



**SKK v Republic (Criminal Appeal 45 of 2022)  
[2024] KEHC 5058 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5058 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL 45 OF 2022**

**RK LIMO, J**

**MAY 13, 2024**

**BETWEEN**

**SKK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. SKK, the appellant herein was charged with offence of defilement contrary to Section 8(1) as read with Section 8(3) of Sexual Offence Act No. 3 of 2006 vide Mwingi Chief Magistrate’s court Sexual Offence case No. 17 of 2020.
2. The particulars of the offence are that on 25<sup>th</sup> August 2020 at about 1900hrs within Kitui County he caused his penis to penetrate the vagina of JMM a child aged 15 years.
3. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of Sexual Offence Act No. 3 of 2006 but after trial he was found guilty of the principal count. Below is a summary of the evidence tendered at the trial.
4. JMM (PW1) the complainant testified on oath that on 25<sup>th</sup> August 2020, her mother sent her to the shops at around 6 pm and that upon returning, it was getting dark and met the appellant who volunteered to escort her home given that it was getting dark. She testified that when they reached the gate leading to her home, the appellant grabbed her threatened her and led her to a nearby farm and defiled her. She stated that she went home and did not tell her mother what had happened but the following day she stated that she went to the appellant’s wife and told her to caution her husband and told her what he had done to her.
5. She stated that after three days she started experiencing pain and afraid, she reported to her aunt who in turn informed her mum. She stated that her mum went and reported to the chief and the chief



reported to the police who swung into action by arresting the appellant and taking the complainant to hospital for examination and treatment.

6. EK (PW2), the mother to the complaint corroborated the evidence of the complainant. She stated that her daughter was born on 7<sup>th</sup> May 2005 and that on 1<sup>st</sup> September 2020, the complainant's aunt namely AM (PW3) informed her that her daughter (the complainant) had been defiled. She stated that she went in the company of her daughter and reported to the chief who in turn called the police. She stated that the police went in and took her daughter to hospital for medical checkup and attention. She recalled that on the material night she noticed that her daughter arrived home and changed her clothes which she found unusual and on inquiring from her daughter, her daughter remained silent.
7. MAN PW3 testified that on 1<sup>st</sup> September 2020 the complainant confided in her that she had been defiled by the appellant on 25<sup>th</sup> August 2020. She told the court that she informed PW2 who in turn reported the incident to the area chief and thereafter to the police.
8. Fred Nzili Mbilu PW4 the assistant area chief Mathunzini sub-location testified that on 1<sup>st</sup> September 2020, PW3 reported that PW1 had been defiled by the appellant and the witness called police from Kanyaa police post who arrested the appellant.
9. Dr. Curtis Alice PW 5, a medical officer from Mwingi level 4 hospital, testified that she examined the complainant and found that external genitalia normal and found that she had a whitish discharge with her hymen missing but with visible remnants. The doctor opined that lack of lacerations on the complainant's genitalia suggested that the complaint could have engaged in voluntary sexual intercourse. The doctor had no doubt that the girl had been exposed to a sexual intercourse. She tendered the P3 she authored and signed as PEX2. She also tendered treatment chit as PEX3 and Post Rape Case Form signed by his colleague Dr Naftali as PEX4. She stated that the findings on the Post Rape Case Form were consistent with her findings.
10. PC Eunice Kanyagia (PW6) the Investigating Officer in the case testified that the report regarding the incident was made at Nguutani police station by PW2. She stated that she escorted the complainant to Mwingi Level 4 Hospital for medical examination. She also stated that she arrested the appellant herein.
11. When placed on this defence, the appellant denied committing the offence terming the charge as false. He stated that he was a musician and that the Area Chief warned him that he was watching him. He stated that when he was told that the police were looking for him, he presented himself at the police station but was released and when he was heading home, the area chief summoned him to the office the following day where he was arrested. He pleaded his innocence.
12. BK (DW2) the mother to the appellant testified and defended her son. She stated that the Area Chief had told her that he would teach her son a lesson though she did not know why. She testified that her son was arrested and charged with defilement. She however stated that she had no difference with the complainant or her parents adding that they are neighbours.
13. The trial court evaluated the evidence tendered and found that the prosecution's case against the appellant had been proved beyond reasonable doubt and convicted the appellant to serve 20 years imprisonment.
14. The appellant felt aggrieved and filed this appeal raising the following grounds namely;
  - i. That the trial magistrate erred in both law and fact by convicting the appellant relying on contradicting evidence.



- ii. That the learned magistrate erred in both law and facts by convicting the appellant without considering that all the witnesses were family members who could liase each other on testimony.
  - iii. That the trial magistrate erred in both law and fact without considering that PW1 was the appellant's cousin but there was a grudge/enmity between the minors mother and the appellant which led to upload the heavy burden on the appellant.
  - iv. That the learned trial magistrate erred in both law and fact by convicting the appellant without considering the doctor's report that the defiler infected the minor with STI disease vis a vis the appellant's examination report which was negative (not infected)
  - v. That the trial magistrate erred in both law and fact by convicting the appellant without considering his defence which was strong enough to beat the evidence adduced before the court.
15. In his written submissions filed on 13th February 2023 the appellant submits that their were inconsistencies in the prosecution case and questions why the complainant failed to scream to alert the neighbours when she was confronted by the appellant. He also questions the complainant's testimony that she did not inform her mother until after three days. He further submits that there was a grudge between him and the area chief due to a previous dispute between them. He further alleges that another dispute between the appellant's brother and the mother of the complainant (PW2). He submits that he was framed.
16. The state/Respondent is opposed to this appeal it has expressed it opposition though written submissions dated 4<sup>th</sup> March 2024. The Respondent submits that the prosecutions established and proved all the ingredients of defilement against the appellant during trial.
17. On the element of age, the respondent contends that it proved that the complainant was born on 7<sup>th</sup> May 2005 through the child health card that showed that the girl was 15 years old at the time.
18. On penetration, the State relies on the complainant's own testimony that she was defiled at around 1800hrs after she had been sent to the shop by her mother. It also submits that the medical evidence by PW5 corroborated the element of penetration adding that the appellant was well known appellant to the complainant.
19. The respondent finally submits that there was no grudge between the appellant and the complainant or any of her witnesses and the allegations of being framed therefore could not hold.
20. This court has considered this appeal and the response by the state. This is a first appeal and the role or mandate of this court is to re-evaluate or re-assess the evidence tendered which I have laid out above with a view to arriving at own conclusions keeping in mind that unlike the trial court I did not get the opportunity to observe the witnesses testify first hand and observe their demeanor.
21. The charge of defilement is brought out by Section 8(1) (3) of the *Sexual offences Act* which provides:
1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  4. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.



22. The above provisions (Section 8 (i)) lays out 3 specific elements which must be proved to the required standard for a charge of defilement to be sustained. The elements are:
  1. Age
  2. Penetration
  3. Positive identification of the perpetrator
23. On age, the clinic card clearly showed that the complainant was aged 15 years at the material time. I also find that the P3 Form (P EX 2) tendered by Dr. Curtis Alice (PW5) also indicates that the complainant was aged 15 years. I therefore find that the evidence by the complainant (PW1) that she was born on 7<sup>th</sup> May 2005 is well corroborated by medical evidence (PEX2) properly tendered by PW5. The element of age was therefore proved beyond any reasonable doubt.
24. On penetration, the respondent relies on complainant's own testimony that she was defiled on her way back from the shops at around 1800hrs and this court finds that the evidence of the complainant in regard to penetration was well corroborated by medical evidence by Dr. Curtis (PW5) who properly tendered a P3 Form (P EX2). One glance of the P3 form and the evidence by the doctor clearly indicates that penetration was positive.
25. The appellant has pointed out that the complainant did not scream during the incident and though the complainant says she was threatened, it is evident that she may have given in to the advances by the appellant given that she remained silent even on reaching home and only raised an alarm after she started experiencing pain. I am however not persuaded by the appellant contention given that the minor was aged 15 years and could not therefore have been in a position to consent to sex legally. This court finds that the element of penetration was proved beyond reasonable doubt.
26. On identification, evidence tendered demonstrated that the appellant and the complainant were neighbours and relatives. The appellant did not deny it. The complainant also gave an account of how the appellant approached her, spoke to her, escorted her and thereafter dragged her to bush and defiled her. The two of them knew each other and the issue of wrong identification in my view did not occur.
27. This court finds that based on the evidence tendered at the trial court, that court reached the correct conclusion that all the ingredients of the offence under which the appellant was charged had been proved beyond doubt. Upon re-evaluation of the evidence as highlighted above, this court has reached the same verdict.
28. The only issue in this appeal is the sentence though the appellant has not raised any issue, the respondent has conceded that the same can be reviewed on account of emerging jurisprudence that sentences in sexual offense are not mandatory and discretion of a court is not merely taken away by the prescriptive nature of the law.
29. I have noted from the proceedings from the trial court, that the trial court found that there was no need to call for a probation report perhaps given the mandatory prescription of sentence under Section 8(3) of *Sexual Offence Act*.
30. This court is alive to the decision in *Maingi & 5 others - v Director of Public Prosecutions & Another* [2022] eKLR and going by that decision it is evident that if the trial court had not found that its hands were tied by the statute, it could have called for probation report and exercise its discretion.
31. In the premises this court hereby reviews the 20 year sentence and in its place given that the appellant had spent around 7 months in custody, he will now serve 15 years in jail from the date of conviction.



The appeal on conviction fails and the same is upheld. The sentence for the arrested reason is revised from 20 years to 15 years in jail after factoring 7 months time spent in custody awaiting trial. He has 14 days Right of Appeal.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 13<sup>TH</sup> DAY OF MAY, 2024.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

