The Defence Case

8. The appellant on oath stated that he met the complainant and they fell in love. She did not disclose that she goes to school she told him that she had challenges and that is why she does not go to school. Upon being cross-examined the appellant told the court that he did not know how old the complainant was. He never asked her for her identity card. The learned trial magistrate found the appellant guilty on



the charge of defilement and sentenced him to serve twenty years imprisonment. In his submissions the appellant cited Section 8(5) of the *Sexual Offences Act* and faults the trial magistrate for failing to consider that the victim deceived him that she was twenty years old. And that she behaved like an adult. The appellant further submits that his defence was rejected without cogent reasons and the learned trial magistrate failed to note that the prosecution witnesses gave contradictory evidence which was not safe to base a conviction. The appellant has relied on the case of *Muoki v Republic* CR. Appeal No. E028/2021. He has also alleged that vital witnesses were not called.

9. Finally, the appellant submits that Section 333(2) of the Criminal Procedure Code which he says was not complied with.
10. The state on its part submits that the charge against the appellant was proved beyond any reasonable doubts and the trial magistrate properly exercised her discretion in sentencing the appellant.
11. I have considered the proceedings before the learned trial magistrate, the grounds of appeal and the submissions.
12. The issues which are for determination are as follows:-
 1. Whether the defence under Section 8(5) of the *Sexual Offences Act* is available to the appellant.
 2. Whether the prosecution failed to call critical witnesses.
 3. Whether the prosecution discharge its burden to prove the charge against the appellant to the required standards.
 4. Whether the section 333(2) of the Criminal Procedure Code was complied with.

Analysis and Determination

13. This is the first appeal

“The duty of the 1st appellant court is to analyse, re-evaluate the evidence which was before the trial court and itself come up with to its own conclusion o that evidence. However, it must warn itself that it did not have the benefits of seeing the witness the witnesses when they testified and must leave room for that. The court of Appeal in the case of *David Njuguna Wairimu v Republic* [2010] while citing with approve the case of *Okeno v Republic* (supra), stated as follows: The duty of the first appellate court is to analyse, re-evaluate the evidence which was before the trial court and itself come up with its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may depend on the facts and the circumstances of the case to come up with the same conclusion as those of the lower court. It may reverse those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision”

The Court of Appeal further stated that “an appellant on a 1st appeal is entitled to expect the evidence as whole to the subjected to afresh exhaustive examination (*Padya v Republic* 1975 EA) 336 and the appellant courts own decision on the evidence. The appellant court must itself weigh the conflicting evidence and draw its own conclusions. In doing so it must make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses, see *Peter v Sunday Post* 1978 EA 424”



14. The appellant was charged with defilement. Section 8(1) and 8(3) of the *Sexual Offences Act* provides as follows
8. Defilement
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
15. The critical ingredients of the charge which the prosecution had to prove are age of the victim, penetration and identity of the perpetrator.
16. See the case of Charles Wamukoya Karani v Republic Criminal Appeal NO. 72/2013 cited by the respondent where the judge stated that “the critical ingredients forming the offence of defilement are age of the complainant proof of penetration and positive identification of the assailant”.
17. See also Dennis Njuki Muraya v Republic [2020]eKLR where the court stated that in a case of defilement the prosecution must establish the complainant’s age, penetration as well as the identity of the perpetrator. I am persuaded by these decisions and associate myself with the holding that in cases of defilement the age of the victim, penetration and identity of the perpetrator are the three key ingredients of the charge which must be proved beyond any reasonable doubts for decision to convict to be reached.

Proof of Age

18. The complainant testified that she was thirteen years old at the time the offence was committed. PW6 PC Shadrack Muniyika testified that the complainant was aged thirteen years. He testified that she took the complainant to Nyambene District Hospital for age assessment. He was given a report by the doctor dated 4/2/22 exhibit 9 showing that the complainant was aged thirteen years. It is trite law that age may be proved by the testimony of the complainant corroborated by medical evidence. Age may also be proved with a birth certificate, baptism card, immunization card or any other credible evidence (See Joseph Kieti Seet v Republic 2014) eKLR in this case the age assessment report is sufficient to prove the age of the complainant. I find that the age of the complainant was proved to the required standard.

Proof of Penetration

19. Penetration is defined under Section 2 of the *Sexual Offences Act* to mean “the partial or complete insertion of the genital organ into the genital organ of the another”. Penetration is proved by the testimony of the complainant corroborated by medical evidence. In this case the complainant testified that she was “married” by the appellant and they lived as husband and wife. This fact is not in dispute as the appellant stated that he did not know that the complainant was not an adult. Witnesses testified that the appellant had married the complainant and was living with her in his house. PW2 testified that he went to the house of the appellant and met the complainant there after she had gone missing for a week. Similarly, PW3 and PW5 testified that they found the complainant in the house of the appellant where they were living as husband and wife. Similar evidence was also adduced by PW6.



20. According to PW6, the investigating officer, the complainant reported that the appellant had severely defiled her. PW6 PC Munyika issued her with a P3 from which was filled by a doctor. That the doctor confirmed that the complainant was defiled. PW4 the clinical officer testified the complainant was presented to the hospital on 3/2/22 at 10:00am. On examination, the hymen was missing. She concluded that there was sexual encounter and that she had a previous sexual encounter with a person she did not disclose. The appellant admitted that she met the complainant and they fell in love. I find that the fact of penetration was proved to the required standards. There were no contradictions or inconsistencies in the evidence proving the issue of penetration. The evidence was well corroborated. The complainant is a minor who talked freely and stated that the appellant had married her and they engaged in sex daily. This was not denied. The complainant was rescued from early marriage. Although the appellant said he had erectile dysfunction, it is my view that it was an afterthought as PW1 stated that they used to engage in sexual intercourse daily. The medical evidence confirmed that the complainant had engaged in Sexual intercourse as the hymen was broken.

Whether the defence under Section 8(5) of the *Sexual Offences Act* is available to the applicant.

21. Section 8(5) of the *sexual offences Act* provides as follows:-

8(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.

22. For the appellant to succeed in this defence he must show the step he took to ascertain that the complainant was adult. The law requires even where the complainant behaved like an adult the belief, the same is to be determined having regard to all the circumstances of the case including any steps the accused took to ascertain the age of the complainant, further more the Section requires that the defence be raised during the trial. The accused is supposed to demonstrate that it is the child who deceived him to believe that she was eighteen years and that when all circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable, what this provision is stating is that an accused person who wishes to rely on the defence it must have raised during the trial. This would give the prosecution an opportunity to interrogate the defence and to respond. The appellant did not raise this defence all he said is that he did not know she was in school. It is only during cross-examination that he said he saw that she is an adult. He never asked her for her Identity Card. The complainant was a child aged thirteen years. The fact that she was not in school due to poverty does not mean she is for that reason an adult. The appellant did not take any steps to confirm whether she is an adult. The defence that he thought she was an adult is a sham and cannot stand it is simply not available to the appellant.

Whether the prosecution failed to call crucial witnesses.

23. Section 143 of the *Evidence Act* provides as follows :-

no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact”.

24. In *Keter v Republic* [2007] EA 135 the court stated that “ the prosecution is not supposed to call a super guilty of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubts”.



25. The appellant in his submissions has not pointed out the witnesses who were not called. I consider that this ground was abandoned. It is the duty of the prosecution to determine the witnesses they wish to call in support of their case. In so doing they are not under the direction of any party. This being a sexual offence, the crucial witnesses who are key in the prosecution are the complainant and the doctor. This is so because a sexual offence is proved by the testimony of the victim corroborated by medical evidence. The law allows the court to rely on the sole evidence of a victim of a sexual offence if it is satisfied that the witness is truthful.
26. Section 124 of the *evidence Act* provides as follows: -
124. Corroboration required in criminal cases
- Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall 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 is satisfied that the alleged victim is telling the truth.
27. It is my finding that the prosecution called more than enough witnesses to prove the case on.

Whether the prosecution discharged the burden to prove the charge beyond any reasonable doubts.

28. I hold that the prosecution proved all the ingredients of the charge of defilement beyond any reasonable doubts. The appellant admitted that he married the complainant who was a child aged thirteen years. The appellant was a male adult aged forty-four (44) years. Section 8(3) of the *Sexual Offences Act* provides as follows:-
- 8 (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”.
29. The section makes it an offence for a person to engage in sexual intercourse with a child aged thirteen years. The law is trite that a child under the age of eighteen years is incapable of giving consent to have sexual intercourse. The *Sexual Offences Act* defines a child as follows – “has the meaning assigned thereto in the *Children Act*”.
30. On the other hand, the *Children Act* defines a child as follows “means an individual who has not attained the age of eighteen (18) years” . The age of the complainant was proved by a doctor to be thirteen (13) years. It was therefore immoral and unlawful for the appellant to marry the complainant who was a child.
31. I do not see how a child aged thirteen (13) can be mistaken for an adult. This was a case of exploiting a child with full knowledge that she was a child. The court must frown at such behaviour. I find that the prosecution did discharge the burden to prove the case beyond any reasonable doubts.



32. The appellant has urged the court to consider the time spent in remand awaiting trial. Section 333(2) of The Criminal Procedure Code provides as follows:

333(2) Subject to the provisions of section 38 of the Penal Code every sentence shall 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 this Code."

33. The section is couched in mandatory terms. The time spent in remand must be taken into account to reduce the sentence imposed. The appellant was remanded from 7/02/2022 and sentenced on 28/2/2023. The sentence imposed should therefore run from 7/2/2022 to take into account the period spent in custody.

Conclusion:

34. For the reasons stated in this Judgment. This appeal lacks merits and is dismissed.

SIGNED, DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER, 2024.

HON. LADY JUSTICE GITARI

JUDGE

In The Presence Of:-

Court assistant – Tupet

Prosecutor –

