



**MI v Republic (Criminal Appeal E071 of 2022)
[2024] KEHC 1072 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E071 OF 2022
A. ONG'INJO, J
FEBRUARY 8, 2024**

BETWEEN

MI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. D. Odhiambo (SRM) in Shanzu Senior Principal Magistrates Court Sexual Offence Case No. E060 of 2021 delivered on 31st August 2022)

JUDGMENT

Background

1. MI, the Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Particulars of the offence were that on the 5th day of March 2021 at [Particulars withheld] Area in Kisauni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of PM a girl child aged 13 years.
3. In the alternative, the Appellant was charged with an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006 in that on the same day and place, he intentionally and unlawfully touched the vagina of PM a girl child aged 13 years.
4. The Appellant was convicted of the offence of defilement under Section 215 of the Criminal Procedure Code and sentenced to serve 20 years imprisonment.
5. Aggrieved by the conviction and sentence, he preferred the appeal herein on the following amended grounds of appeal that were filed together with submissions:



1. That the learned trial court magistrate erred in law and fact by failing to find that the age of the complainant which is one of the vital elements of the charge of defilement was not proved by the documentary evidence.
2. That the learned trial court magistrate erred in law and fact by failing to find that the medical examination report P3 Form does not support the complainant's allegations of defilement.
3. That the learned trial court magistrate erred in law and fact by failing to find that the doctor PW3 who produced the P3 Form before the trial court was not familiar with the handwriting and the signature of the medical officer who examined PW1 and later on filled the P3 Form.
4. That the learned trial court magistrate erred in law by relying on the evidence of PW1 who did not voluntarily give evidence but was coerced to say so by PW2, her mother, because of the grudge that existed and that there was no nexus between what happened to her and the appellant.
5. That the learned trial court magistrate erred in law and fact by failing to find that there was no any police officer who came to testify in the trial court to corroborate the complainant's claim of defilement.
6. That the learned trial court magistrate erred in law and fact by discounting and not considering in detail the defence evidence.
7. That the learned trial court magistrate erred in law and fact by not considering the appellant's mitigation.
8. That the learned trial court magistrate erred in law and fact by giving a harsh and excessive mandatory minimum sentence.
9. That the learned trial court magistrate erred in law and fact by failing to consider the time spent in remand custody as provided under Section 333(2) of the Criminal Procedure Code.

Prosecution's Case

6. PW1, PM the complainant testified that she was 16 years old and she lived with her mother, brother and step father who is the appellant herein. She said that they lived in a single room divided by curtains and that while she slept on the floor, her father and mother slept on the bed. She said that her mother was working while her father was not. PW1 testified that her mother would go to work at 6.00 am and she would remain with her father in the house. That her father used to sleep with her when her mother was not around and that he would go to where she was sleeping and start touching her all over the body. That he would then remove her clothes and also his and defile her, and that she felt pain. The complainant said that he did it several times and that at first she did not tell anyone because the appellant said he would kill her. That after several times, she told her mother about it. That they went to the chief then proceeded to the police station. That she was then taken to hospital and given medication. She identified the perpetrator as the accused in court.
7. PW2, the mother of the complainant said that she stayed with her two children and with the appellant. That the appellant did not have a job and would stay in the house. That the appellant used to frustrate the children and would lock them out of the house. That the complainant told her that the appellant had defiled her and that PW2 reported to the chief and they were sent to Bamburi. That she took the complainant to hospital and the doctor confirmed that she had been defiled. PW2 identified the perpetrator as the accused in court.



8. PW3, Dr. Gabriel Mngola from Coast General Hospital said that he had a P3 Form for the complainant aged 15 years and that the incident happened on 15.3. 2021. That the complainant reported having been defiled by someone known to her and that she had changed clothes by the time she went to hospital. That the complainant reported having been defiled by a stepfather several times and that he inserted his penis into her vagina. PW3 said that a blunt object was used, most likely a human penis and that she was put on PEP and STI medication. He said that the degree of injury was harm and that the outer genitalia was normal but the hymen was broken. PW3 produced the P3 Form as Exhibit 1. He said that he also had a PRC Form filled on 7.4.2021. That the incident happened in their house and that she reported that her stepfather had been inserting his penis into her vagina. The hymen was broken with a scar although the outer genitalia was normal. He produced the PRC Form as Exhibit 2.

Defence Case

9. The appellant was placed on defence and he gave sworn testimony and said that he had a relationship with the complainant's mother and that they stayed in Bamburi but within 3 months, they started arguing in the house and they went to the chief at Kero Court. The appellant said that the complainant's mother then chased him from the house on 2.3.2021 and that he went to stay with Morine whom he had a child with. That the complainant's mother then followed him and asked him to get back with her. That after one month, she accused him of defiling the child. That the child said she was defiled many times but it is not true. He said that the PRC Form should not be believed as it had no stamp from the hospital, that the date of birth of the child could not be established, that the child could not say why she was not able to scream yet her mouth was not blocked, and that he was detained at the police station for three days without being taken to court.

Appellant's Submissions

10. The Appellant filed his submissions and argued that the prosecution made no effort to provide the trial court with proof of the complainant's age. That both the complainant and her mother in their evidence stated that the complainant was 16 years old but the charge sheet gave the complainant's age as 13 years. He stated that not a shred of documentary evidence was adduced by the prosecution to prove the age of the complainant when elements of offences under the [Sexual Offences Act](#) must be proved by the prosecution to the required standards.
11. The appellant cited the case of Robert Mataya Kodi v Republic, HCCCR App. No. 336 of 2008 at Mombasa where it was held that: -

“In cases of defilement under Section 8 of the [Sexual Offences Act](#), it is essential that the age of the child be ascertained as this age will inform not only which provision the charge will be brought under but also what minimum mandatory sentence will apply upon conviction of such a charge. A mere casual statement that the victim is this or that age will not suffice. Proof of age must be provided. Such proof would include a birth certificate, a baptismal card, health vaccination card, school records or any other document which states the year of birth of the victim. Failure to adduce such evidence means that one vital element of the charge remains unproved thus in such circumstances a conviction would be unjustified.”
12. The appellant contended that the second issue relates to whether the prosecution proved beyond reasonable doubt that PW1 was indeed defiled by the appellant. The appellant relied on the case of Jacob Odhiambo Omuombo v Republic, Cr. App. No. 80 of 2008 (Kisumu) that penetration is a key ingredient of the offence of defilement and must be satisfactorily proved. He stated that he does not think the medical evidence on record really established that PW1 was defiled. That the P3 Form



at section B (2) on appropriate age of the injury shows that the complainant had no physical injuries on any part of her body and that there was no evidence of defilement. That the complainant was also examined by a medical officer who never testified. That PW3 merely produced the P3 Form and he was not conversant with the signature and handwriting of the maker. That PW3 never claimed to have worked with the doctor who filled the P3 Form.

13. The appellant cited the case of Arthur Mshila Manga v Republic, Criminal Appeal No. 24 of 2014 at Mombasa where it was held that: -

“Another patently erroneous statement by the trial court, which the first appellate court ought not to have missed if it had indeed subjected the evidence to fresh and exhaustive examination, was the conclusion that PW3 was the clinical officer who completed the P3 form that established that JM had been defiled. We have already stated that the P3 form had no such conclusion. But secondly it was not even filled by PW3 as the trial court claimed. Jenliza is the one who examined JM and filled the P3 form, with PW3 merely produced it in evidence in the absence, on study leave, of the maker whose signature he was conversant with.”

14. The appellant submitted that the doctor who filled the P3 Form never expressed any opinion that the complainant had been defiled on 5.3.2021 and that there was nothing on record to suggest that PW1 had lost her hymen the day before the doctor examined her.
15. The appellant stated that the medical evidence having failed to confirm that PW1 was defiled, the only other evidence of defilement was that of PW1 herself. That under provisions of Section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of sexual offence alone. That however, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief.
16. The appellant stated that no single police officer testified, who charged him and why. The appellant cited the case of Geoffrey Nguku v Republic, Cr. App. No. 166 of 1983 (Kisumu) where it was held that, “an investigating officer is a very essential witness where failing to call him/her leaves the prosecution’s case unapproved.”
17. On the mandatory minimum sentence of 20 years, the appellant relied on the decisions in the cases of Samuel Ochieng’ Alego v Republic (2018) eKLR and Constitutional Petition No. E017 of 2021 of Philip Mueke Maingi and Others v The DPP. He stated that the mandatory minimum sentence of 20 years imposed upon him was harsh in the circumstances of the case.

The Respondent’s Grounds of Opposition

18. The Respondents opposed the Petition of Appeal on the following grounds:
1. Identification of the appellant was established.
 2. The age of the minor was proved at the trial court.
 3. The fact of penetration was proved.
 4. The trial court guaranteed the Appellant’s right to a fair trial.
 5. The appellant’s defence was considered by the trial court and a finding made on the same.
 6. The prosecution proved its case beyond reasonable doubt.
 7. The period spent by the appellant in custody was considered during sentencing.



8. The sentence meted by the trial magistrate was lawful.

Analysis and Determination

19. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

20. After considering the grounds of appeal, records of the trial court and the submissions, main issues for determination are as follows: -

1. Whether the age of the complainant was proved and whether the sentence was harsh and excessive in the circumstances
2. Whether the P3 Form corroborated the complainant’s evidence that she was defiled and whether the doctor who produced the P3 Form was familiar with the handwriting and signature of the medical officer who examined PW1 and filled the P3 Form
3. Whether PW1 was coerced by PW2 to give evidence that fabricated the appellant because of alleged existing grudge and whether the appellant’s defence was considered
4. Whether failure of a police officer to testify was fatal to the prosecution’s case
5. Whether the appellant’s mitigation was considered
6. Whether the trial court considered the time spent in remand custody pursuant to Section 333(2) of the Criminal Procedure Code

Whether the age of the complainant was proved and whether the sentence was harsh and excessive in the circumstances

21. From the charge sheet, the complainant was allegedly defiled when she was 13 years old on 5th March 2021. At the time the complainant testified on 5th October 2021, she said that she was 16 years old but she did not produce her certificate of birth. The complainant’s mother, PW2, also said she was 16 years old but did not give her date of birth neither did she give her certificate of birth. PW3, Dr. Mngola said the complainant was 15 years old but when she was referred for medical examination, the police officer indicated that she was 13 years old.
22. Although the trial magistrate also found a discrepancy on the age of the complainant, he did not clarify which one of the two ages he relied on but he found the appellant guilty of the offence under Section 8(1) as read with Section 8(3) and sentenced him to 20 years.
23. Having established that the complainant was born on 18th October 2005 at the time of the alleged incident and was therefore 16 years, the applicable law is Section 8(4) of the *Sexual Offences Act* which



provides that a person who commits an offence of defilement with a child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years.

24. The sentence of 20 years was therefore illegal and is hereby set aside.

Whether the P3 Form corroborated the complainant's evidence that she was defiled and whether the doctor who produced the P3 Form was familiar with the handwriting and signature of the medical officer who examined PW1 and filled the P3 Form

25. The complainant testified that the appellant defiled her on several occasions totaling to 10 times when her mother, PW2, had gone to work in the morning. She said her mother used to leave the house at 6.00 am and that she used to work at Serena Hotel. She said that she did not report because the appellant threatened to kill her. When she finally reported to the mother, she went and reported to the Chief and the police and she was taken to hospital. In cross examination, the complainant denied that the village elder talked to her about a certain boy. She also said that it was not true that her mother was looking for another man. The complainant said she had no reason to frame up the appellant.
26. PW2, the mother of the complainant, MM testified that the appellant who was her husband did not have a job and would therefore remain in the house as she went to work. She said the appellant used to frustrate her children PM and I and that he would lock them out of the house. She said that the complainant herein reported to her that the appellant was touching her all over the body and had had sex with her for over 10 times. She reported the matter to the Chief and to Bamburi Police Station and also took the complainant to hospital. She said that she did not coach the complainant to lie about the appellant.
27. PW3, Dr. Mngola produced the P3 Form filled on 17th February 2022 indicating that the hymen was broken with one scar. He also produced the PRC Form which was filled on 7th April 2021 when the complainant went for treatment at Coast General Hospital.
28. The evidence of the complainant that she was defiled is confirmed by the examination of the doctor who filled the P3 Form that the complainant was defiled. The complainant said that it was the appellant who defiled her on several occasions when her mother left early in the morning to go to work. The complainant and the appellant were staying in a one-roomed house as he was her step-father. They therefore knew each other very well. The complainant denied having had a relationship with any other person and PW2 said that she did not tell the complainant to lie against the appellant. The appellant was therefore identified as the perpetrator with no room for mistaken identity.
29. The issue as to whether PW3, Dr. Gabriel Mngola was familiar with the handwriting and signature of the doctor who examined PW1 and filled the P3 Form did not arise during trial and it cannot be raised on appeal as this is an expert witness' evidence and the appellant has not shown any prejudice that was suffered when PW3 produced the P3 and PRC Forms.

Whether PW1 was coerced by PW2 to give evidence that fabricated the appellant because of alleged existing grudge and whether the appellant's defence was considered

30. The appellant claimed in his evidence that 3 months into their relationship with PW2 they started quarreling and they went to the chief but PW2 chased him from the house on 2nd March 2021. That when he went to stay with Maureen with whom he had a child, the complainant's mother went and asked him to get back with her but after one month, he accused him of defiling the complainant. He said that this court should disregard the evidence in the PRC Form because it did not have the hospital stamp. He also said that the date of the complainant's birth was not established. He also said that he did not understand why the child did not scream when being defiled because her mouth was not



blocked. He pleaded to be released so that he continues with his life. In cross examination, he said that he used to leave the house earlier than the complainant's mother. He said that he had a grudge with the complainant's mother and that they even had to go to the chief to resolve their disputes.

31. The trial court found that there could have been tension between PW2 and the appellant but the case about the appellant could not have been brought about the tension as the complainant's testimony was consistent and confident. This court reiterates that the medical officers who examined the complainant and filled the PRC and P3 Forms knew nothing about the complainant's mother and the appellant and could not have found that the complainant was defiled if there was no such observation.
32. This court finds that the appellant's defence was considered and the trial magistrate properly found that the tension between the appellant and the complainant's mother did not cause the appellant to be fabricated.

Whether failure of a police officer to testify was fatal to the prosecution's case

33. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides: -
No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.
34. In *Keter v Republic* (2007) 1 EA 135 the court held: -
"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."
35. The prosecution had been granted the last adjournment to avail the investigating officer but on 13th June 2022, the investigating officer failed to turn up and the prosecution closed its case. The appellant has not disclosed how failure by the investigating officer to attend has prejudiced his case as it is not disputed that he was charged after being arrested for the offence of defilement for which PW1 and PW2 have testified.

Whether the appellant's mitigation was considered

36. Although the trial magistrate said he had considered the appellant's mitigation, the sentence passed as stated in paragraph 24 above was illegal and is therefore set aside.

Whether the trial court considered the time spent in remand custody pursuant to Section 333(2) of the Criminal Procedure Code

37. The appellant was remanded in custody on 9th April 2021 and granted bond of Kshs. 300,000 but was not able to raise security so he was in remand custody throughout trial and therefore entitled to deduction of the remand period from the sentence i.e. 1 year, 4 months and 22 days.
38. In conclusion, this court finds that the appeal on conviction is dismissed, the appeal on sentence is allowed. The sentence of 20 years is set aside and substituted thereof with 10 years imprisonment to run from 9th April 2021. Right of appeal of 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 8TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE



In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

