



**HK v Republic (Criminal Appeal E062 of 2022)
[2022] KEHC 15519 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E062 OF 2022
TW CHERERE, J
NOVEMBER 21, 2022**

BETWEEN

HK APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Tigania Criminal S. O
No. E032 of 2021 by Hon. P.M.Wechuli (SRM) on 29th March, 2022)*

JUDGMENT

1. HK (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). 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. The offences were allegedly committed on March 22, 2020 against BM a child aged 17 years.
2. Complainant stated that she was born on November 17, 2003. It was her evidence that appellant was her boyfriend and that on March 22, 2020, he went to their home and gave her KES. 2,000/- and she agreed to have sexual intercourse with him as a result of which she became pregnant. Her mother did not know about the incident until July 14, 2020 when she learnt that complainant was pregnant. Complainant was examined on July 15, 2020 and a P3 tendered in evidence revealed that she had an old hymenal tear. Complainant's complaint was subsequently reported to police.
3. PC Ndugu investigated the case including sending DNA samples to government analyst whose report confirmed that there was a 99.9 % probability that appellant was the father of the complainant's child.
4. Appellant in his unsworn defence conceded that he was the father of complainant's baby.



5. After considering both the prosecution and defence cases, the learned trial magistrate found the prosecution case proved and on March 29, 2022 convicted and sentenced appellant to serve 10 years' imprisonment
6. Dissatisfied with both the conviction and sentence, appellant lodged the instant Appeal and in the amended grounds raised the following issues:
 - i. The defence under section 8(5) was not availed to him
 - ii. His defence was not considered
 - iii. The time he spent in custody was not considered
7. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] e KLR that:

“It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”
8. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *CWK v Republic* [2015] eKLR).
9. That complainant was born on November 17, 2003 and was 17 years when the offence was committed was demonstrated by complainant's certificate of birth that was tendered in evidence. December 26, 2011 and was therefore 9 years as at the date she was allegedly defiled.
10. That complainant conceived and begot a baby that appellant concedes is his confirms that he engaged in sexual intercourse with the appellant.
11. I have considered whether the defence under section 8(5) and (6) of the Act is available to appellant. The sections provide that:

“(5) It is a defence to a charge under this section if-

 - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - (b) the accused reasonably believed that the child was over the age of eighteen years.
12. The foregoing sections provides a statutory defence. Other than that complainant was appellant's boyfriend, it was not demonstrated that she behaved in a manner that might deceived the appellant that she was over 18 and this defence is therefore unavailable to the appellant.
13. Concerning sentence, section 333(2) of the *Criminal Procedure Code* provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

14. There is evidence that appellant absconded for 11 months after he was granted bail which was a period more than the 4 months he spent in custody.
15. Concerning sentence, the extent that the *Sexual Offences Act* prescribe 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”.
16. From the foregoing analysis, I make the following orders:
 1. The appeal only succeeds on sentence
 2. The 15-year sentence is substituted with a 10-year imprisonment term from the date of conviction and sentence on March 29, 2022.

DELIVERED AT MERU THIS 21ST DAY OF NOVEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)

