



**PMS v Republic (Criminal Appeal E013 of 2021)
[2022] KEHC 14499 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E013 OF 2021**

RK LIMO, J

OCTOBER 26, 2022

BETWEEN

PMS APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal vide Kitui Chief Magistrate's Court Sexual Offence Case No. 56 of 2017
against the Judgement of Hon. M. Kasera that was delivered on 19th May, 2021)*

JUDGMENT

1. PMS the appellant herein was charged with offence of defilement contrary to section 8(3) of the [Sexual Offence Act](#) vide Kitui Chief Magistrate's court Sexual Offence Case Number 56 of 2017. The particulars were that on July 12, 2017 at 06 30 hours at Kalundu Market, Kalundu Sub-Location within Kitui County he intentionally and unlawfully caused his penis to penetrate the vagina of (name withheld) a child aged 8 years.
2. He also faced an alternative but since he was convicted on the Principal Count, this appeal relates to the conviction on the main charge of defilement.
3. A brief summary of the evidence tendered indicates that the complainant, a child aged 8 years left her home early and went to his father's place of business which was a club situated at Kalundu. The child boarded a boda boda and was going to the club ostensibly to collect school fees. On reaching there, she testified that the appellant who was her uncle and an employee in the said club gave her fare but before doing so he defiled her in a room within the club where he used to sleep. The girl further testified that after the ordeal, the appellant told her to dress up and go to school which she did but at school she noticed she was bleeding from her private parts. She stated that she was afraid to inform her teacher and only reported to her mother after 4 PM when she went back home.



4. The complainant's mother called the husband upon receiving the sad news and later in the company of the complainant's father took the child to Kitui Police Station to make a report and later proceeded to hospital where the girl was treated.
5. The evidence of the minor was corroborated by the evidence of her father EM (PW2). He gave an account of what transpired from when he received the report to when he found her daughter and wife crying owing to the trauma of what had happened.
6. Police Constable Judy Wachira (PW3) testified and informed the trial court that she had taken over the investigations from one Police Constable Waluku and tendered medical evidence to wit P3 Form P Ex 2, Treatment Card P Ex 3 and Age Assessment Report P Ex 4.

The Police Officer tendered the medical evidence after the prosecution applied for production of the same by the police officer on the grounds that the medical officer who authored them was deceased.

There are no reasons given why another medical expert could not be summoned to testify but I will get back to that issue shortly.

7. When placed on his defence, the appellant admitted that he used to send a motorbike to go and pick the child from home and on the material date (July 12, 2017) his boss (PW2) called- him and asked him to send a boda boda to pick the child so that she could board a TukTuk at Kalundu to school as was the norm.

The appellant stated that he sent a motorcycle who picked the child and that he paid the rider before the child according to him, proceeded to school.

He testified that at around 5:00PM he was arrested and taken to Police custody. He blamed the Complainant's father that he was trying to extract money from him.

8. The trial court evaluated the evidence and found that the prosecution's case had been proved and the defence allegations of frame up was an afterthought. The appellant was convicted and sentenced to serve 40 years' imprisonment.
9. He was aggrieved and filed this appeal raising the following grounds namely: -
 - i. That he was denied the right to be represented by an advocate assigned by the State given the gravity of the offence.
 - ii. That he was denied a chance to recall and cross examine PW1 and PW2 who had testified when the appellant was unrepresented.
 - iii. That the trial magistrate erred by allowing a Police Officer, who was not a medical expert, to produce medical reports and age assessment thus recanting miscarriage of justice.
 - iv. That the trial court erred by admitting medical evidence from someone who was not an expert and relied entirely on the same as a basis of conviction.
 - v. That the trial court did not properly evaluate the evidence tendered to satisfy herself that the prosecution's case had been proved beyond doubt.
 - vi. That the trial court ignored the existence of a grudge between the appellant and complainant's father.
10. This appeal is not opposed perhaps due to the glaring gaps that the prosecution ignored or overlooked during trial, For the interest of judicial time, I will go straight to the obvious irregularity in the



proceedings where the prosecution for unknown reasons applied that a police officer be allowed to tender medical evidence despite the clarity of provisions of section 48 of the *Evidence Act*.

11. While it is true that section 33 of the *Evidence Act* allows for production of statements or evidence of persons who cannot be found (for reasons of death or any other reason like where a witness cannot be procured without unnecessary expense or delay) the provision has to be read together with provisions of section 48 of the *Evidence Act* particularly where the evidence sought to be tendered relates to expert opinion or evidence.

Section 48 of the *Evidence Act* provides;

“Opinions of experts (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts.”

The trial court fell into error by allowing the prosecution to tender expert evidence through a police officer. The law required that a witness stepping into the shoes of departed witness to tender expert opinion should also have been an expert who was also familiar with the handwriting and signature of the deceased doctor. That way, the medical evidence would have been credible and reliable.

The trial court cited the provisions of sections 124 of *Evidence Act*, but given that the Magistrate who took over the case from another magistrate who took the evidence of PW1, it is not clear how she was able to use the demeanour of the witness to find that she was truthful, credible and reliable.

12. The trial court fell into error when she relied on expert evidence which evidence was not properly tendered in accordance with the law and in the process subjected the appellant to unfair trial contrary to the provisions of article 50 (4) of the *Constitution* of Kenya.
13. The Prosecution in my view bungled their case but the victim had no role in that inadvertence on the part of the prosecution. In the circumstances, this court finds that an Order for retrial will serve the ends of justice.
14. In the premises, for the aforesaid reasons, this appeal is allowed. The conviction and sentence is set aside. I will direct that the appellant be released forthwith unless otherwise lawfully held but he will be escorted to the duty court for a retrial before another magistrate with competent jurisdiction.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

