



**Mwijuma v Republic (Criminal Appeal E059 of 2021)  
[2022] KEHC 14700 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14700 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E059 OF 2021  
A. ONG'INJO, J  
OCTOBER 28, 2022**

**BETWEEN**

**JUMA ALMASI MWIJUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision by Hon. R. M. Amwayi, Senior Resident on 20th November 2019 in Mombasa Sexual Offences Case No. 25 of 2019, Republic v Juma Almasi Mwijuma)*

**JUDGMENT**

**Background**

1. The accused Juma Almasi Mwijuma was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on the 15<sup>th</sup> day of March 2019 at [particulars withheld] area in Likoni sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of JW a child aged 16 years.
2. In the alternative charge Juma Almasi Mwijuma was charged with the offence of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on the 15<sup>th</sup> day of March 2019 at [particulars withheld] area in Likoni sub-county within Mombasa County, intentionally and unlawfully did an indecent act by touching the vagina of JW a child aged 16 years with his penis.
3. The trial magistrate considered the evidence of four prosecution witnesses and found that there was sufficient evidence to put the accused on his defense. The trial magistrate was satisfied that the prosecution was able to prove the case of defilement against the accused person to the required standard beyond any reasonable doubt. The accused person was then sentenced to serve fifteen (15) years imprisonment.



4. The appellant was aggrieved and dissatisfied by the entire decision by the trial court preferred the appeal herein on the following grounds: -
  1. That the learned trial court magistrate erred in law and fact by not considering that there were massive contradictions and discrepancies in the prosecution case.
  2. That the learned trial court magistrate erred in law and fact by failing to consider that the prosecution did not prove its case beyond reasonable doubt.
  3. That the learned trial court magistrate erred in law and fact by failing to consider the doctor's evidence did not corroborate with the complainant's evidence.
  4. That the learned trial court magistrate erred in law and fact by failing to consider my defence which I was sure of a win.
  5. That the learned trial court magistrate erred in law and fact by to consider my mitigation.
5. The prosecution's case was that the complainant's mother PW2 sent her to Malindi on February 15, 2019 to stay with her aunt IW who was supposed to take her to High School. However, when she called to find out whether the complainant had arrived, she was told she had not arrived and after some time she learnt that the complainant had been seen at Gede boarding a bus that was going back to Mombasa.
6. PW2 reported the matter to the police and on March 18, 2019, the complainant was arrested together with the accused in the accused person's house and taken to the police station. That the complainant was taken to hospital and on examination found to be 7 months pregnant. She said that the accused person was responsible for her pregnancy.
7. The complainant, PW1, stated that the appellant was known to her as he was her boyfriend and made her pregnant. She said that the appellant was her boyfriend since class 8 and since he made her pregnant they decided to stay together. She said that she did not know if the appellant knew that she was in school.
8. According to the complainant, on November 30, 2018, there was a wedding in the neighborhood and she accompanied her mother to the wedding at 9.00 pm. When the mother went back to sleep at midnight, the complainant was left at the wedding. When she returned back to the house the father threw her bag out. She decided to go to the appellant's house at 4.00 am in the morning and he allowed her to live with him. That she stayed with him for 2 days and decided to go back home. That when they went to hospital with the appellant, pregnancy test was done and she was found to be pregnant. She said that prior to being chased from home, she used to visit the appellant during the weekends as he was her boyfriend and they had sex severally.
9. PW1 confirmed her aunt I had offered to pay her school fees and said that she should go and stay with her in Malindi but when she was sent to Malindi, she did not stay with her aunt as she decided to go back to Mombasa to stay with the appellant as husband and wife. That on March 17, 2019 in the morning, she saw a vehicle from Inuka Police Station and they were arrested. PW1 said she knew the appellant from the estate and his home was 1 km from his home.
10. PW3 Corporal Fatuma Mbale testified that on March 18, 2019, a defilement case was minuted to her for investigations. She interrogated the complainant who narrated to her that she was a friend to the appellant and that she ran away to stay with the appellant when she noticed that she was pregnant.



11. PW3 took the complainant to Likoni Sub County Hospital in the company of PW2 and she was examined and treated and PRC as well as P3 form filled. She then preferred charges against the appellant.
12. PW4 Stephen Kali, Clinical Officer at Likoni sub-county hospital examined the complainant and established that she was 20 weeks pregnant. He then filed the PRC and P3 Forms which he produced as exhibits together with treatment notes.
13. When the appellant was placed on defence, he gave a sworn statement and said that the complainant was not defiled by him. He said that the complainant was his friend but she also had another boyfriend and that before he had sex with her, she already had sexual intercourse with somebody else. He said the complainant used to go to his house at night and stayed with him for three days. He said that he asked whether the complainant was a student, she said she was not a student but failed to disclose her age. He said that the complainant went missing for some time and on coming back, she informed him that she had come from her aunt's place in Malindi and that she was pregnant. He said that he told her to stay with him as he looked for money to pay dowry, that while he was still looking for money, he was arrested and charged. He said that his family was giving support to the complainant and the child as he committed the offence unknowingly as he did not know the age of the complainant.

### **Respondent's Grounds of Opposition**

14. The State had the following grounds to oppose the petition of appeal: -
  1. Identification of the appellant was established
  2. The age of the minor was proved to the trial court
  3. The fact of penetration was proved
  4. The trial court guaranteed the appellant's right to a fair trial
  5. That the appellant's defense was considered by the trial court and a finding made for the same
  6. The prosecution proved its case beyond reasonable doubt
  7. The period spent by the appellant in custody was considered during sentencing
  8. The sentence meted by the trial magistrate was lawful

### **Analysis and Determination**

15. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”



16. After considering the grounds of appeal, records of the trial court, grounds of opposition, and circumstances of the case, the issues for determination are as follows: -
- i. Whether there were massive contradictions and discrepancies in the prosecution's case
  - ii. Whether the prosecution proved its case beyond all reasonable doubt
  - iii. Whether the doctor's evidence corroborated with the complainant's evidence
  - iv. Whether the appellant's defence under section 8 (5) and (6) of the *Sexual Offences Act* was considered
  - v. Whether the appellant's mitigation was considered

**Whether there were massive contradictions and discrepancies in the prosecution's case**

17. Although the appellant stated that there were massive contradictions and discrepancies in the prosecution's case, he failed to file submissions which would have pointed out to the contradictions and discrepancies. This court has reevaluated at the evidence on record for the prosecution and no discrepancies or contradictions have been seen.

**Whether the prosecution proved its case beyond all reasonable doubt**

18. The elements that the prosecution was expected to prove for the offence of defilement under section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* were: -
- a) Penetration.
  - b) Age of the complainant
  - c) Perpetrator.
19. The evidence of PW1 was that the appellant was her boyfriend and made her pregnant. That he had been her boyfriend for over one year since she was in class 8 and they used to meet during the weekends. She said that on November 30, 2018, she had accompanied her mother to a wedding in the neighbourhood at 9.00 pm and her mother returned home at midnight and left her at the wedding. That when she returned home, her father threw her clothes out and chased her away and she went to the appellant's home at 4.00 am. That the appellant took her in and agreed to stay with her. That prior to being chased away, she had been visiting the appellant during weekends and she used to stay in his house. She said that after 3 weeks, she realized she was pregnant, that she went to hospital and the pregnancy test proved to be positive. That the appellant also accompanied her to hospital and confirmed that she was pregnant. The complainant's aunt, I volunteered to pay for her school fees but when she sent fare for the complainant to go and stay with her in Malindi, that the complainant instead went to stay with the appellant in Malindi. That they commenced cohabitation as husband and wife from February to March 17, 2019 when they were arrested.
20. PW2, the mother of the complainant, also confirmed that the complainant was 7 months pregnant. PW4 the clinical officer at Likoni examined the complainant and confirmed that she was 20 weeks pregnant and filled the PRC and P3 forms. The complainant could not have been pregnant if there was no penetration. The element of penetration was therefore proved.
21. There is no dispute that the appellant was the perpetrator because he even admits it in cross examination and in his defense.



### **Whether the doctor's evidence corroborated with the complainant's evidence**

22. As stated above, the evidence that the complainant got pregnant was confirmed by medical evidence of PW4. It is not explained by the appellant what aspect of the complainant's evidence was not corroborated by the doctor's evidence. In any case, as was stated in the case of *George Kioji v Republic*, Criminal Appeal No 270 of 2012, although medical evidence is welcome, it is not mandatory or even the only evidence upon which an accused person can be convicted for defilement.

### **Whether the appellant's defence under section 8 (5) and (6) of the Sexual Offences Act was considered**

23. The appellant in his defence said that he asked the complainant if she was a student and she told him she was not a student. That he also asked her about the age but she did not disclose her age to him. He said that the complainant went missing and when she came back she said that she was from her aunt's place in Malindi and that she was pregnant and he told her to stay with him as she was looking for money to go and pay dowry but he was arrested before he could deliver dowry. He said that he committed the offence unknowingly and that if he had known her age, he could not have engaged her.
24. The trial magistrate in considering the appellant's defence said that the burden of proving that he was deceived and that he believed the complainant was 18 years fell upon him and the standard is on a balance of probabilities. The trial magistrate contended that the appellant did not explain the steps that he took to ascertain the age of the complainant being that she declined to tell him her age and that defense is not available for him.
25. In *Royton Muriungi Kirimi v Republic* [2020] eKLR, it was held: -

“This section requires that an accused person raises this defence at his trial. Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under section 5 & 6 of Sexual Offences Act the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond.”

26. The complainant said that she did not know if the appellant knew that she was in school. In cross examination, she told the appellant that he did not tell her to stop schooling so that he could marry her. She said that the appellant was well known in the estate. PW2, the mother of the complainant said that the appellant was her neighbor. From the above evidence, there is no way that the appellant could have failed to know that the complainant was a school girl since they were neighbours. He did not raise the issue of age in cross examination of prosecution witnesses. He did not therefore discharge the burden that he was deceived and he believed that the complainant was the age of majority.

### **Whether the appellant's mitigation was considered**

27. The appellant in mitigation asked the court for leniency and the trial magistrate indicated that she had considered the mitigation and sentenced him to serve 15 years imprisonment. The circumstances of this case however called for a more lenient sentence being that the complainant on two occasions took herself to the appellant's house. On one occasion when the father had chased her away and she went



to the appellant's house at 4.00 am in the morning and again she had been sent to the aunt's place in Malindi but she returned and went to the appellant's house. I therefore set aside the 15 years jail term and substitute it with 5 years imprisonment to take effect from the date the appellant was arraigned in court on March 19, 2019.

28. In conclusion, the appeal on conviction is dismissed and the sentence set aside and substituted with 5 years imprisonment from March 13, 2019. 14 days right of appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 28<sup>TH</sup> DAY OF OCTOBER 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

