



**NMN v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 18466 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E037 OF 2022
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

NMN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the original conviction and in Criminal Case No 5 of 2020 in the Chief Magistrate's Court at Chuka delivered on 7th March 2022 by Hon. Njoki Kabara, SRM)

JUDGMENT

A. Case Background

1. The Appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006 and he was sentenced to 15 years' imprisonment.
2. The particulars of the offence were that on the December 3, 2019 and February 8, 2020 in Igembe Sub County within Tharaka Nithi County the appellant unlawfully and intentionally caused his penis to penetrate the vagina of BKK a girl aged 17 years old.
3. The Appellant 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.

B. Appeal

4. Being aggrieved by both the conviction and sentence the Appellant filed this appeal. He assails the impugned judgment on grounds that his conviction was based on the evidence of one eye witness hence unsafe. He states that his constitutional rights were violated and his defence was rejected without any cogent reasons. He maintains that the offence was not proved beyond any reasonable doubt and that



the victim already had a child prior to the alleged commission of the offence hence the medical evidence of broken hymen did not relate to him.

5. The appeal is resisted by the State.

C. Submissions

Appellant's Submissions

6. The Appellant submits that at all material time the victim who already had a 3-year-old child had held herself out as an adult and that the Appellant took her in as his wife. He cites the case of *Martin Charo vs Republic* Malindi Criminal Appeal No 32 of 2015. He also relies on the case of *Inrauka Shina Pandya vs Republic* (1967) EA 336 for the argument that where the prosecution evidence is contradictory and inconsistent than a conviction cannot be founded on it.

Respondent's Submissions

7. The Respondent submits that the ingredients of defilement that is minority age of victims, penetration and identification had been proved and cites the cases of *George Opondo Olunga vs Republic* (2016) eKLR and *Mwalango Chichoro Mwajembe vs Republic* Mombasa Criminal Appeal No 24 of 2015. (2016) eKLR.

D. Evidence

8. PW 3 testified that she was 17 years and her birth certificate was produced as P. Exhibit 1. This witness was categorical that she was living with Appellant as a wife and husband and that they were having unprotected sex, a fact that is confirmed by the Appellant. PW 3 was pregnant at the time of the arrest of the Appellant.
9. The medical evidence adduced by PW 4 Joseph Mwenda Mireba a clinical officer from Chuka District Hospital attests to this fact. The treatment notes were produced as P. Exhibit 2, P3 Form a P. Exhibit 3 and PRC Form as P. Exhibit 4.
10. The Appellant maintained that he met PW 3 carrying baby and he requested for her friendship, went to her mother and sought her consent to marry her and thereafter started cohabiting with her. He all along thought she was an adult.

E. Analysis And Determination

11. As a first appellate court, I am enjoined to re-evaluate, re-analyze and scrutinize the evidence afresh and make my own conclusion while taking into account that unlike the trial court, I do have the advantage of seeing and hearing the witnesses first hand. (See *Okeno vs Republic* (1972) EA 32, *Pandya vs Republic* (1975) EA 336 and *Shantial M. Ruwal vs Republic* (1957) EA 570.
12. I have re-evaluated, scrutinized and re-analyzed the evidence in its entirety and I find as of fact that indeed the victim herein was prior to the commission of the offence a mother of a 3-year-old child and she held herself out as an adult.
13. PW 3 mother who gave out her daughter for marriage was never called to testify. Whereas I am persuaded that the prosecution did establish beyond any reasonable the ingredients of defilement, (See *George Opondo Olunga vs Republic* (2016) eKLR) the trial court did not consider the defence raised by



the Appellant. I find that the circumstances of the case avail the appellant the defence contemplated under Section 8(5) of the [Sexual Offences Act](#) which states: -

- “(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 reasonable believed that the child was over the age of eighteen years.
 - c. 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.”

14. The Appellant herein went to the victim’s mother and sought PW 3 hand in marriage and upon the acceptance of his request he married PW 3 and took in her child with unknown person and they were living as a family at the time of this arrest. It is noteworthy that the complainant and her mother’s conduct were consistent to the fact that the victim was holding herself out as an adult.

15. In the case of [Eliud Waweru vs Republic](#) (2019) eKLR the Court of Appeal rendered itself as follows:-

“We think also that it stands to reason that a person is more likely to be deceived into believing a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.....

We think that had the two courts below had properly directed their minds to the Appellant’s defence and the totality of the circumstances of this case, they would in all likelihood have arrived at a different conclusion. It was a non-direction that they did not do so, rendering the conviction unsafe.”

16. The Court of Appeal went on to quote with approval the holding of Lord Scarman in the case of [Gillick vs West Norfolk & Wisbeach Area Health Authority](#) (1985) 3 All ER 402 thus:-

“If the law should impose on the process of growing up fixed limits where nature knows only a continuous process, the price would be artificial and a lack of realism in an area where the law must be sensitive to human development and social change” page 422.

17. The Court of Appeal thus held that:-

“A candid national conversation on this sensitive yet important issue implicating the challenges of maturity, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having sexual intercourse with adolescent girls whose consent has been held immaterial because they were 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.”

18. The circumstances of this appeal falls squarely under the parameters envisaged in the afore cited case. The person who sired the victim’s three (3) year old son has never been prosecuted for any offence but the Appellant who believed that the victim was an adult and who took up the responsibility of raising



another man's child in now serving a long sentence whilst the victim is now a single mother of two children. The law can never be applied mechanically and as if in a vacuum.

Conclusion

19. The conclusion cannot be escaped that the trial court did err in convicting the appellant on the circumstances prevailing at the time of the commission of the offence. The appellant's defence was disregarded wherefore the trial court failed to consider a relevant factor.

Orders:

1. The appeal herein is allowed, the conviction and sentence are set aside.
2. The Appellant be and is hereby set free unless otherwise lawfully held.

20. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF MARCH 2023

MWANAISHA S. SHARIFF

JUDGE

