



**Havi v Republic (Criminal Appeal E232 of 2022)
[2023] KEHC 24273 (KLR) (Crim) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E232 OF 2022
LN MUTENDE, J
OCTOBER 25, 2023**

BETWEEN

KENNEDY KIBIYI HAVI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal arising from the original conviction and sentence
in Sexual Offence Case No. E054 of 2022 at the Chief Magistrate's
Court Kibera, by Hon. E. Riany – SPM on 1st December, 2022)*

JUDGMENT

1. Kennedy Kibiyi Havi, the Appellant, was charged with the offence of Defilement contrary to Section 8(1) (3) of the *Sexual offences Act*. The particulars of the offence being that on 15th day of May, 2022, in Dagoretti Sub-County within Nairobi County, he unlawfully and intentionally caused his penis to penetrate the vagina of FW a child aged 13 years.
2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the said date at the stated place he allegedly touched the genital organ (vagina) of FW a girl aged 13 years old with his penis.
3. Having denied the charge, the appellant was taken through full trial, convicted on the main count and sentenced to serve twelve (12) years imprisonment.
4. Briefly, facts presented by the prosecution were that on the 13th May, 2022, PW1 PK who had travelled to her rural home in Bungoma encountered the complainant herein who requested her to help her secure employment in Nairobi. Considering that she did not have parents and lived as a squatter, she offered to sponsor her to a dress making course. In the result she travelled with her to Nairobi. Upon



arrival she handed her over to the appellant herein who allegedly was to introduce her to the trainer. The appellant took her to his house where she was made to cook and have sexual intercourse with him. During the three days duration that she stayed with him, she was also required to wash his clothes. On the day that she was rescued the appellant made her remove her clothes and spread her legs, and he inserted his penis into her genitalia, an act that was painful.

5. On the May 19, 2022, PW4 PA, a neighbor of the appellant, was at her kiosk when the complainant went to purchase the Swahili bun (Mandazi). Upon inquiring why she was not in school, she claimed to be married. She notified a pastor Grace who took the complainant/victim to the chief. Subsequently PW5 No. 83871 PC Douglas Ombati of Mutuiru Police Station received a call from Mr. Waweru of Kabina regarding the matter. He summoned PW1 who met the complainant at the Police Station. Investigations conducted resulted into arrest of the appellant. The complainant was examined by a clinician. Consequently the appellant was charged.
6. Upon being placed on his defence, the appellant stated that PW1 rang him on May 13, 2022, and said that she had travelled home and found a girl above 18 years who would be his wife and he was agreeable. They travelled three days later. He went to Huruma stage after work and met PW 1, his brother Nixon and the girl who allegedly said she was 21 years old but small bodied. He gave PW1 Ksh. 1000/- and took her to his house and stayed with her for three days. Subsequently, neighbours complained and took the complainant to the Chief. This resulted into his arrest. PW 1 was also arrested. Both of them were arraigned but she was later released.
7. The trial court considered evidence adduced, found the victim to be between 13 and 15 years at the time of the act. It concluded that penetration was proved and the appellant was the offender, who did not state the steps he took to establish the age of the complainant who on observation would pass for a ten-year-old.
8. Aggrieved by the decision of the court, the appellant proffered this appeal against the conviction and sentence on grounds that: The court erred in law and fact by convicting the appellant on contradictory and uncorroborated evidence; The prosecution did not prove the ingredients of the charge of defilement; The prosecution did not discharge the burden of proof beyond reasonable doubt; The court erred in law and fact when it failed to consider the appellant's defence; and, that appellant did not have a previous criminal record hence deserved an alternative sentence.
9. The appeal was canvassed through written submissions, the appellant consolidated the grounds of appeal into two main heads, namely, that the magistrate erred in law and in fact in convicting and sentencing the appellant by relying on the uncorroborated and contradictory evidence of witnesses, the star witness was an accomplice; and, that the court erred in failing to consider his defence as required under Section 8 (5) of the *Sexual Offences Act*.
10. It is urged by the appellant that PW1 stated that the girl told her that she was 21 years when they met in Bungoma, and when she reached Nairobi she confirmed this to him. That the age assessment report by Mr. John Ongeri stated that she was between 13 and 15 years but the qualification of the assessor was not known and all witnesses approximated the girls age. That no reason was given for not producing the birth certificate to ascertain the correct age and body size can always give a false impression.
11. That the appellant's defence is satisfactory and meets the requirement of Section 8(1)(5) of the *Sexual Offences Act* that PW1 called and informed him that she found a girl aged 21 years for marriage. That upon inquiry the appellant confirmed the girl's age as 21 years old. The appellant further inquired if she had a national identification document.



12. That PW1 corroborated the appellant's evidence on the fact that the girl could not obtain the National Identity card because her parents were separated and none of them was at home to assist her obtain the national identity card. That the appellant made efforts to ascertain whether the child was over 18 years old.
13. That the name of the school which PW1 was to take the victim and the person who was to pay fees was not stated in her evidence. That PW1 came up with the story to escape charges. That the victim also told the shopkeeper and old people that she was married.
14. The appellant relied on the case of *Royton Muriungu Kirimi -Vs- Republic* (2020) eklr where the defence under Section 8(5) of the *Sexual Offences Act* was addressed.
15. The appeal is opposed by the State/ Respondent who submit that penetration was proved as per the victim's evidence where the appellant took her to his house and had sex with her, that she was in the appellant's house for three days and she washed clothes and cooked and would be left with ksh.100/=.
16. On age, reference is made to the age assessment report indicating that she was apparently between 13 and 15 years. On the veracity of the appellant's defence, the respondent contends that the burden of proof shifts to the accused to prove that he satisfied conditions and believed that the child was over the age of 18 years and steps taken by the accused to ascertain the age of the complainant. In this respect reliance is placed on the case of *Irene Atieno Ochieng -Vs- Republic* (2017) eklr. That the appellant did not seek to see the identity card and did not ask for it, he did not inquire the complainant's age from the village she had come from. That the information was readily available if he inquired the complainant's details from the caregiver.
17. This being a first appeal, the court has the mandate to reassess the evidence adduced at the trial court and come up with its own conclusions on whether the appellant was rightly convicted. The court must however note that the it never saw or heard the witnesses. The court must also weigh any conflicting evidence.
18. In the case of *Kiilu & Another -vs- Republic* (2005)1 KLR 174, the Court of Appeal stated as follows:

“ An Appellant in a first appeal is entitled to expect the evidence as a whole to be submitted 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 conclusion.

It is not the function of a first appellate court to merely 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.”
19. Issues for determination are therefore: whether the prosecution proved defilement beyond doubt; Whether the defence put up was credible; and, the merit on the appeal on sentence.
20. Section 8(1) of the *Sexual Offences Act* provides as follows:
 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



21. In this case, the appellant does not contest having sexual intercourse with the complainant, he challenges the evidence proving age of the complainant and in his defence he states that the complainant was an adult who went to be his wife.
22. Penetration occurs when a person intentionally inserts his genital organ into the genital organ of another. The act may be complete or partial. The evidence of penetration was proved by the complainant's evidence of how the accused had sex with her for the three (3) days she had stayed with him.
23. The medical evidence adduced also confirmed that the complainant was examined on May 20, 2022 and abrasions were noted on her legs and also tenderness on the lower abdomen. Her hymen was not intact and she had contracted a sexually transmitted disease (STD). The examination was linked to the sexual intercourse with the appellant.
24. The perpetrator was identified as the appellant. It is common ground that the complainant had lived with him for 3 days having been left in his custody by PW1. The complainant testified that neighbors came to her rescue, further evidence adduced also show that the appellant was arrested following his alleged marriage with the complainant.
25. As regards age, which has been contested in this appeal. In the case of *Kaingu Elias Kasomo vs Republic*, C.A Malindi, Criminal Appeal No. 54/2010, the Court of Appeal held that age must be proved with credible evidence since it guides the court on the ultimate sentence. It stated as follows:

“Age of the victim of sexual assault under the *sexual offences Act* is critical component. It forms part of the change which must be proved in the same way as penetration in cases of rape and defilement.

It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will depend on the age of the victim.”
26. The accused submits that the birth certificate was not produced and that no reason was given. PW1 stated that the complainant's parents were separated and their whereabouts were unknown. Therefore, the complainant's documents were not obtained. That notwithstanding, a birth certificate is not the only way of determine age. In the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR, the Court held that:

“... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases”
27. Other forms of proof of age include oral evidence and the court's own observation during evidence.
28. In the case of *Mwalengo Chichoro Mwajembe v Republic*, Msa. App.No. 24 of 2015 (UR) , the Court of Appeal held that:

“ ...the question of proof of age finally been settled decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decision from the High Court that age can also be proved by observation and common



sense. (See *Denis Kinywa vs Republic*, Criminal Appeal No. 19 of 2014 and *Omar Uche Vs Republic*, Criminal Appeal No. 11 of 2015).”

29. Section 2 of the *Children Act* enacts in respect of age that:

“Where actual age is not known means the apparent age”. In this case, the trial court carried out voire dire examination. The court also observed the child’s demeanor and noted what led to the conclusion in the judgment that the child could easily pass as a ten-year old.

30. PW4, a shopkeeper who attended to the complainant explained that she was concerned that the complainant was not in school, evidence that showed that the complainant was a minor.

31. The complainant was subjected to age assessment. The report was produced as proof of the estimated age. The complainant’s age was estimated to be between 13 and 15 years. Further, the appellant who was represented by Counsel did not seek to call and cross examine the author under Section 77 of the *Evidence Act*, hence his appeal that the credentials of author were not known does not hold.

32. The age assessment report corroborated the observation of the court and also the evidence of PW4 that the complainant was below eighteen (18) years.

33. Lastly, the alarm raised by neighbors ending up at the Chief and later the arrest of the appellant is further circumstantial evidence confirming that the appellant had molested a minor.

34. The appellant urges that he was brought and informed of a girl aged twenty-one years that he was to marry by PW1. Upon seeing the victim, he noted that she was small bodied. Section 8 (5) (6) of the *Sexual Offences Act* provide as follows:

(5) It is a defence to a charge under this section if –

a. It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. The accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

35. The provision of the law alluded to when relied upon in defence would require the accused to prove that he was deceived or led to believe that the minor was above eighteen (18) years old. He must set out what made him believe that the minor was an adult. This means that he assumes the burden of tendering a plausible explanation.

36. In the case of *Paul Munyoki vs Republic* [2021] eKLR, the Court of Appeal held that:

“...Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes



to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond.”

37. Evidence on record does not suggest that PW1 deceived the appellant into believing that she was over the age of eighteen years. He did not state what reasonably made him believe that PW1 was over the age of eighteen years. He appreciated that the victim was small bodied, a fact that should have raised his antennas up and he would have declined to accept the victim.
38. It is worth noting that on cross examining the complainant, it was not alleged that she mentioned her age. Further, the complainant denied the assertion that PW1 told the appellant that she was twenty-one years. The complainant’s evidence was given on oath and it was clear that she did not know her age and there was nothing to doubt it. There is nothing to prove any deception on the part of the victim. This evidence was cogent such that there was no misdirection on the part of the court in believing the complainant.
39. Secondly, the appellant was required to demonstrate the steps he took to ascertain the age of the complainant before he could marry her and consummate their relationship considering the fact that she was small bodied. That was also not done, as in his defence he stated that he took the victim and stayed with her for three days and neighbours started complaining. The defence the appellant could have put up has been argued in submissions at an appellate stage. Other than the fact that it should have been argued at trial, submissions are not evidence.
40. In this case, the age assessment established the complainant’s age which was nowhere near adulthood. The complainant also testified that she came to Nairobi in belief that she would get work only to be taken as a wife by the accused and forced into sexual intercourse, an act she did not consent to.
41. On sentence it is argued that the appellant was a first offender and that he deserved an alternative sentence to a custodial one. Section 8(3) of the *Sexual offences Act* on which he was convicted enacts that:
 - (3) 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.
42. The court sentenced him to 12 years imprisonment, in exercise of its discretion. This court takes it as lenient considering the circumstances of the offence and the impact on the child. The sentence which was befitting the circumstances, the nature and severity of the offence does not match with any alternative sentences which the appellant urges the court to consider. The appellant was in custody for six (6) months which shall be considered as part of the sentence. Therefore, this court directs that the sentence runs from the date of arrest, the May 23, 2022.
43. The upshot of the above is that the appeal is devoid of merit and is hence dismissed.
44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 25TH DAY OF OCTOBER, 2023

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Ochako for Appellant

Ms. Chege for ODPP



