



REPUBLIC OF KENYA



KENYA LAW
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**Hassan v Republic (Criminal Appeal E049 of 2021)
[2023] KEHC 23983 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E049 OF 2021
GMA DULU, J
OCTOBER 24, 2023**

BETWEEN

KARIUKI HASSAN APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E005 of 2021 at Taveta Law Courts delivered on 13th August 2021 by Hon. C. L. Adisa (RM))

JUDGMENT

1. The appellant herein was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that between 8th February 2021 and 11th February 2021 in Taita Taveta County around 2100hours unlawfully and intentionally caused his penis to penetrate the vagina of RK a girl aged 14 years.
2. In the alternative, he was charged with committing an indecent act with a child act contrary to Section 11(1) of the Sexual Offences Act, the particulars of which being that between the same dates and at the same place unlawfully and intentionally touched the vagina of RK a girl aged 14 years using his penis.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to fifteen (15) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-
 1. That the learned trial Magistrate erred in law and fact by failing to appreciate that the appellant was not informed of his right to legal representation pursuant to Article 50(2) (g) (h) of the Constitution of Kenya and as such his right to a fair trial was violated.



2. The learned Magistrate erred in law and fact by failing to appreciate that the appellant's identification was not positive.
3. The learned trial Magistrate erred in law and fact by failing to find that the prosecution did not discharge its duty of proving its case against the appellant to the required standard of beyond reasonable doubt.
4. The sentence imposed against the appellant was both harsh and excessive since it was applied in mandatory terms without consideration of the appellant's mitigation or unique facts and circumstances of the offence. Recent law developments have declared mandatory minimum sentences as being unconstitutional.
5. 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.
6. At the trial, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses. From the evidence on record, the trial court convicted and sentenced the appellant for defilement which is now being contested on appeal.
7. In the case of *Charles Wamukoya Karani = Versus = Republic* – Criminal Appeal No. 72 of 2013, the critical elements of the offence of defilement for which the appellant was convicted were listed as three. First, the age of the complainant who should be below 18 years. Secondly, sexual penetration. Thirdly, the identity of the perpetrator.
8. The burden was on the prosecution to prove each of these three elements of the offence beyond reasonable doubt, this being a criminal case.
9. Having perused and considered all the evidence on record, I find that the age of the complainant PW1 (RK) was not proved beyond reasonable doubt. This was because PW1 merely stated in evidence that she was 15 years old without either mentioning her date of birth nor relying on any document.
10. PW1's mother who was PW2 VK also merely stated that PW1 was in Primary School Class 4. She neither stated her age, nor date of birth. The investigating officer PW4 PC Ann Kimani referred to an age assessment report which was neither produced in evidence, nor was its source disclosed.
11. I thus find that the prosecution did not prove the age of the complainant PW1 beyond any reasonable doubt.
12. With regard to sexual penetration, PW1 stated that she was sexually penetrated. PW2 her mother stated that PW1 had disappeared for almost a week. Though PW2 stated that PW1 had become pregnant, the medical evidence tendered in court had no indication of any such pregnancy.
13. In my view, though the hymen of PW1 was missing, there was no proof beyond reasonable doubt of the alleged sexual penetration.
14. As for the identity of the perpetrator, since I have found that sexual penetration of PW1 was not proved beyond reasonable doubt, I also find that the appellant was not the perpetrator.
15. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF OCTOBER 2023 IN OPEN COURT AT VOI.



GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State

