



**JMM v Republic (Criminal Appeal 155 of 2017)  
[2020] KEHC 463 (KLR) (17 December 2020) (Judgment)**

*JMM v Republic [2020] eKLR*

Neutral citation: [2020] KEHC 463 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU**

**CRIMINAL APPEAL 155 OF 2017**

**CM KARIUKI, J**

**DECEMBER 17, 2020**

**BETWEEN**

**JMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**Charging a male child with the offence of defilement of a female child amounted to discrimination on the basis of sex.**

*The decision dealt the criminality of sexual acts between minors. It evaluated whether there was discrimination by the prosecution in preferring charges of defilement against a male child for engaging in sexual acts with a female child.*

Reported by Moses Rotich

**Constitutional Law** - Bill of Rights - rights of a child - right to a fair trial - the principle of the best interests of a child - where the appellant (a minor) was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act - where the appellant was not accorded legal representation during trial - whether failure by the trial court to accord a minor legal representation during trial violated their right to a fair trial Constitution, articles 50(2)(b) and 53(2); Children Act, No 8 of 2001, sections 77 and 186 (b).

**Constitutional Law** - Bill of Rights - right to equality and freedom from discrimination-where the prosecution in preferring charges of defilement against the appellant who was a minor, discriminated the appellant on the basis of sex - both the appellant and the complainant were minors at the time of commission of the offence - where the complainant was older than the appellant by 1 year and 4 months-whether in preferring charges of defilement against the appellant, who was a male child the prosecution unlawfully discriminated against the appellant on the basis of sex - Constitution, article 27(4); United Nations Convention on the Rights of a Child, article 2 (5).

**Children Law** - rights of a child - guarantees to a child accused of an offence - where the trial court described the appellant who was a minor as an accused instead of a subject contrary the Children Act - where the trial of the appellant, who was a minor, was conducted in open court thereby violating the right of the appellant to privacy



*guaranteed by the Children Act-where the appellant was not provided with legal representation despite the fact that he was facing a serious charge of defilement - what were the rights guaranteed to a child and whether the court observed them during trial - Children Act, No 8 of 2001, sections 186 and 189.*

### **Brief facts**

The appellant, a minor, was charged with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act, cap 63A. Following the trial, the appellant was found guilty and sentenced to 15 years' imprisonment. Aggrieved by this outcome, the appellant filed the instant appeal challenging both the conviction and sentence.

The appellant argued that the trial court erred in law and fact by rejecting the complainant's application to withdraw the charges. Additionally, the appellant contended that the trial court failed to treat him as a minor throughout the proceedings, thereby violating his rights as a minor in conflict with the law. He further asserted that the trial court failed to consider that both he and the complainant were minors, with the complainant being slightly older, and that they were both children in need of guidance and counseling. The appellant claimed that charging him alone amounted to discrimination.

### **Issues**

- i. Whether failure by the trial court to accord a minor legal representation violated the child's right to a fair trial.
- ii. Whether in preferring charges of defilement against the appellant, who was a male child, the prosecution unlawfully discriminated against the appellant on the basis of sex.
- iii. What were the rights guaranteed to a child and whether the court observed them during trial.

### **Held**

1. The proceedings before the trial court did not indicate whether before the appellant's release on bond, there was an order for the appellant to be detained at a police station as required of minors in conflict with the law. After it was brought to the trial court's attention that the appellant was 16 years old, the trial court did not make any inquiry as to the age of the appellant as required by section 143(1) of the Children Act, 2001 (Children Act).
2. The appellant was throughout the trial proceedings treated as an adult and strict provisions of the law which guaranteed protection of a child in conflict with the law were overlooked. The appellant was denied the right to a fair trial as his rights such as the right to legal representation given the gravity of the offence that the appellant was facing were not observed.
3. The trial court record did not indicate that the proceedings were conducted in camera and as such the trial of the appellant in open court violated his right to privacy as provided for under section 186 (g) of the Children Act. The violations of the appellant's rights by the trial court were gross and infringed on the appellant's right to a fair trial. The conviction of the appellant resulting from the proceedings before the trial court was, thus, a nullity.
4. The appellant's age was confirmed through a birth certificate. The birth certificate placed the appellant at the age of 16 years and 3 months at the time of the commission of the offence. The complainant was older than the appellant by 1 year and 4 months.
5. The complainant voluntarily escorted herself to the appellant's house where she stayed overnight. According to the complainant's evidence, she was not forced into sex and they had sex twice with the appellant. It followed that the complainant could as well have defiled the appellant. In the complainant's examination in-chief, she stated that she had pleasure from the act and which could be interpreted to mean that the complainant indeed enjoyed herself.
6. The appellant and the complainant were arrested and the boy child was discriminated against and arraigned in court to face charges of defilement. The girl child on the other hand, was treated as a victim and a complainant. The complainant had no complains at all to whatever happened between her and the appellant. The complainant's mother and the police were more or less the aggrieved parties. The



- complainant's request to withdraw the matter, which request was consented to by the prosecution was denied by the trial court.
7. Article 27 of the Constitution guaranteed the right from discrimination by the state either directly or indirectly against any person on any ground including sex. Protection of a child from discrimination on the ground of sex was provided for under article 2 (5) of the United Nations Convention on the Rights of a Child. It was apparent that the appellant was discriminated against on the basis of sex and as such the conviction could not stand.
  8. The words conviction and sentence were used by the trial court in relation to the appellant contrary to mandatory provisions of section 189 of the Children Act. The appellant had been in prison for more than 4 years. However, the complainant who admitted to having had pleasure from the act that drove the appellant to prison was out there enjoying her life. The violations of the appellant's rights vitiated the trial court's conviction and sentence. Therefore, the appellant had been serving an invalid sentence.

*Appeal allowed.*

#### **Orders**

- i. *The conviction of the appellant by the trial court was quashed.*
- ii. *The sentence of 15 years meted on the appellant by the trial court was set aside.*
- iii. *The appellant was set at liberty unless otherwise lawfully held.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Amoah, Simon v Republic* Criminal Appeal 171 of 2009 — (Applied)
2. *Charo, Martin v Republic* Criminal Appeal 32 of 2015; [2016] KEHC 5619 (KLR) — (Applied)
3. *GO v Republic* Criminal Appeal 155 of 2016; [2017] KEHC 6758 (KLR); [2017] eKLR — (Applied)
4. *JMG v Republic* Criminal Appeal 227 of 2010; [2016] KEHC 2021 (KLR) — (Applied)
5. *POO (A Minor) v Director of Public Prosecutions & another* (Constitutional Petition 1 of 2017; [2017] KEHC 8341 (KLR) — (Applied)

##### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 2(5); 27 — (Interpreted)
2. Children Act (cap 141) sections 143; 186(g); 190; part XIII — (Interpreted)
3. Criminal Procedure Code (cap 75) section 87(a) — Interpreted
4. Sexual Offences Act (cap 63A) sections 8(1); 8(4); 40 — (Interpreted)

##### **Instruments**

Convention on the Rights of the Child (CRC), 1989 article 2(5)

##### **Advocates**

*W Muriithi* for the appellant.

*Rugut* for the respondent.

## **JUDGMENT**

1. The appellant was charged with offence of defilement contrary to section 8(1) as read with section 8(4) [Sexual Offences Act](#) No 3 of 2006.
2. Particulars being that on January 17, 2015at [particulars withheld] Trading Centre within Laikipia County internationally caused his penis to penetrate the genital organ namely vagina of GWM a girl aged 17 years. Pled not guilty and matter went into trial.



3. The appellant was found guilty and was sentenced to serve 15 years imprisonment being aggrieved. The appellant has lodged appeal namely;
  - I. That the learned trial magistrate erred in law and in fact in rejecting the complainant's application to withdraw the charges against the appellant.
  - II. That the learned trial magistrate erred in law and in fact in failing to treat the appellant as a minor throughout the proceedings and for violating his right as a minor in conflict with the law.
  - III. That the learned trial magistrate erred in law and in fact in failing to find that the complainant who was aged 17 ½ years old behaved like an adult and she deceived the appellant in believing that she was an adult.
  - IV. That the learned trial magistrate erred in law and in fact in failing that both the appellant and the complainant were minors and the complainant slightly older than the appellant and they both needed guidance and counseling and charging the appellant alone amount to discrimination.
  - V. That the learned trial magistrate erred in law and in fact finding that the medical evidence on record supported a case of defilement.
  - VI. That the learned trial magistrate erred in law and in fact in sentencing the Appellant who was charged while aged 16 years 10 months old like an adult.
  - VII. That the learned trial magistrate erred in law and in fact in failing to request for a pre-sentencing report on the appellant before sentencing him.
  - VIII. That the learned trial magistrate erred in law and in fact in sentencing the appellant to fifteen years in prison.
4. The state has conceded the appeal as the trial court argued the fact that the appellant was a minor and continued to try him as an adult and in fact convicted and sentenced him to serve 15 years imprisonment contrary to the law.
5. The appellant via his counsel has did file and served submissions to canvass the appeal.
6. After going through the proceedings and the submissions on record, I find the issues are; whether the trial violated constitutional, legal and procedural provisions thus a nullity? If above in negative, was case proved beyond reasonable doubt? and was sentence meted out legal?
7. The court observes from the record that, when the matter came up for hearing on April 23, 2015 the state through the Office of the Director of Public Prosecution informed the Honourable Court that they had instructions to withdraw the matter under section 87(a) of the Criminal Procedure Code and as read with section 40 of the SOA for reasons that there was no sufficient evidence in the matter and the complainant had approached their office and even written a letter requesting to withdraw the matter.
8. The application was denied by the court and the matter was ordered to proceed for full hearing.
9. The prosecution called a total of 5 witnesses and the appellant was put on his defence on the April 8, 2016.
10. The appellant gave sworn evidence and vide a judgment delivered on the May 18, 2016, the appellant was convicted of the main count of defilement and sentenced to serve 15 years imprisonment.
11. Leave to appeal out of time was granted on June 4, 2020.



12. The appellant was accused of defiling a girl aged 17 years on the January 17, 2015. when the matter came up for hearing on the April 23, 2015 the court was informed by the prosecution that the appellant was aged 16 years old.
13. The court had previously treated the appellant as an adult as discerned from the proceedings of January 19, 2015 when plea was taken, January 23, 2015, January 27, 2015, February 5, 2015, and April 23, 2015 where the appellant was described as an accused instead of a subject in the proceedings.
14. The proceedings do not indicate that prior to his release on bond, there was an order for the appellant to be detained at a police station as required of minors on conflict with the law
15. After it was brought to the court's attention that the appellant was 16 years old, the trial court did not make any inquiry as to the age of the appellant as required of it under section 143 (1) of the *Children Act*.
16. The appellant was thereafter treated as an adult and strict provisions of the law which guarantees protection of a child in conflict of the law were overlooked through the trial. The provisions found in part XIII of the *Children act* were not complied with and the appellant was thus denied a fair trial as such rights as the right to legal representation given the gravity of the offence that the appellant was facing were not observed.
17. The typed proceedings do not indicate that the proceedings were conducted in camera thus the trial in open court violated the appellant's right to privacy as provided for under section 186(g) of the *Children Act*.
18. The violations were gross and they infringed the appellant's right to a fair trial and thus the conviction thereof *ipso facto* is a nullity. In the case of *JMG v R* High Court of Kenya At Nyeri Criminal Appeal No 227 of 2010 where similar violations were raised on appeal the court held:-
 

“In the face of these violations of the law, it is not difficult to conclude that the trial of the appellant was invalid, it was a mistrial at the very least and in such circumstances the appellant's conviction cannot be sustained.”
19. The appellant's age was indeed confirmed through a birth certificate which was supplied to the trial court. (see page 35 of the Record of Appeal.)
20. The birth certificate indicates that the Appellant was born on the November 2, 1998 which places his age at 16 years 3 months at the time of commission of the alleged offence. The complainant was older than him by 1 year 4 months. The question that arises from this evidence is, who between the two committed defilement?
21. The complainant voluntarily escorted herself to the appellant's house where she stayed overnight and they had sex according to her evidence. She was not forced into sex and they indeed did it twice.
22. The complainant could as well have defiled the appellant. In her Exam in Chief page 13 lines 18 of the Record of Appeal, she stated that she had pleasure from the act which can be interpreted to mean that she indeed enjoyed herself.
23. The two were arrested in the morning and the boy child was discriminated against and arraigned in court to face charges of defilement whereas the girl child was treated as a victim and complainant.
24. The complainant had no complains at all to whatever happened in the night of January 17, 2015 and her mother and the police were more or less the aggrieved parties and the complainant's request to



withdraw the matter and which request was consented to by the Office of the Director of Public Prosecution was denied by the court.

25. In the case of *POO (a minor) v DPP & Ano.* (2017)eKLR , the court had this to say faced with a similar case:-

“Does a boy under 18 years have the legal capacity to consent to sex “Haven’t” both children defiled themselves” shouldn’t both then be charged or better said shouldn’t the Children’s Officer be involved and preferably a file for a Child in need of care and protection ought to be opened for both of them.”

26. Article 27 of the *Constitution of Kenya* guarantees the right from discrimination by the state either directly or indirectly against any person on any ground including sex. Protection of a child from discrimination on the ground of sex is provided for under article 2(5) of the *United Nations Convention of the Rights of the Child.*

27. Thus it is apparent that the appellant was discriminated against on the basis of sex and the conviction cannot stand.

28. A similar position was arrived at in the case of *Martin Charo v R* High Court At Malindi Criminal Appeal No 32 of 2015.

29. The sentence contravenes section 190 of the *Children Act* which provides that: - No Child shall be ordered to imprisonment or to be placed in a detention camp.

30. The words conviction and sentence were used by the trial Court in relation to the appellant contrary to mandatory provisions of section 189 of the Children Act.

31. In the case of *GO v R* High Court At Siaya Criminal Appeal No 155 of 2016, the court held that:-

“In the instant case, I find that at time of the commission of the offence, both the appellant and the complainant were minors; I find indeed the complainant was senior to the appellant and the blame should not have been wholly shifted to the appellant but should have been apportioned against both the complaint and the appellant, and both being minors, they need protecting against harmful sexual activities and none should have been sent to prison.”

32. The appellant was sentenced on the May 19, 2016 and he has been in prison for more than 4 years now whereas the complainant who admitted to having had pleasure from the act that drove the appellant to prison is out there enjoying her life.

33. In the Court of Appeal decision of *Simon Amoah v R* COA At Kisumu Criminal Appeal No 171 of 2009 where court faced with similar facts the Court held that:-

“Because of his present age, we cannot, for instance, send him to a Borstal institution. Apparently he was in prison custody throughout his trial. That means that he has been in prison for over four years. In our view, that is sufficient punishment taking into account the circumstances of his case”.

34. Even without looking at other grounds, the finds that the violations noted above vitiates the trial court conviction and sentence. Thus taking to account the appellant has been serving an invalid sentence since conviction, I make the following orders ;

- (i) The conviction is quashed and the sentence set aside.



(ii) The appellant shall be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 17<sup>TH</sup> DAY OF DECEMBER, 2020.**

**CHARLES KARIUKI**

**JUDGE**

Present:-

W. Muriithi for Appellant

Rugut for Respondent

