



REPUBLIC OF KENYA



**KENYA LAW**  
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**SB v Republic (Criminal Appeal 27 of 2020)  
[2022] KEHC 11870 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11870 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 27 OF 2020  
HI ONG'UDI, J  
AUGUST 5, 2022**

**BETWEEN**

**SB ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(eing an appeal against the Judgment delivered by Hon. C. Menya on 27th  
June 2017 in Kimilili Principal Magistrate's Criminal case No. 1634 of 2013)*

**JUDGMENT**

1. SB the appellant herein was charged with the offence of Defilement Contrary to Section 8(1) and (3) of the [Sexual Offences Act](#) No. 3 of 2006.  
The particulars being that the appellant on the December 4, 2013at [Particulars Withheld] location of Bungoma County intentionally caused his penis to penetrate the vagina of MN a girl aged 13 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars being that the appellant on the 4<sup>th</sup> day of December 2013 at [Particulars Withheld] location of Bungoma County unlawfully and intentionally touched the vagina of MN a girl aged 13 years.
3. The appellant pleaded not guilty to both counts and the matter proceeded to full hearing. He was later convicted of the principle count and sentenced to twenty (20) years imprisonment.
4. Being dissatisfied with the Judgment he filed this appeal against both the conviction and sentence by raising grounds which he later amended and reduced to two namely: -
  - (i) That, the learned Magistrate erred in both law and fact in convicting him by failing to observe that the appellant's rights under article 50(2)(c) was not complied with.



- (ii) That the appellant's conviction was based on the absence of essential witnesses.
5. A summary of the prosecution case will suffice. Four witnesses testified on behalf of the State. PW 1 (MN) testified on February 10, 2015 and said she was aged 15 years, and in std 8 at [Particulars Withheld] Primary School. It was her evidence that on 4<sup>th</sup> December 2013 at around 4:00 pm her grandmother sent her to the appellant's shop to buy items. It was raining and the appellant offered her shelter. Soon thereafter he arrived with a leso and a panga and threatened to kill her if she screamed.
  6. He undressed her by forcefully removing her skirt and pant. He placed his penis inside her vagina and even strangled her. This went on for 3 hours before he left her. He refused to open the door so she spent the night there. She was rescued by uncle Bonny a brother to the appellant. She went home and reported to her grandfather. The appellant was later arrested on December 6, 2013. She went to hospital the day he was arrested. She was examined and was treated and a P3 form filled.
  7. PW 2 (GB) is PW1's grandmother. She testified that she had on November 30, 2013 sent PW1 to her mother's home at Cherenusu. She arrived safely but on 4<sup>th</sup> December 2013 she was called and informed that PW1 was found in the house of her brother B. She took a motorcycle and went straight to Baraza's house but found he had escaped. He was later arrested and charged. She identified the appellant as the B who had defiled PW1.
  8. Pw 3 NO 64157 CPL Zilda Kilele was the investigating officer. She confirmed the appellant was brought to her office on December 6, 2013 at 12:23 pm by members of the public on allegations of defilement. She took the appellant and PW1 to hospital.
  9. PW 4 Beatrice Akusa a Clinical Officer based at Kimilili Sub – County Hospital examined PW1 on December 9, 2013 for purposes of filling the P3 form which she produced as PEXB 3. On examination she found that PW1 had a broken hymen but there was no discharge. She confirmed that PW1 had been defiled and had unprotected penetrative sex. The age assessment conducted revealed she had scanty public hair, dental formula of 28 teeth thus placing her age at 13 years.
  10. The witness further produced the following documents: -Immunization card showing date of birth as May 11, 2000– PEXB3. Laboratory investigation and results PEXB 2(a) and (b). Medical examination of the appellant P EXB 4.
  11. The appellant in his unsworn defence denied the charge saying he was arrested on December 4, 2013 while he was in the shamba with his mother. In the process of arrest, he was beaten and tied up before being taken to the police station. An age assessment of the appellant was done on 28<sup>th</sup> June 2017 on orders of the Court. The report filed shows he was approximately 18 years old.
  12. The appellant's submissions are dated April 12, 2022 and filed on August 2, 2022. Referring to Article 50(2)(c) of *the Constitution*, he submits that he requested for witness statements which were never supplied to him in spite of the many orders issued by the Court in respect of the same. He also contends that crucial witnesses like Bonny never testified. He relied on the case of *Gidraf Thuo & another .v. Republic* CRA No 12 – 13 of 2006 – Court of Appeal Nyeri in support.
  13. It's his submission that not much weight was given to his defence by the trial Court. Further, no explanation was given for the failure to avail all witnesses.
  14. The respondent filed written submissions dated May 6, 2022 through prosecution counsel J. Tarus. He submits that all the ingredients for a charge of defilement were proved as follows: -
    - i. Age - through the production of her immunization card PEXB 3; Assessment by PW4 – PEXB 1.



- ii. Penetration – by the evidence of PW4 the Clinician – PEXB 1.
  - iii. Identification – The encounter was during the day and the victim spent the whole night with the appellant who was the perpetrator.
15. He submits that there was no evidence to support his claimed defence of alibi. That though charged under section 8(1) as read with section 8(2) he was properly convicted under section 8(1) as read with section 8(3) as she was aged 13 and not 11 years.

### **Analysis and Determination**

16. This is a first appeal and this Court has a duty to re-evaluate and re-consider the evidence afresh and arrive at its own conclusion. The Court of Appeal in the case of *Kiilu & another v Republic* [2005] 1 KLR 174 had the following to say of this noble duty:
1. An Appellant on 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 conclusions.
  2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and 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.

The same was the position in *Simiyu & another v Republic* [2005] 1 KLR 192 by the Court of Appeal.

17. Upon careful consideration of the evidence on record, both submissions, and the Law I find the main issue falling for determination to be, whether the charge of defilement was proved against the appellant. In other words, were the following proved? Namely: -
- (a) Age of the victim.
  - (b) Penetration of the victim's genital organ.
  - (c) Identification of the appellant as the culprit.

#### **(a) Age of the victim**

18. PW 1 told the Court on 10<sup>th</sup> February 2015 that she was 15 years of age. The incident had occurred on December 4, 2013. The child health card/Immunization card (PEXB 3) shows PW1 was born on April 25, 2000. This confirms she was on the fateful day aged 13 years plus 7 months plus 10 days. PW4 the Clinical Officer who assessed her and who explained what she did and found her to be about 13 years old (PEXB 1). She did this on 9<sup>th</sup> December 2013. I am therefore satisfied that age was proved.

#### **(b) Was there proof of penetration of the victim's female organ?**

19. PW 1 explained with no hesitation what had been done to her. By her description there was penetration. This was further confirmed by the medical examination done by the Clinical Officer (PW4). She produced the P3 form (PEXB 1). Laboratory investigation plus results (PEXB 2a and b). I find that there was penetration of PW1's genital organ.



**(c) Was the culprit identified?**

20. The appellant has in his first amended ground of appeal stated that he was not issued with witness statements which was in breach of his rights under article 50(2) (c) of *the Constitution*.
21. I have perused the record and it shows that indeed several orders for supply of witness statements to the appellant were made. However, on May 9, 2014 when he appeared for mention he told the Court that he lost his statements. This confirms they had been supplied to him. A fresh order for supply of the statements was made, and the matter fixed for hearing on June 24, 2014. A surety was approved and the appellant was released on bond on May 28, 2014. Thereafter the matter came up for hearing with both the appellant and prosecution giving excuses as to why it could not proceed.
22. On February 10, 2015 the appellant informed the Court that PW1 wished to withdraw the matter. The Court declined the request since it was not from the Director of Public Prosecution. The Court directed that the matter proceeds to hearing. At no single point did the appellant raise an issue on witness statements. It means he had been supplied with the witness statements. He cross examined the witnesses who testified. I therefore find no violation of article 50(2) (c) of *the Constitution*.
23. PW2 confirmed that she had sent PW1 to see her (pw2's) mother, on November 30, 2013, and she had not returned home by 4<sup>th</sup> December 2013 when she received the report of the defilement. The report was that PW1 had been found in B's (her brother's) house.
24. On the other hand, PW1 and testified she had been sent to the appellant's shop to pick items by her grandmother. This grandmother happens to be B's mother and also PW2's mother. Brother B who rescued PW 1 is a brother to the B who happens to be the appellant herein.
25. The appellant has raised issues about witnesses not being called to testify. This appears to have been a close family matter and that's why the appellant's mother and brother B did not appear to testify. At one point the appellant told the court that PW 1 (a minor) wanted to withdraw the complaint. It was that bad.

The issue is whether PW1's evidence was credible. Could it be relied on to found a conviction?

26. The Court of Appeal in *Kiilu & another (supra)* stated the following on this issue: -

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”
27. In the present case the victim and the appellant are related. She explained clearly how she found herself in the appellant's shop. She knew him and she had been sent there by her grandmother. It was broad day light but it was raining hence the need for shelter. The child reported to her grandfather who for obvious reasons did not testify. A report was however made to the police.
28. PW3 the Investigating Officer stated that the appellant was brought to the station by members of the public who included PW1's grandmother and uncle. The allegation against him was defilement. PW1



remained with the appellant on the fateful day for over 12 hours and this was not a short time. She was also rescued from his house and no other house.

Yes, the appellant gave unsworn evidence saying he was arrested while in the shamba with his mother on December 4, 2013. His mother who also happens to be the one who sent PW1 to the appellant's shop never testified.

29. Secondly the appellant was arrested on December 6, 2013 and not December 4, 2013 as he alleges. The December 4, 2013 is the date of incident. Upon his arrest on December 6, 2013 he was taken to the police station. He was never taken there on December 4, 2013 as he claims. This confirms that his defence was made up of lies and not even worth considering.
30. The appellant did not give any reason as to why PW1 as young as she was would lie against him. I am satisfied that even though PW 1 was a single identifying witness her evidence is reliable and she had no reason to lie against the appellant.
31. My only concern is about the sentence passed against the appellant. Upon conviction on June 27, 2017 the appellant was given a chance to mitigate. He told the Court that he was 19 years old. The Court ordered for an age assessment to be undertaken. The same was done and a report filed showing he was 18 years old or thereabouts. This was done on June 28, 2017. This offence was committed on December 4, 2013.
32. This shows that the appellant was about 14 – 15 years of age when the offence was committed. He too was a minor. Could he have been sentenced to the 20 years' imprisonment?
33. This matter was handled by the same trial Magistrate from the beginning to the end, and she should have noted this. The fact that she ordered for an age assessment to be done shows she wanted to confirm the real age of the appellant. She however never acted on the age assessment report which was an error on her part.
34. My finding therefore is that the sentence meted out on the appellant who was a minor at the time of the offence is an illegal sentence. The learned trial Magistrate should have given any other sentence other than a custodial one.
35. The upshot is that the conviction is confirmed but the sentence of twenty (20) years imprisonment is set aside.

The appellant should be released forthwith unless otherwise held under a separate warrant.

Orders accordingly.

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 5<sup>TH</sup> DAY OF AUGUST 2022 IN OPEN COURT AT BUNGOMA.**

**H. I. ONG'UDI.**

**JUDGE OF THE HIGH COURT**

