



**BMJ v Director of Public Prosecutions (Criminal Appeal
E133 of 2023) [2024] KEHC 3258 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E133 OF 2023
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

BMJ APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(An Appeal from conviction and sentence in Githongo Criminal Case S.
O No. E005 of 2022 by Hon.E.W. Ndegwa (CM) on 09th October, 2023)*

JUDGMENT

1. BMJ (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The offences were allegedly committed 12th November, 2022 against FW a child aged 8 years.
2. Complainant stated that Appellant was his uncle. She recalled that on the material date, Appellant found her planting onions behind their house. He pulled and took her to a bench outside their house. He pulled up her dress and pulled down her pant to the thighs. He also pulled down his trousers to the thighs. He then made her to sit on his thighs facing him and there inserted his penis in her vagina. Her father found them and caused Appellant to be arrested by neighbors.
3. Complainant’s father stated his wife left early to go to work on that day and he left to graze cows leaving complainant and Appellant at home. He stated that when he returned home, he found saw Appellant whose trouser was unzipped seated on a bench outside the house with Complainant seated with legs spread on each side of Appellant’s thighs. He screamed and his neighbours went to the scene and arrested Appellant.



4. Upon being examined by a clinical officer on 14th November, 2021, complainant was found with a swollen labia majora and perforated hymen from which a conclusion was made that she had been defiled. Subsequently, Appellant was charged.
5. In his defence, Appellant stated that on the material date, he went to the home of Complainant's father to assist him harvest some mangoes. That he was waiting for him at the gate when he returned and started screaming and when his neighbours arrived he told them she had defiled his daughter and he was arrested and subsequently charged. He stated he first saw Complainant when she testified.
 6. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution had proved the charge of defilement, convicted and sentenced Appellant to serve life imprisonment
 7. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and raised 8 grounds which I have summarized into three grounds:
 - i. Prosecution case was not proved
 - ii. The sentence was harsh
8. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs. Republic* [1972] EA 32, *Pandya -vs- Republic* [1957] EA 336 and *Kiilu & Another vs. Republic* [2005]1 KLR 174.
9. An accused is innocent until the prosecution proves its case beyond any reasonable doubt. In the English case of *Woolmington vs. DPP* 1935 A C 462 in *Miller v Minister of Pensions* {1947} 2 ALL ER 372, the Court held at page 373:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
10. A certificate of birth tendered in evidence reveals that complainant was born on 05th April, 2014 from which the trial magistrate ruled that complainant was 8 years the time of the commission of the offence.
11. Concerning 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 dated 14th November, 2021, which was two days after the alleged offence was committed revealed that Complainant had a swollen labia majora and perforated hymen. From the foregoing, I find that the trial magistrate correctly found that penetration was proved.



13. Concerning Appellant’s culpability, I have considered the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say regarding reliance on Section 124 of the *Evidence Act* to convict:
- “as a general rule of evidence embodied in Section 124 of the *Evidence Act*, 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 makes 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. Although Appellant alleged he did not know Complainant, her evidence revealed she knew him and even referred to him as Brayo synonym for Brian. Complainant’s evidence that she was known to Appellant was also evidence was corroborated by the evidence of her father and aunt.
15. The manner in which the offence was committed as described by the Complainant was corroborated by her father how found Complainant seated on Appellant whose zip was open. From the foregoing, I find that the finding by the trial magistrate that Appellant had been identified as the perpetrator was well founded.
16. Section 8(2) of the *Sexual offences Act* under which Appellant was convicted which provides that:
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
17. Odunga J (as he then was) in the case of *Mainigi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held that to the extent that the *Sexual Offences Act* prescribes mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* which provides that “Every person has inherent dignity and the right to have that dignity respected and protected”.
18. In the end, the conviction is upheld but the life sentence is substituted with a 15 years’ imprisonment term from the date of arrest on 12th November, 2022.

DELIVERED AT MERU THIS 14th DAY OF March 2024

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/munene

Appellant - Present

For DPP - Ms. Rotich (PC-1)

