



REPUBLIC OF KENYA



**KENYA LAW**  
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**JK alias J v Republic (Criminal Appeal E022 of 2021)  
[2023] KEHC 1171 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1171 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E022 OF 2021  
RL KORIR, J  
FEBRUARY 24, 2023**

**BETWEEN**

**JK ALIAS J ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From Conviction and Sentence by Hon. Kipkurui Kibelion, PM in  
Bomet Principal Magistrate's Court, Sexual Offence Number 68 of 2019)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on diverse dates between the month of January 2019 and September 2019 at Bomet township within Bomet County, intentionally caused his penis to penetrate the vagina of SC, a child aged 14 years.
2. The Appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the alternative charge were that on diverse dates between the month of January 2019 and September 2019 at Bomet township within Bomet county, intentionally touched the vagina of SC a child aged 14 years with his penis.
3. The Appellant took plea on 18<sup>th</sup> October 2020 where he pleaded not guilty to the main and alternative charges. The matter proceeded to full trial with the Prosecution calling five (5) witnesses in support of their case.
4. At the close of the Prosecution case, the Appellant was placed on his defence and section 211 of the [Criminal Procedure Code](#) was explained to him. He elected to give sworn testimony and called no witnesses in his defence.



5. By judgement dated 17<sup>th</sup> June 2021, the Appellant was convicted of the said offence and sentenced to 20 years imprisonment.
6. Being aggrieved with the conviction and sentence, the Appellant filed a Memorandum of Appeal on 27<sup>th</sup> July 2021 where he raised 6 grounds of appeal verbatim as follows: -
  - 1) That he pleaded not guilty at the trial and still maintained the same.
  - 2) That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence hence failing to note that some of the key witnesses were not summoned to adduce evidence.
  - 3) That the learned trial magistrate erred in both law and fact by failing to analyse that the entire evidence was manipulated, framed and manufactured to meet the predetermined goal of fixing him.
  - 4) That the learned trial magistrate erred in both law and fact by not observing that there was no medical evidence to link him to the act of penetration and that there was no medical examination done to him, that he was HIV Positive and any medical tests done on PW1 could have resulted in a positive result.
  - 5) That the learned trial magistrate erred in both law and fact by rejecting his plausible defence without any further explanation to it.
  - 6) He prayed to be present during the appeal hearing.
  - 7) On 18<sup>th</sup> August 2022, the Appellant filed an amended Memorandum of Appeal raising four grounds as follows:-
    - (1) That the learned trial magistrate erred in law and fact by failing to find that the age of the victim PW1 was not proved as required by law and failed to find that the birth certificate produced before the court was tainted.
    - (2) That the learned trial magistrate erred in law and fact by not conducting a *voire dire* examination on PW1 as required by law.
    - (3) That the learned trial magistrate erred in law and fact by relying on evidence that was inadmissible, unreliable and doubtful and that no DNA was conducted.
    - (4) That he prayed to be present during the hearing of the Appeal.
8. By Court directions on 27<sup>th</sup> July 2022, the parties were directed to canvass the appeal by way of written submissions.

### **The Appellant's Submissions.**

9. The Appellant's submissions were filed on 18<sup>th</sup> August 2022. He submitted that the age of the victim, in this case, was in dispute because the witnesses testified that she was born on different dates in the year 2004. He also submitted that the birth certificate relied on by the Prosecution was manipulated to fit the interest of those who made it. In this regard, the Appellant submitted that it was wrong for the court to depend on such evidence to convict him because age was not proven beyond reasonable doubt. That any evidentiary gaps should have been construed in favour of the accused.
10. The Appellant submitted there were no *voire dire* proceedings conducted in the trial court and that section 124 of the *Evidence Act* was not complied with. The Appellant also submitted that the



Prosecution evidence was doubtful as it had many contradictions. That DNA tests ought to have been done to uncover the real father of the victim's child and failure to do so meant that the Prosecution could not ascertain the Appellant's guilt since the case was based on an existing grudge between the Appellant and the victim's mother.

### **The Prosecution's/Respondent's Submissions.**

11. The Prosecution submissions are dated 7<sup>th</sup> October 2022 and were filed on 22<sup>nd</sup> September 2022. The Prosecution opposed the appeal on the grounds that the trial court properly relied on the evidence presented by the Prosecution and judiciously discharged its duties in convicting and sentencing the Appellant. They submitted that the victim's age was proven by her immunization card (P.Exh4) which showed that she was born on 20<sup>th</sup> April 2004. They submitted that the card confirmed that the victim was 15 years old at the time of the incident.
12. The Prosecution submitted that the medical evidence available showed that the victim was pregnant and PW3 produced the P3 Form which was P.Exh2 to confirm that the victim was pregnant. That such evidence presupposed that an act of penetration had occurred.
13. On identity of the perpetrator, the Prosecution submitted that PW2 identified that Appellant as their neighbour and PW1 confirmed the same. Thus, the issue of identification was properly settled.
14. The Prosecution further submitted that the Appellant's defence of alibi ought to have been raised at the first instance and that the Appellant failed to call any witnesses who would corroborate his absence at the time. That the issue of the existing grudge between himself and the victim's mother never arose during the trial making it an afterthought.
15. Lastly on sentence, the Prosecution submitted that the court afforded the Appellant an opportunity to mitigate and properly considered the same when handing down the sentence. The Prosecution asked the Court to dismiss the appeal.
16. It is the duty of the first appellate court to re-analyze and re-evaluate the entire trial evidence in order to arrive at its own findings of a case. This duty was clearly enunciated by the Court of Appeal in [David Njuguna Wairimu v Republic](#) [2010] eKLR as follows: -

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash 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 decisions.”
17. Having perused the trial Record, the amended Memorandum of Appeal, the Appellant's submissions and the Respondent's submissions, there are two issues for my determination as follows:-
  - i. Whether the offence of defilement was proven by the Prosecution to the required standard.
  - ii. Whether the sentence was legal and appropriate.

#### **i. Whether the offence of defilement was proven by the Prosecution to the required standard**

18. The [Sexual Offences Act](#) No. 3 of 2006 provides for the offence of defilement under section 8 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.
  - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
  - (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.
  - (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the *Children Act* (No. 8 of 2001).
  - (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.
19. For a charge of defilement to stand, three ingredients must be proven by the Prosecution. These ingredients as outlined in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 [2015] eKLR are the age of the victim, penetration and identification of the perpetrator.
20. The importance of proving the age of a victim in a sexual offence case cannot be gainsaid because from the ingredient of age stems the appropriate punishment by the law. In *Hilary Nyongesa v Republic*, Eldoret Criminal Appeal No.123 of 2009, [2010] eKLR, Mwilu J (as she then was) stated that:-
- “Age is such a critical aspect in Sexual Offences that it has to be conclusively proved...And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”



21. In the present case, the victim testified that she was 15 years old and that she didn't have a certificate of birth. Her evidence alone was insufficient in proving age as was held by Ndolo J and Karanja J in *Dominic Kibet Mwareng v Republic* [2013] eKLR:

“I agree and add that while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the Complainant as to their age does not in my view, constitute such proof.”

22. It follows then that age must be proven by cogent evidence. In most instances, this will be by documentary evidence or medical assessment while in other instances it will be the testimony of the mother or by the court's own observation.

23. In the Ugandan Court of Appeal case of *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000 it was held thus:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

24. I have reviewed the testimony of the victim's mother PW2. She stated that the victim was born on 20<sup>th</sup> April 2004. I have also reviewed the evidence on Record in respect of age. The investigating officer PW5 produced the victim's clinic card (P.Exh4) which I have re-examined and noted that the victim's date of birth was recorded as 20<sup>th</sup> July 2004.

25. I have thoroughly scrutinized the victim's clinic card and noted that while it indicated a different month of birth from that which was stated by the victim's mother PW2 in her testimony, the said card recorded the various dates for the victim's first immunization within the year 2004. Thus, it is clear that, although the victim's month of birth was in contention, this Court is satisfied that the evidence adduced by the Prosecution proved that she was born in 2004 and was therefore 15 years old as at the time of the offence. The age of the victim was therefore adequately proven to the required standard.

26. I revert to the age assessment dated 22<sup>nd</sup> October 2019 in which Dr. Saidera of Longisa County Hospital confirmed that the victim was below 18 years of age. I place my reliance on this and find that the victim in this case was a minor born sometime in 2004 and at the time of commission of the offence, was 15 years old. The aspect of age was therefore adequately proven by the Prosecution.

27. The second ingredient is Penetration which is defined under section 2 of the *Act* as:

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

28. The Prosecution called the oral evidence of the victim and produced a medical report. The victim testified that she first had sexual intercourse with the Appellant in January 2019 in his house. She stated as follows:

“On arrival, he asked me to remove my school uniform..... he spread a sack. He did not force me. I removed my clothes voluntarily. He then undressed and inserted his penis into my



vagina. He did not use protection....We used to meet with the accused in the same house on several occasions. I cannot remember the number of times we had sex with the accused....”

29. The clinical officer from Longisa County Hospital (PW3) testified that he examined the victim on 16<sup>th</sup> October 2019 and found that while she had no physical injuries on her genitals, her hymen was absent and the pregnancy test was positive. He filled a P3 form (P.Exh 2) and produced the victim’s ultrasound report (P.Exh1) which indicated that she was 36 weeks pregnant.

30. From the above evidence, it is clear that the victim had been penetrated and that such penetration resulted in her conceiving a child. While this Court takes judicial notice of the concept of conception, it is important to clarify that in cases of defilement, it is penetration that forms an ingredient of defilement and not impregnation. The evidence must thus point towards penetration. This was the guidance given by the Court of Appeal in the case of *Evans Wanjala Wanyonyi v Republic* [2019] eKLR where it was stated thus:-

“ An essential ingredient in the offence of defilement is penetration and not impregnation.”

31. With the above in mind, having re-analyzed the evidence of the victim and the medical evidence on Record, this Court concludes that an act of penetration was committed against the minor. This ingredient stands proven.

32. The last ingredient is identification. The victim, in this case, testified that she knew the Appellant as her neighbour. This evidence was corroborated by PW2 her mother. In the same light, this Court noted that the victim and the Appellant engaged in sexual intercourse on several occasions and that from her testimony, the victim stated that the Appellant would give her money after every sexual encounter they had.

33. The Court of Appeal in *Anjononi and Others v Republic*, [1976-1980] KLR 1566 stated that in considering evidence of identification, a victim’s recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

34. Thus, my analysis of the above evidence is that the Appellant was well-known to the victim and owing to the number of times that they had interacted sexually, it would be impossible for the victim to mistake him as the one with whom she had sex with and was therefore responsible for her pregnancy.

35. I have also considered the Appellant’s ground of Appeal in respect of conducting a DNA test and his submissions that failure to conduct the DNA test proved fatal towards linking him to the defilement offence.

36. The issue of DNA testing is provided for under Section 36 as follows: -

“ 36. Evidence of medical, forensic and scientific nature

1. Notwithstanding the provisions of Section 26 of this *Act* or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.



37. The Court of Appeal gave clear guidance on section 36(1) in *Robert Mutungi Muumbi v Republic*, MLD CA CRA No. 52 of 2014 when it held:-

“Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests including for D.N.A test to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.

38. Similarly in *Williamson Sowa Mbwanga v Republic* Criminal Appeal No. 109 of 2014 [2016] eKLR, it was held by the Court of Appeal thus:-

“...As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured.....It is partly for this reason that Section 36 (1) of the *SOA* is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing.”

39. As already analyzed from the Prosecution evidence in this case, an act of penetration was occasioned on the victim. The evidence demonstrated that the said act occurred severally resulting in the victim conceiving.

40. Further to this, I noted that the trial court did not record any reasons as to why it would have doubted the testimony of the victim and being in the advantageous position of observing her demeanor, the trial magistrate concluded that the evidence of the victim was believable.

41. In *George Otieno Dida & Another v R* Kisumu Criminal Appeal No. 404 of 2009, [2011] eKLR, the Court of Appeal stated thus:-

“The trial court, unlike an appellate court, has the benefit of seeing and hearing witnesses testify. It is better placed to assess credibility of those witnesses.

42. Based on the foregoing, I also find that the victim’s testimony was believable more so because it was properly corroborated by other evidence before the trial court.

43. It is therefore my finding that the absence of a DNA test did not impede the strength of the Prosecution’s evidence in respect of penetration and identification. I am satisfied that the Appellant was properly linked to the crime in question. I therefore hold that the Prosecution proved the offence of defilement to the required standard and I hereby uphold the conviction.

## **ii. Whether the Sentence was legal and appropriate.**

44. The punishment outlined by the *Sexual Offences Act* for a person who is convicted of the offence of defilement contrary to section 8(1) as read with section 8 (3) is imprisonment for a period not less than 20 years.

45. While it is not a ground in this appeal, this Court is mandated to review the sentence of the trial court for appropriateness and legality. Section 354 (3) (a) and (b) of the *Criminal Procedure Code* Cap 75 empowers this Court to correct an illegality or impropriety meted in sentencing as follows: -



- (3). The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-
- (a) in an appeal from a conviction-
    - i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
    - ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
    - iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
  - (c) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.
46. Thus, I have considered the sentencing proceedings in the trial Record. Defence Counsel submitted that the Appellant was a first offender, that he was remorseful and was a person of good standing. Counsel urged the court to take into consideration that the Appellant was 46 years old and a father of 5 children who depended on him. Counsel urged the court to consider exercising its discretion and deviate from the mandatory minimum sentence prescribed by the law as guided by the case of David Achowo v Republic Criminal Case No.17 of 2018 [2019] eKLR.
47. It was the decision of the trial court that the circumstances of the Appellant were not superior to those of the victim who had been defiled at 15 years of age. For this reason, the Appellant was sentenced to 20 years imprisonment.
48. I have considered the objectives of sentencing in the 2016 Judiciary Sentencing Guidelines. I have also considered the mitigating circumstances that must be considered by the Courts in sentencing alongside the facts of this case. I have noted that the Appellant turned the 15 year old victim into his sexual partner by having sex with her on several occasions to a point of impregnating her. I have also considered the Appellant's age vis-à-vis the victim's and noted that he ought to have conducted himself as a father figure to the minor and not the person who took away her innocence. In consonance with the aspect of pregnancy, I find that the numerous sexual encounters were aggravating circumstances and thus called for a deterrent sentence.
49. The Court of Appeal in *Wagude v R* (1983) KLR 569 (Kneller, Hancox JJA. & Chesoni, Ag.JA.) held that –
- “The Court may interfere with the sentence only if it shown that it was manifestly excessive. In this instance two years’ Imprisonment for stealing by a person employed in the public service was not manifestly excessive.”
50. Based on the circumstances of this case and the law, this Court finds that the punishment imposed on the Appellant by the trial court was justified and was legal and will not interfere with the same.
51. In the end, I affirm the conviction and sentence. The appeal is thus dismissed.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF FEBRUARY, 2023**

**R. LAGAT-KORIR**

**JUDGE**



Judgement delivered in the presence of the Appellant, Mr.Njeru for the State and Siele (Court Assistant)

