



REPUBLIC OF KENYA



KENYA LAW
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**IMM v Republic (Criminal Appeal 11 of 2021)
[2023] KEHC 18352 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 11 OF 2021
SC CHIRCHIR, J
MAY 31, 2023**

BETWEEN

IMM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon. I Gichobi, Principal Magistrate on 30th June 2021 in Kangema Senior Principal Magistrate's sexual offences case number 18 of 2020)

JUDGMENT

1. The Appellant herein seeks to quash the conviction and sentence in Kangema SO 18/2021 delivered on June 30, 2021 whereof he was convicted for the offence of rape of a 16 years old girl contrary to Section 8(1) of the *Sexual Offences Act* No 3 of 2006 and handed a sentence of 15 years' imprisonment.
2. The particulars of the offence were that during the month of November, 2019 at unknown dates in Kamacharia Sub-county within Murang'a County the Appellant caused his penis to penetrate the vagina of PWW a child aged 16 years.
3. The Appellant faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 The Act).
4. He was convicted after a full trial and sentenced to 15 years in prison. Being aggrieved by the outcome, he filed the present Appeal.

Grounds of Appeal

5. The Appellant has set out the following Grounds;
 - a. That the honourable court erred in law and in fact by failing to find that the essential ingredients of the offence as charged were not proved.



- b. That the honourable court erred in law and in fact in convicting the Appellant when the evidence on record could not sustain a conviction.
- c. That the Honourable court erred in law and in fact in relying on section 124 of the Evidence Act in the face of serious gaps in the evidence of the prosecution.
- d. That the Honourable court erred in law and in fact by imposing a sentence that was manifestly harsh and excessive in the circumstances of the case.

Appellant's submissions

6. The Appellant does not contest the fact that the Appellant was 16 years.
7. On the issue of penetration, it is the Appellant's submission that the evidence of PW1 was not corroborated by the medical evidence presented by PW3 and that this particular witness did not examine the complainant. He submitted that the medical evidence availed was inconclusive.
8. On identification of the perpetrator, he relied on the case of Kariuki Njiru & 7 others Vs Republic and Daniel Kipyegon Ng'eno vs Republic (2018) eKLR to buttress his submissions. It is his submission that there was no proper identification of the Appellant as the perpetrator of the alleged offence. He points out that the name given by the complainant as the perpetrator was one Patrick Maina . He testified that PW5 evidence on the identity of the perpetrator was not corroborated
9. The Appellant further argues that the court did not comply with the requirements of section 124 of the evidence Act, in accepting the evidence of the complainant. He submits that the complainant evidence is unreliable.
10. On sentencing, it is the Appellant submits that the 15 years imposed on him was too harsh and excessive. He has relied on the high court decision of Bernard Kimani Gacheru Vs. republic (2002)e KLR to make a case for a lesser sentence. He further submitted that in his sworn defence, he expressed his desire to bring up the child and that he was not aware that the complainant was below 18 years, but that the court failed to take all that into consideration while passing the sentence.
11. He has further relied on the case of Philip Maingi & 5 others Vs. Director of public prosecution & another (Petition E017 of 2021) where the high court held that the minimum sentences provided for under the sexual offences Act are unconstitutional as they ran afoul Article 28 of the constitution and take away the courts discretion in imposing the appropriate sentence.

Respondent's submission

12. It is the Respondent's submission that all the ingredients of the charge of defilement were proved.
13. On the age of the complainant, it is the Respondent's submission that the complainant's birth certificate was produced which certificate showed that the complainant was born on August 18, 2003, and therefore the complainant was 16 years at the time of the incident
14. The Respondent further submits that penetration was proved through evidence of the victim and which was corroborated by the medical evidence from the delivery and anti-natal care card produced in respect of the baby , the Exhibit memo and the DNA test done on the baby.
15. On the issue of identification, it is the Respondent's submission that it was the complainant's testimony that she knew the Appellant well as they were neighbours and cousins. That it was further her testimony that IM and PM was one and the same person. The prosecution further points out that



PW2 identified the Appellant as a relative of her husband as her husband and the Appellant's father are cousins.

16. On whether there was material and irreconcilable contradictions in the prosecution's case, the Respondent has relied on the case of Philip Nzaka Watu vs Republic (2016) CCR APP 29 of 2015 as well as *Joseph Maina Mwangi Versus Republic* Criminal Appeal no. 73 of 1993 where it was held that "in any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the *Criminal Procedure Code*"
17. The Respondent urges the court to find that the discrepancies and the contradictions, if any, were not prejudicial to the Appellant's case and not fatal to the Respondent's case in any event. That the victim was able to narrate what happened on the fateful day and managed to link the perpetrator to the offence. she identified him as PM also known as IMM.
18. On whether Pw5 was qualified to produce the DNA report under section 77 of the *Evidence Act*, the Respondent submits that section 77 of the Evidence Act does not deal with issue of who can produce a document but rather the section allows the court to presume that the document is genuine.
19. The prosecution further submits that PW5 as the investigating officer could validly produce the document by virtue of the fact that he was the custodian of the document and he is the one who obtained the report from the Government chemist.
20. On the issue of sentencing, reference was made to section 8(4) of the *sexual offences Act* and stated that the court did not rely on the wrong principle and neither did it overlook any material factors during the sentencing process to warrant any review of the sentence

Summary of Evidence

21. PW1 was the complainant. She stated that she knew the accused since he was his cousin. She recalls that in November on a date that she cannot remember, her mother sent her to deliver Kshs.200/= to Maina their neighbour. She decided to pass through a short cut which passes near their cousin's home (the Appellant's). The time was around 4.00pm. she recalled that P greeted her and then stretched his hand for a handshake, he then pushed her to his house. She stated that PM was the accused person seated at the dock. She further testified that upon pushing her in, he laid her on his bed, lifted her dress and removed her panties. He removed his clothes and the shorts that he was wearing. She resisted but he told her not to worry. He then covered her mouth with his hand and had sex with her.
22. She further stated that once he was done, he told her to leave and that he would kill her if she informed anyone. She delivered the money and went back home and that she did not tell anybody out of fear.
23. She stated that after a month, her mother asked her where she got money for her sanitary pads and she informed her that she had her own money. She recalls that she stopped having her periods after the incident and after end of every month, her mother asked the same question.
24. On June 23, 2020, they went to Wahundura dispensary, her urine sample was taken and she was found to be pregnant. When her mother asked who was responsible for the pregnancy, she refused to say since she was scared.
25. She told the court that on July 1, 2020, they reported the incident to Kamacharia Chief's office and the chief advised them to report to Kiriani police station. They were later taken to Nyakianga Health centre where the P3 form was filled.
26. She produced a copy of her delivery and post-natal care form and a copy of her birth certificate that indicated her date of birth as August 18, 2003. She testified that her baby was born on August 15, 2020



and named BW They were taken for DNA sampling on November 3, 2020 and the results were yet to be released at the time she was giving her testimony.

27. On cross examination, she told the court that the Appellant had threatened to kill her if she told anybody about the defilement.
28. PW2 was the complainant's mother. She told the court that the complainant was 17 years old. She testified that she knew the Appellant, since she was married into the Appellant's family. She stated that the Appellant was a cousin to her husband.
29. On June 22, 2020 at around 3.00 pm when she came back from work, she noticed that PW1 tummy was big and when she asked if she was pregnant, she denied. she took her to Wahundura Dispensary where she was tested and pregnancy confirmed. She was told that the expected date of delivery was 7-7-2020. She then reported the matter to the chief's office. They then proceeded to Kiriaini police station and later to Nyakianga Health centre where the complainant was examined and a P3 form filled.
30. She further testified that on August 15, 2020 PW1 delivered the baby and that PW1 has never told her when the baby was conceived. She then identified the Appellant as the on the dock.
31. On cross examination, she testified that when she went to work, she would leave PW1 at home and that she used to visit the Appellant's house. The visits only stopped after the incident, save the day she and the complainant had come from the hospital upon getting the pregnancy test results.
32. PW3 was a clinical officer working at Nyakianga Health centre. She presented the P3 form as well as the Anti- Natal card No 20xx/xx/x belonging to the complainant. She testified that the minor reported that she had been defiled in November, 2019 and that by the time she examined her she was already pregnant.
33. She estimated the complainant's age at 16 years. She testified that detailed exam was not conducted on her genitals since she was already pregnant. That no other tests were done on the complainant because of her condition. She recommended a DNA test to ascertain paternity of the complainant's baby.
34. PW4 was P.C Isaiah Ngeno No. 261925 attached at Kamacharia Police post , under kiriaini police station.. He recalled that on July 4, 2020 at around 1000 hours, she was called to the Investigations officer's office office and told to assist in the arrest of the Appellant. He and his colleague went to the Appellant's house and arrested him. He told the court that prior to the incident, the complainant and her mother had reported about the defilement.
35. Pw5 was PC Jaqueline Kamola Mwengi No 104417. She testified that at the time of the incident, she was attached at Kiriaini police station. She recalled that on July 1, 2020 around 5.30 P.M while at the station, she was called by the Officer commanding police station (OCS) who told her that defilement case had been reported and she was instructed to investigate.
36. She then met with the complainant and her mother at the office and she interviewed the girl who narrated to her what had happened.
37. She stated that after the delivery, the DNA test was done on the complainant's baby. she also obtained a copy of the complainant's birth certificate. She told the court that the DNA test confirmed that the Appellant was the father of the complainant's Baby. She produced the DNA Report .
38. On being put on his defence, DW 1 testified that he knew the complainant as a neighbour and a friend. That she used to work for him by doing his laundry and cooking for his family.



39. On cross examination, he confirmed that he knew the complainant; That he had been separated from his wife for about 10 years and at the time of the incident he was not married. He testified that he had employed the minor and that he did not know it was wrong to employ her and that he would pay her Kshs 200 or kshs 500/= depending on the work done.
40. He recalled that on November 3, 2020, he went to the government chemist with the complainant and the baby and samples were taken. He insisted that that the baby was born out of consensual sex and not defilement. He stated he did not know how old the complainant was and that he never made any attempts to ascertain her age; that there was a secret arrangement between him and the complainant that they could live as husband and wife. He admitted that he had sexual intercourse with the complainant, and not once. He stated that the complainant was his girlfriend. He told the court that he does not deny he is the father of Baby BW. He testified the court that he was 35 years old.

Determination

41. This being the first Appeal, the role of this court is to relook at the evidence, re- evaluate it and make its own independent decision. (see *Okeno vs Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that: “An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”)
42. In my view the following issues lend themselves for Determination: -
 - a. Whether the defilement was proved
 - b. Whether the Trial Court erred inn relying on section 124 to convict the Appellant.
 - c. Was the sentence harsh and excessive?
43. The ingredients of the offence of defilement has been restated by the courts in many past decisions. The ingredients are proof of age of the victim, penetration and positive identification of the perpetrator. (See the case of *George Opondo Olunga v Republic* (2016) eKLR.)
44. The age of the Appellant was not an issue in the trial court or this Appeal. However the Respondent did produce a birth certificate showing that the complainant was 16 years old at the time of the defilement. The Appellant told the court that he did not know that the age of the complainant, however he admitted that he never made any efforts to ascertain her age. Consequently, his defence is not sustainable.
45. On penetration, Section 2 of the *Sexual Offence Act*, defines penetration to mean: “the partial or complete insertion of the genital organs of a person into the genital organ of another person.”.
46. The Appellant’s complain in regard to penetration is that the evidence of PW1 was not corroborated by the medical evidence adduced by PW3. That since the complainant’s genitalia was not examined, defilement was not ascertained.
47. It is my finding that the act of penetration was proved beyond doubt. There was a DNA test that proved that the Appellant was the father of the complainant’s baby. In the case of *WLN Vs Republic*(2021)e



KLR, the court held: “... of great evidentiary importance, however, is that in criminal cases, defilement or rape, DNA result that prove a person to be the biological father of a child conceived through defilement is proof of penetration by the person so found to be the biological father of the child”.

48. On the case of *AML Vs Republic* referred to by the Appellant, it is true that the court held that penetration cannot be proved by DNA. However, the court was addressing itself to the use of DNA of the accused in relation to having come into contact with the victim but not the DNA of a child born out of defilement or rape. The two scenarios are completely different
49. Further Appellant freely admitted in his defence that he had sex with the minor, that she was allegedly his girlfriend and he never denied he was the father of the child.
50. Finally, the complainant narrated the act of rape which was not contested in cross-examination.
51. Am therefore satisfied that penetration was proved beyond reasonable doubt.
52. On identification, the Appellant is splitting hairs about the name the use of the name “patrick” by the complainant, when considered against the fact that he and the complainant knew each other well. It was his admission he had sex with her for more than once, and that he was his girlfriend. He also did not dispute the fact that they were distantly related and were neighbours. It was his evidence too that he would occasionally hire the complainant’s services to wash and cook for him. This was therefore identification by way of recognition

Whether the trial court failed to comply with section 124 of the evidence Act.

53. The section provides as follows: “Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

54. In this case the complainant’s testimony was not the only one. As pointed out by the trial court her evidence was corroborated by, among other things, the DNA test results as aforesaid. The Trial court in fully complied with the aforesaid provisions. This submission therefore is misplaced and without merit in any event.
55. On review of the entire evidence, am satisfied that the Appellant was validly convicted and there is no merit on the Appeal in this regard

Sentence

56. The Appellant was charged under section 8(4) of the Sexual Offences Act which provides as follows:
 - (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”.
57. The trial court sentenced the appellant to 15 years’ imprisonment. The position of the law is that where the law imposes a minimum sentence, the court has no discretion to impose anything other than the



minimum sentence. The complainant in this case fell under the age bracket of 16 to 18 years. The sentence for a person convicted of the offence of defiling a child of that age is imprisonment for a term of not less than 15 years. The sentence imposed in this case was therefore lawful.

58. The Appellant has relied on the decision of the high court in *Maingi & 5 others Vs DPP & Ano* (*supra*) to argue for a lesser sentence. However the Supreme court in *Francis Muruatetu vs Republic* (2017)eKLR was emphatic that its declarations in the Muruatetu case was specific to section 204 of the penal code and did not apply to , among others, the offences under the sexual offences Act. Am bound by the decision of the supreme court in this regard.

59. The Appeal in its entirety has no merit. The same is hereby dismissed.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY, 2023.

S CHIRCHIR

JUDGE.

In the presence of:

Susan- Court Assistant

Appellant – present

Ms Muriu for the Respondent.

