



**HKK v Republic (Criminal Appeal E028 of 2022)
[2024] KEHC 5039 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E028 OF 2022**

GL NZIOKA, J

MAY 13, 2024

BETWEEN

HKK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of; Hon Rawlings Liluma, Senior Resident Magistrate (SRM), delivered on, 4th August 2022, vide Engineer Senior Principal Magistrate’s Court Sexual Offence No. E005 of 2021)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate’s court at Engineer charged vide Criminal Case S/O No. E005 of 2021 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No 3 of 2006 (herein “the Act”) in count (1) and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the charge are as per the charge sheet.
2. The prosecution called a total of three (3) witnesses following a plea of not guilty entered by the appellant on both counts. (PW1) AWN (herein “the complainant”) testified that on the 12th day of July 2020, her mother sent her to the shop. That while on the way, the appellant and another man approached on a motor bike and offered her a lift. That she hesitated at first but then conceded.
3. That, they went passed her home to a shopping centre known as Mawingu, where they ate food at a hotel. After eating the complainant and the appellant went to a lodging while the rider left. It is the evidence of the complainant that, the appellant offered her a brown drink while they were in the room in the lodging and after she took it, she doesn’t know what happened, as she woke up the following day by the road side.



4. The complainant further testified that, she went home and did not tell anyone anything about the incident. However, after three months she realized her stomach was bulging and her mother asked her whether she was pregnant but she denied. Her mother nevertheless bought a pregnancy kit from the chemist and confirmed that she was pregnant. She then took her to the clinic as she continued with her studies at [Particulars Withheld] Secondary School where she was in form three.
5. On January 27, 2021, she delivered a child names T; and at the time she was testifying in court on September 1, 2021 the child was 4 months old. She told the court that after delivery she informed her parents what had happened and the matter was reported to the police station at Kipipiri. The complainant was referred to Engineer Sub-County Hospital for examination; where the P3 and PRC forms were filled. The appellant was arrested and charged accordingly.
6. At the close of the prosecution case the appellant was placed on his defence. He told the court that on July 12, 2020, he did not take the complainant to any room nor defiled her. He insisted that he did not commit the offence. In cross-examination he maintained that, he did not commit the offence arguing that, he could not have carried the complainant at daytime without anyone seeing him. That he doesn't do *boda boda* work.
7. At the close of the entire case, the Magistrate in a judgment dated August 4, 2022, found the appellant guilt of the offence on main count of defilement convicted him and sentenced him to serve fifteen (15) years imprisonment.
8. However, the applicant being aggrieved by the decision of the trial court has appealed against it on the grounds filed in court on August 17, 2022 and amended on April 17, 2022.
9. The subject grounds states: -
 - a. That the learned Magistrate erred in law and facts in convicting and sentencing the appellant on inconclusive and insufficient evidence.
 - b. That the learned trial Magistrate erred in law and in facts in finding that there was evidence of penetration in this case when the evidence that was adduced was insufficient and did not proof the case a required.
 - c. That the learned trial Magistrate erred in law and in facts in finding that age of the complainant was proved when there is no evidence to proof the age of the appellant.
 - d. That the learned trial Magistrate in law and facts in convicting and sentencing the accused in a defective charge.
 - e. That the learned trial Magistrate erred in law and facts in failing to consider that the conviction and sentence against the appellant were unsafe in the circumstances.
 - f. That the learned trial Magistrate erred in law and facts in not requiring the DNA to be performed as that would have connected the appellant with the offence.
 - g. that the learned trial Magistrate erred in law and facts in finding that the victim/complainant became pregnant and delivered a child in nine months when there was no medical evidence to support that evidence.
 - h. That the learned trial Magistrate erred in law and facts in relying on the evidence of the doctor when there was no P3 form produced in court or on record to support the doctor's evidence.



- i. That the learned trial Magistrate erred in law and facts in not finding that the complainant/victim's evidence in this case did not prove that there was any penetration that was done by the appellant.
 - j. That the learned trial Magistrate erred in law and facts in not finding that the P3 form is not an age assessment report as required in law to establish the age of the complainant/victim.
 - k. That the learned trial Magistrate erred in law and in fact in not finding that there was no evidence adduced by the complainant or by the complainant's mother regarding the age of the complainant.
 - l. That the learned trial Magistrate erred in law and in facts in not finding that the evidence of this case was insufficient to prove the age of the complainant when there was no substantive evidence from the complainant or her mother as to when the complainant was born.
 - m. That the learned trial Magistrate erred in law and in facts in not calling and in not considering the previous record of the appellant which would have assisted the court in passing sentence.
 - n. That the learned trial Magistrate erred in law and in fact to mete a sentence of 15 years to the appellant which was excessive in the circumstances of this case.
10. However, the appeal was opposed vide grounds of opposition dated February 10, 2023, in which the respondent argues: -
- a. That the age of the complainant was sufficiently proved as provided for under the [Sexual Offences Act](#).
 - b. That penetration was proved under of the [Sexual Offences Act](#) through the evidence of the doctor examined the complainant and produced P3 form and PRC form.
 - c. That the trial court considered the appellant defence and subsequently dismissed it.
 - d. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the [Criminal Procedure Code](#).
 - e. That the sentence imposed by the trial court was proper and in line with the [Sexual Offences Act](#). Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant.
 - f. That the petition is misconceived and lacks merit and ought to be dismissed forthwith and the conviction and sentence be upheld.
11. The appeal was disposed of vide filing of submissions. The appellant in submissions dated 17t April 2023, and further skeleton supplementary submissions dated June 16, 2023, argued that, the charge sheet was defective as the word "unlawful" was omitted from both the main charge and the alternative charge. He relied on the case of; [Achoki vs R](#) No. 6 of 2000 where the Court of Appeal held that, in a charge of rape the particulars must allege the sexual assault was unlawful and without consent.
12. The appellant submitted that, the evidence of penetration was inconclusive, insufficient and unsafe. That, the complainant did not adduce any evidence that she was defiled as she drank some drinks and lost consciousness. Further, no medical evidence such as clinical notes nor was the birth notification or hospitalization documents produced in court to show that, the complainant was indeed pregnant and gave birth on April 27, 2021.



13. Additionally, the P3 form marked as exhibit 1 is not available in the record of appeal. In any event, even if the P3 form was available, the evidence by PW3 Dr. Newton Karanja was hearsay and cannot help the court to determine if the complainant was indeed defiled as the matter was reported to the police almost a year late from the date of the offence after she had given birth.
14. The appellant argued that, the prosecution did not comply with section 48 (2) of the *Evidence Act* as the qualifications of Dr. Oduor, who filled the P3 form were never stated. Also, the qualification of Monica, the Clinical Officer who filled the PRC form were never stated to the court to qualify her as an expert. Furthermore, PW3. Dr. Newton Karanja never informed the court how he came to be familiar of Monica's handwriting and signature. He relied on the case of; *Ndiki Senze vs Republic* Criminal appeal No. 8 of 2020 where it was held that the evidence of the doctor was hearsay and inadmissible for the failure by the prosecution and/or the witness to lay a basis upon which he qualified to testify as an expert under section 48(2) of the *Evidence Act*.
15. The appellant submitted that, despite the trial court ordering that a DNA of the child, mother and the appellant to be conducted, the results were never communicated, which evidence was crucial as it would have connected the appellant to the offence.
16. The appellant further submitted that, the Birth Certificate of the appellant was never produced but was only marked for identification as stated by the trial Magistrate in his judgment. That, in absence of the Birth Certificate, no age assessment was conducted. However, the finding of the trial Magistrate that, the age of the complainant was proved through her evidence and the evidence of the mother and the doctor was based on conjecture and was thus unsafe and inapplicable. That, the trial Magistrate relied on the case of *Joseph Kieti Seet vs Republic* [2014] eKLR, however at no point did he state that he used observation and/or common sense to conclude that the complainant was a minor.
17. That, the importance of establishing the age of the complainant was set out in the case of *Hillary Nyongesa vs Republic* [201] eKLR where the court stated that, age has to be conclusively proved as the sentence under the *Sexual Offence Act* is determined by the age. Further, if age is not proved the sentence meted out would be a matter of conjecture which cannot stand in a criminal case where offences must be proved beyond reasonable doubt.
18. Lastly, the appellant submitted that, the trial Magistrate did not consider the previous record of the appellant in sentencing him and relied on the case of; *Dismas Wafula Kilwake vs Republic* Criminal Appeal 129 of 2014 where the Court of Appeal stated that, there was no reason why the reasoning of the Supreme Court that mandatory death sentence is unconstitutional for depriving courts of discretion to impose appropriate sentence should not be applied to the provisions of the *Sexual Offences Act*.
19. However, the respondent in submissions dated February 10, 2023, stated the elements of defilement to be proved beyond reasonable doubt are proof of age, identification of the perpetrator, and penetration.
20. The respondent submitted that, the complainant testified that she was born on September 29, 2003 and was 17 years old at the time of the offence which evidence was corroborated by the evidence of both PW2 and the Doctor.
21. The respondent further submitted that, the appellant was positively identified by the complainant who stated that she had seen him for more than two (2) months before the incident. That, her evidence in cross examination was unwavering that it was the appellant who defiled her.
22. The respondent submitted that, PW3 produced the P3 form and the PRC form which indicated that, the appellant had given birth and proved penetration. Reliance was placed on the case of *Mark Oiruri*



Mose vs Republic (2013) eKLR where the Court of Appeal stated that, the law does not require evidence of *spermatozoa* as penetration is proved whether if only on the surface and needs not be deep inside the girls organ.

23. Finally, the respondent submitted that, the trial court considered the appellant's mitigation and sentenced him to fifteen (15) years imprisonment in accordance with the law.
24. I have considered the materials placed before the court, in the exercise of the role of the first appellate court as stated in the case of; *Okeno vs. Republic* (1972) EA 32, where the Court of Appeal stated that, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
25. In that matter, the court stated as follows: -

“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*) EA 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]* EA 570. It is not the function 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”
26. I have evaluated the evidence adduced and I find that the prosecution was duty bound to prove three elements of the offence of defilement.
27. The first element is the age of the complainant. The charge sheet states that she was 17 years old at the time the offence was committed. She testified that she was born on September 29, 2003. She referred to her Birth Certificate which was marked as (MFI3). PW2 TW the complainant's mother testified that the complainant was born on 29th September 2003, as her first born child. She too made reference to her Birth Certificate marked (MFI 3). It suffices to note that no other witness testified to the age of the complainant. The Birth Certificate was to be produced in evidence by the Investigating Officer who never testified. Therefore as it were, it was not admitted in evidence and could not have been relied on to establish the age of the complainant.
28. The argument by the trial court that, age could be proved by other means other than a Birth Certificate is not tenable where the prosecution fails to produce primary evidence in its possession and take refuge in an observation by the court and alleged age by the witnesses, when the prosecution has a duty to prove the case beyond reasonable doubt. I therefore find that, the complainant's age was not proved beyond reasonable doubt.
29. The other element is of penetration. Penetration is defined under the Act as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”. It is in evidence of the complainant that, after she drunk the brown liquid given to her by the appellant, she became unconscious and later found herself at the road side the following day. She could not therefore recall the appellant defiling her. That, she only found she had a sensation and whitish discharge from her private parts the following day. In the trial court's judgment, the court states that “I have considered the circumstances referred to above and they lead to one conclusion alone there was penetration”.
30. However, the prosecution had to prove penetration beyond reasonable doubt. The evidence could only be led by the complainant and the Medical Doctor. However, it suffices to note that, when the



complainant discovered the sensation and whitish discharge, she did not go to the hospital immediately. The alleged offence is said to have taken place on July 12, 2020. The PRC and P3 form filed on May 31, 2021, after ten (10) months.

31. Taking into account the period taken from the date of the incident and medical examination, it is not certain beyond reasonable doubt that the old hymen tear at 2 and 9 o'clock was occasioned on the alleged date in question. Again, the prosecution failed to prove the penetration took place on the July 12, 2020, and not in any other date.
32. The last ingredient is the person who committed the offence. The complainant stated she found herself on the road after she became unconscious. She could not state with certainty it was the appellant. She was in a lodging room. She did not know at what time she left the lodging and in what state and for how long she was at the road side to rule out that, other than the appellant, no one else would have defiled her. The appellant of course denied the offence. As such, the only evidence that would have put the matter beyond reasonable doubt was the paternity test through DNA.
33. The trial court was live to that issue as the trial court indicates that, it ordered for that test. Yet, the results were not availed and therefore, for the trial court to arrive at a finding that DNA does not prove penetration and identification is not tenable. The total circumstances of this case required that, the paternity of the child was to be done to implicate or exonerate the appellant.
34. The case herein collapsed when the prosecution closed its case, albeit amidst protest without availing the investigating officer who would have explained *inter alia*, why the appellant was charged and whether the DNA test was done, and produced the Birth Certificate.
35. I further note from the record of the trial court that, the court indicated that, the Investigating Officer who would have explained *inter alia*, why the appellant was charged and whether the DNA test was done; and produced the Birth Certificate.
36. Further, I note from the record of the trial court that, the court indicated that, the Investigating Officer failed to appear in court on four (4) different occasions. I note that, the Investigating Officer failed to go to court because she was on leave, then manning KCPE examination, and on the last date she was said to be unwell. Unfortunately, the failure to accord the prosecution an adjournment only led to injustice to the victim. The court should have used all the provisions of the law, right from issuance of summons to compel the Investigating Officer come to court or even allow the prosecution to withdraw the case to allow the victim to receive justice. The failure of an Investigating Officer to come to court should not be allowed to deny a victim of crime a day in court.
37. The upshot of the aforesaid is that, there was no adequate evidence to sustain a conviction herein and I consequently quash the conviction and set aside the sentence.

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF MAY 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Ms. Wambui h/b for Mr. Mburu for the appellant

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant

