



REPUBLIC OF KENYA



KENYA LAW
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**Muthama v Republic (Criminal Appeal 218 of 2019)
[2023] KEHC 18195 (KLR) (Crim) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL 218 OF 2019**

GL NZIOKA, J

MAY 16, 2023

BETWEEN

BENEDICT MUSAU MUTHAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the decision on conviction by, Hon. D. Mikoyan, Senior Principal Magistrate, dated, 18th July, 2019, and sentence by Hon. M. Nanzushi, Principal Magistrate delivered on; 11th September 2019, vide Criminal Sexual Offence Case No. 24 of 2018, in the Chief Magistrate's Court at Milimani)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court on 13th August 2018 charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 (herein the "Act") and an alternative count of, committing an indecent act contrary to section 11 (1) of the Act. The particulars of each count are as per the charge sheet.
2. He pleaded not guilty to the charges and the case was fully heard with the prosecution calling a total of six (6) witnesses. The case in brief is that, in the month of January 2018, "GMM" (herein "the complainant") aged 17 years, went to visit her mother (PW2) JMM at Athi River when she met the appellant and they developed a relationship.
3. That, in the month of March 2018, the appellant called the complainant to meet him and they met in a hotel. That after chatting, they ended up in a room booked and paid for by the appellant and engaged in unprotected sex. After the act the appellant gave the complainant bus fare to return home.



4. That, a week later the complainant and the appellant met again in a different hotel, where they booked a room and once again engaged in unprotected sex. Further, in the month of April 2018, they met for a third time once again in a hotel and similarly engaged in unprotected sex.
5. However subsequently, the complainant missed her monthly periods and suspected that she might be pregnant. That, she informed her mother of the same and the relationship with the appellant. Her mother took her to Nairobi Women's Hospital where tests confirmed that she was indeed pregnant.
6. As a result, the matter was reported to River Police Station where the complaint recorded a statement naming the appellant as the father of the child and that the appellant had acknowledged the pregnancy. Subsequently the appellant was arrested and charged.
7. At the close of the prosecution case, the court ruled that the appellant had a case to answer and placed him on his defence. He gave an unsworn statement to the effect that, he was working as a petrol attendant and knew the complainant as a vendor selling bhajia and chips and that he would occasionally assist her with change.
8. Further, that he knew the complainant's mother who was working in a pub called "Particulars Withheld" where used to visit and that the charges herein are fabricated by PW2 JMM who developed a grudge against him when he declined to buy her alcohol and would entice him in a relationship with the complainant, alleging that one day he would be her son in law.
9. That after he was arrested and accused of having sexual intercourse with the complainant, her mother demanded for Kshs 60,000 but his family was only able to raise Kshs. 40,000 and upon failing to pay the balance he was charged.
10. At the conclusion of the trial, the learned trial Hon. Magistrate delivered a judgment dated 18th July 2019, in which he found the appellant guilty of the offence of defilement and he was sentenced him to serve fifteen (15) years imprisonment.
11. However, the appellant being aggrieved by the conviction and sentence has appealed against it on the grounds as here below reproduced:
 - a. That, the learned trial magistrate misdirected herself in law and fact by failing to appreciate that the prosecution's case was not only insufficient but also speculative and lacked probative value to justify a conviction.
 - b. That, the learned trial magistrate erred in law by convicting the appellant on hearsay and uncorroborated evidence of the complainant.
 - c. That, the trial magistrate misdirected herself in law and fact by failing to conduct a scientific test (DNA) as per the provisions of section 36 (1) of the [Sexual Offences Act](#) No. 3 of 2006 to determine the paternity of the complainant's child when the same was a material issue before the court as the child was alleged to be the result of the act of defilement for which the appellant was charged.
 - d. That, learned magistrate erred in law and fact by failing to appreciate that the conduct of the complainant was consistent with that of an adult.
 - e. That, the learned trial magistrate erred in law and fact in holding that the prosecution proved its case beyond reasonable doubt yet there was no such proof before court.



- f. That, the learned trial magistrate erred in law and in fact by falling to consider all the evidence placed before the court with an open mind despite the fact that the accused had pleaded not guilty and had steadily maintained that he had not committed the offence.
 - g. That the learned trial magistrate erred in shifting the burden of proof to the accused person instead of requiring the prosecution to prove his case beyond reasonable doubt.
 - h. The learned trial magistrate erred in law and fact by failing to critically examine evidence placed before the court.
 - i. The learned magistrate erred by passing a sentence which was manifestly harsh and excessive in the circumstances, in any event.
12. The appeal was disposed of by the parties filing submissions. The appellant in his submissions dated 14th June 2022, argued that the age of the complainant was not proved to the required standard as no document was produced in court to prove her age. He relied on the decision in *Eliud Waweru Wambu v Republic* [2019] eKLR and *ES & OSJ v Republic* [2020] eKLR where it was stated that of the age of victim is a critical component and must be proved by credible evidence beyond reasonable doubt as the sentence imposed on conviction will depend on it.
 13. Further, reliance was placed on the case of; *Francis Omuroni vs Uganda Criminal Appeal No. 2 of 2000* where the court stated that in determining the age of a victim medical evidence was paramount in absence of which it may be proved by the birth certificate, the victim's parents and observation and common sense.
 14. That the appellant was not aware of the age of the complainant as she presented herself as an adult with the capacity to get married. He cited the case of; *Eliud Waweru Wambui vs Republic* [2019] eKLR where the Court of Appeal considered the defence provided for under section 8 (5) and (6) of the *Sexual Offences Act* and stated that, where a child is closer to the age of eighteen (18) years it is more likely for a person to believe that the minor is over 18 years. Further, knowledge that a person is dealing with a minor is an important element of defilement and that in the instant case the complainant was seventeen (17) years old.
 15. However, the respondent in their submissions dated 16th June 2022 argued that, penetration was proved by the evidence of the complainant that was corroborated by the medical evidence. That the age of the complainant was proved by the evidence of the complainant during voir dire examination, and the mother produced the birth certificate and medical documents that indicated the age of the complainant. Also, the age of the complainant was not in dispute during the trial.
 16. Further, the appellant was positively identified by the complainant as a neighbour to her mother and the person she was in a relationship with. furthermore, the complainant's mother was able to identify the appellant to the arresting officers for the warrants of arrest to be executed.
 17. The respondent submitted that, there was no need to conduct a DNA test to prove defilement as the ingredients of the offence; the age of the victim, positive identification and penetration were proved. That, the prosecution had proved its case beyond reasonable doubt and therefore the conviction was safe.
 18. On the issue of sentence, it was submitted that the case having being decided on its merits and conviction based on proper law, the court should not interfere with the decision of the trial court as held by the Court of Appeal in *Ogolla s/o Owuor vs Republic* [1954] EACA that a court will not alter a sentence unless the court acted on the wrong principles or overlooked some material facts.



19. At the conclusion of the arguments by the parties, I recognize the role of the first appellate court as well articulated in the case of *Okeno vs. Republic* (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
20. In that matter the court stated as follows: -

“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”.
21. Be that, as it were, a case of defilement is proved if three elements are established. These ingredients were considered in the case of; *Agaya Roberts vs. Uganda*, Criminal no. 18 of 2002, and *Bassita Hussein vs. Uganda* Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.
22. On the issue of the age, it is settled law that, primary evidence in proof of the age of a person is the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. However secondary evidence can be deduced from the evidence of a parent or guardian, or physical observation of the child and/or common sense as held in; *Hilary Nyongesa vs Republic (Uganda)* HCCRA No. 123 of 2009.
23. Even then, the fact that the parent of the child alludes to the child’s age and the court observes the child is of tender years, does not prove beyond reasonable doubt the exact age of the child for the purposes of sentencing. This is due to the fact that various factors, for example, the child’s physical appearance can lead to a conclusion of an age that may not be correct. Further it is possible an appearance of a child may lead one to overestimate the age or even under estimate the same.
24. As such where the court has to accept the alternative age assessment, an explanation has to be offered as to why the birth certificate, or baptismal card or even an age assessment report cannot be availed.
25. In the instant matter, the trial court relied on the verbal evidence of the child’s mother to prove age without seeking for explanation of the absence of any documentary evidence. PW2, JMM the complainant’s mother, merely stated that the complainant was born on 4th November 2000. Furthermore, in cross examination the complainant told the court that she never discussed the issue of her age with the appellant and maintained that he was her friend and should be released.
26. On the issue of penetration, PW3 John Njuguna, a Clinician based at the Nairobi Women’s Gender Recovery Centre produced the medical to the effect that the complainant was examined on 26th July 2018 in a case of defilement. That the urine test for pregnancy was positive which confirmed vaginal penetration. Further, the examination revealed that the complainant’s hymen was not intact but there were no physical injuries noted. This evidence corroborated the complainant’s evidence that she engaged in unprotected sexual inter-course with the appellant on several occasions.



27. The last issue for determination is whether, it is the appellant who defiled the complainant. The complainant maintained it was the appellant and the appellant denied the same in his defence despite the complainant pleading for his release and the complainant mother having a soft stand on the matter.
28. The question is how then was this issue to be proved beyond reasonable doubt especially when the complainant was categorical that while engaging in the sexual intercourse with the appellant she did not feel pain as she had been engaged in the same before. She maintained that the appellant had sex with her and her mother testified that she was living at Athi River and the complainant lived in Dandora, but would visit her regularly. That she knew the appellant as he lived in the neighbouring plot.
29. However, the complainant was pregnant at the time she testified, she delivered before the case was concluded and by the time the defence was offered. Why wouldn't DNA test have been done to put the issue to rest?
30. The provisions of; section 36 (1) of the *Sexual Offences Act* provides:
- “(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence”.
31. Indeed, this court is aware of the Court of Appeal in *Evans Wamalwa Simiyu vs Republic* [2016] eKLR where it was stated that:
- “(19) Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to section 36 of the *Sexual Offences Act* which evidence could have exonerated him. In *AML v Republic* 2012 eKLR (Mombasa), this Court upheld the view that:
- “The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”
- (20) This was further affirmed in *Kassim Ali v Republic* Cr Appeal No 84 of 2005 (Mombasa)(unreported) where this Court stated that:
- “The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
32. However, in a case where there is clear doubt as to who defiled the complainant upon her own confirmation that she engaged in sexual relationship with more than one person the only way is a DNA test where an issue has resulted out of the sexual relationship.
33. In the instant matter after PW4 No.111913 Police constable Fathwel Kariuki and PW5 No. 83739 Cpl Florence Ngomoli from Athi River Police Station arrested the appellant on 9th August 2018, and escorted him to Central Police Station, (PW6) No. 96896 PC Eunice Nasiaye Maloo, the investigating officer did nothing more than just charge the appellant.



34. The prosecution on the other hand compounded that pathetic state by closing its case without seeking to have the DNA test done and neither did the court invoke the provisions of section 36, thus fatally collapsing the case as to whether the appellant definitely defiled the complaint.
35. A very unfortunate state of affair, but the doubt must be resolved in favour of the appellant and consequently the court is inclined to and hereby quash the conviction and set aside the sentence meted out. The appellant shall be released forthwith unless otherwise lawfully held.
36. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 16TH DAY OF MAY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Mr Mutua for the appellant

Mr Kiragu for the Respondent

Ms Ogutu: court assistant

