



**Hussein v Republic (Criminal Appeal E180 of 2022)  
[2022] KEHC 15505 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15505 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E180 OF 2022  
TW CHERERE, J  
NOVEMBER 21, 2022**

**BETWEEN**

**MOHAMED HUSSEIN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence in Isiolo Criminal  
SO no 33 of 2018 by Hon L K Mutai (CM) on November 16, 2021)*

**JUDGMENT**

**Background**

1. Mohamed Hussein (appellant) was charged defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* no 3 of 2006 (the Act). He also faced an alternative charge of committing an indecently and intentionally contrary to section 11 (1) of the *Sexual Offences Act* no 3 of 2006. The offences were allegedly committed on diverse dates between December 06 to 13, 2018 against LOH a child aged 16 years.
2. Complainant stated that she was 17 years when the offence was committed. She recalled that on December 16, 2018 at about 08.00 pm, appellant who was a *bodaboda* rider went to their home, spent the night and they engaged in sexual intercourse. That the following day, appellant took her to his parent's home in [particulars withheld] and introduced her to his mother as his wife. That they spent three days there and engaged in sexual intercourse. That police in company of her father later found her with appellant and they were both arrested. Her father was on December 06, 2018 informed by his son that complainant had disappeared from home. He reported the matter to police that arrested appellant and complainant on December 15, 2018. It was his evidence that complainant subsequently delivered a baby boy in December, 2019.



3. Complainant was examined on December 17, 2018 and a P3 tendered in evidence revealed that she had an old perforated hymen. PC Nyakundi the investigation officer received appellant and complainant from the arresting officers on December 16, 2018 and escorted them to hospital where complainant was confirmed to have been defiled and her age assessed at 16 years.
4. Appellant in his sworn defence denied the offence. He stated that he married the complainant and was arrested after he failed to pay her father kes 250,000/-.
5. After considering both the prosecution and defence cases, the learned trial magistrate found the prosecution case proved and on November 15, 2021 convicted appellant and on November 16, 2021 sentenced him to serve 15 years' imprisonment

### **Appeal**

6. Dissatisfied with both the conviction and sentence, appellant lodged the instant appeal on grounds that:
  - i. *Voire dire* examination was not conducted
  - ii. The trial magistrate failed to find that complainant deceived appellant that she was of age
  - iii. Defence was not considered
7. The state on the other hand submitted that all the ingredients of defilement had been proved and appellant positively identified as the perpetrator.

### **Analysis and determination**

8. The appeal proceeded by way of written submissions. This being a first Appeal, this court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial court, and give due allowance for that (See *Okeno vs Republic* [1972] E A 32). I have considered the appeal and I shall deal with it as set out herein below.
9. Concerning complainant's age, 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. In *Kaingu Kasomo vs Republic* Criminal Appeal no 504 of 2010 the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”
10. The complainant's age assessment report tendered in evidence confirmed that complainant was 16 years as at December, 2018 when she was allegedly defiled.
11. Regarding penetration, 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.”
12. The P3 form reveals that complainant tendered in evidence reveals that complainant had had an old perforated hymen and the trial magistrate's finding that that an act of penetration had been proved was therefore well founded.



13. Concerning appellant’s culpability, it is a general rule of evidence embodied in section 124 of the Evidence Act that 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 make 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.”

14. Appellant was not a stranger to the complainant a fact conceded by appellant. The incidents allegedly happened over a period of time. In fact, appellant conceded to have married the complainant and the evidence that he defiled complainant was therefore not denied.

15. Complainant was 16 years when she testified and was therefore not a child of tender years and it was therefore not necessary to subject her to *voire dire* examination.

16. Appellant by his defence conceded that he had married the complainant. I have considered whether this is a case where the defense under section 8(5) and (6) of the Act can be implied. 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.

16. The foregoing sections provides a statutory defence. See (*Muoki v Republic*(Criminal Appeal E028 of 2021) [2022] KEHC 10117 (KLR) (18 May 2022) (Judgment)) As it is, the complainant who was 16 years, behaved like an adult and even agreed to marry the appellant. The complainant not only spent a night with appellant at her parent’s home by as stated in her evidence voluntarily went to appellant’s parent’s home where according to her she was introduced to appellant’s mother as appellant’s wife and continued to live with appellant and engage in sexual intercourse with appellant of her own free will. Taking into account the fact that, there is no evidence on record that the appellant knew the actual date of birth of the complainant, in my view, the defence under section 8 (5) of the Sexual Offences Act applies in this case, because the complainant portrayed herself as an adult. The mere evidence that complainant was 16 years did not confirm that she was below 18 years. I will thus allow the appeal only on that account.

17. In the end, I find that the appeal has merit. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that appellant be set at liberty.

**DELIVERED AT MERU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022.**

**T W CHERERE**

**JUDGE**

**Appearances**

**Court assistant - Kinoti**



Accused - Present in person

For the State - Ms Mwaniki (PPC)

