



**JM v Republic (Criminal Appeal E 165 of 2021)
[2022] KEHC 13144 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E 165 OF 2021
TW CHERERE, J
SEPTEMBER 29, 2022**

BETWEEN

JM APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence in Criminal Case 1712 of 2015 in the Principal Magistrate's Court at Tigania by Hon. P.M. Wechuli (SRM) on 30.01.2020)

JUDGMENT

1. JM (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 (the Act). The offence was allegedly committed on August 8, 2015 against DK a child aged 10 years.
2. Appellant also 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. It was alleged that on the same day and place, he intentionally rubbed his penis against the vagina of DK a girl aged 13 years.
3. JK, complainant's mother and Appellant's wife stated that he disagreed with Appellant and she went to her parents' home leaving behind her children including the complainant. That when she returned after 3 days, complainant informed her that Appellant had defiled her. Complainant stated she was 10 years and in class 4. She recalled that on a certain date while her mother was away, her father, Appellant herein asked her to sleep on his bed with the baby and it was then that he defiled her. Martha Njeri, a clinician examined complainant on 10.08.2015 and found her with torn hymen and inflamed labia majora and minora as shown on the P3 form PXH.1.
4. Appellant in his sworn defence denied the offence. He stated that was framed by his wife after he found a man in their house.



5. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on January 30, 2020 convicted and sentenced Appellant to serve life imprisonment
 6. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal mainly on grounds that the Prosecution case was not proved beyond any reasonable doubt and that his defence was not given due consideration.
7. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs. Republic* [1972] EA 32, *Pandya -vs- Republic* [1957] EA 336 and *Kiilu & Another vs. Republic* [2005]1 KLR 174.
8. 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

9. 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.
10. 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. (See *Kaingu Kasomo vs. Republic* Criminal Appeal No. 504 of 2010).
11. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo vs Republic* Criminal Appeal No. 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello vs. Republic* Cr. App. No. 203 of 2009[2010] eKLR).
12. Complainant stated that she was 10 years a fact that confirmed by the clinician that filled the P3 form.

Penetration

13. 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.”
14. The P3 form PEXH. 1. reveals that complainant had torn hymen and inflamed labia majora and minora as shown on the P3 form PXH.1 and I find that the trial magistrate correctly found that penetration was proved.



Identity of the assailant

16. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say regarding reliance on Section 124 of the *Evidence Act* to convict:
- “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.” (emphasis added).
17. Appellant is complainant’s father. Although she was the sole witness, her evidence concerning how she was defiled was comprehensive and as was rightly found by the trial magistrate not shaken and was therefore credible.
18. From the foregoing, I find that the prosecution case was proved beyond any reasonable doubt. The defence was duly considered and from the evidence on record, I find that the defence did not cast doubt on the prosecution case and was therefore rightly rejected.
19. From the analysis of the prosecution case, I find that conviction was well founded Concerning sentence, to the extent that the *Sexual Offences Act* prescribes minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, falls foul of Article 28 of the *Constitution* which provides that “Every person has inherent dignity and the right to have that dignity respected and protected”.
20. The court record reveals that Appellant was in custody for 5 years during the trial. In the end, the conviction is upheld but the life sentence is substituted with a 10 years’ imprisonment term from the date of arrest on August 11, 2015.

DELIVERED AT MERU THIS 29th _____ DAY OF *September* 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)

