



**Jefa v Republic (Criminal Appeal E037 of 2023)  
[2024] KEHC 12980 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12980 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E037 OF 2023  
SM GITHINJI, J  
OCTOBER 28, 2024**

**BETWEEN**

**RAMA MWATETE JEFA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both conviction and sentence in MSCO No. E009 of 2022 at Kaloleni by Hon R.M.Amwayi – SRM delivered on 28th day of November, 2022)*

**JUDGMENT**

1. RMJ was charged in the lower court with the offence of attempted defilement, contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No.3 of 2006.
2. The particulars of this offence are that on the night of 15<sup>th</sup> day of March, 2022 at Kilifi County, the appellant intentionally attempted to cause his penis to penetrate the vagina of G.J, a child aged 5 years old.
3. The prosecution case is that Pw-2 is the mother to Pw-4 the victim in this case. They live at [Particulars withheld] where Pw-2 does business. The appellant herein was their neighbour and at the time of the alleged offence they were living within the same homestead. The victim herein was born on 5/10/2016 according to her mother who produced her child health monitoring card showing the said given date of birth. At the time of the alleged offence, that is on 15<sup>th</sup> March, 2022, the victim was aged 5 years.
4. On the material day the appellant went to the house of Pw-2 to buy “mahamri”. He said he will go with the victim to give her Kshs.10 for “mahamri”. He left with her to his house. They overstayed which prompted Pw-2 to go check on her daughter. When she got to appellant’s house she found the door locked. According to the victim, when they got into the house the appellant removed her panty and dress. He then applied petroleum jelly on her private part (showed it by pointing at her vagina). He removed his trouser and inserted his urinating organ (referred to it as “dudu” which he uses for short



call). When her mother found the house locked she called out her name loudly. The victim rushed and opened the door for her. She found the appellant in bed having covered himself with a bedsheet. She grabbed the sheet and uncovered him only to find that he was naked. His trouser was on the floor. Pw-2 screamed for help. Neighbours were attracted by the screams and the appellant was arrested. He was taken to Jibana Chief's Office. The matter was reported at Kaloleni Police Station. Pw-4 investigated the case. He went to the Chief's Office and re-arrested the appellant. Together with the victim were taken to the police station. Statement of the mother and the victim were recorded. She was issued with a P-3 form. The P-3 form was filled at Mariakani Sub – County Hospital by Pw-3 on 15/3/2022. The victim was naked at the time. She had pain in lower abdomen.

5. Her external genitalia was normal. She however had lacerations and abrasions on labia majora and minora. Hymen was intact and there was no discharge noted. The clinical officer was of the opinion that there was no penetration but there was attempted defilement. Pw-4 upon conclusion of his investigations had the appellant charged with the said offence.
6. The appellant in his defence stated that he comes from Kambe and he is a farmer. He alleged that he was living with his mother and grandmother, as well as other siblings who all depended on him.
7. The trial court evaluated the evidence and found that the offence had been proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years' imprisonment.
8. Dissatisfied with the said conviction and sentence, the appellant preferred an appeal before this Court on the grounds that; -
  1. The charge sheet was amended and he was not called to plead afresh thus rendering the trial a nullity.
  2. Evidence of the appellant's birth certificate (attached) shows he was born on 8/11/2006.
  3. At the time of the alleged offence the appellant was 16 years old.
  4. As a minor he should not have been incarcerated in the same facility with adult offenders.
  5. As a minor he should have been accorded a pro-bono advocate at the expense of the state as he was ignorant of law and greatly prejudiced.
  6. Prosecution case was not proved beyond reasonable doubt.
  7. The Sentence imposed is harsh and excessive.
9. The appeal was canvassed by way of written submissions and both sides filed their respective submissions. As a first appellate Court I have re-considered the charge, evidence adduced, judgment entered and sentence meted; grounds of the appeal and submissions.
10. The respondent does not oppose the appeal on the grounds that there was evidence from the on-set that the appellant was a minor during commission of the alleged offence and trial. The trial court was so informed by the prosecutor and appointed an advocate to represent him. However, when the matter proceeded, though there was an advocate on record, the appellant was not represented which is in violation of Article 50 of the *Constitution* and section 222(2) of the *Children's Act 2022*. The imposed sentence also violates section 239 (1) of the *Children's Act*. As such the respondent submitted that the total trial was in violation of the law and is a nullity.
11. When the appellant took plea on 16/3/2022 the prosecutor informed the Court that he had the age assessment report of the appellant and he was 17 years old. The court given the information



released him on personal bond of 50,000/= and directed that the Court Administrator do appoint a pro-bono Advocate to represent him. The advocate was appointed as on 7/4/2022 Mr Kiragu Advocate appeared for him on pro-bone basis. However, on 1/9/2022 when the matter commenced hearing before another magistrate it proceeded without representation of the accused. It appears Hon R.Amwayi- SRM did not go through the previous record in the file by Hon L.N.Wasige (Mrs) – PM. The prosecutor was also new, Ms. Edith and it would also appear she had not gone through her file record. The matter proceeded as if the appellant was an adult, all through up to the date of sentence on 28/11/2022.

12. A child need to be represented in a criminal trial because children often lack the maturity, understanding and legal knowledge required to navigate the trial process effectively. This is well demonstrated in what happened in this particular case as the appellant did not cross-examine the key eye witnesses who are Pw-1 and Pw-2, and scantily cross-examined Pw-3 and Pw-4. When it came to his defence he offered nothing that would amount to a defence but simply stated a sentence which amounts to mitigation.
13. Under Article 50 (2) (h) the appellant had a right to be represented by an Advocate at state expense as substantial injustice would otherwise have resulted as witnessed in the trial. Though the Advocate was appointed, he did not serve the purpose and appellant suffered substantial injustice throughout the trial. I do agree with the respondent’s submissions that the whole trial is in violation of the law and is therefore a nullity.
14. When it comes to sentence, the appellant though vivid was a child, was sentenced as an adult. There was therefore total disregard of provisions of section 8 (2) of the *Children Act* 2022 where his best interest as a child should have been accorded paramount consideration. Section 239 of the *Children Act* which guides the sentence that can be imposed on a child was not followed. A child cannot be imprisoned but can be committed to a rehabilitation school or Borstal Institution depending on his or her age. Other orders such as fines, probation, CSO, committing a child to a fit person for care, placement in an educational institution or vocational training program and more, as carried in paragraph 3.1.2 of the Sentencing Policy Guidelines 2023, should have been explored.
15. Having weighed the foregoing, it’s explicit that the appeal succeeds against the conviction and the sentence. The conviction is therefore quashed as well as the sentence. The appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024**

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

M/s Achola for the State

Appellant in Person

