



REPUBLIC OF KENYA



KENYA LAW
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**Juma v Republic (Criminal Appeal E091 of 2021)
[2023] KEHC 1516 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E091 OF 2021
FG MUGAMBI, J
FEBRUARY 24, 2023**

BETWEEN

JUMA MOHAMED JUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. C.K. Auka, RM dated 19th July 2021 in Sexual Offence Case No. 5 of 2020 in the Senior Principal Magistrate's Court at Kwale)

JUDGMENT

1. The appellant was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to section 8(1) read with 8(3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on diverse dates between October 22, 2019 and November 10, 2019 at [Particulars Withheld] village, Mwaluphamba location, Matuga subcounty, Kwale county within Coast region, he intentionally and unlawfully caused his penis to penetrate the vagina of MK, a child aged 15 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of 2006.
2. The appeal is preferred against the conviction and sentence as set out in the Petition of Appeal filed on October 14, 2021 and the Amended Grounds of Appeal filed on August 31, 2022. The appellant also relies on his written submissions. The respondent opposed the appeal and filed written submissions of its counsel filed on January 18, 2023.
3. During trial the prosecution called five (5) witnesses. PW1, MK's mother, stated that MK was 15 years old and a class 6 student at [Particulars Withheld] Primary School. She further stated that she found out her daughter was pregnant and when she enquired, her daughter confirmed and told her that the appellant was responsible. She reported the matter to the school head teacher and later to the chief. She accompanied MK to the hospital. MK, who testified as PW2 stated that she was in a relationship with



the appellant who was also her classmate. It was her evidence that she had been in a sexual relationship with him since July 2019. She found out that she was pregnant in September 2019 and when she informed the appellant, he suggested an abortion which MK refused.

4. PW3 was the investigating officer attached to Buriani Police Post. He arrested the appellant and accompanied MK to hospital. PW4 is the medical officer attached Kwale Hospital. He examined MK and filled the PE form. He confirmed that MK was pregnant. PW5 was an analyst at the government chemist in Mombasa and is the one who accompanied MK, PW1 and the appellant for a DNA examination. He produced the DNA report which confirmed the overwhelming chances that MK's child was fathered by the appellant.
5. The appellant gave sworn evidence and testified that he was 18 years old. It was his case that MK had visited his house at 10:00pm to give back money that she had borrowed the appellant. On that night, she forced herself on his bed and he had intercourse with her. He stated that he was ready to take care of the child.
6. The appeal is based on the following grounds:
 - i. Whether the offence of defilement was proved beyond reasonable doubt
 - ii. Whether the learned trial magistrate erred in not conducting a *voire dire* examination
 - iii. Whether the sentence imposed was harsh and excessive under the circumstances
 - iv. Whether the Appellant's constitutional rights were breached.
7. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v Republic [1972] EA 32*). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic (1987) KLR, 19* & *Okeno v Republic (1972) EA, 32*. Against this background, I have considered and reassessed the evidence before the trial court and the written submissions of both parties. Following is an analysis and determination on each of the issues.

i. Whether the offence against the appellant was proved beyond reasonable doubt

8. The elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are provided under section 8 of the [Sexual Offences Act](#). These are:
 - i. Age of the complainant,
 - ii. Penetration and
 - iii. Positive identification of the assailant.

Age of the complainant

9. The Appellant submits that the age of MK was not conclusively proved by use of either a birth certificate, baptismal card or other school documentation. The issue is whether these documents are compulsory and whether this is the only way that age can be proved. The Court of Appeal stated in [Edwin Nyambogo Onsongo Vs Republic \(2016\) eKLR](#) that: -

' The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the



parents or guardian or medical evidence, among other credible forms of proof.' we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.'

10. MKs testimony is that she was born on January 1, 2004. Her mother corroborated this information which would make her 15 years old as at 2019. The Age Assessment Certificate produced at the trial by PW3 further corroborated the testimony of both MK and her mother. I find that the nature of evidence given was conclusive proof of the victims age in this matter.

Penetration

11. It is the appellant's submission that penetration was not proved beyond reasonable doubt. The appellant submits that the medical evidence of PW4 in reference to the broken hymen did not prove that the appellant had been defiled.
12. The established principles on proof of penetration are that penetration may be proved by relying on the evidence of the victim. Corroboration is not mandatory depending on the circumstances of the case. Where the court finds that the testimony of the victim is believable, it must state the reasons for believing the testimony. In such cases the evidence of the victim is sufficient to convict, even without the need for corroboration. Where there is need for corroboration, the medical examination of the complainant is sufficient even without the examination of the perpetrator. See [*JWA -vs- Republic \(2014\) eKLR*](#) and *Geoffrey Kioji v Republic, Nyeri Criminal Appeal No 270 of 2010*.
13. MK gave an account of her sexual relationship with the appellant describing how they had been in a sexual relationship since July 2019. The appellant did not controvert this evidence during cross examination. In fact, he too gave an account of how MK had forced herself on his bed and he had fallen into the temptation and had sex with her. He states in his defence that I tried to resist but she declined to leave. She started caressing me and I was tempted to have sex with her. It was my first time to have sex with her. Then there is the evidence by PW4, the medical officer who examined MK and confirmed that the victim's hymen was broken. Above all else there is the DNA test that gave the overwhelming chances that the appellant was the father of MKs child. I am satisfied that the appellant had sex with MK and that there was penetration.

Identification of the perpetrator

14. MK and the appellant were schoolmates. They were in a relationship. This fact was not controverted by the appellant. The appellant was also known by PW1, the mother to MK who stated that he was a distant relative and came from the same village. MK was therefore familiar with the appellant to identify him from recognition.

For the reasons that I have stated above, I find that the appellant was convicted on cogent evidence.

ii. Whether the learned trial magistrate erred in not conducting a voire dire examination

15. In his submissions, the appellant argues that the learned trial magistrate did not subject the appellant to a voire dire examination as required under section 19 of the [*Oaths and Statutory Declarations Act*](#). He invites the court to find that the complainant was a child as defined under the [*Children Act*](#) and to take into account the provision in section 2(1) of the [*Sexual Offences Act*](#) which makes reference to the [*Children Act*](#) for the definition of a child. It is his case that the trial court ought to have carried out the voir dire examination before admitting the complainants evidence.
16. The need to subject young witnesses of tender age to voire dire examination is founded under section 125(1) of the [*Evidence Act*](#) which deals with competency of witnesses generally as well as section



19(1) of the [Oaths and Statutory Declarations Act](#) deals with the aspect of reception of evidence from witnesses of tender age. The critical question then becomes, when should a voir dire examination be conducted? The appellant invites this court to find that the same should have been conducted in the instant case, before taking the testimony of a 15-year-old. The Court of Appeal in the case of [Patrick Kathurima V Republic \(2015\) eKLR](#) stated as follows:

' We take the view that this approach resonates well with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of Cap 15. We are aware that section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the [Oaths and Statutory Declarations Act](#) cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes'

17. Further, the Court of Appeal had this to say in the case of [Maripett Loonkomok v Republic \[2016\] eKLR](#)

' That the definition in the [Children Act](#) is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that: - 'In appropriate cases where voir dire is not conducted, but there is sufficient independent evidence to support the charge the court may still be able to uphold the conviction.'

18. In the view of the foregoing I find no fault with the trial court in not conducting a voir dire examination and this ground therefore fails.

iii. Whether the sentence was lawful, justified and proportionate

19. The appellant states that the learned trial magistrate ought to have considered a non-custodial sentence under the [Probation of Offenders Act](#) taking into account his youth. An age assessment report produced during the trial indicates that the appellant was 20 years old at the time of the offence. He was sentenced under the provisions of section 8(3) of the [Sexual Offences Act](#) which provides that: 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.

20. During sentencing the learned trial magistrate observed as follows:

I am satisfied that confining the accused person to 20 years being the minimum sentence provided by law will be deterrent and sufficient punishment.

21. Recent jurisprudential developments on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences. It is not clear whether the mind of the court was drawn to the fact that there was discretion to give a lesser sentence than the minimum provided in the statute book. The learned trial magistrate was not bound to the minimum sentence where circumstances were found to be deserving.



22. In *Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR* it was stated that:

‘To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences’

23. I have taken into account the circumstances of the present case. The complainant, a girl then aged 15 years was in what she believed was a love relationship with a young man aged 20 years who was her schoolmate. She was in love with him and he loved her and gave her gifts. It was voluntary. I am well aware of the limitation for minors to give consent and it is unfortunate that the appellant is the one who should have guided the minor but instead chose to take advantage of her. Out of the relationship a child was born. The appellant states that he is going to help take care of the baby.

24. In the circumstances I find that the appellant’s conviction, based on the evidence presented was proper as the complainant was proved to be a minor; that indeed there was penetration as the complainant and the appellant had sex and the identity of the appellant was not in doubt. The trial and conviction were not in breach of his constitutional rights. However, there is a possibility of a miscarriage of justice having occurred with respect to the sentence. In the premises I hereby set aside the sentence imposed on the appellant and substitute it with 5 years’ imprisonment to run from the date of his arrest which was January 10, 2020.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI (VIRTUALLY) THIS 24TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE

