



REPUBLIC OF KENYA



KENYA LAW
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**KT v Republic (Criminal Appeal E030 of 2022)
[2023] KEHC 1104 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E030 OF 2022
HK CHEMITEI, J
FEBRUARY 23, 2023**

BETWEEN

KT APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. H. A. TOWET (SRM)
DATED 22ND JUNE 2022 IN RAVINE CRIMINAL CASE NO. E003 OF 2020)***

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on the October 25, 2020 in Koibatek sub county within Baringo county intentionally and unlawfully caused his penis to penetrate the vagina of PJ a child aged 2 years.
2. The alternative charge was 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 offence were that on the October 25, 2020 in Koibatek sub county within Baringo county intentionally and unlawfully caused his penis to come into contact with the vagina of PJ a child aged 2 years.
3. The appellant was convicted after a full trial and sentence to serve three years in a borstal institution. Being dissatisfied with the same he appealed against the entire conviction and sentence.
4. It must also be noted that when the matter came up for hearing and directions the court directed the parties to abandon the application for bail pending appeal and argue the appeal wholesomely.
5. The parties did file their submissions and the court has perused the same. The appellant submitted as per the grounds of appeal one of which is that the appellant, a minor, did not have a counsel to represent him during trial something which ran contrary to the provisions of article 50 (2) of the [Constitution](#).



6. The other ground raised by the appellant is that the ingredients of the offence were not proved. He argued that there was no evidence of penetration and that as a matter of fact PW3 found the child playing and not lying naked in bed as stated by PW2 her mother.
7. That PW5 who produced the p3 form was not the maker of the said treatment documents and that the appellant was not granted the opportunity to accept or not the production of the same.
8. He further submitted that the court did not consider the psychiatric report which indicated that the appellant had some mental challenges and that he ought to have been committed to Mathari Mental Hospital.
9. In essence the appellant prayed that there was a total mistrial and the appeal ought to be allowed.
10. The learned state counsel opposed the appeal by submitting that all the ingredients of the offence had been established. That the evidence of PW2 the mother to the complainant and the medical report clearly established that she had been defiled.
11. The learned state counsel however found that considering the age of the appellant, the trial court failed to take into consideration that the appellant needed to have had a counsel to represent him. He therefore submitted that this court ought to order a retrial.

Analysis And Determination.

12. The court has perused the proceedings herein, the submissions by the parties and the judgement of the trial court.
13. This court agrees with the submissions by both the counsels for the appellant and the respondent that there was a mistrial. It is clear that the appellant may have been suffering from some mental disease as suggested by a letter dated November 13, 2020 from his school [Particulara Withheld] Primary School which indicates that the child is a slow learner although he was in grade 4.
14. The court also ordered for a social inquiry and the report dated December 7, 2020 clearly found him to have had evident of mental problem from childhood. It also concluded that the victim's mother may not been a person to be believed.
15. The psychiatric report dated January 20, 2021 although concluded that he was fit to follow proceedings found that he was anxious and sad and had a remote memory among other deficiencies.
16. Coupled with the fact that he did not have a legal representation which was a cardinal issue in such a case, this court finds that there was a mistrial. The court has two options, either to order a retrial as submitted by the respondent or allow the appeal.
17. I have anxiously considered the same but in my view the evidence by the victim's mother do not tally with that of PW3. If indeed the child was defiled she would have been writhing in pain when the witness arrived at the scene. On the contrary he arrived when the child was playing. Clearly a two-year-old child who had just been defiled cannot be in such a state of playing under such horrendous act.
18. The court ought to have granted the appellant a benefit of doubt. His defence although unsworn was persuasive. The complainant did not explain that she had requested the appellant to take care of her children.
19. Consequently, and for the reasons stated above this court finds that the appeal is meritorious. The same is allowed, the appellant set free unless lawfully held.



DATED SIGNED AND DELIVERED VIA VIDEO LINK AT KABARNET THIS 23RD DAY OF FEBRUARY 2023.

H. K. CHEMITEL.

JUDGE

