



**JM v Republic (Criminal Appeal E085 of 2021)
[2023] KEHC 17820 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E085 OF 2021**

**GMA DULU, J
MAY 18, 2023**

BETWEEN

JM APPELLANT

AND

REPUBLIC RESPONDENT

*(from the conviction and sentence in Sexual Offence
Case No. 33 of 2020 of the CM Court at Makueni)*

JUDGMENT

1. The Appellant was charged in the Magistrate’s Court at Makueni with defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on diverse dates between the month of April and May 2020 at Kathonzweni Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of EM a child aged 16 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, the particulars of which being that between the same months and at the same place intentionally touched the vagina of EM (name withheld) a child aged 16 years with his penis.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and imprisoned for seven (7) years.
4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal, and relied on the following grounds:-
 1. The learned trial Magistrate erred by failing to observe that the trial was conducted in contravention of Section 19 of the [Oaths and Statutory Declarations Act](#) concerning reception



and admissibility of evidence of a child of tender years, Article 4 of the Constitution and Section 2 of the Sexual Offences Act, as well as presiding over an unfair trial against his constitutional right.

2. The learned trial Magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of incest (sic) to the required standard of law beyond reasonable doubt.
3. The trial Magistrate erred both in law and fact by failing to apply Section 124 of the Evidence Act and to observe that the prosecution case was full of contradiction and inconsistencies which rendered the prosecution case unbelievable.
4. The learned trial Magistrate erred both in law and fact when he dismissed his defence which alleged possibility of being framed up due to existing grudge without giving cogent reasons provided under Section 169 of CPC.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This is a first appeal. As a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
7. I have evaluated the evidence on record. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witness.
8. The appellant has complained that the trial court did not comply with the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15) concerning reception and admissibility of the evidence of a child of tender years. He also cited violation of Article 2 of the Constitution and Section 2 of the Sexual Offences Act.
9. Indeed, under Section 2 of the Children Act No 8 of 2001, a child of tender years is defined as a child under the age of 10 years. Under Section 19 of the Oaths and Statutory Declarations Act (Cap.15) such a child is required to be tested by the trial court through voire dire examination to determine the intelligence of the child and whether he or she knows the importance of saying the truth, and whether he or she understands the nature of an oath.
10. Though the appellant has raised the above ground of appeal, I note that PW1 EMM the alleged victim was born in 2004 and thus way above 15 years at the time of testimony. The other young witness, PW2 CN was said to be above 20 years of age.
11. It is clear to me therefore that no witness who testified at the trial, was a child of tender years. There was thus no need for the application of Section 19 of the Oaths and Statutory Declarations Act – relating to children of tender years. I dismiss that ground.
12. I note that in submissions, the appellant has also raised an issue that the charge sheet was defective. Having perused the charge, I find no defect merely not mentioning specific dates is not in default. I dismiss that complaint.
13. I now turn to the substantive grounds of appeal. The elements of defilement for which the appellant was convicted, are the age of the victim who should be below 18 years, penetration of a sexual nature, even if partial, and the identity of the culprit. I have to bear in mind that the prosecution was duty



bound to prove each of the elements of the offence beyond any reasonable doubt. The appellant had no burden to prove his innocence – see *Woolmington v DPP* [1935] AC 462.

14. With regard to the first element of age of the alleged victim PW1, she stated in evidence before the trial court that she was born on April 9, 2004 and relied on her birth certificate, which was produced in evidence as exhibit 1. This evidence was not challenged. I find that the prosecution proved beyond any reasonable doubt that the alleged victim PW1 was aged 16 years at the time of the alleged offence.
15. I now turn to the second element of sexual penetration. PW1 stated in her evidence before the trial court that she met the appellant in February, 2020 and that the appellant later called her through the phone of PW1's cousin CN (PW2). That thereafter in April, the appellant came home and they shared a bed for the night and engaged in sexual intercourse using a condom, and that he later continued coming home and engaging in sex with her at various times, until May 2020 when neighbours reported the activities to her Uncle.
16. On her part, PW2 CN testified in evidence before the trial court that the appellant used her phone to contact the victim PW1, and that the two (PW1 and the appellant) met several times over the weekends and were now planning to elope, and that was the reason she informed her father PW3 PK about the goings on.
17. On his part, PW3 PK stated in evidence before the trial court that he was called on phone by PW2 and went to the house and found PW2 struggling with the appellant who was trying to escape, and that he restrained the appellant who had already been warned earlier by 'nyumba kumi' vigilante to stop his affair with PW1.
18. The medical evidence of PW4 Stella Nthambi Mwasya a Clinical Officer was to the effect that PW1 had normal genitalia, but the hymen was broken. That treatment notes on the appellant showed that he was medically normal.
19. In my view, the medical evidence on record on its own does not establish the sexual penetration on PW1 alleged, even though the hymen of PW1 was missing. However, with the evidence of PW1 the alleged victim, and the evidence of PW2 and PW3, on the chain of events leading to the arrest of the appellant at the house where PW1 lived, I like the trial Magistrate find that PW1 was penetrated sexually severally between the dates mentioned in the charge sheet. Thus in my view, the prosecution proved beyond any reasonable doubt that sexual penetration of the victim PW1 had occurred within the period stated in the charge sheet.
20. With regard to the third element of the culprit, the evidence of PW1, PW2 and PW3 puts the appellant as a common participant of sexual activities with the victim PW1. He was arrested in broad daylight at the house where PW1 lived.
21. I note that in his defence, the appellant said that from January, 2020 he wanted to marry CN PW2. That in August 2020 C called him to say that the child was sick and as a result he went to her house only for C's father to emerge and tie him with ropes with the help of 'nyumba kumi' members, and take him to custody.
22. Considering the totality of the evidence of the prosecution on record, against the defence of the appellant, it is clear to me that the appellant was lying when he said in his defence that he went to the house of PW2 in August, while all the evidence on record, including the medical evidence, was that he was arrested on July 25, 2020 and was brought to court on July 28, 2020, which was earlier than August.



23. Again though the appellant has complained of contradictions and inconsistencies in the prosecution evidence, I find none. Further, though he complains that the trial court did not consider his defence of an existing grudge, the fact that the trial Magistrate believed the prosecution evidence and disbelieved the appellant's defence version, which the trial court was entitled to do, was adequate consideration of the appellant's defence.
24. As for his defence alleging an existing land dispute, it was an afterthought as the appellant never raised such an issue during investigations or during cross-examination of witnesses, but only come up with that surprise story in his defence. His defence, is thus not believable, and did not shake the prosecution evidence.
25. Like the trial court therefore, I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus dismiss the appeal against conviction.
26. With regard to sentence, the statutory sentence under Section 8(4) of the *Sexual Offences Act* is imprisonment for a term of not less than fifteen (15) years. The appellant having been sentenced to serve seven (7) years imprisonment, should count himself lucky. I will not interfere with the sentence imposed.
27. Consequently, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY, 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima holding brief for Mr. Kazungu

Mr. Otolu court assistant

