



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**SM v Republic (Criminal Appeal E072 of 2021)
[2023] KEHC 19037 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E072 OF 2021**

**A. ONG'INJO, J
MAY 31, 2023**

BETWEEN

SM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the decision of the G.G. KIPKORIRI (SRM) as matter upon me in respect of Criminal Case No. 2 of 2019 dated and delivered in Chief Magistrate's Court at Msambweni on this 29th November 2019)

JUDGMENT

1. The appellant SM vide application filed on January 20, 2023 amended his grounds of appeal as follows:-
 - i. That the learned trial court Magistrate erred in law & fact by failing to conduct the requisite voire dire examination on the complainant.
 - ii. That the trial Magistrate erred in law & fact by failing to see that the offence that was proved by the prosecution was that of attempted defilement.
 - iii. That the learned trial Magistrate erred in law & facts by failing to consider the appellant's mitigation before sentence.
 - iv. That the trial court erred in law & fact by failing to take into account the pre-trial custody period in the appellant's sentence.
2. The appellant therefore prayed that his conviction & sentence in Msabweni CM's Court CR. Case No. 2 of 2019 be quashed and sentence set aside.



3. The appellant was convicted & sentenced to serve 20 years' imprisonment for having defiled a girl aged 15 years namely DKR on the 16th day of July 2019 in Mwereni location. The prosecution's case was that the appellant who is married to PW 2's cousin waylaid PW 1 while on her way to school wrestled her to the ground and defiled her while strangling her to restrain her from screaming and call for help.
4. PW 1 reported to her sister – PW 2 who in-turn called their father and reported to him and he advised that the complainant should be taken to hospital. PW 2 took the complainant to school and also to the dispensary at Mtumwa and they were referred to Mwangulu Hospital/Dispensary where PW 3 – Senior Clinical Officer examined her and established that she had a swelling on the neck and marks of strangulation. That she also had swelling in her public area. That the complainant also had pain in her stomach. PW 2 said that the complainant went back home while crying at 6.00am.
5. PW 3 said he also examined the appellant and found pus cells in his urine similar to the pus cells in complainants where and administered medication. The offence was reported at Mwangulu police patrol base and P.C. Fredrick Bala conducted investigations and when the appellant was taken to the patrol base by members of the public he changed him and took him to court.
6. PW 4 said he also recorded statements of witnesses and send PW 1 for filling of P3 form by PW 3 upon medical examination. He said that he established through certificate of birth certificate that PW 1 was born on April 26, 2004 and was therefore 15 years as at the time she was defiled. PW 4 also said that he presented the appellant for Medical Examination as indicated/confirmed by PW 3. PW 4 produced blood stained trouser which the appellant was said to have left after the offence EXP 5(a). He also produced skirt and shirt that the complainant was wearing at the time offence & Exhibits 5(b) & (c). PW 4 said the trouser (blood stained) was found at appellant's home.
7. PW 1 was recalled and she identified the trouser that the appellants was wearing on the material days as well as the skirt, blouse, to pantry and biker that she was wearing on the material day she was defiled. When placed on defence the appellant gave unsworn statement and said that he was working as a security guard but he was jobless at the time of arrest. He said he fell ill in 2013 and was taken to Port Reitz Hospital and he was supposed to get an infection after every 3 months. He said that when he got back home he again fell ill and he burnt his house with all the documents that showed he had mental illness.
8. He said that in August 2019 he found himself at Kwale Prison and he was shocked by the charge. He said he didn't commit any mistake. He said he takes medicine in prison when she suffers mental illness. He said he doesn't know what he did and that if he defiled the complainant. It was due to ill health. He prayed that he should be acquitted. The mental assessment report was explained to the appellant in court – dated July 24, 2019 where the psychiatrist Dr. Mwangome examined the appellant and found he had no mental illness and that he was fit to plead.
9. The appellant called are witness Kadzeya Jabil his brother-in-law who said the appellant was unwell and he produced a police abstract – EXD 1 to confirm that appellant lost documents. DW 2 the village elder said he is the one who took appellant to the police station for the offence of defilement.
10. He said the appellant burnt his own house when he was unwell and the reported loss of documents to the police. He confirmed that complainant was defiled and that the appellant concedes that he defiled her.
11. This appeal was canvassed by way of written submissions. The appellant file his submissions on January 20, 2023 whereas the respondent filed on January 23, 2023.



12. The appellant on his submissions argued that the complainant was a child of tender age and did not have the capacity to testify an oath as the trial Magistrate said she did not appreciate what is an oath.
13. The appellant also argued that the evidence tendered in court pointed to an offence of attempted defilement and not defilement and thus the charge was not proved. The appellant contended that the ingredients of the offence of defilement namely age, penetration and identity of perpetrator had not been proved beyond all reasonable doubt.
14. The appellant said that his trouser stained with blood when he attempted to defile the complainant and she resisted as she was having her monthly periods.
15. Regarding sentence, the appellant submitted that the trial court omitted to take his mitigation into account after erroneously finding him guilty for the offence of defilement. He said if his mitigation had been considered the trial Magistrate would have considered a lesser sentence than what was passed. The appellant pleaded with the court to consider the plight of his children and adjust his sentence accordingly.
16. The respondent filed their submissions on January 23, 2023 and argue that they sufficiently proved the 3 elements of the offence of defilement namely age, proof of penetration and identify of the perpetrator in regard to sentence the respondent appears to have left out the page that contained the said submissions.

Analysis and Determination

17. This being 1st appeal against conviction and sentence this court is enjoined as was decided in the case of *Kiilu & another v Republic* [2005] 1 KLR 174 that an appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court to draw its own conclusion after weighing conflicting evidence.
18. Having exhaustively analyzed and weighed the evidence in the lower court, the Judgment of the trial Magistrate as well as the grounds of appeal and submissions by the appellant and the respondent herein the issues for determination are:-
 - a. Whether the requisite *voire dire* examination was properly conducted by the trial court.
 - b. Whether the offence of defilement was proved
 - c. Whether appellant's mitigation was considered in the sentence.
 - d. Whether the sentence considered the appellants remand period during trial.
19. On whether *voire dire* examination was properly done, the complainant was 15 years old female minor and therefore not a child of tender years to require *voire dire* examination. In any case when the trial Magistrate opted to conducted the *voire dire* examination it was found that the complainant understood the nature of an oath and consequences of lying on oath and that she had enough intelligence to understand questions that were being asked. She was duly cross examined by the appellant and there is nothing to show she didn't understand questions put to her in cross examination.
20. I do find that this ground of appeal fails.
21. On whether the prosecution proved that the complainant was defiled, it is not in doubt that the age of complainant was proved to be 15 years as at the time the offence was committed, the complainant identified certificate of birth showing she was born on April 26, 2004. PW 4 – P.C Fredrick Baler



- the Investigating Officer produced the certificate of birth as exhibit – P2. This court finds that age of complainant was proved.
22. Whether penetration was proved the complainant said the appellant who is married her cousin way land her on her way to school and defiled her. He did overpower her by strangling her and she was unable to scream. The complainant was on the material day having her menstrual period and the same stained the appellants trouser. The trouser was recovered by the police. The complainant went to Mwangulo Hospital and she was examined and treated.
 23. Pw 3 the Clinical Officer – Waruhu Joha observed that her hymen was broken. He also saw that the complainant swelling on the neck which had strangulation marks. He also observed public swelling. PW 3 said he conducted lab-tests and found numerous pus cells in the urine and he administered medication. He advised that perpetrator should also go for medical examination and when the appellant was taken tests revealed he also had numerous pus cells in urinalysis test. There was proof beyond all reasonable doubt that there was penetration.
 24. On whether the perpetrator was properly identified the P3 indicates the perpetrator was known to the complainant. The complainant and her sister PW 2 said the appellant is married to their cousin. The offence took place in the morning when the complainant was going to school. The appellants pair of trouser was recovered and it had blood stains. The appellant did not deny having committed offence. He says that if he did then it was due to his mental health status.
 25. The appellants witness DW 2 confirmed that the complainant was defiled and he arrested the appellant for committing the offence. When arraigned in court the appellant pleaded mental incapacity and the trial court ordered for mental assessment and he was found to be of sound mind. This court would not deviate from this finding as there was no other evidence adduced to show the appellant was of unsound mind.
 26. I do find that the appellant did not benefit from right under section 333(2) of the *Criminal Procedure Code* as it is apparent that he remained in remand custody during the entire period of his trial. The appeal therefore succeeds partially. The conviction is upheld and sentence substituted with 10 years to take effect from July 22, 2019.
 27. Right of Appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 31ST DAY OF MAY 2023**

HON. LADY JUSTICE A. ONG'INJO
JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

Advocate for Appellant - No appearance

Hon. Lady Justice A. Ong'injo

Judge

31/05/2023



Court

Certified copy of judgment to be supplied to Appellant & Respondent.

Hon. Lady Justice A. Ong'ino

Judge

31/05/2023

