



**GMM v Republic (Criminal Appeal 30 (E023) of 2023)
[2024] KEHC 5950 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 30 (E023) OF 2023**

TA ODERA, J

MAY 23, 2024

BETWEEN

GMM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the sentence and conviction delivered on 5th December 2022 by Hon. G.N BARASAH (SRM) in OGEMBO S.O. No 45 of 2022)

JUDGMENT

1. The Appellant GMM has appealed to this court against conviction and sentence for the offence of defilement contrary to Section 8(3) of the Sexual Offences Act (the SOA) and the life sentence imposed by the trial court.
2. The particulars of the offence were that on the night of 21st November 2021 within Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of JNN (name withheld), a child aged 16 years. He faced an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act particulars being that on 21st November 2021 within Kisii County, the Appellant intentionally caused his penis touch the vagina of JNN a child aged 16 years.
3. This being the first appeal, this court has a duty to re-evaluate the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses testify. The court is alive to and cognizant of the principles laid down in the case of Okeno vs. Republic (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting



evidence and draw its own conclusions (Shantilal M. Ruwala V. R. [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."

4. From the record of the trial court, the minor, JNN (PW1) testified and told the court that she is 16 years old. She produced a copy of her birth certificate as an exhibit to prove her age. She narrated that on Sunday 21st November 2021 she went to the market to buy clothes. While on her way back home she met the Appellant who was her biology teacher. The appellant asked her to accompany him to [Particulars Withheld] Market and he took her to a room behind a certain hotel within [Particulars Withheld] Market. While inside the room, he closed the door and forced her to have sex with him. He proceeded to insert his penis inside her vagina. After the ordeal she proceeded home but did not tell anyone about what had happened to her. When her grandmother asked her to disclose where she had gone to she just told her that she had gone to the market because the accused person had told him not to reveal the incident to anyone. When she went to school around January 2022, the Deputy Principal asked her whether she was pregnant and she admitted that she was indeed pregnant. When the Deputy Principal demanded to know who had made her pregnant she disclosed that it was the Appellant. She narrated that she was thereafter suspended and was not able to go back to school. She delivered her baby on 15th April, 2022. She disclosed too that she delivered her baby prematurely at 5 months at Kisii Hospital.
5. During cross-examination, PW-1 she stated that there were no witnesses to the act of defilement. She reiterated that the Appellant was her biology teacher.
6. PW-2 was the grandmother to the minor. She informed the court that she saw her grandchild pregnant. She asked her what had happened and he responded that it was her teacher, the Appellant who had defiled her. She went to school and she was informed that the matter had been reported to TSC. She confirmed that she knew the Appellant as a teacher to her granddaughter. She also testified that her granddaughter gave birth prematurely at 5 months.
7. At cross-examination, she yielded that she did not know the exact date that the defilement occurred nor did she know whether the accused person had sex with minor or not.
8. PW3 was PC Millicent, the Investigation officer narrated that on 13th April, 2024 received a complaint from PW-1 that she had been defiled by her Agriculture and Biology Teacher. She interrogated PW-1 who opened up that he had been defiled by the Appellant who met her at the market place and lured her to his house closed the door and had unprotected sexual intercourse with her. The minor, however did not disclose the defilement to anyone until her grandmother noticed that she was pregnant. Her grandmother discovered the pregnancy after she started developing complications. Her grandmother went to school to report the matter; the appellant was called. Upon interrogation the Appellant accepted that he was responsible for the pregnancy and promised to take care of the minor throughout the pregnancy journey. After 5 months the minor delivered prematurely and the baby was taken to a nursery. When TSC members interrogated him he changed tune and claimed that he was not responsible for the pregnancy. The investigating officer equally revealed that there was a time that he sent a cousin to the minor to inquire whether it was possible for them to terminate the pregnancy. The two reported the matter to the Principal who called for the arrest of the Appellant who was eventually arrested and charged with the offense of defilement.



9. During cross-examination by the Appellant, PW3, reiterated that the minor was the Appellant's student. He reiterated too that the minor only reported the matter upon her mother finding out that she was pregnant.
10. PW4 was Lawrence Mwaniki a clinical officer South Mugirango Sub- County. He testified that the Minor was attended to by her colleague who was on Maternity leave and whom he had worked with for 5 years and was conversant with her handwriting. He proceeded to produce a P3 form for the Minor which evidenced that the minor was defiled. He testified that at the time of filling the P3 form she was examined and it was established that she was 15 weeks pregnant that is 4 months and one week. During the examination, it was noted that there were no tears, no lacerations and no discharges were noted. The treatment notes dated 17th February, 2022 shows that she was taken to the laboratory where several tests including pregnancy tests, HIV and syphilis tests were taken wherein only the pregnancy test turned positive. He also produced an ANC profile which bears the name of the minor which showed that the minor was being attended at (particulars withheld) Health center for clinic purposes and benefited from Linda Mama programme. He disclosed that on 14th April, 2022 the baby was born prematurely and was referred to NKU care.
11. Before closure of the Applicant, the learned counsel for the Appellant who had just come on record made an Application to recall the first witnesses for cross-examination as well as DNA Sampling. The court granted him the prayer to recall the first two, PW1 and PW2. However, the prayer for DNA sampling was not granted for reasons that the Prosecution indicated that they intended not to rely on them as evidence in support of their case.
12. PW1 during cross-examination by the learned counsel for the Appellant, stated that she was born in the year 2005. She indicated that she did not have a boyfriend. She yielded that she together with the appellant went for a DNA test but she did not know the results of the same. She reiterated that the appellant was a person known to her and that he stayed at [Particulars Withheld] High school. She also reiterated that after defiling her, the Appellant told her not to inform anyone. She disclosed that she was suspended from school for 3 days by the headmaster after she had a fight with her brother. She disclosed too that by the time she was suspended she was already pregnant.
13. During re-examination by the prosecutor, she disclosed that by the time she was being defiled by the teacher she was not a virgin. She indicated that she was suspended from the school because they were fighting with her brother. She stated too that she was not suspended because of the pregnancy. She stated equally that by the time she was having a fight with her brother in school she was already pregnant. She disclosed while she was being suspended, the deputy who had noted pregnancy signs called her back and questioned her about the pregnancy. She insisted that that her grandmother did not have any grudge with the Appellant who was her teacher.
14. When PW2 was cross-examined by the learned counsel for the Appellant she reiterated her testimony that PW1 was her granddaughter who schooled at [Particulars Withheld]. She indicated that she did not a part from the head teacher, Mr. Orangi. She disclosed that it was a teacher in the school who noted that her granddaughter was pregnant. She reiterated her testimony in chief that her granddaughter told her that it is Appellant who had made her pregnant. She conceded that she heard DNA was carried out but she did not know the outcome of the same. At re-examination she reiterated that she did not know about the DNA Results.
15. Upon closure of the prosecution case, the trial court made a ruling that that the prosecution had established a prima-facie case against the Appellant and proceeded to place him on his defense. The Appellant called three witnesses including himself.



16. During examination in chief, the Appellant testified that he is a secondary teacher at [Particulars Withheld] Secondary, school. He testified further that on 21st November, 2021, she had gone to his home which is at Nyamonari, to meet his in-laws who had come to visit them. He stated that the said visitors arrived at 10:00 and left his home the following day. He stated that it was not true that left his home to go to Riosiri market on 21st November, 2021 to meet the minor. She accepted though that the minor was her student. He disclosed that there was a time he was on duty, and the complainant and his twin brother fought and he recommended that they be suspended. It is only after they were suspended that the claim arose that he was suspending the child because he had made her pregnant. He indicated he did not have any issue with the student before the suspension.
17. He went on to aver that the Principal reported the matter to TSC offices that he had impregnated a student. The Police wanted to find out the DNA of the born child who had been born prematurely. He volunteered himself for DNA for the DNA samples. The DNA samples were taken to Kisumu government Chemist. The government chemist however has never supplied him with the results. He however indicated that he once had a glimpse of the report which was in soft copy.
18. He prayed for justice since some people wanted him to lose his job. He disclosed that he had been interdicted and the interdiction letter indicated that he was the father of the baby. He also indicated that he has an issue with TSC.
19. During cross-examination by the prosecutor, he reiterated that he is a teacher at [Particulars Withheld]. He indicated that the school was between Riosiri and Nyabigena. He disclosed that Riosiri Market was, about 12km from his home and that it could only take 20 minutes on a motorbike to get there. He yielded that it was after the suspension that it was noted that the minor was pregnant. He stated too that he has never met the parents or guardian of the minor before the TSC meeting where it was decided that he be interdicted. He yielded that there were deliberations regarding the pregnancy before the interdiction letter was handed over to him. He reiterated that the DNA results have never been given to him. He however yielded that he has never seen the details of the DNA results. Regarding the issue of being framed, he stated that he feels that it was the guardian who framed him after the minor who was an orphan was suspended. He however yielded that in as much he was the master on duty, it was the head teacher who issued the suspension letters. He insisted that the Results of the DNA result would vindicate him that he did not have sexual intercourse with girl. He went on to state he visited the government chemist to follow up on the results and the Government chemist told him not to fear anything. He indicated that if the report was available they would take it.
20. DW2 was AOM, a wife to the Appellant. She testified that on 21st November, 2021, her husband was at home for the whole day with visitors who had come to visit them and did not leave till the following morning when the visitors left. She insisted that his husband was being framed so that he could lose his job
21. DW3 was JKO, a sister-in-law who testified and stated that on 21st November, 2021, there was a ceremony at the Appellants home where the Appellant, her wife children and another person were all present. She testified further that they slept at the Appellant's home and left the next day. He insisted that the Appellant did not leave the house the whole day.
22. The trial court delivered its Judgment on 5th December, 2022 where it found the appellant guilty of the offence of defilement contrary to section 8 (3). The court held that the prosecution had proved all the elements of defilement.
23. Regarding the defence, the learned trial magistrate dismissed the claim by the Appellant that he was framed. She stated that the accused person and the complainant did not have any serious grudge that



would have occasioned the complainant to frame his teacher. She underscored further that after all, the complainant did not get pregnant on the date the appellant caught the complainant fighting with his brother. It was her observation that the victim could not be said to have had any grudge with the Appellant to an extent of wanting him to lose his job. She added that by the Appellant being at work he would have helped her take care of the child now that she was an orphan and him losing his job would not benefit her. It was her observation too that suspensions from schools are normal that would not warrant one to frame a person over serious allegations like the ones in this case.

24. Regarding the Appellant's defense of alibi, the learned trial Magistrate observed that the alibi presented by the Appellant and his witness was an afterthought and the same did not add up. She observed that since complainant had stated that she met the appellant at Riosiri Market and that the accused person had stated that his home was 12 Km from the market there was a possibility that that the appellant could have left his home and met the complainant.
25. On issue of DNA results which were not filed, she observed that even if the court went with the assumption that the minor's child was not a child of the accused person, it would not have vindicated him; the same would just have cast doubt on the character of the minor who after all had indicated that she had had sex before the Appellant had sex with her.
26. The learned held further that both the complainant and the Appellant knew each other very well. she went further went on to hold that the birth certificate showed that the minor was 15 years at the time of the offense and that the penetration was proved by the medical evidence.
27. The Appellant when given time to mitigate his sentence, he indicated that he was sorry and would not repeat the offence again. The court ordered for a pre-sentencing report which was later filed in court and the same recommended a custodial sentence of three years.
28. The accused person was later on sentenced to 15 years in prison. It is against this background that the accused person filed this Appeal. In his petition of appeal filed on 31st May 2023, the appellant complained that;
 - a. The learned trial magistrate erred in law and fact by convicting when the Prosecution did not prove their case to the required standard thereby occasioning a miscarriage of justice.
 - b. The learned trial magistrate erred in law and in fact by convicting the appellant without considering that the essential elements of the charge of defilement had not been proved by the prosecution
 - c. The learned trial magistrate erred in law and in fact by drawing adverse inference against the appellant and thus shifting the burden of proof to the appellant contrary to the law of evidence
 - d. The learned magistrate erred in law and in fact by failing to consider the defense and submissions by the defense
 - e. The judgment is not well reasoned and is based on guess work and speculations
 - f. The learned magistrate erred in both law and fact by basing his judgment on assumption and suspicion thus arriving at a finding which was contrary to the evidence on record.
 - g. The learned magistrate erred in law and fact by failing to appreciate that the medical report did not support the prosecution case and/or the penetration and or evidence on penetration were not proved.



- h. The learned magistrate erred in law and fact by failing to consider that witnesses relied on by the prosecution were not credible and could not be trusted in their testimony.
 - i. The learned trial Magistrate erred in law and in fact by failing to consider the defense testimony and the rivalry between the parties and thus arriving at a wrong finding.
 - j. That the evidence on record was not sufficient to sustain the conviction.
29. Prior to his Appeal being listed for hearing the Applicant made two applications; an application to be admitted to bond and an application to be allowed to adduce additional evidence in the DNA Sample Results Report from the government Analyst dated 27th May, 2022 that showed that he was not the father of the Minor's child. The two Application were allowed by this court in the interest of Justice. Prosecution conceded to the application for production of the DNA report saying that the appellant was denied the denial report in the trial court despite orders by the trial court for supply of the same.
30. During the hearing of the Appeal, the learned counsel for the appellant relied on his written submission filed in court on 29th January, 2024 while the Prosecution relied on his written submissions filed on 15th February, 2024.

The Appellant's Submissions

31. In his submissions, the learned counsel for Appellant submitted the Prosecution did not establish the three elements of defilement which include, penetration, age of the complainant and identification of the assailant.
32. On the element of age, the learned counsel submitted that the age of the minor was not proved conclusively since no documentary evidence was adduced to prove the minor was 15 years old at the time of the alleged offence. He contended that the minor appeared before a clinical officer who did not carry out age assessment to confirm that in deed the child was 15 years old. He contended that the trial court only relied on the evidence of the witness to conclude that the minor was 15 years old.
33. On penetration, the learned counsel submitted that medical evidence that was presented before the trial court being the P3 form and the treatment notes did not at all point out that there was penetration as was alleged. He contended that the P3 form filled on 13th April, 2022 showed that the genitalia were normal, there were no tears, lacerations or discharge noted. He contended that the only evidence the prosecution relied on was the fact that a child was born out of the purported penetration. He stated further that the OCS Nyamarambe Police station vide an order of the lower court dated 24th May, 2022 did subject the accused person and minor purportedly born out of the defilement which took place and the results turned out that he was not the father of the said minor. He urged the court to consider the DNA sampling results by the government Analyst dated 27th May, 2022 admitted by this court as evidence.
34. On identification, the learned counsel submitted that since the appellant and the complainant are persons who knew each other very well, the complainant could be used to fix her teacher as it was in this case. He argued too that this was a case of personal vendetta. He argued further that the Appellants defense of alibi was not challenged. He insisted that the Appellant had proved through his witness that he was at home on 21st November, 2021 when the offence is alleged to have taken place and not at the scene of crime in any way.



The Respondent's Submissions

35. On his part, learned prosecuting counsel on behalf of the Respondent contested the Appeal. He submitted in order to the offence of defilement the elements identification of the offender, penetration and the age of the victim.
36. On the issue of age of the victim the learned counsel submitted the prosecution adduced evidence that the victim was aged 15 years at the time the offence was committed. He stated a certificate of birth was produced as Pexh 6. This document was not challenged at the trial court therefore the issue of age was conclusively proved.
37. On the issue of penetration, the learned counsel submitted that the victim testified that the appellant defiled her. He underscored that her testimony was corroborated by the evidence of other witnesses and the medical evidence that showed that she was 15 years.
38. On the issue of identification, the learned counsel submitted that the victim gave uncontroverted evidence that the appellant was a person well known to her as her Biology and agriculture teacher and thus he contended that the Appellant was properly identified.
39. Regarding the issue of DNA results, the learned counsel submitted that the issue of paternity has nothing to do with the element of penetration. He contended that the fact that the Appellant did not impregnate the minor did not at all cost negate the fact the minor was defiled. To support his argument, he relied on the Court of Appeal decision the case of Evans Wanyonyi vs Republic (2019) eKLR.
40. Having considered the petition of Appeal, re-evaluated the evidence and testimonies of parties and their witness at the lower court, the judgment of the trial court and the written submissions of parties as summarised hereinabove I note the sole issue of determination is whether this court should quash the conviction and set aside the sentence of the lower court for being erroneous.
41. The ingredients of the offence of defilement were well stated in the case of Dominic Kibet Mwareng v Republic [2013] eKLR, by Ndolo J. as follows:

“The critical ingredients forming the offence of defilement are;

- a. Age of the complainant,
- b. Proof of penetration
- c. Positive identification of the assailant.”

Age

42. In proof of the complainant's age, she produced her birth certificate (exhibit 1) which showed that she was born in 2005. The birth certificate proves the victim was 15 years old at the time of the offence. And, therefore a child. Age the complainant was proved beyond reasonable doubt.

Penetration

43. The P3 form produced in support of this case showed genitalia were normal, no tears, lacerations and discharge but the complainant was pregnant. The pregnancy of the girl was sufficient prove that there was penetration into the vagina of complainant.



Identification

44. It is trite law that the prosecution must prove beyond reasonable doubt that the appellant is the one who penetrated the complainant and therefore committed the offence of defilement. PW1, the complainant testified that she had sexual intercourse with the Appellant who was her biology teacher once on 21st November 2021 which resulted in her pregnancy and that she gave birth pre-maturely on 14. 4.2022 while she was 15 weeks pregnant (i.e 4 months and one week). Appellant denied this saying he was at his home at the material time attending a ceremony. This is supported by the evidence of Dw2 and Dw3. From the testimony of PW1, PW2 and the Appellant it is clear that a DNA examination was indeed carried out and the report was identified by PW1 as PMFI 3. On 27.7.22 the Appellant through his counsel sought to be supplied with the DNA report and prosecution replied that they would not rely on the report but the court did not make a ruling on the same. The report was not produced in the lower court but in this appeal after appellant made an application for admission of the same which the state did not oppose saying that it ought to have been supplied.
45. It is interesting that the learned trial magistrate in her Judgement observed that even if the results of the DNA examination were to turn out negative the same would have cast doubt on the character of the complainant. It was not in place of the Trial Magistrate to comment on the implications DNA report that had not been produced before her as a DNA report is a relevant and admissible document which assists courts to arrive at just determination of paternity and maternity of a child born out of defilement. It also assists the court to determine credibility of witnesses. Now turning to the credibility of PW1, From the record it is outright that when complainant was re-examined by the learned prosecution counsel, she stated categorically that though she was not a virgin she was defiled once by the Appellant once and she conceived. The DNA report produced herein rules out the appellant to be the father of the infant child of PW1. The child was also born at 4 months and one week as per pPW1, PW2 and PW3. The material date as per the charge sheet is 21st November, 2021. This court takes judicial notice that the normal gestation period for human beings is between 37-40 weeks. Odero J, in the case of Simon Gichuki Maina v Republic [2016] eKLR faced similar facts as to correctly observed, which observation am persuaded with, that:
- “Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.
46. The evidence on record is that PW1 had a premature birth at 14 weeks and that appellant was responsible for the pregnancy but in view of the DNA results and the defence of alibi raised by appellant, I doubt the credibility of PW1 as to the date of conception and the identity of the perpetrator as the DNA report does not link appellant to the infant child of PW1 who was allegedly conceived on the material date. The trial court erred in finding that PW1 identified appellant as her defiler.
47. I have re-evaluated the entire evidence on record and I find that prosecution failed to prove their case against appellant beyond any reasonable doubt in the lower court and thus the learned Trial magistrate erred in convicting and sentencing the appellant.



48. Accordingly, the appeal succeeds. I allow the appeal. The conviction against the Appellant is hereby quashed and sentence of 15 years' imprisonment is set aside. The Appellant is hereby set free unless lawfully held. Security be released to depositor.

T.A ODERA

JUDGE

23 .5.24

Delivered virtually in the presence of: -

Appellant

Mr. Koima for the State

Court Assistant: Oigo

Appellant: I seek copy of judgment.

Order: A certified copy of judgment be supplied.

T.A ODERA

JUDGE

23 .5.24

