



**KA v Republic (Criminal Appeal E064 of 2021)
[2023] KEHC 1514 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E064 OF 2021
FG MUGAMBI, J
FEBRUARY 14, 2023**

BETWEEN

KA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the sentence of Hon. R.M. Amwayi, SRM dated 21st April 2021 in Sexual Offence Case No. 119 of 2019 in the Chief Magistrates Court at Mombasa)

Conclusive proof of age in sexual offences did not necessitate the use of a birth certificate.

The main issue was whether a conclusive proof of age in sexual offences necessitated the use of a birth certificate. The High Court held that it did not necessarily require a birth certificate. Other formal documents could be used. Formal documents could be necessary in borderline cases, but other modes of proof of age were available and could be used in other cases.

Reported by John Ribia

Law of Evidence – age assessment – age assessment in sexual offences – documents or information that could be used to assess the age of a complainant/survivor of a sexual offence – birth certificate - whether conclusive proof of age in sexual offences necessitated the use of a birth certificate – Sexual Offences Act (CAP 63A) section 8(1) and (4).

Brief facts

The appellant was charged with the offence of defilement of a girl aged 17 years and was convicted and sentenced to 10 years' imprisonment. He subsequently filed the instant appeal where the appellant alleged that no evidence including a birth certificate was adduced in court to prove the age of the complainant and that no assessment was carried out.

Issues

Whether a conclusive proof of age in sexual offences necessitated the use of a birth certificate.



Held

1. The duty of the first appellate court was to analyse and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. Depending on the facts and circumstances of the case, the court was at liberty and may come to the same conclusions as those of the lower court or it may rehash the lower court's conclusions.
2. The trial court based its finding on a health card which corroborated the appellant's testimony that she was 18 at the date of testifying and also placed her age at approximately 16 to 17 years of age between 2017 and December 1, 2019, when the offence was alleged to have been committed.
3. Conclusive proof of age did not necessarily require a birth certificate. Other formal documents could be used. Apart from medical evidence age could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. Conclusive proof of age in cases under Sexual Offences Act did not necessarily mean a certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age were available and could be used in other cases.
4. The ingredients necessary to satisfy a charge of defilement were proved by the prosecution against the appellant.

Appeal dismissed, conviction and sentence affirmed.

Citations

Cases

Kenya

1. *Ngui, Fappyton Mutuku v Republic* Criminal Appeal 32 of 2013; [2014] KECA 570 (KLR) - (Explained)
2. *Njoroge v Republic* Criminal Appeal 149 of 1986; [1987] KECA 4 (KLR) - (Explained)
3. *Wairimu, David Njuguna v Republic* Criminal Appeal 28 of 2009; [2010] KECA 495 (KLR) - (Applied)

Regional Court

1. *Okeno v Republic* [1972] EA 32 - (Applied)
2. *Omuroni v Uganda* [2002] 2 EA 508 - (Explained)

Statutes

Kenya

Sexual Offences Act (cap 63A) sections 8(1)(4); 11(1)- (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) and 8(4) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on diverse dates between the year 2017 and December 1, 2019 at [Particulars Withheld] area in Changamwe Sub County within Mombasa county, he intentionally and unlawfully caused his penis to penetrate the vagina of AK, a girl aged 17 years old.
2. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006 on which the charge sheet alleged that on the same dates and place, he intentionally and unlawfully caused his penis to rub the vagina of AK a child aged 17 years old.



3. During trial the prosecution called 5 witnesses. AK testified as PW1 as to her age and to the events underlying the charge, giving an account of the moments when her step father would ensure that they were alone in the house for years since 2017 and how he had defiled her at different times. She testified also on the events of the material day in December 2019 when her step father sent her brothers to the shops and in the absence of her mother who had left for work, defiled her. PW2 testified as a neighbour and an eye witness to the defilement. He corroborated PW1's account of the defilement and subsequent arrest of the appellant. PW3 AK's mother and wife to the accused testified that she took the complainant to hospital after the incident. Her testimony touched on the appellant's indecent behaviours where she had even been in a reconciliatory meeting with the appellant because of touching the children indecently. The doctor and investigating officer testified as PW4 and PW5 respectively. The learned trial magistrate found that the appellant had a case to answer and put him on his defence. The appellant gave unsworn evidence and did not call any witnesses. He denied having committed the offence terming it as fabricated.
4. The court found that the elements of the offence had been proved, convicted and sentenced the appellant to 10 years' imprisonment. He subsequently filed this appeal against the conviction and sentence. The appeal is set out in his petition of appeal filed on July 26, 2021. The appellant also relies on his written submissions filed in court on November 9, 2022. The prosecution opposed the appeal through the written submissions of its counsel dated January 19, 2023 and filed on January 20, 2023. The appellant's grounds of appeal are based on the lack of evidence pointing to the age of the complainant.
5. The appellant alleges that no evidence including birth certificate was adduced in court to prove the age of the complainant and that no assessment was carried out. It is also his case that the parents of the complainant were also not called to testify to her age. The appellant also points out to contradictions between PW1, PW4 and the entry in the P3 form as to the age of AK. On this basis the appellant submits that the conviction and sentence are illegal and prays that the same be quashed.
6. As the first appellate court it is the duty of this court to analyse and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v Republic* [1972] EA 32). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) EA, 32. Having said that, depending on the facts and circumstances of the case, this court is at liberty and may come to the same conclusions as those of the lower court or it may rehash those conclusions. There is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision (See *David Njuguna Wairimu v Republic* [2010] eKLR)
7. Against this background, I have considered the evidence before the trial court both for the prosecution and defence and reassessed that evidence and taken into account the written submissions and authorities cited by both the appellant and the prosecution counsel.
8. AK testified that she was 18 years of age. The evidence of age from PW3, the complainant's mother was that her daughter was 19 years. Quite apart from these, the medical examination report reads 17 and 19 years in different sections and then there is the charge sheet which reads 17 years. The lower court record shows that a Health Clinic Card was produced by the prosecution and marked as PMF1 3 and that the card indicated the date of birth of the appellant to be December 28, 2001. The same is missing from the original court records and the record of appeal. No birth certificate was produced. I would take the record from the lower court as conclusive proof of what transpired in court. From the trial court records it is also clear that the learned trial magistrate based his finding on the health card which



would corroborate the appellant's testimony that she was 18 at the date of testifying and also place her age at approximately 16 to 17 years of age between 2017 and December 1, 2019, when the offence is alleged to have been committed. In this regard the next question would be whether the Health Clinic Card is conclusive proof of age in the absence of a birth certificate.

9. It has been held that conclusive proof of age does not necessarily require a birth certificate and that other formal documents may be used. In *Francis Omuroni vs Uganda* CC No 2 of 2000 it was held that apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. Likewise, in *Fappyton Mutuku Ngui vs Republic* (*supra*) it was held that:

...“Conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

10. In sum, I am in agreement with the trial court that all the ingredients necessary to satisfy a charge of defilement were proved by the prosecution against the appellant. I affirm the conviction and sentence.
11. The appeal is dismissed.

DATED, SIGNED AND DELIVERED VIA VIRTUAL PLATFORM AT NAIROBI

THIS 14TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE

