



**Mbaabu v Republic (Criminal Appeal E180 of 2022)
[2023] KEHC 19351 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E180 OF 2022
LW GITARI, J
JUNE 27, 2023**

BETWEEN

DICKSON MURITHI MBAABU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006 and an alternative charge of committing an indecent act with a child.
2. The particulars of the offence were that on diverse dates between 15th and November 29, 2020 in Imenti South Sub-County within Meru County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of WK, a child aged 14 years old.
3. The Appellant denied the charge and after a full trial, he was found guilty, convicted and sentenced to serve fifteen (15) years imprisonment.
4. Dissatisfied by the trial court's decision, the Appellant vide the Amended Petition of Appeal filed together with his submissions on March 9, 2023 raises the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact by failing to note that the *voir dire* examination was not properly conducted since there was no finding that the complainant PW1 understood the importance of giving evidence on oath.
 - b. That the learned trial magistrate erred in law and fact by failing to find that the elements of defilement were not proved beyond reasonable doubt.



- c. That the learned trial magistrate erred in law and fact by failing to find that the whole case against the Appellant was based on suspicion which the same cannot form a basis for a conviction.
 - d. That the learned trial magistrate erred in law and fact by failing to find that the clinical report does not support the allegation of defilement.
 - e. That the learned trial magistrate erred in law and fact by convicting the Appellant to serve 15 years' imprisonment without supportive evidence.
 - f. That the learned trial magistrate erred in law and fact by dismissing the Appellant's defense without giving cogent reasons of dismissing it.
5. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. It is the Appellant's submission that the trial court proceeded to take the testimony of PW1 under oath without testing whether the child understood the duty of speaking the truth in contravention of Section 19 of the *Oaths and Statutory Declarations Act* (Cap 15 of the Laws of Kenya). It was further the Appellant's submission that the prosecution failed to conclusively prove that there was penetration and that it is the Appellant who caused the alleged penetration to the minor. Finally, that the whole case against the Appellant was based on suspicion which fell short of the required standard of proof to warrant the Appellant's conviction. The Appellant thus urged this Court to allow the appeal by quashing his conviction and setting aside his sentence.

The Respondent's Submissions

7. On its part, the Respondent denied the Appellant's allegation that the prosecution witnesses gave inconsistent testimonies and that key witnesses were not called. It was the Respondent's submission that the 5 witnesses called by the Prosecution gave consistent testimonies and that the prosecution did prove its case against the Appellant beyond reasonable doubt. Further that the medical evidence adduced by PW4 proved penetration and that PW1 positively identified the Appellant as the perpetrator.
8. On the issue of the Appellant's defence, it is the Respondent's submission that the trial court considered the same and dismissed it for want of merit. The Respondent thus submitted that the instant appeal should be dismissed and the Appellant's conviction and sentence upheld.

Issue for Determination

9. Having considered the grounds of appeal as well as the submissions of the parties, the following issues arise for determination by this Court:
- a. Whether the trial court properly conducted the *voir dire* examination of the complainant
 - b. Whether the prosecution proved its case beyond any reasonable doubt;
 - c. Whether the sentence meted against the Appellant was appropriate in the circumstances of this case.



Analysis

10. The duty of this Court as a first appellate court is now well settled in law which is to re-evaluate the evidence adduced before the trial court, analyse it, and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanour. [See *Okeno vs. Republic* [1972] EA 32].
11. Guided by the above authorities, I shall now re-analyse the respective cases of the parties.

The Prosecution's Case

12. The complainant herein, WK, testified as PW1. She stated that she was 14 years old as she was born on August 26, 2006. It was her testimony that between November 15, 2020 and November 29, 2020 she was with the Appellant. That on November 15, 2020, the Appellant requested her to escort him to Nkubu. That he picked her at her home at around 1 p.m. and they then proceeded to Nkubu. Further, that in the evening at around 7.30 p.m., the Appellant requested her to go to his house and they went and stayed there for two weeks within which period they had sexual intercourse repeatedly.
13. It is PW1's testimony that on November 29, 2020, the Appellant asked her to go pick her clothes from home. That her grandparents then questioned her on her whereabouts and called her mother who also came and questioned her. Upon telling her that she had gone to collect her clothes, her mother took her to Uruku Police Station where she was interrogated by a police officer and PW1 told them that she had had sexual intercourse with the Appellant. PW1 was then referred to Githongo Sub-County Hospital where she received treatment.
14. PW2 was DN, PW1's mother. It was her testimony that on November 15, 2020, she was called by her father who told her that PW1 had gone missing from home. That she searched for PW1 to no avail and on November 22, 2020, she reported the matter to Nkando Police Station. It was further PW2's testimony that PW1 finally came back home on November 29, 2020 where she met PW2's mother. PW2 was called from work and she took the complainant to the police station to report the incident. According to PW2, the complainant told her that she had been staying with the Appellant. That she had met the Appellant who offered to take her out and later took her to his home where they stayed.
15. PW3 was LG, PW2's mother and the complainant's grandmother. She testified that on November 15, 2020, the complainant left for school but did not come back until after two weeks when the complainant returned home stating that she had come for her clothes. She corroborated PW2's testimony that upon PW1's return, PW2 reported the matter to the police and escorted the complainant to hospital.
16. PW4 was Dr. Brenda Koech of Githongo Sub County Hospital. She examined the complainant and noted that her genitalia had no visible injuries but her hymen was broken. That there was no visible discharge from the vagina and no spermatozoa was seen. PW4 produced into evidence the complainant's P3 Form and treatment card as P. Exhibits 1 and 2 respectively.
17. PW5 was P.C. Andrew Muriungi, the investigating officer in this case. It was his testimony that on November 22, 2020, PW2 reported that the complainant had gone missing. That it emerged that the complainant was at [Particulars Withheld] area at the Appellant's residence and that it is the complainant who led them to the Appellant's house. That the Appellant was then arrested and the complainant was taken to hospital for treatment.



The Defence Case

18. When placed on his defence, the Appellant was the sole witness in support of his case. He denied committing the offence stating that he was not subjected to medical examination that could link him to the subject offence.
19. From the above facts, I shall now move to analyzing the issues arising for determination by this Court.

a. Whether the trial court properly conducted the *voir dire* examination of the complainant

20. It is the Appellant's contention that the trial court erred by not properly conducting a *voir dire* examination of the complainant. *voir dire* examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. "*voir dire* definition" *Duhaime's Legal Dictionary*). With specific regard to the testimony of children, *voir dire* examination is essential to enable the court satisfy itself that the child is conscious of the need to tell the truth. The purpose of *voir dire* was explained by this court in *Johnson Muiruri v Republic* [1983] KLR 445 as follows:

1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voir dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

21. The purpose of the "*voir dire*" examination is to ensure that the minor understands the solemnity of the oath and if not, at the very least, the importance of telling the truth. Section 19 of the *Oaths and Statutory Declarations Act* provides as follows:-

- "19. Evidence of children of tender years (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may



be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

- (2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

22. The section stipulates that a *voir dire* examination shall be conducted where a minor child of tender years is called to testify. From the onset, it is clear from the proceedings that the learned trial magistrate did not conduct a *voir dire* examination. In her testimony the complainant informed the court that she was fourteen years old as she was born on August 26, 2006. The copy of the birth certificate shows that she was born on August 26, 2006, it was produced as exhibit 3. The offence was committed on November 15, 2020. The complainant attained the age of fourteen years on August 26, 2020. This means that at the time the offence was committed she was aged fourteen years and two months and twenty three days old. She was a borderline case.

In the case of *Kabageny Arap Kolit v R* [1959] E.A 92 the Court of Appeal stated that the expression of child of tender years for the purpose of Section 19 of the *Oaths And Statutory Declarations Act* (*supra*) in the absence of special circumstances means a child of any age, or apparent age of under 14 years. The only definition of a child of tender years is found under Section 2 of the children's Act. The *Sexual Offences Act* has categorized the age of the victim and the sentence to be imposed based on the age. The younger the victim the severe the sentence. It does not define the term child of 'tender years'. In sexual offences, the age of the child has to be proved with precision. The Court of Appeal in the case of *Patrick Kathurima v R* (*supra*) has been quoted with approval in *Mariplet Loonkomok v Republic* [2016] eKLR, Court of Appeal where the court stated-

“... that the definition in the *Children Act* is not of general application... it follows therefore that the time honoured fourteen (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 failure to do so does not per se vitiate the entire prosecution case but the evidence taken without examination 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 case 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.”

23. The record shows that the complainant gave her evidence before the trial court on June 28, 2021. At that date she was well over fourteen years. It is my view that under Section 19 of the *Oaths and Statutory Declarations Act* *supra* the *voir dire* examination must be done if the child is a minor at the time of giving evidence and not at the time the offence was committed. If the child has become of age at the time of giving evidence “*voir dire*” examination is not necessary. There are two issues that arise here. Even if the complainant was a minor and no “*voir dire*” examination was done, it does not per se vitiate the prosecution's case, the court can convict if there is evidence to corroborate the evidence



of the minor. Secondly if the child had attained the age of over fourteen years at the time of giving evidence, no “*voir dire*” examination was required. I find that no “*voir dire*” examination was required as the complainant had attained the age of fourteen years and above at the time of giving evidence. No miscarriage of justice was occasioned. In view of the foregoing this ground of appeal must fail.

b. Whether the prosecution proved its case beyond any reasonable doubt

24. The Appellant herein faced a charge of defilement contrary to Section 8(1) which provides as follows:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

25. In defilement cases, the ingredients that need to be proved are identification or recognition of the offender, penetration and the age of the victim. This was so held in the case of *Moses Mwarimbo Dau v Republic* [2018] eKLR cited by the Respondent.

26. It was the evidence of the complainant that she went to the house of the appellant and stayed there for a period of two weeks. She testified that she had met the appellant at the church the previous year. The trial magistrate held that the complainant lived with the appellant for a period of two weeks between 15 -29 November, 2020. The complainant spent time with appellant. She is the one who pointed out the accused to the arresting officers. In these circumstances, I am persuaded that there was no mistaken identity. See page 35 line 8-13 of the proceedings. Further, the trial magistrate stated as follows: “I observed the complainant’s demeanor throughout her testimony. She was eloquent and consistent. She was very specific in her narration of what transpired. I am convinced she told the truth. “I believe in her testimony”. Page 35 line 14 – 17- I find that the complainant knew the appellant before. There was no possibility of mistaken identity. The trial Magistrate had an opportunity to see the complainant and based on the facts of this case her finding is sound.

I find that the appellant was properly identified as the perpetrator.

Penetration

Section 2 of the *sexual offences Act* defines penetration as -:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person”

In *Mark Oiruri Mose v Republic* [2013] eKLR, the Court of Appeal stated;

“So long as there is penetration whether only on the surface, the ingredients of the offence is demonstrated and penetration need not be deep inside the girl’s organ” In this case the complainant testified that they had sexual intercourse all the time that she was in the appellant’s house. On the other hand medical evidence adduced by P.w 4 corroborated the testimony of the complainant that there was penetration. The evidence of P.w 4 that the hymen of the complainant was broken is proof of penetration. I hold that the evidence to support the fact penetration was sufficient.

Age

As earlier observed, the age of the complainant was proved with the production of the birth certificate.

I find that the prosecution did prove all the ingredients of the offence of defilement beyond any reasonable doubts.



27. The appellant submits that the case was based on suspicion. In view of the evidence on the identification of the appellant which I have analyzed above, I find that the allegation by the appellant that the case was based on suspicion is a mere sham which does not hold any water. There was no requirement that he be examined. The law is now well settled that penetration is proved by the testimony of the complainant. Medical evidence is for corroboration of the complainant's evidence. In a clear case where the perpetrator is positively identified, failure to examine him cannot viate the conviction. There was sufficient evidence adduced by the prosecution to prove the charge against the appellant. I reject the contention that the charge was based on suspicion.

b. Whether the sentence meted against the Appellant was appropriate in the circumstances of this case.

28. Section 8(3) of the *Sexual Offences Act* 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.”

29. The Appellant in this case was sentenced to fifteen (15) years imprisonment. However, the complainant was 14 years of age at the material time. As per the provisions of Section 8(3) of the *Sexual Offences Act*, the Appellant upon conviction was therefore liable to imprisonment for a term of not less than twenty years. As such, it is my view that the minimum sentence prescribed in law that the trial court ought to have meted against the Appellant was twenty years.

30. In this case the prosecution has not urged the court to enhance the sentence. The appellant has not submitted on the sentence. Since the appellant was not warned that if he pursues the appeal he risks having the sentence enhanced, I will not interfere with the sentence. The appellant should have been warned so that he could opt to pursue the appeal or abandon the appeal.

31. In the circumstances, for the reasons given and having found that the prosecution proved the charge against the appellant beyond any reasonable doubts, I find that the appeal lacks merits and is dismissed.

Order

1. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JUNE 2023

In the presence of

Mr. Magoma - for state

Appellant- present

Court Assistant V. Kiragu

HON. LADY JUSTICE L. GITARI

HIGH COURT - JUDGE

