



**Aden v Republic (Criminal Appeal E034 of 2022)
[2023] KEHC 27228 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E034 OF 2022
DK KEMEL, J
DECEMBER 20, 2023**

BETWEEN

MUSTAFA ZAMU ADEN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and Sentence of Hon Kitthinji A.R
(CM) in Nanyuki CM S.O No 92 of 2018 delivered on 14th April, 2022)*

JUDGMENT

1. The appellant was charged, tried and convicted of the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The particulars were that on 16/12/2018 in Nanyuki township within Laikipia county, intentionally and unlawfully caused his penis to penetrate the vagina of EW, a girl aged 17 years. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said *Act* in that he intentionally and unlawfully touched the breasts of EW a girl aged 17 years.
2. After a full trial, the appellant was convicted and sentenced to 21 years imprisonment. He was aggrieved and moved this court on appeal raising the following grounds;
 - a. The case was not proved beyond reasonable doubt.
 - b. The complainant was not established between the two sisters.
 - c. The scene of crime was not visited.
 - d. The investigating officer failed to corroborate on the matter before the court but was investigating an entirely different matter altogether.
 - e. There was no independent prosecution witness.



- f. He was not subjected to medical test to ascertain his culpability and also confirm his HIV status.
 - g. The prosecution witnesses failed to corroborate their testimonies.
 - h. There was sufficient and substantial material discrepancies and inconsistencies in the case.
 - i. The doctor's report failed to link the appellant with the alleged offence in terms of time and date.
 - j. The appellant's defence was rejected without cogent reasons.
3. In his submissions, the appellant added the following grounds;
- a. The learned trial magistrate erred in failing to note that the court denied the appellant his right to re-summon and further cross-examine PW-1 after the charge sheet was amended contrary to section 146 of the *Evidence Act* and Section 124(1)(i)(ii) of the *Criminal Procedure Code*.
 - b. The learned trial magistrate erred in not resolving the discrepancies, inconsistencies and contradictions prevalent in the prosecution case to the benefit of the appellant which was his right in law.
 - c. The learned trial magistrate erred by admitting as evidence a medical report that was not duly filled, signed and stamped as required by law.
 - d. The sentence meted out on the appellant was manifestly harsh and excessive in the circumstances of the case.
4. The evidence before the trial court was presented by five witnesses who testified as follows;
5. PW-1, the minor testified that on that day, she was home with her siblings when the appellant called her from behind their fence. That the appellant sent her to his house and when she entered the house, he held her and dragged her into the bedroom throwing her onto the bed and defiled her from there. That he blocked her mouth with a cloth and tied her hands with a rubber. That she managed to wrestle herself out and ran home where she informed her mother. On cross-examination, she stated that she bled at the time and that her clothes were stained but she washed them.
6. PW-2, AN, the minor's mother testified that she was in church on the said date. That she was left at church by her children including the victim. That when she arrived home, the minor informed her that she had been defiled by Mustafa, their neighbor. On cross-examination, she stated that the appellant is their immediate neighbor and that she had erroneously indicated in her statement with the police the name of Wamunyu instead of Wanjiru.
7. PW-3 FR, the village elder stated that he met PW-1 and PW-2 who reported to him that the appellant had defiled PW-1. He reported to the area chief who advised that they report at Nanyuki police station. He escorted her to the police station and the hospital.
8. PW-4, Steven Mugo, a clinical officer stated that upon examining the minor, he noted vaginal inflammation, broken hymen and whitish discharge from the vagina. He concluded that sexual penetration had taken place. He produced the P3 form and post rape care form as exhibits. On cross-examination, he stated that he did not find any semen or spermatozoa. He also stated that hymen can be broken by other factors.
9. PW-5, PC Halima Mamu, the investigation officer investigated the case and charged the appellant.



10. The appellant was put on his defence and he elected to tender sworn evidence. His testimony was that he was arrested on 17/12/2018 by the area chief who took him to Nanyuki Police Station. That he did not commit the offence. On cross-examination, he stated that he has no grudge against the complainant's family.
11. By directions of this court, the appeal was disposed of by way of written submissions. Both parties duly complied.
12. I have considered the record as well as the submissions. This being a first appeal, the duty of the court is as was held in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

...the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
13. In a charge of defilement, the prosecution is required to establish beyond reasonable doubt the victim's age, the act of penetration and the perpetrator's identity.
14. Before analyzing the above ingredients, I find it pertinent to examine the question that the appellant was not accorded a chance to recall PW-1 for further cross examination following an amendment of the charge that introduced a different date of the alleged offence.
15. The record shows that the order for recall of PW-1, the minor was made on 26/8/2019 when the charge sheet was amended and the charges read afresh. The appellant consequently sought to recall the witness. There is no evidence that the witness ever attended court for further cross examination.
16. In the absence of such evidence therefor, it is therefore safe to conclude that the victim was never recalled. This had a huge impact on the matter as far as the appellant was concerned as there was prejudice suffered.
17. I must point out that the right to fair trial under Article 50(2)(k) of the *Constitution* includes but not limited to the appellant's/accused's right to adduce and challenge evidence adduced on behalf of the prosecution.
18. In the instant case, the amendment of the charge sheet was calculated to cure the defect on the dates on the charge sheet. In the former charge sheet, the particulars read 16/11/2018 while the latter read 16/12/2018. There was also another fact that came out in PW-2's cross-examination in relation to the victim's name.
19. From the evidence on record, it is noted that PW-2 in her statement to the police had recorded that the victim was Jane Wamuyu while the victim according to her was E.W. The statement referred to was not produced into evidence so that a proper analysis of the same could be done. That state of affairs seem to create some doubt as to the identity of the person allegedly defiled.
20. The right to fair hearing as contained in article 50 above-stated is buttressed by section 214 of the *Criminal Procedure Code* which states;

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:



Provided that-

- i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2)

(3)"

21. The court in *Josphat Karanja Muna -Vs- Republic* [2009] eKLR observed as follows regarding amendment of charges in the middle of a trial.

“That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word.”

22. As stated above, the defect sought to be cured relates to the date of the offence. The courts seem to have settled that the factor to be considered is whether the amendment prejudiced the accused in any way as was held in *M N v Republic* [2017] eKLR where the Court said:

“It is settled that a charge sheet can be amended at any stage of the proceedings before the conclusion of the trial. However, there are safeguards set in place to ensure that the rights of an accused person are not violated by such amendments. Of relevance to this case is Section 214 (1) of the *Criminal Procedure Code*.”

23. In this case, the trial court allowed the appellant to recall the victim who had by then testified. The trial subsequently proceeded to its conclusion without the victim ever taking to the witness stand for cross-examination.

24. In my view, the time of the commission of the offence was a material fact that ought to have been subjected to cross examination considering that the victim was aged 17 years and therefore a borderline age. It is trite law that an accused person is the most favored child of the law and that the court should be at the forefront championing the rights of such a person. In the circumstances, I find the court ought to have recalled the witness for purposes of cross examination and this leads to the conclusion that the trial after the amendment of the charge sheet fell short of the rights of the appellant under article 50 of the *constitution*. It is clear that the appellant was prejudiced by the denial to recall Pw1 for further cross-examination. In the premises, the eventual conviction was unsafe and must be interfered with.

25. In view of the foregoing observations, a further scrutiny of the other issues become moot.

26. The upshot of the above is that the appeal has merit. The same is allowed. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.



DELIVERED AT BUNGOMA (VIRTUALLY) THIS 20TH DAY OF DECEMBER 2023

D. KEMEI

JUDGE

In the presence of :

Mustafa Zamu Aden Appellant

Kimaru for Respondent

Savuni Court Assistant

