



**KK v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 12461 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E027 OF 2023
RK LIMO, J
OCTOBER 14, 2024**

BETWEEN

KK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein, KK was charged and convicted of the offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2016 vide Kyuso PM’s court S.O Case No. E007 of 2020.
2. The particulars of the charge were that on the 20th October 2019 at around 5.00pm within Kitui he intentionally caused his penis to penetrate the vagina of FM (name withheld) a child aged 17 years.
3. A brief background of the case against the applicant at the trial going by the record indicates that the appellant and the complainant were immediate neighbours and it also indicates that the offence appears to have occurred on 2 occasions on 10th October 2019 and 20th October 2019.
4. The complainant (PW1) testified that she met the appellant first on 10th October 2019 at a nearby stream when she was coming from school and that the appellant appearing drunk grabbed her and defiled her. She stated that after the ordeal she went home and never told anyone. She proceeded that again on 20th October 2019 while heading to the same river, the appellant who was working at a nearby farm jumped over the fence, grabbed her and defiled her again. She stated that she never told anyone about the incident but in November 2019 she missed her periods. She stated she also missed her periods in December 2019 which made her mother inquisitive on why she was not using her sanitary pads. She stated that on 13th February 2020 her school teacher reported to her mother that she was pregnant who in turn informed her father.
5. She testified that his father called his brother J who took the responsibility of find out of inquiring who the culprit was. She stated that she informed her mother and her uncle that the appellant was



- responsible and from there the matter was reported to the police who swung into action and referred the complainant to hospital for medical examination. She stated that she gave birth on 9th July 2020.
6. ENM (PW2) the complainant's mother testified and corroborated the evidence given by her daughter (PW1). She stated that in January 2020, she noticed that her daughter appeared pregnant but on asking her, she decline. She stated that on 14th February 2020 she was called to school by the complainant's teacher and informed that her daughter was pregnant. She stated that she notified her father who in turned called J (PW3) her brother in law to inquire from the appellant. She stated that the appellant was called and on being told about the pregnancy of the complainant, the appellant was mute for about an hour before reportedly admitting having had sex with the complainant. The witness stated that the appellant was a worker to her immediate neighbour. She stated that she later went to Tseikuru Police Station to report.
 7. JNK (PW3) testified and largely corroborated the testimonies given by both PW1 & PW3. He stated that the complainant who was his niece reported to him that the appellant was responsible for the pregnancy she was carrying. He stated that when he inquired from the appellant who worked at a nearby home of about 300 metres away from where they lived, he reportedly admitted to defiling her.
 8. Alex Nguma (PW4), a clinical officer from Tseikuru testified and confirmed that the complainant was defiled and was pregnant when he examined her.
 9. He tendered a P3 Form which he authored and signed as PEX2 and treatment notes as PEX1. He confirmed that the child born as a result of the incident was not subjected to DNA test.
 10. Jane Wanjiku (PW5) the Investigating Officer in the case testified that a report regarding the defilement was made at Tseikuru Police Station on 15th February 2020. She stated that a copy of the birth certificate given to her indicated that the minor was born in 2003. He tendered the birth certificate as PEX3 and PRC Form as PEX4. She further narrated the action the police took after the report was made regarding the defilement.
 11. When placed on his defence, the appellant gave unsworn defence and denied committing the offence. He conceded that he knew the complainant as she lived over the other side across the road. He stated that it was not possible for him to defile the minor in a river where many people went to fetch water. He also stated that he could not jump over the fence to go and defile the minor near the stream.
 12. The trial court evaluated the evidence tendered and found that the incident took place in a broad day light and found that the prosecution's case against the appellant was sufficient to sustain the conviction on the principal charge of defilement and convicted him and sentenced him to serve 15 years imprisonment.
 13. The appellant felt aggrieved and filed this appeal and raised the following grounds namely;
 - i. That the trial magistrate erred by failing to record reasons for believing the evidence of a single witness contrary to Section 124 of the *Evidence Act*.
 - ii. That the case against him was proved on assumptions.
 - iii. That the trial court erred by disregarding his defence without cogent reasons.
 - iv. That the trial magistrate erred by finding that the ingredients of the offence were proved beyond reasonable doubt.
 - v. That the trial magistrate erred by imposing a harsh sentence.



14. In his written submissions, the appellant submits that action against him was taken after the pregnancy of the complainant. He urges this to find that the complainant behaved like an adult because of the time they used to meet which was 5.00pm. He submits that the complainant appeared like an adult to him and that the act should not have been treated as defilement adding that the act was mutual.
15. He submits that there was no evidence tendered to show that he could have known that the complainant was school going and a child. He submits that it took time for the offence to be reported to the police. He faults the trial court for not considering why it took 4 months for the incident to be reported and submit that the reasons why the complainant's parents called and spoke to him first before reporting the matter to the police was to solve the matter as adults.
16. The State has opposed this appeal vide submissions filed dated 17th July 2024. The state submits that DNA evidence was not mandatory or necessary to establish a sexual offence. It submits that the delay in reporting the matter was not justified and that the matter was only reported to the police because the complainant's father insisted that the issue be reported.
17. The State concedes that the trial court never gave reasons to believe the complainant as stipulated under Section 124 of Evidence Act and that for that reason, the conviction in its view was not safe. The state has therefore conceded to this appeal.
18. This court has however considered this appeal, evidence tendered and the decision being appealed here. The state has conceded but this court is however inclined to determine this appeal on merit.
19. The appellant was charged with the offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act. For the offence of defilement to be sustained, the prosecution should establish and prove the following ingredients beyond reasonable doubt namely;
 - i. Penetration
 - ii. Age of the complainant
 - iii. Positive identification of the perpetrator
20. The main grounds raised in the petition of appeal are as follows;
 - i. That the trial court erred by relying on the evidence of a single witness without giving reasons as stipulated under Section 124 of Evidence Act.
 - ii. That the prosecution's case was not proved beyond doubt.
 - iii. That the sentence was harsh.
21. I will look at the first ground which the State has conceded. It is true that the trial court did not indicate that it had reasons to believe the complainant but the prosecution's case did not just hinge on the evidence of the complainant alone. The trial court also relied on the corroborative medical evidence of a Clinical Officer Alex Nguma (PW4).
22. The Medical Officer testified that when he carried out medical examination on the minor when she was taken to the hospital on 15th February 2020 he found out that she was 16 weeks pregnant. That period was in tandem with the evidence of the complainant who stated that she was defiled on 10th October 2019 and 20th October 2019. This is because if you count the weeks from 20th October 2019 to 15th October 2020 it is approximately 16 weeks. The trial court considered that fact and the fact that a child was born out of the defilement incident exactly 9 months after the defilement.



23. The evidence given by the complainant's mother (PW2) further corroborated the evidence of her daughter and the victim. The trial court therefore relied on the evidence given by the medical officer and the other witnesses to render a conviction which I find to be sound.
24. This court finds that the element of penetration was clearly proven by the medical evidence (P3 form-P exhibit 2) which corroborated the evidence by the complainant.
25. The appellant in his defence chose to give unsworn defence and cannot fault the trial court for failing to give weight to the same. Unsworn weight of an unsworn statement is less compared to sworn statement. The trial court correctly found that the defence was a mere denial.
26. In his written submissions, the appellant has even appeared to admit to the act of defilement. He seems to raise a defence albeit belatedly that the complainant behaved and acted like an adult. That the act was consensual. However, a look at his unsworn defence clearly shows that this is an afterthought because he ought to have raised the issue in his defence. He also did not raise the issue in his petition of appeal and only raised the issue in his written submissions without seeking leave of this court. A minor is also incapable of consenting to sex and the appellant cannot therefore plead that the complainant consented to the act.
27. This court further finds that DNA evidence is not a pre-requisite in proving a sexual offence. The sexual offences can be proved through DNA evidence use but it is not mandatory. The offence can be established by proving the 3 necessary ingredients highlighted above in this Judgement.
28. On age, this court finds that both the birth certificate tendered and P3 tendered proved beyond doubt that the complainant was aged 17 years old at the time. The element of age was therefore proved beyond doubt.
29. This court on re-evaluation of evidence tendered at the trial finds that there was sufficient evidence to find a conviction on the charge upon which the appellant was convicted. His belated excuse that the girl behaved like an adult or consented to the act cannot aid him. He should have raised the issue in his defence and the trial court could have considered the defence in line with the provisions of Section (8) (5) & (6) of the *Sexual Offences Act* which states 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
 - 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.”
30. Having not raised the defence that the girl appeared like an adult, the appellant could have raised it in his appeal because it was belated as I have found out. This court is not in a position to establish the said fact, at this appellate stage.
31. On sentence, this court finds that the lower court passed a lawful sentence prescribed under Section 8(4) of the *Sexual Offences Act* and going by the current position taken by the Supreme Court in the



Case of Muruatetu 3, the hands of the trial court were tied by the statute and the appellant cannot claim that the sentence was too harsh.

In sum, this court finds no merit in this appeal for the aforestated reasons, the appeal is disallowed conviction & sentence are upheld.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

