



**SM v Director of Public Prosecution (Criminal Appeal E036 of 2023)
[2023] KEHC 20820 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E036 OF 2023
TW CHERERE, J
JULY 27, 2023**

BETWEEN

SM APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Being an appeal against judgment, conviction and sentence in Tigania Criminal
S. O No. E002 of 2020 by Hon. F.K.Munyi (PM) on 23rd February, 2023)*

JUDGMENT

Background

1. SM (Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with 8(3) of the [Sexual Offences Act](#) No 3 of 2006. The offence was allegedly committed on December 28, 2020 against BM a girl aged 15 years' old He also faced an alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006 by unlawfully touching her vagina.
2. Appellant was tried, convicted on the main charge and subsequently sentenced to 20 years' imprisonment.

Appeal

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal mainly on the ground that the prosecution case was not proved beyond doubt.

Analysis and determination

4. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the



- witnesses testify as did the trial Court, and give due allowance for that (See [Okeno vs. Republic](#) [1972] E.A.32).
5. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant. (See [C.W.K v Republic](#) [2015] eKLR).
 6. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In [Kaingu Kasomo vs. Republic](#) Criminal Appeal No 504 of 2010 the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.
 7. Complainant’s age was proved by way of a Child Health Card which reveals that she was born on 27.01.05 and was 15 years when the offence was allegedly committed.
 8. Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”
 9. The P3 form revealed that complainant was not only defiled but was 8 months pregnant when she was examined on July 22, 2020.
 10. Appellant has raised the issue of failure by the prosecution to subject the Complainant’s baby to DNA testing which he says was fatal. Courts have developed jurisprudence that it is now trite that DNA is not necessary to prove a fact of rape or defilement. (See [A.M.L vs- Republic](#) (2012) eKLR. It therefore follows that failure to conduct DNA testing was not fatal to the prosecution case

Appellant’s culpability

11. Complainant stated that she used to stay with Appellant’s family and that on the material date whilst his wife was away, Appellant returned home at about 11.00 am dragged her to bed and defiled her. Complainant’s mother confirmed that Complainant lived with Appellant’s family until December, 2020 when she returned home. She testified that she noticed that Complainant was pregnant in June, 2021 and it was when she took her to hospital that she disclosed to the doctor that she had been defiled by the Appellant.
12. Appellant denied that he was at home on the material date. His wife denied that she was away from home on the day Complainant was allegedly defiled.
13. Complainant was the sole witness to the offence. I have considered the case of [Stephen Nguli Mulili v Republic](#) [2014] eKLR where the Court of Appeal had this to say regarding reliance on Section 124 of the [Evidence Act](#) to convict:

“as a general rule of evidence embodied in Section 124 of the [Evidence Act](#), an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:



“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.” (Emphasis added).

14. The trial court considered complainant was living with Appellant’s family at the material and believed that Complainant was telling the truth. It is to be noted that Complainant was blessed with a baby on the 9 month after the offence was committed thereby further corroborating her evidence that she was defiled in December, 2020.
15. Although the trial court did not consider the Appellant’s defence of alibi, I find that the alibi did not dislodge the prosecution case and I find the trial magistrate’s finding that the case was proved beyond reasonable doubt well founded.
16. Accordingly, and for the reasons set out hereinabove, I find that the Appellant was rightly convicted and the conviction is upheld.
17. On sentence, Appellant was a first offender was sentenced to the maximum sentence under Section 8(3) of the Act. I hereby set aside the 20-year sentence and substitute it with 10 years’ imprisonment from the date of conviction on February 23, 2023.

DELIVERED AT MERU THIS 27th DAY OF July 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present in person

For DPP - Ms. Rita (PC-1)

