



REPUBLIC OF KENYA



KENYA LAW
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**SKM v Republic (Criminal Appeal E038 of 2023)
[2024] KEHC 9291 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E038 OF 2023**

**JM NANG'EA, J
AUGUST 1, 2024**

BETWEEN

SKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Principal Magistrate's
Court at Kangema (Hon. I. Gichobi) delivered on 22/02/2023)*

JUDGMENT

1. The appellant is dissatisfied with the said judgement of the above stated lower court before which he was charged with a main offence of defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the same Act.
2. The particulars of the main charge are that on 10/11/ 2021 within Murang'a County the appellant intentionally caused his penis to penetrate the vagina of EWK , a child aged 15. It is alleged in relation to the alternative charge that during the same date and at the same place the appellant intentionally and unlawfully touched the child's vagina using his penis.
3. The appellant refuted the charges.
4. After a full hearing, the trial court convicted the appellant of the main charge of defilement pursuant to Section 215 of the *Criminal Procedure Code* and sentenced him to 30 years imprisonment. No order was made regarding the alternative charge.
5. The grounds of appeal as per Grounds of Appeal filed on 27/05/2024 may be condensed as follows:
 - a. That the learned trial magistrate erred in law and fact by failing to find that the ingredients of the offences charged were not established.



- b. That the learned trial magistrate erred in law and fact by convicting the appellant against the weight of the evidence.
- And
- c. That the learned trial magistrate erred in law and fact by failing to consider the defence evidence.
6. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {see the case of *Okeno V. Republic* (1972) EA 32}.
7. The prosecution evidence is that on 7/11/ 2021 at around noon EWK (hereinafter referred to as “the complainant”) met with the appellant as she was going to visit her grandmother at Iregi. She knew him as her uncle since he is her father’s cousin. The appellant invited her to his home but she declined and proceeded to her grandmother’s home.
8. The complainant further testified that on 10/11/2021 she also visited her other grandmother who is the appellant’s mother. While she was there the appellant, who lived in the same homestead came. He invited her to his house and later took her on a walk in the company of his friend.
9. At this point, the prosecuting Counsel brought to the court’s attention that the complainant was giving evidence that contradicted her statement recorded with the police. The court granted the prosecution’s request for her to be stood down to enable the investigating officer conduct further investigations. The complainant was ordered remanded in police custody pending the investigations.
10. The complainant resumed her testimony on 4/7/2022. She told the court that when the appellant ushered her into his house they engaged in sexual intercourse. The appellant’s sister named NM came to do laundry work outside the house and heard them talking inside the house. M ordered her to go back to her parents’ home and the appellant escorted her away. She never disclosed the sexual act to her parents. The complainant further told the court that the appellant was her boyfriend.
11. The complainant’s father (PW3) told the court that on 7/11/2021 while he was in Nairobi the said NM rang him up and related to him that his daughter was not continuing with her education and was instead spending most of her time in the appellant’s home. Alarmed and enraged, he travelled to his rural home and reported the matter to the area chief and to the police. PW3 caused the police to arrest the appellant who denied defiling the complainant. The complainant is, however, said to have told the police that she had engaged in sexual intercourse with the appellant. The witness denied a claim by the appellant that they had a land dispute.
12. PW5 (Clinical Officer) examined the complainant and prepared her medico-legal report dated 15/11/2021 he tendered in evidence. Her hymen was absent but there was no evidence of a fresh tear. No other abnormalities were noted in the girl’s genitalia. The witness also produced the complainant’s treatment records dated 13/11/2021 from Kangema Sub County Hospital which indicate the same medical findings.
13. The appellant gave a sworn defence saying that PW3 is his cousin while the complaint is his niece. He contended that the complaint is malicious because of his past differences with PW3. The latter together with others had earlier falsely alleged that he stole a drum and caused his arrest and prosecution. He said he was innocent but decided to plead guilty to a charge of house breaking and stealing to avoid a prolonged hearing of the case.



14. The appellant's sister, the said NM, testified as a defence witness. She denied having called PW3 to inform him of the complainant's presence at the appellant's house adding that she didn't even have his phone number.
15. Both parties filed written submissions which I have perused against the record. I will consider all the grounds of appeal together. It is indisputable based on the complainant's Birth Certificate produced in evidence that she was 15 at the material time. It is also common ground that the appellant and the complainant are close relatives and the question of the latter mistaking her alleged defiler does not therefore arise. The fact that there is no medical evidence of defilement does not necessarily mean that the complainant was not defiled. Determination of this appeal turns on whether the prosecution showed that the complainant spoke the truth implicating the appellant in terms of the proviso to Section 124 of the *Evidence Act*. This statutory provision dispenses with the requirement for corroboration of the evidence of a child in sexual offences cases where the child is a victim, if the court is satisfied that the child has spoken the truth regarding complicity of an accused person. The case of *JWA V. Republic* (2014) eKLR among many other judicial determinations has reiterated this position.
16. The appellant contends in his submissions that the prosecution failed to call crucial witnesses including the complainant's grandparents she visited on the material date and the appellant's witness (NM). Section 143 of the *Evidence Act*, however, provides that "no particular number of witnesses are required to prove any given fact. Indeed evidence is not counted but rather it is weighed. Even the evidence of one witness may be sufficient to prove a fact if the evidence is credible (see also case law in *Benjamin Mbugua Gitau eKLR V. Republic* (2011)).
17. Having noted as above, it is not explained why the complainant's grandparents were not called to corroborate her evidence that she visited their homestead where she also met the appellant. NM who is claimed to have alerted PW3 of the presence of the complainant at their home instead testified for the defence and denied giving such information. Her evidence was not discredited. If she was a crucial witness for the prosecution, it is not explained why she was not summoned to testify. It is also noted that PW3 was very angry when he got home from Nairobi and confronted the appellant over the defilement allegation. It is probable in the circumstances that the complainant did not freely implicate the appellant. The court is accordingly unable to affirm that the complainant spoke the truth implicating the appellant. His conviction was unsafe.
18. All the grounds of appeal therefore succeed.
19. The upshot is that the appeal is allowed and it is directed that the appellant be forthwith set at liberty unless otherwise lawfully held.

JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF AUGUST, 2024 IN THE PRESENCE OF:

The Prosecution Counsel, Ms Gakumu

The Appellant

The Court Assistant (Ruth)

J. M. NANG'EA

JUDGE

