



**M v Republic (Criminal Appeal E060 of 2022)  
[2024] KEHC 11875 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11875 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E060 OF 2022**

**DK KEMEL, J  
OCTOBER 4, 2024**

**BETWEEN**

**DFM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement and sentence of Hon. P.N Gesora (CM) in Bungoma Chief Magistrate’s Court Sexual Offence Case No. 109 of 2020 delivered on 13th June 2022)*

**JUDGMENT**

1. The Appellant, DFM, was charged before the Chief Magistrate’s Court at Bungoma in Sexual Offences Case No. 109 of 2020 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that the Appellant, on 6<sup>th</sup> October 2020 at (particulars withheld) in Kanduyi Sub-County within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of VNW, a child aged fifteen (15) years.
2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the Appellant, on 6<sup>th</sup> October 2020 at (particulars withheld) in Kanduyi Sub-County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of VNW, a child aged fifteen (15) years.
3. On 7<sup>th</sup> October 2020, the charge was read to the Appellant in his preferred language and that he pleaded not guilty to both counts. After a full trial, the Appellant was convicted and sentenced to fifteen (15) years’ imprisonment.
4. The lower Court record reveals that the Prosecution called four (4) witnesses in support of its case.



5. In his judgement, the learned trial magistrate found that the Appellant committed the offence with which he was charged in the main charge, proceeded to convict him under Section 215 of the Criminal Procedure Code and sentenced him to serve Fifteen (15) years' imprisonment.
6. Being dissatisfied with the conviction and sentence, the Appellant has lodged the instant appeal based on the following supplementary grounds:
  - a. That the trial Court erred in both law and in fact in not making a finding that penetration by the Appellant was not proved beyond reasonable doubt.
  - b. That the trial Court erred in both law and in fact in admitting the evidence of PW4 who did not prove to the Court that she is properly qualified for the work.
  - c. That the trial Court erred in both law and in fact in not declaring PW1 a witness that is not truthful thus convicting on contradicted and untruthful evidence.
  - d. That the trial Court erred in both law and in fact in not making a finding that the mandatory nature of the sentence under Section 8(4) of the Sexual Offences Act No. 3 of 2006 is unconstitutional.
  - e. That the trial Court erred in both law and in fact in not making a finding that the sentence of 15 years was manifestly excessive and not proportionate to the circumstances of the case.
  - f. That the trial Court erred in both law and in fact in not making a finding that the Appellant's sentence to run from the date of his arrest pursuant to Section 333 (2) of the Criminal Procedure Code.
7. He prayed that this appeal be allowed; conviction and sentence be set aside and the Appellant be set free.
8. The appeal was canvassed by way of written submissions. Both parties complied with the Court directive.
9. The Appellant submitted that the ingredient of penetration was not duly proved by the Prosecution as expected. According to him, if the evidence of the Complainant, PW1, in this case is in doubt that means that the evidence of the Medical Officer, PW4 that corroborates the same is also in doubt. He submitted that the medical examination herein was simply circumstantial evidence that must have any other co-existing circumstances that destroys its inference of guilt of order to convict.
10. He submitted that Section 124 of the Evidence Act entails that corroboration is not necessary in sexual offences but only if the Court finds the Complainant to be a truthful witness which was not the case herein.
11. He submitted that defilement was not proved by DNA test but by way of evidence and in the absence of medical examination to support the fact of rape, the same is not decisive as well. He relied on the case of Kassim Ali versus Republic Mombasa Criminal Appeal No. 84 of 2005.
12. According to him, the medical examination did not identify who caused the penetration referred to and that the same simply amounted to a reasonable doubt. He also submitted that as per the evidence of PW1 she did not have any coital relations with the Appellant considering the fact that she was the only sole witness of the defiler. He submitted that PW1 protested testifying about the same until she was made a refractory witness. He insisted that PW1 was not a truthful witness thus the medical examination or any other corroboration meant to corroborate an untruthful witness thus lacked the capability of advancing any conviction beyond reasonable doubt.



13. He submitted that PW4 further failed to show the Court her requisite qualifications as a clinical officer as the mere assertion that she works as a clinical officer does not suffice thus doubting her findings.
14. On the sentence aspect, he submitted that the sentence as dispensed by the lower Court of 15 years' imprisonment, is manifestly excessive as per the circumstances. He relied on the cases of Eliud Wambui vs Republic (2019) eKLR; Martin Charo vs Republic (2016) and Maingi & 5 Others vs D.P.P & Another (Petition E017 of 2021 (2022) KEHC 1318 (KLR).
15. He urged this Court, in case of a dismissal of his appeal on conviction, to consider a least prescribed sentence pursuant to Article 25 (c), 50 (2) (p) COK 2010. Further, he urged this Court to consider the time he spent in custody as per the provisions of Section 333 (2) of the Criminal Procedure Code.
16. The appeal was opposed by Ms. Kibet, the Learned Prosecution Counsel as she submitted that the appeal is devoid of merit and thus ought to be dismissed. According to her, if there were any inconsistencies in the testimony of the Prosecution witnesses, the same were of very minor nature and did not go to the root of the Prosecution's case for it to cause the Appellant any prejudice. She relied on the case of the Court of Appeal in Nyeri in Richard Munene vs Republic (2018) eKLR.
17. The Respondent opposed the appeal vide its submissions dated 17.7.2024. On the age of the Complainant, it was submitted that the availed Birth Certificate of the victim showed that she was 15 years at the time of the incident and thus her age was duly proved.
18. On the sentence aspect, it was submitted that the complainant herein was 15 years old at the time of the offence. The *Sexual Offences Act* stipulates under Section 8(3) that the Appellant is to be sentenced to an imprisonment term of not less than 20 years. She submitted that the sentence was commensurate to the offence. She relied on the case of Miscellaneous Criminal Application No. E014/2021-Rotike vs Republic, Bernard Kimani Gacheru vs Republic (2002) eKLR and The Supreme Court of Kenya Petition 018/2023 R vs Joshua Gichui Mwangi and Initiative for Strategic Litigation in Africa (ISLA) and Others.
19. The Respondent's counsel sought for the dismissal of the appeal.
20. The duty of this Court while exercising its appellate jurisdiction was set out by the Court of Appeal in Okeno Vs Republic [1972] E.A. 32 and re-stated in Kiilu and Another Vs R [2005] 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereafter, the court should draw its own conclusions. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. Further, the Court should be alive to the principle that a finding of fact made by the trial Court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial Court acted on the wrong principles (See Gunga Baya & another Vs Republic [2015] eKLR).
21. Having considered and analyzed the evidence before the trial Court, the issue for determination is whether the appellant has made a case for this Court to interfere with the conviction and sentence imposed by the trial Court.
22. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the Prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the case of Woolmington Vs DPP [1935] AC 462.
23. Before i proceed with my re-analysis, it is essential to note that the charge sheet herein indicates that the Appellant was charged with an offence under Section 8(1) as read with 8(4) instead on 8(3). As noted above, the Complainant was 15 years old at the time of the offence and hence the charge should have been brought under section 8(1) as read with section 8(3) of the Act. However, it is my view that



charging the Appellant under the wrong provision of the *Sexual Offences Act* did not in any way vitiate the trial or deter the Appellant from understanding the charges against him or making his defence. Furthermore, it cannot be said to be lawful for an adult to have carnal knowledge of a minor. In any event, this omission is curable under Section 382 of the Criminal Procedure Code as the same was not capable of rendering the charge defective.

24. In the case before the trial Court, the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. In *Charles Wamukoya Karani Vs Republic*, Criminal Appeal No. 72 of 2013,

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

25. The question therefore is whether the above elements were proved to the required standard.
26. It is not disputed that the Complainant at the time of the commission of the offence, was 15 years old as the same could be ascertained from the evidence produced before the trial Court (P.Exh. 1 - Birth Certificate).
27. In the case of *Edwin Nyambaso Onsongo Vs Republic* (2002) eKLR, in which the Court cited the case of *Mwolongo Chichoro Mwanjembe Vs Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held that:

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof....”

28. In this case, a birth certificate was produced as an exhibit. It shows that the complainant was born on 2<sup>nd</sup> January 2005. As such, this Court is satisfied that the Complainant was a minor which satisfies the legal requirement.
29. In regard to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the ‘partial’ or complete insertion of the genital organs of a person into the genital organs of another.
30. In this case, PW1 testified how she attended a football match and while there the Appellant who is well known approached her asking her to accompany him to Webuye to which she consented. She told the Court that she went home and at about 10.10pm she heard a knock on her door and on opening she realized it was the Appellant. She told the Court that she sneaked out and proceeded with the Appellant to Webuye using a motorcycle and that they entered a house, one roomed house, which he lit with a torch. She told the Court that on that night nothing happened and when morning arrived, the Appellant left her in the house and she was fed by his relatives. On 5<sup>th</sup> October 2020, the Appellant arrived home at 1.00 pm telling her that they had to return back to Bungoma. They boarded a matatu to Mpeti Bungoma and he took her to a home where an old couple resided, informing her that they were his grandparents. At bedtime, the girl present in the home spread a mattress for them and that at 4.00 am they had sex.
31. The Appellant has in his submissions urged this Court basing his arguments on the law on the hostility of PW1 to quash the decision of the lower Court. In *Daniel Odhiambo Koyo v Republic* [2011] eKLR,



the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

“... The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In *Maghenda v. Republic* [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

“The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.”

There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.

Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify...

32. The Court of Appeal also summarized the applicable law in *Abel Monari Nyanamba & 4 Others v Republic* [1996] eKLR as follows:

“In *Coles v Coles*, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-

“A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.”

33. The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no Court could find a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.
34. The Complainant in the course of her testimony refused to proceed prompting the Prosecution to have her remanded for five days in a children’s cell at Bungoma Police Station and on 3<sup>rd</sup> December 2020, she proceeded with her testimony. PW4, testified that she is a clinician at Kimaeti Health Centre and the one who filled the P3 form for the Complainant herein. According to her, on examination of the Complainant herein, she noted that her private parts had lacerations and that there was a smelly discharge from her vagina and concluded that the Complainant herein had had sexual intercourse. According to the availed P.Exh.3-P3 form, she noted that there was no hymen, injuries on the Complainant’s bruised labia majora and that her vulva was soiled with blood.
35. The Appellant in his testimony denied the charges preferred against him noting that he was working on the day of the alleged incident and that he was working alone. He told the Court that he was arrested on 6<sup>th</sup> October 2020 while at work and taken to the police station. The evidence does not add up because the Complainant’s testimony was that the Appellant was her boyfriend. It is of equal importance as was also noted by the trial Court that the defence as fronted by the Appellant was not corroborated and could not be well accounted for.
36. On the evidence of identification, what this Court has to grapple with is whether the Appellant was positively identified. The Appellant was the Complainant’s boyfriend. It’s highly improbable that she could have mistaken him. I find and hold that there is nothing to suggest that the Appellant was not properly identified.



37. On the issue of the credentials of PW4, the Appellant did not challenge the qualifications of the Clinical Officer when she testified. It is in cross-examination that the matters which the Appellant is raising would have been cleared. Section 154 of the Evidence Act Cap 80 provides: -

“When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend–

- (a) to test his accuracy, veracity or credibility;
- (b) to discover who he is and what is his position in life;
- (c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.”

38. I find that the credibility of PW-4- was not challenged. The court was therefore entitled as it did to rely on the evidence of the Clinical Officer. This court stated in *James Kariuki Mwai v Republic* [2017] eKLR

“From the record, the clinical officer John Mwangi (P.W. VI) testified and stated that he is a clinical officer attached to Kerugoya County hospital. The appellant cross-examined him at length but he did not dispute that he was a qualified clinical officer. The appellant was given a chance to interrogate his credentials when he was given a chance to cross-examine. It is now too late to dispute his qualifications.

The Court in the case of *Kyalo Kiswii -V- Republic* [2015] eKLR when addressing the issue of competence of clinical officer had this to say:

The issue of whether or not a clinical officer is a competent person to give medical evidence was settled by this Court in *Raphael Kavoi Kiilu v Republic* [2010]eKLR (*Criminal Appeal No. 198 of 2008*). In that appeal, it was alleged that a clinical officer was not qualified under the Evidence Act to give evidence in matters relating to sexual offences. The Court held that a clinical officer was in fact, authorized under the Clinical Officers (Training, Registration and Licensing) Act and therefore is fit to give medical evidence.....

We agree with this proposition. A clinical officer, being authorized under the Clinical Officers Act is an authorized person who can render medical services, and further can give medical evidence under section 77 of the Evidence Act. Nothing therefore turns on this ground of appeal as well.”

39. The evidence of the Clinical Officer was not interrogated on the matters raised by the Appellant. Her evidence is intact that she was a Clinical Officer who was qualified and experienced to examine the Complainant and give her opinion. The ground must fail.

40. Having considered the entire evidence adduced, i find that the Prosecution proved its case beyond all reasonable doubt. PW1 was able to narrate the occurrence of the incident and what the Appellant did to her. The medical evidence also collaborated the evidence that PW1 had been defiled, her hymen was missing, had a bruised majora labias and a smelly discharge from her private parts.

41. The entire evidence on record left no doubt, as the trial Court found, that the Appellant defiled PW1 in the manner described. The trial Court considered all the evidence presented and having done so, came to a proper and inevitable conclusion, that of guilt of the Appellant. The finding on conviction by the trial court was therefore quite sound and I see no reason to interfere with it.



42. The Appellant did submit that the sentence meted by the trial Court was unlawful and excessive. In the instant case, the sentence under Section 8(1) as read with (3) of the *Sexual Offences Act* states that:
1. A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.
  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.
43. In my view, the sentence imposed was not within the law as it is clear that a person who defiles a child between the ages of 12 to 15 years is liable upon conviction to an imprisonment term of not less than 20 years. It is noted that the Respondent opted not to issue a notice of enhancement of sentence and hence I will not interfere with the same. The said sentence will be maintained. As the Appellant was in custody throughout the trial since 6.10.2020, the sentence will run from the said date in compliance with the provisions of section 333(2) of the Criminal Procedure Code.
44. In the result, the appeal against conviction lacks merit and is dismissed. The appeal on sentence partially succeeds to the extent that the sentence of 15 years' imprisonment shall commence from the date of arrest namely 6.10.2020.

**DATED AND DELIVERED AT BUNGOMA THIS 4<sup>TH</sup> DAY OF OCTOBER 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

DFM Appellant

Miss Mwaniki for Respondent

Kizito Court Assistant

