



**SM v Republic (Criminal Appeal E106 of 2022)
[2024] KEHC 13688 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E106 OF 2022
LW GITARI, J
OCTOBER 29, 2024**

BETWEEN

SM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The amended supplementary grounds of appeal are:
 1. That the learned trial magistrate erred in law and fact by failing to note that the key witnesses were not called to support the testimony of PW1 in this case.
 2. That the learned trial magistrate erred in law and fact by failing to note that the evidence of broken hymens is not prove of defilement.
 3. That the learned trial magistrate erred in law by failing to note that the evidence of clinical officer indicate that the offence is sexual assault not defilement according to the charge sheet.
 4. That the learned trial magistrate failed to take into consideration he defence of the appellant.

Background:

2. The appeal arises from the Judgment in the Chief Magistrate’s Court Meru Sexual Offences Case No.E007/2021 where the appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No.3/20006. The particulars were that on diverse dates between 2018 and 18/7/2020 in Imenti North Sub-County within Meru County intentionally and unlawfully caused his penis to penetrate the vigena of K a girl aged eleven (11) years.
3. The appellant was also charged with an alternative charge of committing can indecent Act with a child contrary to Section 6(a) of the Sexual offences Act. Upon being arraigned in court the appellant denied



the charges and a full trial was conducted. In the end he was convicted on the charge of defilement and sentenced to serve twenty (20) years imprisonment. He was aggrieved with both conviction and sentence and filed this appeal. He prays that the conviction be quashed, sentence be set aside and he be set at liberty.

Prosecution's Case:

4. The complainant (PW1) is a step-daughter to the appellant. It is the complainant's evidence that she used to live in the same house with the appellant but he used to sleep in a different room. Sometimes in 2018 the appellant went to where PW1 used to sleep and told her that he wanted to penetrate her vagina so that her breasts could grow big. He then removed the trouser that PW1 was wearing as well as her pants. The appellant then removed his trouser and penetrated the complainant's vagina. The complainant did not report to anyone. Thereafter the appellant made it a habit of defiling the complainant whenever her mother was away. The appellant used to work as a watchman while the complainant's mother used to do work as a casual worker. It happened that PW2 the complainant's brother witness when the appellant was defiling the complainant and he reported to his mother JK (PW2). The PW2 did not ask the complainant. However JK asked PW1 what she was doing with the appellant on her parent's bed. That is when the complainant revealed that the appellant told her to start having sex so that her breasts could grow. PW1 also revealed to her mother that the appellant had threatened her with death if she ever told anybody about what he was doing to her. The complainant revealed that the defilement had been taking place for a long time. The matter was then reported at Meru Police Station. The complainant was referred to hospital and a P3 form was issued. The complainant was born on 29/3/2009 as per her birth certificate which was produced as exhibit 1.
5. The complainant was examined by Doctor Mutwiri at Meru Level 5 Hospital who and she filed a P3 form which was produced in court by Doctor Malcolm Kithinji PW5. The doctor testified that the complainant was eleven years old at the time of examination and had been defiled repeatedly by her stepfather from the year 2018 up to 2020. On examination there were no injuries on the genitalia. The hymen was broken and she had a yellow foul smelling discharge. He produced the P3 form as exhibit 2- and PCR Form as exhibit 3. The appellant was arrested by PW3 & PW4 and handed over to the police.
6. The matter was investigated by PW6- Police Constable Woman Idewa Beatrice who is attached at Meru Police Station Gender and Children Desk. The matter was reported by complainant's mother on 18/2/2020 after a brother of the complainant witnessed as the appellant defiled the complainant. The appellant fled from the scene. The complainant was referred to hospital and a P3 form was issued. The doctor confirmed that she was defiled. The appellant was then arrested and charged.

Defence Case:

7. The appellant gave unsworn defence and told that he was framed.

The Appeal:

The appeal was canvassed by way of written submissions. The appellant submits that key witnesses were not called. He cites the complainant's brother who was not called as a witness yet it was the evidence of PW1 that he witnessed the defilement and reported to PW3. The appellant relies on the case of *David Mwingirwa v Republic* Criminal Appeal No. 23 of 2015.

On the issue of penetration, the appellant submits that broken hymen is not evidence of penetration. He relies on the case of *John Mutua Munyoki v Republic* (2017) eKLR and *P.K.W v Republic*.



The appellant submits that the charge against him was not proved beyond any reasonable doubts.

The Respondent's Submissions:-

8. The respondent submits that the ingredient of the charge, namely penetration, Age of the victim and the identity of the perpetrator was proved beyond any reasonable doubts.
9. She relies on Charles Wamukoya Karani-v Republic Criminal Appeal No.72/2013 and [*Joseph Kieti Seet v Republic*](#) (2014) Eklr
10. On the sentence the respondent submits that the sentence was lawful, and deserved as the appellant was a father figure of the complainant and owed her a duty of care but instead defiled her over a period of two (2) years. He relies on [*Benard Kimani Gacheru v Republic*](#) (2002) eKLR. The respondent submits that the appeal lacks merits and should be dismissed.

Analysis and determination:

11. The issue that arises for determination is whether the charge was proved beyond any reasonable doubts. This is a first appeal. The jurisdiction of the court is to consider both facts and the law. Section 347 of the [*Criminal Procedure Code*](#) provides that-

“(1) Save as in this part provided-

a person convicted on a trial held by a Sub-ordinate Court of the first second class may appeal to the High Court.

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.”

12. The duties of the first appellate court has been well laid down in decisions of this court and Court of Appeal.
13. This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is *Okeno v Republic* (1972) E.A 32 where this duty was discussed. This was buttressed in the case of [*Kiilu & Another v Republic*](#) (2005) 1 KLR 174 where the Court of Appeal stated:-

“An Appellant on a first appeal is 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 first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses.”



14. The appellant was charged with defilement under Section 8(1)(2) of the *Sexual Offences Act*.
- “(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.”
15. The ingredients of the charge are as well stated by the Counsel for the respondent that they include-
1. Proof of age of the victim
 2. Penetration
 3. Positive identification for the perpetrator
16. I find that the prosecution discharged the burden of proof the ingredients beyond any reasonable doubts. The age of the complainant was proved with the production of the birth certificate which has produced as exhibit -1 and shows that the complainant was born on 29/3/2009. This shows that the complainant was at that time a child of tender years.
17. On penetration, the complainant testified that the appellant defiled her repeatedly since the year 2018 to 2020. She did not disclose to anyone as the appellant had threatened her with death if she revealed. It was not until the time the complainant’s brother witnessed the defilement in broad day light and he informed his mother PW2. The PW2 then reported to the police. The appellant has submitted that the said brother of PW1 was not called as a witness to corroborate her testimony. Section 143 of the *Evidence Act* provides that-
- “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.”
18. In *Keter v Republic* (2007) E.A the court stated that
- “The prosecution is not supposed to call a super fruity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubts.”
19. The prosecution has the discretion to determine the number of witnesses the wish to call and in so doing they are not under the direction of any party. The question is whether failure to call the complainant’s brother was fatal to the prosecution case. This being a sexual offence, the crucial witnesses in the prosecution case are the complainant and the doctor. A sexual offence case is proved by the testimony of the complainant, corroborated by medical evidence. The law allows the court to rely on the sole evidence of the victim of a sexual offence if it is satisfied that the witness is truthful. Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya provides that-
- “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.”

20. The learned trial magistrate conducted ‘voire dire’ examination and stated that the complainant (PW1) was intelligent and understands very well the meaning of Oath. In her Judgment the learned trial magistrate found that the testimony of the complainant corroborated by medical evidence. I find that the learned magistrate having satisfied herself that the complainant was truthful, no further evidence was necessary. Penetration is prove by the testimony of the complainant corroborated by medical evidence. The doctor PW5 testified that the complainant’s hymen was broken and she had a foul smell from her genitalia. The doctor’s evidence was that the broken hymen was proof of penetration. I find that there was sufficient evidence. Failure to call the said witness was not actuated by ulterior motive. The evidence against the appellant was overwhelming and not barely enough. Failure to call the said witness by the prosecution was not fatal to their case. The law allows the court to rely on the uncorroborated testimony of victim. Medical evidence sufficiently corroborated the testimony of the complainant on the fact of penetration.
21. Section 2 of the *Sexual Offences Act* defines penetration to mean that partial or complete insertion of the genital organs of a person into the genital organs of another person.
22. In this case there was evidence of broken hymen to proof penetration. The absence of bruises and injuries does not rule out penetration. This is a child who was defiled over a period of two years. The doctor stated that once the hymen is broken it cannot be stitched. He further told the court that the complainant last time the complainant was defiled by the perpetrator was two weeks before the examination. The fact that no injuries were noted does not rule out defilement. I conclude that penetration was proved with sufficient evidence. On the identity of the perpetrator, the appellant was well known to complainant. They lived in the same house. She was defiled over a period of two years. She could not have failed to know that it is the appellant who was doing it. PW2 testified that she came to learn that the complainant was defiled by the appellant and reported the matter to the police. Following the discovery, the appellant fled from the scene only to be tricked by the teacher to go to school and he was arrested. The flight of the appellant is incompatible with his innocence.
23. I find that the appellant was positively identified as the perpetrator.

Whether charge was proved beyond any reasonable doubts.

24. The appellant was presumed innocent under Article 50 (2) (a) of the *Constitution*. The prosecution had the burden to proof the guilt of the accused beyond any reasonable doubts.
25. For the reasons stated above I find that the prosecution had discharged its burden to prove the charge beyond any reasonable doubts. See *Woolmington v D.P* (1935) AC 422 where it was stated.

“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 but not in the lease probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

Lord Oputa of the Supreme Court of Nigeria in the case of *Bakare versus state 1985 2NWL*R adopted the statement as follows at page 465.

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the



presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charge. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

26. The prosecution laid sufficient evidence in court and proved the charge to the required standard page 49 of the record shows that the defence of the appellant was considered and rejected. The learned magistrate was not in error as the defence was a mere denial and raised matters which were not put to the witnesses when they testified. On the sentence, the minimum mandatory sentence under Section 8(1) (2) of the *Sexual Offences Act* is life imprisonment. The appellant was sentenced to serve twenty years imprisonment on considering the gravity of the offence and that he committed the offence against his own child she concluded that a deterrent sentence was called for. In *Benard Kimani Gacheru v Republic* (2002) eKLR it was stated”-

“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, will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances to 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.”

27. The learned magistrate considered relevant matters when sentencing. The sentence was reliant as the sentence provided was life imprisonment.
28. I find no good reason to interfere with the sentence.

Conclusion:

I find that the appeal lacks merits. I dismiss the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF OCTOBER 2024.

L.W. GITARI

JUDGE

29/10/2024

Ms Joan -ADPP

C/A – Muriuki

Appellant -present – virtually from Meru Prison.

The Judgment has been delivered out in open court.

L.W. GITARI

JUDGE

29/10/2024

