



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karagure v Republic (Criminal Appeal E181 of 2021)  
[2022] KEHC 563 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E181 OF 2021  
TW CHERERE, J  
MAY 26, 2022**

**BETWEEN**

**MORRIS MURIUKI KARAGURE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Meru Chief Magistrate's Court Criminal SO No. E016 of 2021 by Hon. E.Mbicha (PM) on 25th November, 2021)*

**JUDGMENT**

**Background**

- 1) Morris Muriuki Karagure (Appellant) was charged defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (the Act). The offence was allegedly committed on 02.06.2021 against BKM a child aged 9 years.
- 2) The prosecution called six (6) witnesses in support of the charges. PW1 the complainant stated that she was 9 years old and in Grade 2. She recalled that on 02.06.2021, she and her brother DM were in Appellant's house not far from their parent's house playing games on Appellant's phone. That Appellant sent her brother to charge the phone leaving her alone with the Appellant and she fell asleep and woke up to find Appellant had undressed her and was defiling her. She reported the matter to her aunt G and was escorted to report the matter to police and was late escorted to hospital where she was examined. PW2 CM recalled that on 02.06.2020, he heard Complainant talking in Appellant's house and informed their aunt G and uncle S. That Appellant was then arrested and escorted to the police station. Complainant was examined on 03.06.2021 by PW4 Huey Atemi a clinical officer who found that the vaginal wall was bruised and hymen was broken from which he opined that there was evidence of recent vaginal penetration. He tendered complainant's P3 form as PEXH.2. PW5 IG, Complainant's aunt stated that on the material date at about 07.50 pm, she sent her husband SM



to pick Complainant from Appellant's house and when she arrived informed her that Appellant had defiled her. Complainant's report to the police was investigated by PW6 CPL Olivia Bundonye and Appellant was subsequently charged. She tendered Complainant's certificate of birth PEXH. 1 which shows she was born on 05<sup>th</sup> May, 2021.

- 3) Appellant in his sworn defence denied the offence and said that the charges were false.
- 4) The trial court after hearing the witnesses for the prosecution and defence found Appellant guilty and sentenced him to life imprisonment.

### **Appeal**

- 5) Aggrieved by the conviction and sentence, Appellant lodged the instant appeal and filed submissions on six grounds mainly that the prosecution case was not proved as required by law and his defence was not given due consideration.

### **Analysis and Determination**

- 6) 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).

### **Age of Complainant**

- 7) The appellant was found guilty of committing an offence contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The provisions stipulate:
  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- 8) 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”.
- 9) Complainant their child born on 05<sup>th</sup> May, 2012 as shown on her birth on certificate of birth PEXH. 1 and was therefore 9 years when she the offence was allegedly committed.

### **Penetration**

- 10) 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.”
- 11) The P3 form PEXH. 2 reveals that complainant had bruises on the vaginal wall and a broken hymen. Whereas a broken hymen per se is not evidence of penetration, the broken hymen coupled with bruises



on vaginal wall make vaginal penetration evident. I therefore find that the trial magistrate correctly found that penetration was proved.

### **Appellant's Culpability**

- 12) Appellant was an employee of Complainant's parents and lived with them in the same compound. He was therefore no stranger. As is normal in sexual offence., Complainant was the sole to the commission of the offence.
- 13) 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.
- 14) It has been alleged that the Appellant was with her brother DM in Appellant on the date the offence was allegedly committed. SM, the Complainant's uncle who allegedly found Complainant in Appellant's house on the material day was similarly not called as a witness. The prosecution did not lead any evidence from the said DM and SM nor was failure to call them explained.
- 15) Given the seriousness of the offence that Appellant was charged with, it would have been prudent to call DM and SM to confirm that indeed Complainant was in Appellant's house on the date that she was defiled. This is not a case where the court would simply invoke the provisions of Section 124 of the *Evidence Act* Cap 80 Laws of Kenya and admit the uncorroborated evidence of the complainant as truthful whereas there is evidence out there which the prosecution failed to avail.
- 16) The prosecution's failure to call DM and SM who would have placed the Complainant and the Appellant at the scene of crime allegedly leads the court to make an inference that their evidence, if adduced would have been adverse to the prosecution case. *See Bukonya & Others v Uganda [1972] EALR 549* at 551.
- 17) In the end, I find that the prosecution case was not proved beyond any reasonable doubt and Appellant ought not to have been convicted.
- 18) Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. It is so ordered.

**DELIVERED AT MERU THIS 26<sup>th</sup> DAY OF MAY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

### **Appearances**

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Nandwa (PC 1)

