



**M v Director of Public Prosecutions (Criminal Appeal
E089 of 2023) [2024] KEHC 6973 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E089 OF 2023
TW CHERERE, J
JUNE 6, 2024**

BETWEEN

JM APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal from judgment and conviction in Isiolo Criminal Case
S. O No. 17 of 2018 by Hon.E.Shimonjero (SRM) on 15th June 2023)*

JUDGMENT

1. JM(Appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) 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 between 11th and 12th August, 2018 against HA a child aged 14 years.
2. Complainant stated that she was born on 18th March, 2003 as shown on her certificate of birth PEXH. 1. She stated she used to attend madrassa with the Appellant. She recalled that on 11th August, 2028, she was walking home from the shops when she met Appellant and they started walking together. That her father saw them and when she arrived home, her father beat her up and threatened to kill her. She sought refuge at the home of Appellant and his aunt showed her where to sleep. That the following day, she slept with Appellant and they engaged in sexual intercourse. They were subsequently arrested and Appellant was charged.
3. Complainant’s mother FB arrived home on 11th August, 2018 to find complainant missing and she was informed that she ran away after her father beat her. Complainant returned home after 3 days and again her father beat her up.



4. On examination by a clinical officer on 14th December 2018, complainant had an old hymeneal scar with no other injuries as shown on the P3 form PEXH. 2 (a).
5. The investigating officer received complainant and Appellant on 13th December, 2021 and after investigations caused Appellant to be charged.
6. Appellant in his sworn defence stated that in the course of his work as a bodaboda rider, he met complainant and another girl and Complainant who was crying asked him to take her to the police station. On arrival at the police station, he was informed that complainant's family had been looking for her. In spite of his protestation, he was arrested and subsequently charged with an offence he denied committing.
7. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on 15th February, 2023 convicted and sentenced Appellant whom he confirmed was 17 years and 2 months old having been born on 20th June, 2001, to serve 10 years' imprisonment
8. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal on grounds that:
 - i. He was a minor and the sentence imposed on him had violated his rights under Article 53(1) (f) of the Constitution
 - ii. The prosecution case was that complainant went to their home to seek refuge after her father beat her and that he was with his aunt
9. This being a first appeal, the court's duty is as was stated by the Court of Appeal in Mark Oiruri Mose v Republic [2013] eKLR that:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”
10. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR).
11. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010).
12. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See Hadson Ali Mwachongo vs Republic Criminal Appeal No. 65 of 2015 [2016] eKLR & Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009[2010] eKLR.
13. Complainant's certificate of birth tendered in evidence reveals she was born on 18th March, 2003 and was therefore slightly 15 years when the offence was allegedly committed.
14. 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.”



15. 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.”

16. In *P.K.W v Republic* [2012] eKLR, the court of appeal stated as follows:

Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the *Canadian case of The Queen Vs Manual Vincent Quintanilla*, 1999 ABQB 769.

17. In *Michael Odhiambo vs Republic* (2005) eKLR, the court held that the rupture of the hymen was not conclusive proof of defilement.

18. In *Daniel Mwingirwa vs Republic* [2017] eKLR, the Court of Appeal made reference to *P.K.W v R* (supra) and made the following observations;

“..... we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen.”

19. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of the *Constitution* which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused. (See *Miller vs. Minister of Pensions* (1942) A.C. and *Bakare vs. State* 1985 2NWLR).

20. Complainant was the sole witness to the offence. Appellant denied the offence. The P3 form reveals that complainant had an old hymenal scar when she was examined 2 days after the incident from which an opinion was formed that she had been defiled.

21. From the totality of the evidence, I have come to the conclusion that the old hymenal scar is no prove of defilement.

22. Consequently, and for the reasons set out hereinabove, I find that the evidence by the complainant was doubtful and unsafe to found a conviction.

23. Additionally, Appellant has raised a constitutional issue concerning the fact that he was a minor as at the time he was arrested, charged and convicted.

24. Section 8 (7) of the *Sexual Offences Act* provides as follows:



- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.
25. As much as the section is not coached in mandatory terms, a child is defined under the Children Act as any human being under the age of eighteen years. Article 53(2) of the Constitution stipulates that the Child's best interest is of paramount importance in every matter concerning a child and Appellant who was a child ought to have been treated as such instead of being condemned to a life of 10 years' imprisonment.
26. In the end, this appeal succeeds and it is hereby ordered:
1. The conviction is hereby quashed
 2. The sentence is set aside
 3. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty.

DELIVERED AT MERU THIS 06TH DAY OF JUNE 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For the State - Ms. Rotich (PC-1)

