



**JOK v Director of Public Prosecution (Criminal Appeal E009 of 2024)
[2024] KEHC 16413 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E009 OF 2024
S MBUNGI, J
DECEMBER 23, 2024**

BETWEEN

JOK APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Being an appeal from the conviction and sentence delivered on 1st February 2024
by Honorable G.P Omondi PM at Mumias in Sexual Offence No. E030 of 2021)*

JUDGMENT

Introduction

1. The Appellant, JOK was charged with Defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 1st November,2018 and 17th July,2021 in Mumias East sub-county within Kakamega County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of PM, a child aged 14 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the sexual offence act No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st November,2018 and 17th July,2021 in Mumias East sub-county within Kakamega County, the appellant unlawfully and intentionally touched the vagina of PM, a child aged 14 years. He pleaded not guilty to both charges.

Facts at Trial.

2. The prosecution set out to prove its case and called five witnesses. PW1 was the victim PM, who stated that she was 14 years old. She stated that the accused is her stepfather and she changed schools when her mother took her away from Shiyabi and they came to live with him. She further recalled that the accused person used to coerce her to sleep with him in his matrimonial bed when her mother was away



- and would touch her breasts and used his penis to rape her. She recalled that the accused used to work in a poshomill and he used to buy her soda and cakes to lure her and she got pregnant and had a still birth. She stated that she told her father who then reported to the police. She stated that she did not tell anyone because she was afraid the accused person would beat him.
3. PW2 was JA, the father to PW1. He stated that she was born in 2007 hence was aged 14 years old. He told the court that PW1 came back from her mother's place in 2021 and he was informed by his wife that she appeared pregnant. Upon taking her for medical examination, the same was confirmed. His wife inquired about the pregnancy from PW1 who informed her that the pregnancy was the accused person's. He then realized that the said person was the husband to the PW1's mother.
 4. PW3 was a clinical officer named Cosmas Tatu Simwa who recalled that PW1 came to Shianda Dispensary accompanied with PW2 and upon examination, it was observed that she was 24 weeks pregnant. She gave the history of the pregnancy and the events that led to it. She stated that the perpetrator was well known to her. The hymen was absent and urinalysis showed that she was suffering from a fungus infection called Candidiasis. He also advised them to go for clinic and legal aid and request a DNA exam upon delivery.
 5. PW4 was Policarp Lutta Kweyu, a government analyst at Kisumu. He gave sworn evidence and stated that On 07.07.2022 at Kisumu, swabs of JOK were taken from the mouth so as to be compared with some cartilage of the deceased child, P and also from the mouth of the complainant and brought to the institution on 09.11.2021 for DNA profiling to establish who was the father of P (the deceased child). He stated that from the test it was found that DNA profile of the child P (deceased) had half of the profile from JO and the remaining half from PM hence the conclusion that the accused was the father of baby P (deceased) and PM was the mother. He produced the report prepared and signed by him on 09.09.2022 in court.
 6. PW5 was P.C Irene Chebet who was at the time attached to Shianda Police station. She stated that she was the Investigating officer and was assigned to the case by the OCS following a report by PW2 on 06.08.2021 regarding the defilement of PW1 whom upon examination was found to be pregnant. PW1 informed her that the accused who was her stepfather had a kiosk and posho mill and would bring her mandazi, soda and cakes, then take her to the posho mill when her mother was not around and have sex with her. Consequently, she arrested the accused person on 14.08.2021.
 7. The court considered the evidence adduced in support of the charge and found that a prima facie case had been established and the accused was put on his defence.

Defence Case.

8. The defence called two witnesses. DW1 was the accused person, JOK. He stated his place of residence and work. She recalled that PW1 was brought by PW2 to his place of residence for her mother, who was his wife, to take her to school. She took PW1 to [particulars withheld] and with time she started beating other children at school. He further stated that he had on several occasions found PW1 in the company of boys and when disciplining her, she had picked a panga and cut him on the hand. He stated that PW1 had also hit him with a stone and even beat his other child. Upon intervention by a neighbor, PW1 bit the neighbor's thumb. It was then that he told his wife to take her back to their home. One month later after she left, 11 police officers came to his home and arrested him on allegations of defiling PW1 since 2017. He stated that he was taken to Kisumu for DNA testing and the results took more than 1 ½ years to be produced. He stated that the Investigating officer asked him for Kshs. 5000/- to go and pick the results in Kisumu and upon telling him that he lacked the amount requested by him, he



threatened that he would be in a problem. He stated that PW1's biological father had been threatening him and his wife and swore that he had not been engaging in sex with PW1.

9. DW2 was PML, the wife to DW1 and mother to PW1. She stated that she gave birth to PW1 when she was still in school and his biological father rejected the child. She got married to DW1 who accepted PW1 as his own child. They lived together with PW1 from March 2009 up to December 2013. Thereafter she went to her grandmother until January 2018. It was from there that her biological father came and took her away and stayed with her until 2021 when she was brought back to the accused and her mother to live and study there. She noted that the complainant was troublesome and she had found her with the son to her brother-in-law and beat them and informed her husband. DW1 also found the complainant with another boy. She further stated that she had found the complainant with another boy behind the toilet in February 2021. A week after the complainant went back to her biological father, police officers came and arrested the accused person and when she tried to approach PW2, he chased her away. She stated that DW1 willingly agreed to partake in the DNA test when the complainant's baby died but the results took way too long.
10. The trial court proceeded to convict and sentence the accused to an imprisonment term of twenty (20) years.

The Appeal.

11. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;
 - i. That, the learned trial Magistrate erred in law and fact by falling to hold that the prosecution evidence adduced did not meet the high standard of proof of beyond reasonable doubt.
 - ii. That, the learned trial magistrate erred in law and fact by failing to appreciate the evidence of the Appellant and DW-2 consistently during cross examination, that the complainant came to the Appellant's house to see DW-2 her mother from January 2021 to August 2021, while the particulars of the charge sheet read that the offence was committed between 1st of November 2018 and 17th of July 2021.
 - iii. That, the learned trial magistrate erred in law and fact by disregarding the evidence of the Appellant that DW2 the wife of the Appellant, was initially married to PW-2 hence there was an existing dispute between the Appellant and PW-2.
 - iv. That, the learned trial magistrate erred in law and fact by not putting into consideration the evidence of DW-2 that the Complainant was with PW2 her father from the year 2018 to January 2021, while the charge sheet read that the Complainant was defiled between 1st November 2018 and 17th July 2021.
 - v. That, the learned trial magistrate erred in law and fact by disregarding the evidence of DW-2 that the Complainant was very rude, indisciplined and at one point DW-2 got her engaging in sex with a son to her brother-in-law.
 - vi. That, the trial magistrate erred in law and fact by not putting into account that the entire evidence of PW-3 was contradictory to the P3 Form produced.
 - vii. That, the trial Magistrate erred in Law and fact by overlooking the evidence of DW2 the mother of the complainant in both examinations in chief and cross-examination and relying on speculative evidence contrary to the law to suit a particular school of thought.



- viii. That, no investigation or proper investigations were carried out which rendered the case against the Appellant fatal.
 - ix. That, the learned trial Magistrate erred in law and fact in relying on the uncorroborated evidence of PW-4 to convict the Appellant.
 - x. That, due to the prevailing circumstances, the learned magistrate should have given a benefit of doubt to the appellant as there was no direct or indirect link to omission and omission of crime under reference.
 - xi. That, the appellant's right to fair hearing was blatantly violated and openly infringed upon.
 - xii. That, the learned trial magistrate erred in law and fact by rejecting the defense and misdirecting himself on mere suspicion to convict and sentence the Appellants.
 - xiii. That, the learned trial Magistrate erred in law by finding and holding that the prosecution proved a prima facie case against the Appellants without considering prevailing contradictions in testimonies and documents produced.
12. The appeal was canvassed by way of written submissions.

Appellant's Case.

13. In a nutshell, the Appellant's submission was that the evidence adduced did not meet the required standard of proof beyond reasonable doubt and that the court disregarded the entire defence evidence and drew a conclusion based on contradictory and incredible evidence of the prosecution.
14. The appellant in his submissions identified two key issues for determination in this appeal:
 - a. Whether the prosecution proved the case beyond reasonable doubt
 - b. Whether the defence of the appellant was considered
15. The appellant challenged the prosecution case, stating that PW1 gave evidence that she had a still birth on 19.10.2021, whereas PW4 stated that he received the swab on 09.11.2021. The appellant submitted that the prosecution did not explain when the swab was taken from the deceased and how long it took them to extract the swab after the birth of the deceased. Further, he averred that the swab taken from the deceased could have been distorted, hence could not produce accurate results.
16. Further, the appellant submitted that the DNA test was carried out after two weeks in which time, it was hard to detect the trace of the father's DNA and equally impossible to detect the mother's maternal plasma.
17. The Appellant submitted that the charge sheet relied upon by the trial magistrate to convict the appellant stated that the offence was committed on diverse dates between 01.11.2018 and 17.07.2021 whereas he stated in his judgment that PW1 had a still birth on 19.10.2021. The appellant submitted that the charge sheet indicated that the last time the appellant defiled PW1 was in the month of July 2021, hence the fetus would have only been 16 weeks, hence the same did not match the evidence of PW1 that he was impregnated by the appellant.
18. The appellant also submitted that the P3 form did not indicate the age of the offence and the prosecution failed to prove the same.
19. The medical report was attacked by the appellant, stating that it did not corroborate the evidence that it was the appellant who committed the offence.



20. The appellant further submitted that the court ought not to have disregarded the evidence by the appellant that there was a serious grudge between PW2 and him, which originated from the appellant getting married to DW2.
21. It was the appellant's submission that the evidence by DW2 that she found PW1 having sex with a son to her brother-in-law and later again with another boy in February 2021 was never rebuffed nor challenged during cross-examination but was totally disregarded by the trial magistrate. The appellant averred that PW1 gave birth on 19.10.2021 hence corroborating the evidence of DW2 that she caught PW1 having sex with a boy in February 2021 and was likely to have gotten pregnant then.
22. Lastly, the appellant submitted that the trial magistrate erred in convicting the appellant based on inconsistent, incredible evidence of the prosecution witnesses and ignoring the defence in its totality.

Respondent's Case.

23. The prosecution counsel submitted that the main ingredients for defilement were sufficiently proved by the prosecution in the trial court. He submitted that the ingredient of age was proved by the production of an age assessment report of the victim and this was corroborated by the evidence by PW2, her biological father, who confirmed that she was 14 years.
24. Secondly, he submitted that the second ingredient of penetration was proven by the victim's testimony in court where she narrated that the appellant used to seduce her with cake and soda and defile her when her mother was not home. He averred that her testimony was corroborated by PW3 who was a clinician who testified that the victim's hymen was broken, she was 24 weeks pregnant, was suffering from syphilis and candidiasis.
25. On the ingredient of proper identification, the respondent submitted that the complainant stated that she knew the appellant very well since he was her stepfather. Moreover, as per her testimony the defilement was not a one-time thing. In addition to the evidence by the victim identifying her defiler, a DNA report confirmed that the accused person was the father to the victim's child who was unfortunately born dead hence proving that the appellant herein had sexual intercourse with the victim.
26. The respondent submitted that the ground of appeal that the dates the appellant is accused of defiling the accused person are incorrect for the reason that the victim only lived with them from January 2021 to August 2021 as opposed to November 2018 to July 2021 as stated in the charge sheet does not hold water since the offence in question was committed over a period of time and the victim being a child might have been confused on the timelines. This notwithstanding, the trial court considered this defence and based on the age of the pregnancy (24 weeks) placed the conception period to be around 24th February, 2021 when the victim was living with them.
27. It was the respondent's submission that the sentence meted by the trial court was lawful and commensurate to the offence as per the provisions of Section 8(3) of the *Sexual Offences Act*.

Analysis and Determination.

28. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses



testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

29. I have looked at the grounds of appeal, the submissions filed by the parties, the lower court proceedings and the trial court's judgment.
30. I find the following broad issues for determination.
 - i. Whether the prosecution proved the case beyond reasonable doubt.
 - ii. Whether the defence of the appellant was considered.
31. 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* which provides:
 - “8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 8(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.”
32. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
 - i. Age of the complainant
 - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*
 - iii. Positive identification of the assailant.
33. On the first ingredient, I note that PW1 underwent an age assessment at the Kakamega County General Hospital and was found to be 14 years old. His biological father also stated that PW1 was born in 2007 hence was a child at the time therefore the ingredient of age was sufficiently proved.
34. The essence of proving the ingredient of age was stated in the case of *Benard Kiptoo v Republic (Criminal Appeal 1 of 2020)* [2021] KEHC 1125 (KLR) where the court stated:

Age of the victim in sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the evidence to the imposed will be dependent on the age of the victim. See also the case of *Hadson Ali Mwachongo Vs R* by the court of Appeal in Mombasa, where the court stated:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”



35. On the proof of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:
- “The partial or complete insertion of the genital organs of a person into the genital organs of another person.”
36. The act of penetration can be proved by the testimony of the victim or medical evidence or any other evidence.
37. In the case of *Andrew Runya Munga vs Rep (2021) Eklr* the court held that:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and collaborated by the medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration...”
38. The victim testified that the appellant used to defile her on Saturdays and Sundays when her mother was absent. He would give her cake and soda and tell her not to tell anyone what happened. When she was examined by the clinical officer, the hymen was found absent and she was 24 weeks pregnant. So, obviously for her to become pregnant, there must have been penetration. So I find this element proved.
39. The question remains, who was the perpetrator? The complainant insisted that it was the appellant who penetrated her mostly on Saturdays and Sundays when the mother was not there. She told the court that the appellant was her stepfather. Within the period of November, 2018 to July, 2021 they were staying together. The prosecution also produced a DNA report showing that the appellant was the father to the complainant's child who unfortunately was born dead. The appellant in his submissions, dismissed the evidential value of the DNA report saying that the father's DNA could not have been traced for one day had lapsed after the still birth and quoted *The American journal of human Genetics* volume 64, issue 1, January 1999, pages 218-224 where it was observed that: "the fetal maternal DNA clears in one day after delivery, and it becomes undetectable in one day of birth. Given the rapid clearance of plasma nucleases, it is impossible to trace the father's DNA strand after one day of a still birth."
40. I have looked at the testimony of PW4 Polycarp Kweyu, the government analyst who produced the DNA report. The appellant never questioned his findings. For him to question the findings at this stage, I find it not fair and also it is unprocedural. The issue of whether the DNA could be traced after one day or not, should have been raised before the trial magistrate for consideration and render a finding on it. Nevertheless, even without the DNA report I am justified that the complainant knew the appellant very well. There is no reason why she could have framed the appellant. What would be her motivation? Here, the court was not trying whether it was the appellant who impregnated the complainant or not; The issue was whether it was the appellant who penetrated her within the period specified in the charge sheet. The trial magistrate cannot be faulted for finding that it was the appellant who defiled the complainant.
41. The last paragraph of the trial court's judgment, it is clearly shown that the trial magistrate considered the defence rendered by the accused and found that it was mere denial and rejected the defence. So, it is not right for the appellant to complain that the trial magistrate never considered his defence.



42. On sentence, the law provides in Section 8 of the Sexual Offence Act as follows:

“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.”

43. The trial magistrate upon finding the appellant guilty, consequently convicted and sentenced him to serve twenty (20) years imprisonment after considering his mitigation.

44. The trial magistrate cannot be faulted for the law provides for a minimum of twenty (20) years sentence in prison for anyone convicted for defiling a child aged between 12 years and 15 years. The complainant herein was aged 14 years at the time she was defiled by the appellant.

45. The upshot of the above, is that I find the appeal has no merit both on conviction and sentence. I do dismiss the appeal.

46. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Appellant – present online

Court prosecutor – Ms. Osoro present online

Court Assistant – Elizabeth Angong’a

