



**IMW v Republic (Criminal Appeal 60 of 2018)
[2021] KEHC 8008 (KLR) (25 March 2021) (Judgment)**

IMW v Republic [2021] eKLR

Neutral citation: [2021] KEHC 8008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL 60 OF 2018
A MSHILA, J
MARCH 25, 2021**

BETWEEN

IMW APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon.E.Micheka Senior Principal Magistrate, Karatina delivered on 29/11/2018 in S.P.M.Criminal Case No.9 of 2014)

There is no requirement for corroboration of the evidence of victims of sexual offences provided that a trial court is satisfied that the victim is telling the truth

This case discusses whether it is a requirement for there to be corroboration of victims' evidence in sexual offences cases. Further, it discusses the production of documentary medical evidence by a person other than the maker of the same.

Reported by Moses Rotich

Criminal Law – sexual offences – defilement - what were the key ingredients of the offence of defilement - Sexual Offences Act, No. 3 of 2006, sections 8(1) and (2).

Evidence Law – evidence in sexual offences cases - corroboration of a victim's evidence - whether corroboration of a victim's evidence was mandatory in sexual offences cases - Evidence Act, Cap 80, section 124.

Evidence Law – evidence – documentary evidence - production of documentary evidence – whether documentary medical evidence was procedurally admitted where a subject did not object to the production by a person other than the maker.

Brief facts

The appellant (a minor) was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006 (Sexual Offences Act). After trial, the appellant was convicted of the charge of defilement and sentenced to life imprisonment.



Aggrieved by the judgment of the trial court, the appellant filed an appeal challenging both his conviction and sentence. It was the appellant's contention that his identification by recognition was faulty as no first description was given by the victim. Further, the appellant argued that the trial court erred in law and fact in convicting him on evidence of a single witness. The appellant claimed that the prosecution failed to call key witnesses contrary to section 150 of the Criminal Procedure Code, Cap 75 (Criminal Procedure Code).

Issues

- i. What were the key ingredients of the offence of defilement?
- ii. Whether corroboration of a victim's evidence was mandatory in sexual offences cases.
- iii. Whether documentary medical evidence was procedurally admitted where a subject did not object to the production by a person other than the maker.

Held

1. The key ingredients of the offence of defilement that the prosecution ought to establish were identification, age and penetration. There were usually no eye witnesses to incidents of rape and defilement. The proviso to section 124 of the Evidence Act clearly stated that in criminal cases involving a sexual offence, there was no requirement for corroboration of the victim's evidence provided the trial court was satisfied that the victim was telling the truth.
2. The court was satisfied with the accuracy of the complainant's evidence and noted that there were no inconsistencies in the complainant's evidence. The complainant told the truth. The complainant positively recognized and identified the appellant.
3. From the testimonies and documentary medical evidence adduced before the trial court, the injuries on the complainant's genitalia were all consistent with forced penetration. Therefore, the prosecution proved the key element of penetration.
4. Section 143 of the Evidence Act provided that there was no particular number of witnesses that the prosecution ought to call to prove any fact. The record indicated that the prosecution called a total of 5 witnesses in support of its case. In the absence of any provision in law as to the number of witnesses to be called to prove any fact, the prosecution was at liberty to choose the witnesses it required to prove the facts of its case.
5. The appellant raised no objection at the trial when PW4 was called to testify. Further, the appellant did not raise any objection to the production of the medical documents by the person other than the maker. In the absence of any objection by the appellant at trial, the testimony of PW4 and the documentary medical evidence were admitted procedurally by the trial court as the attendance of the doctor could not be procured without unreasonable delay.
6. The trial court record did not reflect that there was an alibi defence raised by the appellant. The defence raised by the appellant was a mere denial and the court was satisfied that such defence did not dislodge the prosecution's case. The trial court was justified in rejecting the appellant's defence.
7. The trial court failed to interrogate the law and particularly section 8(7) of the Sexual Offences Act, section 191 of the Children Act and the principles that dealt with the sentencing of minors who became of age at the conclusion of the trial process.
8. The court took into consideration the gravity of the offence and the psychological and emotional effects the offence had on the complainant. The appellant though a minor when he committed the offence, ought to bear the responsibility of his acts or omissions or lack of proper judgment by serving a custodial sentence. He had attained the age of maturity and he could not be released to the society without assistance and understanding the consequences of his actions.
9. The trial court had applied the wrong principles of law when sentencing the appellant. Considering the circumstances of the instant case, there were good reasons to justify interference with the life sentence imposed on the appellant by the trial court and impose a lawful sentence given the appellant's age when he committed the offence.

Appeal partly allowed.



Orders

- i. *The conviction of the appellant by the trial court was upheld.*
- ii. *The sentence of life imprisonment imposed on the appellant by the trial court was set aside and substituted with a sentence of 7 years imprisonment.*

Citations

Cases

Kenya

1. *GOA v Republic* Criminal Appeal E019 of 2020; [2021] KEHC 3613 (KLR) - (Applied)
2. *Republic v Dennis Kirui Cheruiyot* [2014] eKLR - (Explained)

United Kingdom

R v Turnbull & others [1976] 3 All ER 549 - (Applied)

Statutes

Kenya

1. Children Act (cap 141) section 191- (Interpreted)
2. Criminal Procedure Code (cap 75) sections 150, 169(2) - (Interpreted)
3. Evidence Act (cap 80) sections 33, 77, 124, 143 - (Interpreted)
4. Sexual Offences Act (cap 63A) section 8(1)(2)(7)- (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant IMW, was charged with the offence of defilement a girl contrary to section 8(1) and (2) of the [Sexual Offences Act](#). The particulars of the charge are that on May 14, 2014 at [Particulars withheld] Village in Mathira East Sub-County within Nyeri County, the appellant intentionally caused his member to penetrate that of FWM a child aged 5 years.
2. The alternative charge was the offence of Indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#); the particulars are that on the above date he appellant intentionally touched the private parts of FWM a child aged 5 years.
3. After the trial, the appellant was found guilty and was convicted on the main charge and was sentenced to life imprisonment.
4. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal and listed four (4) grounds of appeal which are summarized *inter alia*;
 - i. section 124 of the [Evidence](#) was not complied with; there was danger in relying on the evidence of a single witness; penetration was doubtful; section 124, 33 and 77 of the [Evidence Act](#) were not complied with;
 - ii. Identification by recognition was faulty as no first description was given by the victim;
 - iii. Key witnesses were not summoned in compliance with section 150 of the [Criminal Procedure Code](#)
 - iv. The trial court disregarded the appellants defence which was not displaced by the prosecution evidence; and; section 169(2) was not complied with;



5. At the hearing hereof the appellant was unrepresented and relied on his written submissions; whereas Ms. Gicheha represented the State and responded by making oral submissions; hereunder is a summary of rival submissions made;

appellant's Case

6. The complainant testified that '*the boy alifanya tabia mbaya*'; it was not clear from the statement what bad things were done to her; ; that there were a myriad of bad things that the appellant could have done which may not necessarily amount to the offence he was charged with she also stated that 'the person did for me bad manners with his thing, *kitu Yake ya kukujoa*'; it must be clearly expressed that the *genitalia* of the offender was partially or completely inserted into that of the victim; the complainants evidence did not shed any light on the manner of defilement; penetration ought to have been proved in accordance with the *Sexual Offences Act*;
7. Even the doctors (PW4) testimony raised doubt as the doctor stated that there were no external injuries on the external *genitalia*; PW1 being a minor of 5 years would have suffered injuries if there was penetration by a 16 year old appellant; her hymen could have been ruptured by any other cause apart from defilement;
8. The appellant was not properly identified; the minor did not provide any description of her assailant to her mother; a lady who was with the mother when the minor identified the appellant was not called to testify;
9. The appellant gave a sworn statement of defence but it was rejected by the trial court with no reasons given as required by section 169(2) of the *Criminal Procedure Code*; neither was his mitigation considered;
10. The appellant urged the court to allow the appeal and to set aside the sentence and set him at liberty.

Respondent's Case

11. In response counsel for the respondent relied on section 124 of the *Evidence Act* does not require corroboration of the victims evidence provided the trial court believes that she is telling the truth; the child was consistent in her testimony; she explained what had transpired and pointed the appellant when coming from school and cringed and hid behind her mother upon seeing the appellant; and had told her mother that he had a red cap which he wore backwards; and in court she became emotional upon seeing the appellant;
12. Her testimony was the appellant tricked her that he would pluck loquats for her but instead led into a coffee plantation and did '*tabiambaya*' with his '*kitu ya kukujoa*;'
13. When interrogated by the mother the appellant confirmed that he had been with the minor at the scene with her; penetration was proved *vide* the P3Form and PRC that was produced by Doctor Kamuti in compliance with section 33 as read with section 77 of the *Evidence Act* and confirmed having worked with the Doctor who examined the minor; the appellant raised no objection to its production by the person other than the maker;
14. The doctor testified that the external genitalia had bruises, with redness and swelling and a tearing the posterior region; the hymen was not only ruptured but also ruptured in a manner consistent with forced penetration;



15. The trial court complied with sections 150 and 169 of the *Criminal Procedure Code* in its judgment; the background of the case, the issues, findings and reasons were outlined and findings based on evidence tendered;
16. The appellant only gave a short defence statement stating he had been framed and innocent; the defence was properly rejected;
17. In conclusion counsel prayed that the appeal be dismissed for lack of merit; and the trial court's conviction and sentence be upheld.

Issues for Determination;

18. After taking into consideration the submissions of both the appellant and respondent this court has framed the following issues for determination;
 - i. Whether the prosecution proved its case to the desired threshold;
 - ii. Whether the prosecution failed to call crucial witnesses;
 - iii. Whether the testimony of PW4 and the medical documentary evidence were admitted procedurally;
 - iv. Whether the trial court erred in disregarding the appellant's defence;
 - v. Whether the trial court in its judgment failed to comply with the provisions of section 169(2) of the *Criminal Procedure Code*;
 - vi. Whether the trial court imposed an illegal sentence on a minor;

Analysis

19. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified.

Whether the prosecution proved its case to the desired threshold;

20. The key ingredients of the offence of defilement that prosecution must prove are identification, age and penetration; case law referred to *GOA vs Republic* [2018] eKLR.
21. On identification the appellant contends that the complainant failed to give a description of the assailant when the matter was first reported and that he was randomly arrested by the police; that there were no eye witnesses to the incident and the only evidence on identification of the appellant was that of a single identifying witness; and that it was questionable as to whether the complainant positively identified her assailant;
22. The trial court found the child was consistent in her testimony; she explained what had transpired on that material date when coming from school and pointed out the appellant to her mother and cringed and hid behind her mother upon seeing the appellant; in the court room during the trial, the trial court noted that the minor became emotional upon seeing the appellant;
23. The appellant upon interrogation by the mother confirmed being with the child on that material day and even confirmed having picked loquat fruits for her; together with the evidence of the red hat the trial court made a finding on the accuracy of the complainant's evidence and made a finding that the appellant was positively identified by the complainant by way of recognition;



24. This court notes that the incident is said to have taken place when the minor was coming from school; school is known to break during the late afternoon which means that the conditions for identification of the appellant were favourable and enabled the minor to see the appellant; they also spent some time together plucking the fruits; caselaw *R vs Turnbull & Others* [1976] 3 All ER 549;
25. This court observes that there are usually never any eye witnesses to incidents of rape and defilement; and further the proviso to section 124 of the *Evidence Act* clearly states in criminal cases involving a sexual offence there is no requirement for corroboration of the victim's evidence provided the trial court was satisfied that the victim was telling the truth; from the recorded proceedings this court is satisfied with the accuracy of the minor's evidence and notes that there were no inconsistencies in her evidence and is also satisfied that the minor told the truth;
26. Having re-examined the evidence on identification this court finds no good reason to interfere with the trial court's finding that the minor '.....recognized him as the person who had defiled her....'; and is satisfied that the complainant positively recognized and identified the appellant.
27. On the age of the complainant is indicated on the Charge Sheet as being five (5) years; PW1 the mother stated that the complainant was born on March 25, 2009; this was corroborated by the Investigating Officer (PW5) who produced the Birth Certificate which was marked as 'PExh.1';
28. This court finds no reason to interfere with the trial court's finding that at the time the incident occurred the complainant was aged five (5) years.
29. On penetration; penetration is defined under the provisions of section 2 of the Act and it reads as follows;

“penetration” Means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
30. The testimony of the minor was that the appellant tricked her that he would pluck loquats for her but instead led into a coffee plantation and 'alifanya tabia mbaya' with his 'kitu yakukojoa'; the minor when stating this pointed to her private parts and became emotional and started shaking which indicates the veracity of her testimony and how the ordeal affected her emotionally;
31. The mother PW1 stated that she found blood on the complainants' private parts; this evidence on the state of the complainants' private parts was corroborated by the testimony of PW4; who stated that the external genitalia had bruises, redness and swelling; there was a tear in the posterior region with blood in her private parts; the hymen was not only broken but ruptured; this evidence was also supported with the documentary medical evidence in the form of the P3Form and the PRC produced by PW4.
32. From the testimonies and the documentary medical evidence this court is satisfied that the injuries were all consistent with forced penetration; and finds that the prosecution proved the key element of penetration;

Whether the prosecution failed to call crucial witnesses;

33. It was the appellant's contention that the prosecution failed to call crucial witnesses; the crucial witness not called to testify being a lady known as Mama K who was with the mother when the minor identified the appellant;
34. section 143 of the *Evidence Act* stipulates that there is no particular number of witnesses that must be called to prove any fact; the record reflects that prosecution called a total of five (5) witnesses in support of its case; and in the absence of any such provisions in law as to the number of witnesses to be called



to prove any fact, the prosecution was at liberty to choose the witnesses it required to prove the facts of its case;

35. This court's considered view is that the failure by the prosecution to call Mama K may have been due to the fact that her evidence was of no probative value as she was not an eye witness to the events of the material date when the offence was committed;
36. This ground of appeal is found lacking in merit and it is hereby disallowed;

Whether the testimony of PW4 and the documentary medical evidence were admitted procedurally;

37. The P3 Form and PRC were produced by Doctor Kamuti (PW4) under the provisions of section 33 as read with section 77 of the *Evidence Act*; the witness confirmed having worked for 2 ½ years with the Doctor who examined the minor; and was conversant with the writing and signature of this doctor who it was stated had left employment with the hospital and could not have been procured without delay;
38. Upon perusal of the court record this court notes that the appellant raised no objection at the trial when PW4 was called to testify and also raised no objection to the production of the medical documents by the person other than the maker;
39. In the absence of any objection by the appellant at trial this court is satisfied that the testimony of PW4 and the documentary medical evidence were admitted procedurally by the trial court as the attendance of the doctor could not have been procured without an amount of delay.
40. This ground of appeal is disallowed as it is found to be lacking in merit.

Whether the trial court erred in disregarding the appellants defence;

41. The court record reflects that the appellant gave a short statement of defence under oath in which he denied having committed the offence and stated that he had been framed by the complainant's mother and that he was innocent; This court notes that the appellant did not Cross-examine PW1 on the issue of being framed by her; Therefore this line of defence is deemed to be an after thought.
42. The trial court considered the appellants defence and gave the reasons for its rejection as follows;

“The accused in his defence denied having defiled the complainant He says that the charges were framed; He confirmed having met the complainant with her mother on May 21, 2014 and the complainant having identified him cringed. I find the accused person's defence to be untruthful. In the end I have no doubt whatsoever that the accused did indeed defile the complainant on the material day.....”

43. Firstly, this court notes that the court record does not reflect that there was an alibi defence raised as submitted by the appellant; Secondly this court notes that the defence raised was a mere denial and is satisfied that it did not dislodge the prosecution's case; and this court is satisfied that the trial court was justified in having rejected the appellants defence;
44. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court in its judgment failed to comply with the provisions of section 169(2) of the Criminal Procedure Code;

45. The appellant contends that the trial court did not analyze the adduced evidence as it was duty bound to do and had failed to comply with section 169(2) of the *Criminal Procedure Code* in its judgment;



46. Upon perusal of the judgment this court notes that the trial court set out the factual background of the case, laid out three (3) issues for determination and gave reasons for each of the findings based on the evidence that was tendered;
47. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the trial court imposed an illegal sentence on a minor;

48. At the time of taking Plea the court record reflects that the trial court took into consideration the age of the appellant and noted that he was a minor aged 16 years at the time the incident occurred and then ordered that he be remanded at the Ruringu Children’s Home during the pendency of the trial;
49. But upon meting out the sentence the record reflects that the trial court apparently forgot to address this fact and sentenced him as an adult by giving him life imprisonment; at the hearing of the appeal this court requested the appellants mother to avail a copy of the appellants Birth Certificate which was availed and it indicated that the appellant was born on August 28, 1999; this satisfied the court that the appellant was indeed a minor at the time when the offence was committed;
50. This court reiterates that the trial court failed to interrogate the law in particular section 8(7) of the *Sexual Offences Act*, section 191 of the *Children Act* and the principles that deal with the sentencing of minors who becomes of age at the conclusion of the trial process; the principles were captured in the case of *R vs Dennis KiruiCheruiyot* [2014] eKLR where in the Court of Appeal held as follows;

‘Whatever the case, life imprisonment is not provided for under the Children Act but when dealing with an offender who has attained 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment from the date of conviction.’
51. This court has interrogated the relevant provisions of the law and is guided by the above authority which deals with the sentencing of minors who become of age at the conclusion of the trial process; this court has taken into consideration the gravity of the offence and the psychological and emotional effect the offence has had on the complainant; the appellant though a minor when he committed the offence needs to bear the responsibility of his acts or omissions or lack of judgment by serving a custodial sentence; he is now an adult and this court is of the view that he cannot be released to society without assistance in understanding the consequences of his actions;
52. This court is satisfied that the trial court applied wrong principles of law when sentencing the minor; and considering the circumstances of this instant case there are good reasons to justify interference with the life sentence imposed by the trial court;and a lawful sentence be imposed given the appellants age when he committed the offence.

Findings & Determination

53. In the light of the forgoing this court makes the following findings and determination;
 - i. The prosecution is found to have proved its case to the desired threshold;
 - ii. The prosecution is found to have called the witnesses it deemed as crucial witnesses to prove its case;



- iii. The testimony of PW4 and the medical documentary evidence are found to have been admitted and produced procedurally;
- iv. The trial court in its judgment is found to have complied with the provisions of section 169(2) of the *Criminal Procedure Code*;
- v. The trial court is found to have considered the appellants defence and gave good reasons for rejecting it;
- vi. The conviction is found to be safe and it is hereby upheld;
- vii. The appeal is found to be partially meritorious only on the issue of sentence; the trial court is found to have erred in sentencing the appellant without considering his age at the time of commission of the offence; the sentence of life imprisonment is hereby set aside and substituted with a sentence of seven (7) years imprisonment to commence from the date of conviction;

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 25TH DAY OF MARCH, 2021

HON.A.MSHILA

JUDGE

