



**Gonjombe v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 11807 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E028 OF 2023
LW GITARI, J
SEPTEMBER 24, 2024**

BETWEEN

ISSA DIKA GONJOMBE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is an appeal which arises from the Judgment of the Senior Resident Magistrate’s Court at Isiolo Sexual Offences Case No. E002/2022. The appellant herein was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3/2006. The particulars of the offence were that the appellant, on unknown dates between 28/2/2022 and 5/3/2022 at Merti Sub-county within Isiolo County intentionally caused his penis to penetrate the vagina of SGHG a girl aged fifteen (15) years.
2. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 200. The particulars are that on unknown dates between 28/2/22 and 5/3/2022 at Merti subcounty intentionally touched the vagina of SHGA a girl aged 15 years.
3. The appellant pleaded not guilty and a full trial was conducted. At conclusion of it the appellant was convicted on the offence of defilement. The appellant was sentenced to serve the minimum sentence of twenty (20) years.
4. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the following grounds.



Grounds

1. That, the learned trial magistrate erred in law and facts in convicting the appellant without considering that the charge sheet was defective.
 2. That, the learned trial magistrate erred in both law and facts in failing to observe that the prosecution tendered uncollaborating, inconsistent and contradictory evidence.
 3. That, the trial suffered procedural irregularities.
 4. That, the learned trial magistrate erred in law and fact to see the whole case in total was not proved beyond reasonable doubts to justify the conviction.
 5. That I pray to be present during the hearing of this appeal.
 6. That the appeal herein is lodged without the copy of the court proceeding, therefore wish to change the same when availed with the certified court proceeding.
5. The appellant prays that the appeal be allowed. Conviction be quashed, and he be set at liberty. The respondent opposed the appeal and filed written submissions.

The prosecution's case

6. The complainant SHG (PW1) was a first child aged fifteen years at the time of the offence. She was a student in class six (6) at [Particulars Withheld] Boarding School. She was left at home by her mother and she received a phone from the appellant who asked her to go and meet him. The appellant bought her a telephone line and an Itel Phone., The appellant told her to go to his house at [particulars withheld] in Merti. She obliged and went to the appellants house where they engaged in sex. Thereafter she remained in the house of the appellant for one week where they had sex on each day. The appellant then got wind that her parents were looking for her. The appellant gave the complainant money and told her to disappear. She went to Isiolo and lived with her brother by name J but he beat her and told her to go back to her parents at Merti. She complied and upon reaching home she was escorted to the police station where the matter was reported. She was then escorted to hospital where she was examined by a Clinical Officer Saudi Omar a clinical officer at Merti Sub-county Hospital. The P3 form was produced in court by Jello Sabia (PW3) who was his workmate and was familiar with his handwriting as well as the signature.
7. On examination, the clinical officer found that the complainant had bruises on the labia minora and majora and the cervix. There was an old broken hymen which was suggestive of frequent penetration. There was a foul smelly discharge which was suggestive of menstrual period. There was no whitish discharge noted, there was blood in the urine, pregnancy test was negative. There was UTI and vaginal Cardiasis. A P3 form was filled and was produced in court as Exhibit 2 and a PRC Form exhibit 3. The laboratory report notes that the complainant had a bacterial infection and cardiasis which was treated. The lab request and the report as well as treatment notes we produced as exhibit 4(a) – (b) (i) (ii) (iii). Pw5 testified that at the time of examination the complainant was fifteen years old.
8. The matter was investigated by Police Constable Nicholas Mbaru Odero PW6 Merti Police Station. He obtained the birth certificate the complainant, exhibit. He also found that the appellant who had claimed to be a minor was an adult who was a holder of Identity Card No. 387XXXX0 Serial Number 24702XXXX12 and was born on 26/5/2001.



9. PW6 is the one who arrested the appellant from Isiolo township. He produced the birth certificate of the complainant as exhibit 1. Report on appellants identity card, exhibits and the birth certificate of the appellant, exhibits 6.
10. The complainant's father NBM (PW2) testified that the complainant was born on 27/3/2007 and he produced her birth certificate in court as exhibit. He testified that the complainant left home on 29/2/2022. He looked for her but did not get her. He told her Z to call her and the complainant said she was married. Later her son informed him that the complainant was at Isiolo and had been living at ID's house. He traced the complainant and the appellant and took them to his house where they had a sitting and resolved to report the matter to the police. He also took the child to hospital and was examined at Merti General Hospital. A P3 Form was filed. He then recorded a statement. PW3 HG testified that he went to visit the complainant and after four days he learnt that the complainant was in Isiolo. Her uncle spotted her and arrested her and he told him to take her to Merti. The complainant told her she was arrested by a man who had promised to marry her. They started looking for him. PW3 gave the complainant his phone and told her to call the appellant. The complainant and the appellant agree to meet at Takiwa Forest. The complainant pointed out the appellant and he arrested him.
11. PW4 No. 23545 Police Constable Patrick Nzau testified that on 22/3/22 he arrested the appellant on allegations of defilement of a girl. The appellant was then charged.

Defence Case.

12. Upon being put on his defence there appellant opted to give a sworn defence and told the court the still denies the charges and that he had no idea as to what happened on the dated of 28/2/2022 and 5/2/2022. That he found himself in the hands of the police.

The Appeal.

13. The appeal was canvassed by way of written submissions.

Appellants Submissions

14. The appellant submits that the charge was not proved beyond any reasonable doubts as the evidence adduced in court was riddled with contradictions and inconsistencies. He cites Article 50(2) (a) of *the Constitution* and submits that he was an inalienable right to be presumed innocent until proven guilty. That the respondent bears the burden of prove the case against him beyond any reasonable doubts. He relies o the case of "Woolmington Versus DPP 1935 AC 462 and Miller Versus Minister of Pensions (1942) AC Bakare Versus State (1985) 2NWLR at 465 – Nigerian Case.
15. The appellant further submits that the sentence was harsh and excessive. He submits that the sentence did not comply with the sentencing guidelines and policy. That the minimum mandatory sentence imposed was unconstitutional. He relies on Maingi & 5 Others Versus Director of Public Prosecutions & Another (Pet. E017 of 2021 (2022) KEHC 13118 (KLR), Odunga J as he was.
16. The appellant further submits the learned trial magistrate erred by failing to treat the minor as an adult. The appellant further submits that his defence and mitigation were not considered.

Respondents Submissions

17. The respondent submits that they discharged the burden of proof, the charge against the appellant beyond any reasonable doubts.



Analysis and Determination

18. The issues that arise for determination are:-
1. Whether the charge against the accused was proved beyond reasonable doubts.
 2. Whether the court erred by failing to hold that the complainant behaved as an adult.
 3. Whether the defence and the mitigation of the appellant was considered.
 4. Whether the sentence imposed was unconstitutional.
19. This is the first appellant court and has a duty to consider the analyse and re-evaluate the evidence that was tendered before the learned trial magistrate and come up with its own independent finding. In doing so the court has to bear in mind that it had no opportunity to see the witnesses when they testified and then leave room for that. See *Okemo Versus Republic* (1972) EA 32.

Whether the charge against the accused was proved beyond any reasonable doubts.

20. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* which provides as follows:-
- 8(3) 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.
21. Under the Section, the prosecution has the burden to prove the three key ingredients of the charge which include
- (1). The age of the complainant
 - (2). Penetration
 - (3). The positive identification and/or recognition of the perpetrator.
22. These three constitutes the ingredients of the charge facing the appellant which the prosecution is duty bound to prove in order to serve a safe conviction against an accused person. These ingredients were affirmed by the Court of Appeal in the Case of *George Opondo Versus Republic* (2016) eKLR

Proof of Age

23. Proof of age in cases of defilements crucial as it determines the sub-section under which an accused person would be charged. Section 8 of the *Sexual Offences Act* provides for stiff sentences based on the age of the child. The younger child the stiffer the sentence.
24. Rule 4 of the Sexual Offences Rules 2014 provides that: “When determining the age of a person the court may take into account evidence of the age of that person that may be contained in a birth certificate any school documents or in a baptism card or similar documents.
25. To buttress this the court of Appeal has stated that whatever evidence the prosecution relies on to prove the age it must be credible. In this case the prosecution relied on the complainant’s birth certificate of SHGA (Complainant) which was issued on 8/3/208 showing that the complainant was born o 26/3/2007. The age of the complainant was therefore proved with credible evidence. The birth certificate which was produced as exhibit proves that in 2022 th4e complainant was aged fifteen years. I find that the age of the complainant was proved to the required standards



Penetration

26. Section 2 of the *Sexual Offences Act* defines Penetration to mean “partial or complete insertion of the genital organs of a person into the genital organs another person”.
27. The fact of penetration is proved by the credible testimony of the complainant corroborated by medical evidence. In this case the prosecution called PW5 the Clinical Officer who produced the P3 form of the complainant and he testified that the complainant’s hymen was broken, which was suggestive of frequent penetration. There were also bruises on the labia minora and majora and the cervix. This evidence proves beyond any reasonable doubts that there was penetration into the genital organs of the complainant.

Identification of the penetration.

28. The complainant identified the appellant as the person who defiled her after living her into his house. Her evidence is corroborated by PW2 & 3 who testified that he was summoned by elders on allegations that he wanted to marry the complainant. The father of the complainant managed to arrest her and he took her to the police station. The defence of the appellant was a mere denial. It follows that the evidence by the prosecution sufficiently proves that the appellant was the perpetrator.
29. In his grounds of appeal the appellant submits that there were contradictions and inconsistencies in the evidence of the prosecution. He has however not produced the inconsistencies and the contradictions in the evidence of the complainant. I have not come across any contradiction or inconsistencies in the complainants’ evidence or in the evidence of the complainant. The law is well settled that not all contradictions or inconsistencies will lead to the rejection of evidence. Minor contradictions and inconsistencies which are not material particulars of the case and disregarded.
30. In the Court of Appeal of Uganda in the case of *Twegare Alfred Versus Uganda CR. Appeal 139/2001 (2003)UGCA* the court stated: - It is not every contradiction that warrants rejection of evidence.

with regard to contradictions in the prosecution case the law is set out in numerous authority in that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate unfaithfulness or it that do not affect the main substance of the prosecution's case”.
31. The contradictions in the evidence of a witness and inconsistencies that are fatal must relate to material facts and mistakes substantial minor or trivial contradictions do not affect the credibility of a witness and can therefore not vitiate a trial.
32. In this case the appellant has not pointed out the alleged contradictions and inconsistencies. The evidence adduced, by the prosecution is devoid of contradictions on material particulars. This ground must fail.
33. The appellant has challenged his conviction on the basis the learned magistrate failed to treat the minor as an adult (sic).
34. Whereas the *Sexual Offences Act* avails a defence that the complainant behaved as an adult, it comes with a condition that he must demonstrate the steps he took to conform whether the complainant was an adult.



35. This defence should be raised before the trial court which should consider and make a finding. Section 111 of the Evidence act Cap 80 Laws of Kenya) provides as follows :-

Burden on accused in certain cases

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall-

- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

36. A person charged with defilement is entitled to raise a defence that he was misled by the complainant to believe that she was an adult. Section 8(5) & (6) of the Sexual Offences Act provides as follows:-

5) It is a defence to a charge under this section if -

- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities.

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- (b) the accused reasonably believed that the child was over the age of eighteen years. (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including



any steps the accused person took to ascertain the age of the complainant.

36. The appellant did not raise the defence before the learned trial magistrate. He cannot therefore raise. This defence on appeal simply because this court does not normally have the opportunity to see the complainant. Such are matters which this court has to leave room for the fact that it had no opportunity to see the witnesses in order to assess her demeanor.
37. The defence of the appellant was a mere denial. It is an afterthought for him to allege that the complainant behaved as an adult. Be that as it may, the age of the complainant was proved to be fifteen years at the time the offence was committed.
38. Based on the appellants submissions, he concedes that it is the law that a child below the age of eighteen (18) years cannot consent to sex and the Section 8(1) to 8(4) penalizes defilement. He further states that it can be easily concluded that its immoral to have sex with a child under the age of eighteen years.
39. This is the law. The appellant did not demonstrate the steps he took to ascertain the age of the complainant. The defence under Section 8(5) of the *Sexual offences Act* does not arise as it has been proved with cogent evidence that the complainant was a minor who the appellant misled that she could be married to him and to engage in sex. I find that the ground is a sham and must fail.

Whether the Sentence imposed on the appellant was unconstitutional?

40. The Supreme Court has in a recent decision affirmed that sentences under the *sexual offences Act* are lawful and courts are obliged to pass thereon on offenders unless the legislature decides otherwise. In case of Republic Versus Joshua Gichuki Mwangi Petition No. E018/2023 Supreme Court, the court overturned the decision of the Court of Appeal granting the Judges and Magistrates the power to hand Sex offender lesser sentences and affirmed the sentences provided in the *Sexual Offences Act*. The Supreme Court further stated that mandatory minimum sentences do not deprive Judicial Officers the power to exercise Judicial Discretion and the sentences under Section (8) are lawful as long as the Section remains valid. The decision finds this court by dint of the principle of state Decisis which is meant to enhance the legal systems predictability and certainty. The court referred to its decision in Gatirau Peter Munya Versus Dickson Mwenda Kithinji & 2 others, Supreme Court Petition N. 2B/2014 (2014)eKLR where it stated that Article 163(1) of *the Constitution* is the embodiment of the time followed common law doctrine of state decisis”. It holds that they precedents set by this court are binding on all other courts in the land. It is imperative for all courts bound by decisions to rigorously uphold their authority, confirming the effective function of the administration of Justice.
41. Further that, “without this steadfast and uniform commitment the legal system risks ambiguity eroding public trust and causing disorder in the administration of justice of Justice”.
42. The learned Magistrate while imposing the sentence, stated that he considered the circumstances under which the offence was committed ad the sentiments by the prosecution as to why the appellant did not deserve leniency stated that the appellant was a repeat offender who committed the offence while serving a sentence on probation for a similar offence after claiming to be a minor but was actually an adult. That he wanted to mislead the court in the present case that he was a minor, only for the Investigating officer to avail evidence proving that he was an adult. The court found that the appellant violated the probation order and was undeserving of the court’s leniency. He proceeded to pass the minimum sentence of Twenty (20) years.
43. I find that the sentence passed was lawful and the learned magistrates considered the relevant matters when passing the sentence. It is my view that the appeal on sentence is without merits.



conclusion:

44. For the reasons stated, it my considered finding that the Judgment of the Learned Magistrate was sound. The appeal lacks merits and is dismissed.

SIGNED, DATED AND DELIVERED THIS 24TH DAY OF SEPTEMBER, 2024.

HON. LADY JUSTICE GITARI

JUDGE

IN THE PRESENCE OF:-

Court assistant - Tupet

Prosecutor

