



**Isaac Munene James v Republic (Criminal Case E040 of 2021)
[2022] KEHC 12900 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E040 OF 2021**

**A. ONG'INJO, J
AUGUST 3, 2022**

BETWEEN

ISAAC MUNENE JAMES APPELLANT

AND

REPUBLIC ACCUSED

(Originating from Sexual Offences Case E026 of 2020)

JUDGMENT

1. The appellant filed a petition of appeal and grounds of appeal on May 21, 2021 but later filed a notice of motion on February 21, 2022 seeking that the court allow his appeal, quash his conviction and set aside sentence against judgment of hon CK Aura in respect of Sexual Offences Case E026 of 2020 in which he was convicted and sentenced to serve 12 years in prison for the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) Number 23 of 2006.
2. The application was supported by amended grounds of appeal as follows:
 - a. That the learned trial court magistrate erred in law and fact by convicting and sentencing me to 12 years' imprisonment without proper finding that I the appellant was a minor below the age of 18 years when this offence was committed.
 - b. That the learned trial court magistrate erred in law and fact by convicting me the appellant on unsubstantiated evidence of the complainant PW3.
 - c. That the learned trial court magistrate erred in law and fact by failing to take into consideration that corroboration is still needful in such circumstances contravening section 163(1)(c) of the [evidence Act](#).



- d. That the learned trial court magistrate erred in law and fact by relying on the evidence of PW3 who did not voluntarily record statement to police and give evidence but was coerced to say so and there was no nexus between what happened to her and I the appellant.
 - e. That the learned trial court magistrate erred in law and fact not considering that even if the victim's hymen was absent, it may not have been caused by me the appellant because the doctor never expressed any opinion that she had been defiled the previous day and there was nothing on record to suggest that the victim lost her hymen the day before the doctor examined her.
 - f. That the learned trial court magistrate erred in law and fact by discounting and not considering in detail my defense evidence.
3. His application was opposed *vide* respondent submissions dated June 21, 2021 that averred that appellant's conviction and sentence was safe and proper and appeal should be dismissed.

Summary of Prosecution Case

4. PW1 was JS, father of the complainant and appellant was his relative from his wife's family. He testified that complainant was his first born child. On October 30, 2020 he started suspecting complainant and Accused were having an affair as they stayed in the kitchen a little too long. He later pretended to have left the house for a journey but entered his bedroom after which he went kitchen where the appellant and complainant were. He knocked but there was no response after which he broke down the door and found appellant cutting onions. He confronted appellant and later went to look for his brother to see to the matter but found appellant and complainant had run away. He reported the matter on October 31, 2020 to the village chairman. He got reports that the two had been seen in Kayawaa in Kombani on November 1, 2020. The chairman for Kapricho told him that he had seen the two and appellant had told him that the complainant was his wife and she had changed her name to C He testified that the two were traced in Shonda with a man called Bob. His brother went to Shonda and arrested the appellant and took him to Kombani Police station. The complainant was later found at Mama Bob's house. PW1 produced a copy of the complainant's birth certificate that indicated she was 13 years. He also identified the P3 form and treatment notes. At the hospital the complainant was assessed by the medical officer to have been defiled.
5. In cross examination he testified that appellant had been warned against being with complainant with his parents and he had warned his daughter as well. He testified that he did not owe the appellant any money and was aware that appellant brother had been killed for breaking into a house.
6. PW2 was MH, mother to complainant. She testified that she did not know appellant prior to incident and that she did not live with the complainant. On October 31, 2020 she received word that complainant had gone missing and it was suspected that she was with her. She confirmed that she wasn't with the complainant. She looked for her in Maweni Village. She went to Tiwi and Kayawaa to trace complainant and later recorded a statement after she had traced the complainant.
7. PW3 was complainant. She testified that she was in class 5. She testified that she used to live with appellant and they ran away together after being intercepted by her father in the kitchen. She was referred to her statement after which she testified that she said that she loved the appellant and wanted him to be her husband. She testified that they had sex with the appellant when they ran away from home. They first went to Kayawaa and then Tiwi then Shunda and were to run away to Kilifi when they were intercepted with her grandmother and the appellant was apprehended.
8. On cross examination she said she had recorded her statement but she said she never told the appellant that she loved him and wanted him to be her husband as recorded in her statements. She testified that



- appellant forced her to run away from with him and that he wanted to make her his wife. She testified that they had sex and she found out she was infected with gonorrhoea when examined. She also testified that she was not aware that her father owed him money.
9. PW4 ACS, uncle to complainant. He also knew the appellant. He testified that PW1 and PW2 had separated and on October 30, 2020. He was notified that PW3 had run away with the appellant by PW1 and he had looked for the two at kawayaa, Tiwi and ujamaa when PW1 called to confirm PW3 had been found. He took PW3 to the police station. At cross examination he confirmed that they found appellant at shunda and he had sustained injuries when trying to run away.
 10. PW5 was Mwajoto Nyamawi clinical officer at Kwale Hospital. He testified he had examined PW3. He testified that he had made the following observations during medical examination; hymen was absent, complainant had a bacterial infection and candida and epithelial cells on her vagina that are gotten through sex. He produced the P3 form, PRC form and treatment notes. In cross examination he testified that there were many ways of breaking virginity that could be through sex or through an accident
 11. PW6 was investigating officer No 241866PC Mercy Fondo. She testified that November 21, 2020 the appellant was brought to the police station after being beaten up by the mob justice. He confessed that he had been living with the complainant and were planning to get married. She took the complainant to hospital and it was confirmed that she was defiled. PW3 told her she was intending to marry appellant and they used to have sex. She produced original birth certificate to indicate appellant was 13 years old and took appellant for age assessment and it was confirmed he was 20 years of age. She produced age assessment report. On cross examination she testified that appellant had confirmed to her that he had sex with PW3 but she did not record the confession.
 12. At the close of prosecution's case the appellant was put to his defence on April 15, 2021.

Defence

13. The appellant testified that he did not know complainant in the case and could not remember where he was on the material day. In 2018 he was up country when PW1 called him and said he had been attacked by people. PW1 owed him KSH 10,000/- but when appellant asked that he pays it back, he fabricated the defilement charge against him.

Summary of Submissions

14. Appellant filed submissions on February 21, 2022. In a nutshell it was submitted that the appellant was below the age of 18 years when the offence was committed. It was submitted that the age assessment report that estimated his age at the time to be 20 years was not conclusive. Moreover, the age assessment report was not produced by its maker and it should not have been relied to prove his age.
15. It was submitted that appellant should have been sentenced in accordance to section 8 (7) of the [Sexual Offences Act](#) Number 2006; section 191 of the [Children's Act](#) and section 6(1) of the [Borstal institution, 2009](#) and be committed in a borstal institution instead of an adult prison. Reliance was placed on *Mwanyele Daniel Thethe VS Rep* HCCR Revision No 24 of 24 of 2014 at Malindi.
16. It was submitted that evidence of complainant PW1 was inconclusive as she did not recall the specific dates that she had been defiled and it is unclear how the police concluded that the offence had happened between October 30, 2020 and November 22, 2020. The recorded statement of the complainant PW3 was also significantly different from her testimony in court and she admitted in cross examination what



- she recorded in the police station was not true. Her evidence ought to be impeached under provisos 163(1) (C) of the *Evidence Act*. Reliance was placed on *Ndung'u Kimani VS Rep* (1979) KRL.
17. It was submitted that there was no witness who testified that he had seen him defile the complainant and PW1's evidence was merely speculative at best.
 18. It was submitted that no evidence was provided to prove that the victim had lost her hymen the day before she was examined by the doctor. The victim also testified to have been infected by a sexually transmitted disease yet the appellant was never examined to establish that he suffered from the same infection.
 19. Respondent filed submissions dated June 21, 2022.
 20. It was submitted that age of appellant was proved as he told the trial court that he was 19 years having been born on December 10, 2000.
 21. It was submitted that a *voire dire* examination of the complainant was conducted and trial court found her to be intelligent enough to understand nature of an oath and her age was verified to be 13 at the time of giving evidence. Proof of penetration was also attested to by evidence of the complainant PW3, PW5 the doctor and PW1 as well and the PRC form was produced.
 22. It was submitted that positive identification of Assailant was proved with the testimony of PW3, PW1 and PW4 and it was the appellant who had defiled the complainant. It is submitted that there were no contradictions in the prosecution case and facts were corroborated.
 23. It is submitted that the appellant was dishonest in his defense as he said he claimed that he did not know the complainant.
 24. appellant filed a reply to submissions filed by respondent on July 1, 2022, submitted that the appellant was never been taken to a medical doctor to assess his age and the trial court did not conduct a proper *voire dire* examination. Reliance is placed upon *ANS VS Rep* (2019) Eklr.

Analysis and Determination

25. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. In *Pandya vs Republic* [1957] EA 336 where the East African the Court of Appeal set out the duties of a first appellate court as follows, "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."
26. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon I find the issues for determination are;
 - a. Did the prosecution prove its case beyond reasonable doubt?



- b. Was age of appellant ascertained?
 - c. Was the sentenced meted out legal?
27. Section 8 (1) and 8(3) of the *Sexual Offences Act* provide thus; -

‘A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

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.’

28. In *Charles Wamukoya Karani vs Republic*, Criminal Appeal No 72 of 2013 the court held; -

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

Age of the Complainant

29. The age of the complainant in the matter herein is not in dispute. The investigating officer PW6 produced the complainant’s birth certificate that indicated that she was 13 years of age and therefore a child as envisaged by section 2 of the *Children’s Act*.

Roof of Penetration

30. PW3 testified that she had sex with the appellant and it was affirmed with the testimony of PW5 who was the medical officer. He testified that his observations were PW3’S hymen was broken and the PW3 had epithileila cells in her vagina which could only be present when an individual had had sex.
31. This element was proved beyond reasonable doubt.

Positive Identification of Assilant

32. PW3 identified the appellant as the person who had defiled her. The appellant was known to her as they lived in the same house and even ran away together. PW1 and PW4 also testified that appellant was their relative. The appellant however pointed out in that PW3 evidence was not consistent and truthful as she gave contradictory evidence and admitted to have lied when recording her statement. Upon perusal of the record, PW3 admitted to have lied in her statement that she had said that she wanted the appellant to be her husband and that she loved him. This to me does not go into the root of the issues and is not a grave lie to lead to rejection of PW3 testimony. In Uganda Court of Appeal in *Twehangane Alfred vs Uganda* it was held that it is not every contradiction that warrants rejection of evidence. The court held: -

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

33. PW1 also gave evidence that PW3 and appellant had run away together having confronted the appellant on having a romantic liaison with PW3. The appellant further avers that PW3 testimony was uncorroborated and a *voire dire* examination was not conducted properly. It is however trite law that



corroboration in sexual offence is not mandatory as provided under section 124 of Evidence Act that provides as follows; -

‘Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: 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.’

34. A *voire dire* examination was also not essential as the complainant was not of tender age. The children’s Act 2014 provides; -

“child of tender years” means a child under the age of ten years’

35. The complainant was 13 years of age. I find the testimony of PW3 believable and therefore find that this element was proved.

36. The appellants herein avers that he was below 18 years, however from evidence on record he testified that he was born on December 10, 2000 and would have been 19 years at the time of commission of offence. The assessment report also indicated that he was around 20 years. He avers that the report was never produced by the maker of the document, however section 77 of the Evidence Act provides that; -

“(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”

37. When interpreting section 77 of the Evidence Act the court in Republic V Ronoh Khalif Ahmed (2015) eKLR. held; -

‘In my view section 77 of the Evidence Act does not deal with the issue as to who can produce such a document. The section allows the court to presume the genuineness of the document. The section also states that the court may call the maker of that statement to be examined on the same. This means that such a document need not be produced by the maker. It also means that the court may or may not require the maker of the document to come to court. It thus means that the document is admissible whether or not the maker comes to court.’

38. From the forgoing it is evident that the appellant was an adult at the time of commission of offence and sentencing.



39. Section 8 (1) and 8(3) of the *Sexual Offences Act* provide thus; -

‘A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

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.’

40. Appellant herein was sentenced to serve 12 years in prison after consideration of time spent in custody, mitigation and Muruatetu sentencing guidelines that were applicable then to sexual offences. 12 years was lenient considering the charge attracts a minimum of 20 years as provided under the provisions quoted above. I find no reason to interfere with the sentence meted out by the trial court and uphold both conviction and sentence.

41. The upshot of the matter is I find that the appeal is unmerited and dismiss it accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3RD AUGUST 2022.

HON. LADY JUSTICE A. ONG’INJO

JUDGE

IN THE PRESENCE OF: -

Ogwell –Court Assistant

Ms Kambanga- For state

Appellant - present in person.

HON. LADY JUSTICE A. ONG’INJO

JUDGE

3/08/2022

