



REPUBLIC OF KENYA



KENYA LAW
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**DKM v Republic (Criminal Appeal 023 of 2021)
[2023] KEHC 2088 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 023 OF 2021
F WANGARI, J
FEBRUARY 6, 2023**

BETWEEN

DKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. V.A
Otieno (Ag. SRM) in Kitui Cr. Case No. 534 of 2012)*

JUDGMENT

Background

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*. Particulars of offence that on 16th day of September 2012 at (withheld) within Kitui County, intentionally caused his male organ to penetrate the female genital organ namely vagina of EMM a child aged 10 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. Particulars of offence are that on 16th day of September 2014 at (withheld) within Kitui County, intentionally touched the female genital organ namely vagina of EMM, a child aged 10 years with his male genital organ namely penis.
3. The appellant was convicted in the main charge and was sentenced to serve life imprisonment. Having been dissatisfied with the judgment, conviction and the sentence imposed, the appellant lodged this appeal.
4. This being the first appellate court, I am guided by the principles as set in the case of Ganpat v State of Haryana, as cited by Mativo J in *Makau v Republic* as hereunder;



- a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
 - b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
 - c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
5. Also in *Okeno v Republic* and *Kiilu & ano. v Republic*, the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.

Summary of evidence

6. The complainant (PW 1) gave evidence that on 15/9/12 the accused who was a relative came to their house and tried to remove her under pant. She resisted but the accused told her that she was his wife. The accused left. He later came back at night while she was sleeping in the kitchen, removed her underpants and defiled her. She said the accused lay on top of her and put the 'thing' that urinates inside her and urinated on her. She attempted to scream but the accused blocked her mouth with his hands.
7. JK who was sleeping in the same room as the complainant told the accused to stop. The accused put on his trouser and left. She said she felt pain during the act. The complainant reported to her aunt what had happened. The accused had previously attempted to have sex with her. On cross examination, she said her father who was a drunkard didn't closely monitor the things that were happening in their home. She also reported the accused to him but he did nothing about it.
8. MM (PW 2), the aunt to the complainant gave evidence that on 17/9/12, her niece, PW 1 came and reported to her that her uncle had defiled her. He had covered her mouth with his hands. He stopped when her brother KM who was sleeping next to her was awoken by the commotion, asked the accused what he was doing. That is when the accused dressed up and left. She took the complainant to the chief, and she was advised to report the matter to the police which she did.
9. On cross examination, she said that the father to the complainant had previously reported that the accused was molesting the complainant and a meeting was to be convened to discuss the issue. The accused defiled the complainant before the said meeting took place.
10. JK(PW 3) gave evidence that on the night of 15/9/12, he was woken up by a commotion. He saw the accused lying on top of the complainant while naked. He asked him what he was doing and the accused told him that he was sleeping. The accused left. PW 1 was crying. When their father returned home, he reported to him what had happened. The witness said that the accused had earlier enquired from him if their father was home and he answered to the negative. He further said that the accused had previously tried to caress him. On cross examination, he said the accused used to visit their home. He also told the aunt what had transpired that night.



11. Dr. Edward Indumwa (PW 4), a medical doctor examined the complainant one month after she was brought to the hospital with a history of defilement. The examination was done on 18/10/12. The hymen was broken and she had a bacterial infection which was an indication of a sexual activity. Though it is not on record that the P3 form was produced as an exhibit, from the court records, it has been filed, which is an indication that it was produced as an exhibit. I shall rely on the contents of the P3 form.
12. A.P.C Hellen Mulati (PW 6) gave evidence that one MM brought a 10 year old child and informed her that 'the accused had entered their house while the child was sleeping in the kitchen'. She took the child to hospital. No more evidence was recorded of this witness.
13. Ann Wangui (PW 5) from Mwingi Police station gave evidence that on 17/5/12, the complaint was brought to the station by APs on allegations of a sexual assault. The complainant was taken to hospital for treatment and she later identified the accused as her assailant. On cross examination, she said the complainant's sibling witnessed the accused commit the offence and he was well known to them as their uncle.
14. In his defence, the accused (DW 1) denied committing the offence. He said he was arrested by the chief on allegations that he had defiled someone. He stated that at the time he was accused of defiling the child, he was at home sleeping.
15. TM (DW 2), gave evidence that the accused was her husband. It is also recorded that she said the accused was her elder brother. It is therefore uncertain the relationship she has with the appellant. She did not give any evidence relating to the commission of this offence. She only said that the accused had been in custody for long.
16. The accused was convicted of the main charge of defilement and sentenced to life imprisonment as the minimum sentence prescribed by the law then.

Grounds of appeal

17. Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on grounds consolidated as hereunder;
 - a. The trial magistrate erred in matters of law and fact by failing to observe that the elements that constitute defilement were not conclusively proved as required by the law.
 - b. The trial magistrate erred in matters of law and facts in failing to find that the appellant was not properly identified as the perpetrator of the offence.
 - c. The sentence was excessive
18. The parties were directed by the court to put in their written submissions. At the time of writing this judgment, the submissions by the respondent had not been filed.

Issues for determination

19. The issues arising from this appeal are;
 - a. Whether the prosecution proved the elements of the offence of defilement.
 - b. Whether the defence raises reasonable doubts against the evidence of the prosecution.
 - c. Whether the sentence was excessive



Whether the elements of the offence of defilement have been proved

20. The appellant was charged with the offence under section 8 (1) as read with section 8 (2) of the S.O.A. The elements arising from the above are;

Age of the complainant

21. The essence of proof of age in a defilement matters is in determination of the sentence to be given upon conviction, as the S.O.A have different sentences based on the age of the victim.
22. In *Musyoki Mwakavi v Republic*, it was held that medical evidence through a doctor, birth certificate, victim's parents or guardians' evidence can be used to determine the age of the victim. It is on record that the trial magistrate severally sought for an age assessment report in respect to the complainant. There is no record that the report was availed in court and neither is it among the documentary exhibits produced. However, the I.O (PW 5) said the complainant was aged 10 years. The doctor (PW 4) relying on the P3 form indicated that the complainant indicating that the complainant was aged 10 years at the time of the defilement.
23. In *Joseph Kieti Seet v Republic*, it was held that the minor's age could be proved by common sense. In *Evans Wamalwa Simiyu v Republic*, the approximate age of the minor indicated in the P3 form was accepted as proof of the minor's age. Relying on the prosecution's witnesses and more specifically the evidence in the P3 form indicating the complainant's age as 10 years, I find that the age element has been proved.

Proof of penetration

24. Section 2(1) of the *Sexual Offences Act* defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
25. The doctor gave evidence that after the examination of the complainant, he found that he hymen was broken. With the history of defilement, the broken hymen, the bacterial infection noted, all these are indications of penetration. I find that the element of penetration was proved.

Identification of the assailant

26. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The complainant's evidence that it was the appellant who defiled her. The appellant was a neighbor and a relative to the complainant. He had earlier in the day attempted to sexually assault the complainant and he later went at night when he defiled her. The eye witness Julius Kilonzo (PW 3) said the accused was his uncle. The accused was well known to the complainant and PW 3. I find the element of identification was proved.

Sentence imposed

27. Section 8 (2) of the *Sexual Offences Act* provides;
- ‘A person who commits an offence of defilement with a child aged eleven years or less shall be upon conviction be sentenced to imprisonment for life’



28. The above provision prescribes a mandatory minimum sentence of 20 years' imprisonment. In *Maingi & 5 others v DPP & ano*, Odunga J. in holding that the mandatory minimum sentences in S.O.A are unconstitutional stated as hereunder;

‘To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*’.

29. The court is therefore bound to re-examine the sentence in the light of the above. The superior courts have made pronouncements on the unconstitutionality of the mandatory sentences in the S.O.A. the court is therefore not bound to give the mandatory life sentence in this matter. The trial court gave a life imprisonment term.

30. I have put into consideration that the accused who is said to be an uncle to the complainant had attempted to defile her before. The brother to the complainant PW3 also testified that the accused had previously caressed him. This is an indicator that the accused was preying on the young and the innocent. The court has a duty to protect the most vulnerable in the society.

31. I therefore uphold the conviction by the trial court. The appellant shall continue serving his life imprisonment term.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF FEBRUARY, 2023.

F. WANGARI

JUDGE

In the presence of;

Pauline Mwaniki for State

Appellant present

Court Assistant - Guyo

