



REPUBLIC OF KENYA



**Kiruja v Republic (Criminal Appeal E008 of 2023)  
[2024] KEHC 3398 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL APPEAL E008 OF 2023**

**LW GITARI, J**

**APRIL 4, 2024**

**BETWEEN**

**MARTIN MUTUMA KIRUJA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Martin Mutuma Kiruja, the Appellant herein, was charged before with the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 2<sup>nd</sup> October, 2019 in Maara sub-county within Tharaka Nithi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of one MK, a child aged 17 years.
2. In the alternative, the Appellant faced the charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge were that on 2<sup>nd</sup> October, 2019 in Maara sub-county within Tharaka Nithi County, the Appellant intentionally caused an of indecency by touching the vagina of one MK, a child aged 17 years with his penis.
3. The Appellant first pleaded guilty on 4<sup>th</sup> September, 2019 when the charge was read to him. He however changed his plea to that of not guilty on 18<sup>th</sup> October, 2019 when the charges were read over to the Appellant in Kiswahili, a language he freely understands.
4. After full trial, the Appellant was found guilty for committing the offence of defilement, convicted accordingly, and sentenced to serve 15 years imprisonment.
5. The Appellant has now come before this Court faulting the trial court for the said decision. He faults the learned trial magistrate for:
  - a. Basing her conviction on the evidence of a single eye witness.



- b. Failing to note that no medical evidence was adduced to link the Appellant with the alleged offence.
  - c. Failing to find out that most prosecution witnesses were related either by blood or marriage.
  - d. Failing to note that no investigations were carried out in relation to the alleged offence.
6. The appeal was disposed of by way of written submissions.
  7. Together with his submissions, the Appellant raised the following amended grounds of appeal:
    - a. That the learned trial magistrate erred in both laws and facts by failing to put into consideration that the minor stated he is not the father of her baby and no DNA was conducted to prove the Appellant had been in sexual activity with the minor.
    - b. That the learned trial magistrate made a grave mistake in both law and facts by failing to screen the names of the person who was charged with the offence was not the one who impregnated the complainant.
    - c. That the learned trial magistrate erred in both laws and facts in failing to demonstrate whether the minor was penetrated after pregnancy or before.

**The state opposed the appeal and filed written submissions.**

**The Submissions**

8. It was the Appellant's submission that the trial court erred in its decision in failing to properly examine the evidence of the complainant and the doctor and as such, the sentence meted against the Appellant is not applicable as the evidence could not sustain a safe conviction of the Appellant.
9. In addition, the Appellant submitted that his plea was equivocal and should not stand. That given the seriousness of the offence that the Appellant was facing, it was pertinent that the Appellant be made to understand the gravity of the consequences of his plea.
10. The Appellant thus submitted that there ought to be a retrial of his case so that he could be able to cross-examine both the complainant and the doctor so as to demonstrate to the court who the real father of the baby is.
11. Based on the aforementioned amended grounds of appeal, the Respondent submitted that the trial magistrate did not err in any way in finding the Appellant guilty of the offence of defilement. That this Court can compel the cross-examination of the said owner of the baby to put the matter to rest. That that notwithstanding, the issue in question is not the paternity of the child born to the complainant but the issue surrounds the events that occurred on the material day as even the Appellant admitted in his cross examination to having sexual intercourse with the complainant on that night. The Respondent thus maintained that the present appeal should be dismissed in its entirety as the issue raised in the Appellant's amended grounds of appeal of the paternity of the complainant's child was not an issue before the trial court.
12. This being a first appeal, this Court is under a duty to re-evaluate the evidence afresh and come up with its own conclusion while being mindful that it never had the advantage of hearing or seeing the witnesses. [See: David Njuguna Wairimu -vs- Republic [2010] eKLR and Kiilu & Another vs. Republic [2005] 1 KLR 174]. Guided by these authorities, below is a summary of the evidence produced before the trial court.



## The Prosecution's Case

13. PW1 Isaac Musembi Kasina stated that he is a registered Clinical Officer and has worked at Magutuni Sub-County where he has worked since year 2009. He produced in evidence a P3 form that was prepared by a Dr. Belo whom they had worked with for 3 years. PW1 testified that he knew Dr. Belo's handwriting and signature. According to the doctor, MK was aged seventeen years. On examination the hymen was torn but she was not a virgin. Pregnancy test was positive.
14. PW2 was the complainant in this case, MK. It was her testimony that the Appellant used to be her boyfriend in 2019 and that they were living together and they used to engage in sexual inter-course many times before she left for her home. On 2/8/2019 PM went with two policemen and found her in the house of the appellant and taken to Magutuni Police Station. She had a pregnancy by one Kimathi. On 2/10/2019 she spent the night in the house of appellant and engaged in sexual intercourse the whole night. She told the court that the appellant never asked her age.
15. PW3 was CPL Wario. It was her testimony that on 2<sup>nd</sup> October, 2019, one Patrick Muthui went to the police station and reported that the complainant was missing from home and had not gone to school. That the said Patrick Muthui gave the police information that the complainant was living with the Appellant. They then proceeded to Appellant's home and found a wooden house that had been locked from inside. The window was open and the complainant was inside. The complainant then opened the door and she was arrested together with the Appellant and taken to Ntumu Police Station.

## The Defence Case

16. When put on his defence, the Appellant urged the court to release him as the complainant had stated that she was 3 months' pregnant and that she stated that the Appellant was not the father. He however admitted that he had engaged in sexual inter-course with the complainant on the day that he was arrested.

## Issues for Determination

17. I have considered the Appellant's amended grounds of appeal as well as the submissions by the parties. The main issue that arise for determination is whether the evidence adduced by the prosecution was sufficient to warrant a conviction.

## Analysis

### Whether the evidence adduced by the prosecution was sufficient to warrant a conviction

18. The offence of defilement is defined under Section 8(1) of the [Sexual Offences Act](#) as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
19. In *Dominic Kibet Mwareng vs. Republic* [2013] eKLR the court stated that:-

‘The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.’
20. On the issue of the age of the complainant, it is on record that the complainant stated that she was aged 17 years old on the date of the alleged offence. The complainant did produce her birth certificate as P. Exhibit 4 to substantiate the claim that she was a minor at the time of the offence. According to



the aforementioned P. Exhibit 4, the complainant was born on 27<sup>th</sup> August, 2003. This means that on 2<sup>nd</sup> October, 2019, when the alleged offence happened, it was a month after she turned 16 years old. She was therefore still a minor.

21. As to the identity of the perpetrator, the complainant was categorical that he knew the Appellant before and had been to his house where they lived together before she returned home. PW3, the arresting officer, found both the complainant and the Appellant locked in the Appellant's house. The Appellant was therefore positively identified by the complainant as the perpetrator.
22. Finally, on the issue of penetration, Section 2 of the [Sexual Offences Act](#) defines "penetration" as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
23. From the evidence on record, the complainant who testified as PW2 gave a detailed account of what transpired on the material day. She stated that the Appellant was his boyfriend from June 2019 up to August 2019. That she was living with him and engaged in sexual intercourse with him many times. Further, that on the material day it was his uncle PM and two police officers that found them in the Appellant's house where the complainant had slept the night before.
24. It was further the testimony of the complainant that on the night of 2<sup>nd</sup> August, 2019, she engaged in sexual intercourse with the Appellant. That she had gone to his house and when it was time to sleep, the Appellant removed her panty and clothes, asked her to enter inside the bed, removed his clothes, started touching her and inserted his penis inside her vagina. Medical evidence confirmed that there was a tear on the hymen of the complainant, no bruises/lacerations, and although the hymen was torn, the complainant was not a virgin. It was also her testimony that on that day, she was pregnant but it was not the Appellant who had impregnated her.
25. With this much evidence, I agree with the submissions of the Respondent that the issue of paternity of the complainant's child was not in issue before the trial court. From the evidence of the complainant and that of medical officer, it is my view that the same has established that there was penetration on the minor with the complainant on the material night. She was a minor who under the Law could not give consent to penetration or sexual intercourse. I agree with the finding of the trial magistrate that the fact that the Appellant was not the father of the complainant's child did not automatically absolve the Appellant from the charges he was facing. In his defence he admitted he had sexual inter-course with the complainant on the material night. The appellant has raised the issue that the trial magistrate erred by relying on the testimony of a single witness. I have considered this ground, I find that this being a sexual offence, the court can convict on the evidence of the complainant if it is satisfied that she is telling the truth. The proviso to Section 124 of the [Evidence Act](#) states:-

"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."

The learned trial magistrate at page 40 of the record line 28, stated as follows: "I find no reason to doubt PW2's credibility as a witness in view of her consistent evidence."

The trial magistrate was therefore satisfied that the complainant was telling the truth. She could therefore convict on the testimony of the complainant without requiring corroboration. The complainant was seventeen years a fact which was proved with the production of her birth certificate as exhibit 4. In Leonard Njuguna Njoroge –vs- Republic [2020] eKLR the court observed that "It is trite that in sexual offences the age of the



complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and secondly; it establishes the age of the complainant for purposes of sentencing.” See *Moses Nato Raphael v Republic* Criminal Appeal No. 169 of 2014 [2015]eKLR.

On the age of the complainant, the Sexual Offences Rules of Court 2014 Rule 4 provides that:-

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

On the other hand, penetration is proved by the testimony of the complainant and corroborated by the medical evidence. The complainant was a minor.

I therefore find that the critical ingredients for the offence of defilement were proved against the Appellant to the required standard of beyond any reasonable doubt.

### **Conclusion**

26. From the foregoing analysis, it is my view that the Appellant’s conviction was safe. The present appeal lacks merits.

I order as follows:

27. The appeal is dismissed.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 4<sup>TH</sup> DAY OF APRIL 2024.**

**L.W. GITARI**

**JUDGE**

