



**SKK v Republic (Criminal Appeal E008 of 2022)
[2023] KEHC 18740 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E008 OF 2022
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

SKK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment in Marimanti S.O NO.
E 007 of 2020 by Hon. P.N. Maina (CM) on 15th July 2021)*

JUDGMENT

A. Case background.

1. The Appellant was charged and convicted of the offence of attempted defilement contrary to Section 8 (1) (3) of the [Sexual Offences Act](#) No3 of 2006. He was sentenced to serve an imprisonment term of 20 years.
2. The particulars of the charge were that on 9th day of October 2020 at Gakurungu Kirindaru location in Tharaka South Sub County within Tharaka Nithi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EGK a girl child aged 15 years old.
3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of [Sexual Offences Act](#) No 3 of 2006.
4. The particulars were that on 9th day of October 2020 at Gakurungu Kirindaru location in Tharaka South Sub County within Tharaka Nithi County the appellant intentionally and unlawfully touched the vagina of EGK a girl child aged 15 years old with his penis.



B. Appeal

5. The Appellant was aggrieved by both the conviction and sentence and thus preferred this appeal and premised it on the following grounds:
 - i. That the learned trial magistrate erred in both matters of law and facts by convicting the appellant on charges that were not proved beyond reasonable doubt as stipulated by law.
 - ii. That the learned magistrate erred in both matters of law and facts by failing to note that the doctor/clinical officer's evidence was not satisfactory to safely convict the appellant.
 - iii. That, the learned trial magistrate erred in both matters of law and facts by failing to note the glaring contradictions and inconsistencies hence discrediting the prosecuting witnesses.
 - iv. That, the learned trial magistrate erred in both matters of law and facts by rejecting the appellant's water tight defense without giving cogent reasons.
6. The appeal is resisted by the Respondent.

C. Submissions.

Appellant's submissions

7. Whereas the appellant has preferred four grounds of appeal he has opted to amalgamate them and make general submissions thereto.
8. The appellant submits that there were contradictions and discrepancies in the evidence of the prosecution witnesses and that the medical evidence did not prove penetration given the absence of debris in the vaginal swab.
9. The appellant submits that the victim was born on 27/9/2004 and the offence was committed on 9/10/2020 wherefore the victim was 16 years old and not 15 years at the material time and he urges this court to reduce the sentence accordingly. The appellant maintains that he had duly raised the issue of the victim's age in his defence but his entire defence was disregarded. He places reliance on the cases of *Kaingu Elias Kasomo v Republic Malindi CA Cr.A 504/2010* and *Eliud Waweru Wambui v Republic (2019)eKLR*. He maintains that the charge sheet was defective and the age of the complainant was not proved.
10. On the balance the appellant urges this court to quash both the conviction and sentence.

Respondent's submissions

11. The Respondent supports both the conviction and sentence and urges this court to uphold the same. The state submits that the three ingredients of the offence of defilement that is age of the victim, penetration and identification of the assailant were prove beyond any reasonable doubt. Further that the evidence of the state witnesses was credible and consistent.
12. The state posits that the trial court duly analyzed the defence and gave cogent reasons for dismissing it as being a sham.
13. On the issue of sentence, the Respondent maintains that the sentence meted was the statutory minimum as per the provisions of section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006 hence proper and lawful.



D. Evidence

Respondent's evidence

14. PW1 was subjected to a voire dire exercise and thereafter gave unsworn testimony after the court found that whereas she was possessed of sufficient intelligence, she did not understand the purport of an oath. It was her evidence that the appellant whom she recognized as a person that she used to see in the village, accosted her on her way from the shop, dragged her into a nearby bush, placed her on the ground while threatening to kill her if she screamed. He then lifted her skirt up, removed her under wear and got on top of her, undressed himself, got out his penis and wore a condom before he defiled her for a lengthy period of time. The appellant had all along covered her mouth with his hand. The victim experienced excruciating pain upon the appellant's insertion of his penis into her vagina wherefore she defecated. The victim later saw some white discharges. Upon being released she went home whereupon her parents got suspicious because of her delayed return from the shop but she maintained that she had been at the shop. She said that her father had earlier on gone searching for her and came across the defilement scene. Upon further interrogation by her parents PW1 disclosed that she had been defiled by the appellant. She accompanied her parents to the scene and a red coloured used packet of condom of the brand name "Sure" was recovered by her father (PW3). The victim and her parents then went and reported the matter to the Assistant Chief who referred them to Tunyai police station. They then proceeded to the said police station and lodged a report. PW1 was then referred to Tunyai Health Centre for treatment and was later referred to Marimanti Level 4 hospital where a P3 form was filled.
15. Pw3 the victim's father said that he had noticed that Pw1 had delayed in returning home from the shop where she had gone to buy a pen. He then dispatched her younger brother to go and trace her in vain, whereupon he traced her shoes print from the shop to a bush where he noticed that the vegetation was messed up. He found a packet of condom and feces on the scene. PW3 then went home and returned to the scene with his wife and PW1. It was at that point that PW1 disclosed that the appellant had defiled her.
16. PW2 a clinical officer from Marimanti Level 4 hospital produced the P3 form as PEX1 and the treatment notes as PEX2. It was her evidence that PW1's hymen was broken, her vaginal vulva was swollen and the vagina was very painful. A whitish discharge and a lot of feces were noted around the vaginal opening. Laboratory tests revealed presence of epithelial and pus cells. PW2 concluded that there was penetration.
17. PW4 the investigating officer testified that she received the report of defilement from the PW1 a girl child aged 15 years. She conducted investigations whereafter the appellant was arrested and charged. This witness produced the packet of used condom as PEX4 and the victim's immunization card as PEX3.

Appellant's evidence

18. The Appellant gave unsworn testimony and he alleged the victim's mother had framed him up after he declined to move in with her.

E. Analysis and determination

19. This court being the first appellate is enjoined to re-analyze, scrutinize and re-evaluate the evidence adduced before the trial court and thereafter make its own conclusion while taking into account the fact that it does not have the advantage enjoyed by the trial court which saw and heard the witnesses



testify first hand and thus had a basis for assessing their character and demeanor. These principles were enunciated in the case of *Okeno v Republic* 1972] EA 32 where the court stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday Post* 1978) E.A. 424.” (Also see *Pandya v R* (1957) EA336.

20. I have re-analyzed, scrutinized and re-evaluated the evidence in it’s entirety and I find that the ingredients of the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* were proved by the Respondent beyond any reasonable doubt.
21. PW1 stated that she was 15 years old. The trial court had during *voire dire* found that PW1 was possessed of sufficient intelligence. Respondent’s PEX3 proved that indeed the victim was 15 years old at the material time as she was born on September 27, 2005 whilst the offence was committed on October 9, 2020. In the case of *Mwolongu Chichoro Mwanjembe v Republic* (2016) eKLR the court rendered itself on the issue of proof of age as hereunder:

“... 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 birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.....We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age , it has to be credible and reliable.”

22. Identification was by way of recognition as the appellant lived in the same village as the victim.
23. Penetration was proved by the evidence of the victim who chronologically narrated the events of the day with clarity and consistency. It was heart rendering to learn that the pain that the victim endured was so excruciating to the point that she defecated on herself. Further upon finding that she could not get conclusive medical attention at Tunyai health center the victim was advised not to take a bath and she had to sleep with fecal matter in her vagina until the next day when she was attended to at Marimanti Level 4 hospital. PW1 was thus exposed to infections and indeed pus cells were revealed by the vaginal swab.
24. The evidence of PW1 was corroborated by that of the PW2, the clinical officer from Marimanti Level 4 hospital who produced the P3 form as PEX1 and the treatment notes as PEX2. PW1 had broken hymen, swollen vulva, painful vagina, fecal matter around the vaginal orifice and a laboratory test of a vaginal swab revealed the presence of epithelial and pus cells that were indicative of sexual intercourse. PW3 also corroborated PW1’s testimony; he recovered a packet of used condom and saw faeces on the disturbed scene. The use of condom by the appellant explains the absence of spermatozoa/debris in the vaginal swab.



25. The defence raised by the appellant does not hold any water and I am not persuaded by it. I find it a sham. It is also noteworthy that the appellant gave unsworn testimony whose potential value is persuasive rather than evidential. In the case of *May v Republic* (1981) KLR the court stated:

“An unsworn statement....potential value is persuasive rather than evidential.”

26. This court notes that whereas the trial magistrate did take note of the 9 months pretrial term spent by the appellant in custody, he did not factor it in the computation of the appellant’s sentence as was required of him per the provisions of section 333(2) of the *Criminal Procedure Code*.

Conclusion

1. The appeal herein is devoid of merit and is thus dismissed. The conviction is upheld.
2. The sentence is confirmed. The same to be computed from the date of the appellant’s arraignment in court that is on 19th day of October 2020.

It is hereby so ordered.

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

M.S. SHARIFF

JUDGE

