



**Paul v Republic (Criminal Appeal E069 of 2021)
[2023] KEHC 19579 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E069 OF 2021
GMA DULU, J
JUNE 30, 2023**

BETWEEN

EMMANUEL WAIHAKA PAUL APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 17 of 2020 at Taveta Law Courts by Hon. C. I. Adisa (RM) delivered on the 25th June 2021)

JUDGMENT

1. The appellant was charged in the Magistrate's court at Taveta with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 14th August 2020 at around 10hours within Taveta Sub County in Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of HW (name withheld), a girl child aged 9 years.
2. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, the particulars of which being that on the same dates and at the same place, unlawfully and intentionally touched the vagina of HW a girl aged 9 years with his penis.
3. He was further charged with a second count of sexual assault contrary to Section 5(1) (a) as read with Section 5(1)(2) of the Sexual Offences Act, the particulars of which being that on the same day and at the same place at 12:00hours unlawfully and intentionally used his fingers to penetrate the vagina of NH (name withheld) a girl child aged 2 years.
4. In the alternative to the second count he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, the particulars of which being that on 14th August 2020 at 12:00hours



- at the same place unlawfully and intentionally touched the vagina of NH a girl child aged 2 years with his finger.
5. He denied all the charges. After a full trial, he was convicted on the main counts of defilement and sexual assault, and sentenced to serve fifteen (15) years in jail and ten (10) years in jail for the two counts respectively. The sentences not being indicated to be consecutive or concurrent, they are presumed to be consecutive sentences.
 6. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal and relied on the following grounds:-
 1. The learned Judge (should be Magistrate) erred in law in failing to appreciate the appellant's right to a fair trial (was) violated since he was not provided with the witness statements and other documentary exhibits which the prosecution intended to rely on in prosecuting him.
 2. The trial Magistrate erred in law by convicting and sentencing the appellant yet failed to find that his constitutional rights to a fair trial under Article 50(g) and (h) were violated.
 3. The learned appellate Judge (should be Magistrate) erred in law by failing to appreciate that the age assessment conducted on the appellant proved that he was an adult aged 18 years. However the court failed to realize that the maker of the age assessment report did not testify before court to produce the report in court as exhibit and the appellant was never given an opportunity to cross-examine the maker of the document.
 4. The learned appellate Judge (should be Magistrate) erred in law by failing to find that the prosecution did not prove its case beyond reasonable doubt (under) the provisions of Section 107 of the Evidence Act.
 5. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and facts and circumstances unique to the case.
 7. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
 8. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanour – see *Okeno =Versus= Republic* [1972] EA 32.
 9. I have evaluated the evidence on record. In proving their case, the prosecution called seven (7) witnesses. On his part, the appellant tendered sworn defence testimony, and called one witness.
 10. This being a matter where the appellant was convicted of two separate offences, committed against two different victims, I have to consider each of the two offences separately. I will start with the offence of defilement.
 11. The elements of the offence of defilement are first the age of the alleged victim. The second element is the act of sexual penetration even if partial. The third element is the identity of the culprit.
 12. The prosecution had the burden of proving each of the elements of the offence beyond any reasonable doubt – see Section 107 of the Evidence Act (Cap.80), and the case of *Sawe =Versus= Republic* (2003) eKLR. Suspicion however strong cannot be a basis for sustaining a conviction in a criminal case. The



appellant, having raised both technical and substantive grounds of appeal, I will deal with the technical grounds first.

13. The appellant has complained that he was not provided with prosecution witness statements and documents at the trial. I have perused the record of the trial court. On 20th January 2021 the appellant asked to be supplied with witness statements. The court ordered that the statements be supplied on 10th February 2021. On 10th February 2021 the appellant asked for help to attend school as he was in Form II. Thereafter, the matter was adjourned a number of times, with the appellant saying that he was ready to proceed with hearing which commenced on 2nd March 2021.
14. At no point did the appellant state that he had not been supplied with witness statement or prosecution documents, not even in his sworn defence statement.
15. I find that there is no basis for the complaint that appellant was not supplied with prosecution statements and documents. I dismiss the complaint.
16. The appellant also complains that his right to fair hearing was violated in terms of Article 50(g) and (h) of the Constitution, that he was not provided with legal counsel or informed of his right to be represented by counsel.
17. It is not on record that the appellant was specifically informed by the court about his right to be represented by counsel. However, in my view such default by the trial court was not fatal to the criminal proceedings and conviction, as there is no evidence that he was not aware of his rights as the law presumes people to know the law. In any case, he would have to pay for the services for a lawyer if he chose to be represented by counsel, as the State did not have a legal duty to provide him with free legal representation. I thus dismiss this ground.
18. The appellant has also complained about his age assessment. I note that on 22nd April 2021 during his defence, he said on oath that he was 18 years old. His birth certificate was also produced by PW7. Thus in my view, the assessment of his age as 19 years was not prejudicial to him in sentencing, as he was above 18 years at the time of sentencing, and the court was correct in treating him as an adult during passing sentence.
19. With regard to the substantive grounds of appeal on proof of the charges, in my view with regard to the defilement charge, the age of PW3 Hellen Wahu was proved beyond reasonable doubt. She did not refer to her age. A birth certificate was however produced by PW2 PC Anne Becky Awor the investigating officer which shows that she was born on 14th June 2011.
20. This birth certificate was not contested. I find that the prosecution proved the age of Hellen beyond reasonable doubt.
21. With regard to penetration of a sexual nature, PW3 stated that she was penetrated. The medical evidence produced by PW6 George Ombayo the Clinical Officer was to that effect that PW3 had fresh bruises and lacerations in the vagina. Her hymen was recently broken. In my view therefore, penetration of a sexual nature was proved beyond reasonable doubt by the prosecution.
22. Was the appellant the culprit? PW3 said so. PW2 AWK the mother of PW3 stated that she heard noise from the house of the mother of the victim in the second charge on 14th August 2020 at 9:00p.m and when she went there she was informed by the said LMM that the daughter of M and the daughter of A had been defiled by the appellant.



23. The appellant on his part, stated that on 14th August 2020 he went to work with his father from 7:00a.m to 4:00p.m and that on return home a neighbour called Marwa took him home and assaulted him and threatened him with a gun. He was not asked any question by the prosecutor.
24. His father DW2 PM also stated that he came with his son from work and M came and assaulted his son. He stated also that the said M later apologized to him.
25. In my view, the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit for two reasons. The first is that this Marwa who was a crucial witness, and who caused the arrest of the appellant was not called by the prosecution to testify in court and no explanation was given for that default by the prosecution. As such we do not know whether the appellant was arrested for the offence alleged or not, or even whether as DW2 said the allegations against the appellant was found to be untrue after Marwa apologized.
26. The second reason why I find that the prosecution did not prove that the appellant was the culprit was that the prosecutor did not ask a single question to test the truth of the sworn defence of the appellant. Thus the sworn defence testimony of the appellant, remained unchallenged. Bearing in mind the legal principle that the prosecution had the burden to prove that the appellant was the culprit beyond reasonable doubt, the unchallenged defence of the appellant in my view creates sufficient doubt regarding the appellant's identity as the culprit.
27. I will thus have to quash the conviction for defilement and set aside the sentence.
28. I now turn to the charge of committing sexual assault on a child. The elements of the offence are the age of the victim who should be below the age of 18 years. Secondly, the physical assault. Thirdly, the identity of the culprit.
29. In my view, the age of the alleged victim PW1 NH was proved beyond reasonable doubt. She stated in evidence that she was three (3) years old. The mother PW4 LMM stated that she was 3 years old. PW4 relied on a birth certificate which was produced as exhibit by PW7 PC Ann Becky Awor the investigating officer. Thus the age of the victim or complainant was proved.
30. With regard to the sexual assault, PW1 NH stated in evidence that Waitbaka used his finger to penetrate her in the vagina. The evidence from PW6 George Ombayo the Clinical Officer showed that her hymen was missing, but no visible injuries or spermatozoa was noted, though there was presence of pus cells.
31. In my view, for a young girl of her age if she was penetrated in the vagina with a finger on 14th August 2020 and was seen in hospital on 15th August 2020 just the next day, there would have been signs of fresh lacerations or trauma in the vagina. In my view, the fact that her hymen was missing alone, did not prove the sexual assault, as there is scientific literature to the effect that some girls are born without the vaginal membrane called hymen.
32. My finding above is fortified by the fact that the father of the alleged victim (M), who caused the arrest of the appellant and who is said by DW2 to have later apologized for a mistaken report, was not called by the prosecution to testify in court and no reason was given.
33. Secondly, the appellant stated in his sworn defence that he did not commit the offence, and the prosecutor did not ask him a single question in cross-examination. His sworn defence thus remained unchallenged. The unchallenged defence twists the pendulum in favour of the appellant, and watered down the prosecution attempt to prove the offence beyond reasonable doubt.
34. I will thus also quash the conviction for sexual assault and set aside the sentence.



35. Consequently, and for the above reasons, I allow the appeal, quash the convictions and set aside the sentences on both counts on which the appellant was convicted and sentenced. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE 2023 AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

The appellant

Mr. Sirima for State

Mr. Otolu court clerk

