



REPUBLIC OF KENYA



KENYA LAW
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**Idadwa v Director of Public Prosecutions (Criminal Appeal E008 of 2021)
[2022] KEHC 16940 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E008 OF 2021
WM MUSYOKA, J
DECEMBER 23, 2022**

BETWEEN

ALEX IDADWA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(From original conviction and sentence in Mumias Senior Principal
Magistrate's Court Sexual Offences Case No. 43 of 2018 by Hon. T.A
Odera CM on 18th December 2020 and sentence on 25th January 2021)*

JUDGMENT

1. The appellant was charged with and convicted of the offence of defilement, contrary to section 8(1), as read with section 8(3); of the *Sexual Offences Act*, No 3 of 2006. He was sentenced to 20 years imprisonment. The particulars were that the appellant had, on November 17, 2018, within Kakamega County, intentionally penetrated the vagina of EAK, a child aged 14 years. There was also an alternative charge founded on the same facts.
2. Witnesses testified. The appellant was an Administration Police Officer based at [Particulars Withheld] Police Post, while the victim of the offence, PW1, was a child living in the neighbourhood of the police post. PW1 testified that the appellant came to her home, and asked her to go with her. She followed her to his house, and he had sexual intercourse with her. At 10.00pm, PW1's father, PW4, went to the police post with his sons, and reported the case to the officer in charge, PW7. They went to house of the appellant, and knocked at his door, he was found with PW1, and he could not explain what he was doing with her. He was arrested. PW5, the clinician, examined PW1 and found evidence that she had been defiled. Medical evidence established that PW1 was 14 years old at the material time.
3. The trial court found that PW1 was aged 14 at the time of the incident. The court also found that there was sufficient evidence of penetration. He was convicted.



4. The appellant was aggrieved, hence the appeal. The grounds are that there was no evidence to prove the charge, the appellant had not been supplied with statements, the appellant was not given ample time to prepare for trial, the medical evidence was inconclusive, the age of PW1 was not proved, there was no proof of recent penetration, the appellant was not subjected to forensics, and the sentence was excessive.
5. Directions were taken on July 1, 2021, for disposal of the appeal by way of written submissions. Only the appellant filed written submission, dated September 5, 2022. The said submissions centred on failure to be supplied with witness statements, on the fact that the trial was rushed, age of PW1 not determined, and the recorded evidence did not prove the charge.
6. I shall determine the matter based on the written submissions. The first and second issues can be addressed together with the pre-trial disclosure of the evidence that the prosecution was to rely on. That principally would mean witness statements, medical records and all other material that the prosecution intended to rely on. Plea was taken on November 19, 2018. After plea was taken, the prosecution stated that it had supplied the defence with a copy of the charge sheet, but would supply him witness statements and copies of treatment notes on November 22, 2018. The case then proceeded the same day, with the victim, PW1, and her mother, PW2, taking to the witness stand. Clearly, the 2 witnesses testified before the appellant was supplied with witness statements and the treatment notes. He was not represented by an Advocate. Clearly, article 50 of the Constitution was not complied with. The appellant did not benefit from prior disclosure of the State evidence. It cannot be said he was accorded adequate facilities to prepare for the trial. The fact that the victim testified minutes after plea was taken made it worse. There was no time for the appellant to digest the case that faced him, so that he could prepare to confront his accusers. I note that he said that he was ready to proceed, but then he did not have the advantage of legal representation, and he had not been given the evidence at all, and he was not accorded the time to prepare for the trial. The trial was rushed. I agree with Joseph Ndungu Kagiri vs Republic [2016] eKLR(Mativo J), that although the Constitution allows for a speedy trial, the desire to accord an accused person a speedy trial should not be at the expense of frustrating his other constitutional fair trial rights, like access to the State evidence and time to prepare for trial.
7. On the age of the victim, the charge sheet stated that she was 14. PW1 put her own age at 14. Her mother, PW2, said she was born in 2004, which would have made her 14 in 2018. Her father, PW3, put her age at 14 PW4, the clinician, put her age at 14. The P3 form put the age at 15 years. I have not seen the age assessment form in the trial court record, it put the age of victim at 16. The parents of PW1 put her age at 14. They are her parents. They are the best to state when their child was born. The other indication of her age is in the P3 form. That entry put her age at 15, but it was not by a doctor or clinician, but by a police officer. The evidence placed on record regarding the age of PW1 is 14 years old. Am not persuaded that there is uncertainty concerning her age.
8. On whether the offence was proved, I understand the appellant to say that penetration was not proved. The medical treatment notes may not be very useful, for they are designed principally for consumption by medical personnel, and may not be very friendly, in terms of interpretation, by lay persons. However, the P3 form is prepared specifically for court use, and it interprets the treatment notes. At section C, it identifies the offence as defilement of a 14-year-old. On presence of discharge or venereal infections, it indicated that there was whitish colour like discharge oozing from the cervical orifice. It is concluded that there was penile penetration despite her age. Approximate age of the “injuries” is put at one day or 1/7. This material should be taken together with the straightforward testimony by PW1, that she had intercourse with the appellant for 2hours prior to the intervention. She was taken away between 8.00pm and 8.30 pm, and the intervention was at sometime between 10.00pm and 10.30pm, when there was opportunity for the alleged offence to be committed.



9. On the facts, the evidence points to an offence. However, what I have discussed in paragraph 7 undermines the fair trial principles. Article 50 was not adhered to. There was no advance disclosure of the evidence before the critical witnesses testified. The trial happened the same day plea was taken which denied the accused time to prepare for his defence. Clearly, there was a mistrial. The trial was conducted in breach of the *Constitution*, and, therefore, I declare the trial to be a nullity. The appeal is allowed. The conviction of the appellant is accordingly quashed, and the sentence set aside.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
23RD DAY OF DECEMBER 2022**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Mukisu, instructed by Mukisu & Company, Advocates, for the appellant

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

