



REPUBLIC OF KENYA



**KENYA LAW**  
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**JM v Republic (Criminal Appeal E024 of 2021)  
[2023] KEHC 18893 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18893 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E024 OF 2021  
RB NGETICH, J  
JUNE 15, 2023**

**BETWEEN**

**JM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against conviction and sentence from the Judgment and/  
or Decree of Honourable A. Towett (SRM) delivered at Eldama Ravine  
Magistrate's Court Sexual Offence Case No.11 of 2020 on 14.10.21)*

**JUDGMENT**

1. The Appellant was charged in Eldama Ravine Law courts vide sexual offences Criminal case No. E001 of 2020 with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars being that the accused on diverse dates between 11<sup>th</sup> and 12<sup>th</sup> September, 2020 in Koibatek Sub-county within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of LA a child aged 14 years.
2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars being that on the diverse dates between 11<sup>th</sup> and 12<sup>th</sup> September, 2020 in Koibatek Sub-County within Baringo county, intentionally and unlawfully caused his penis to come in contact with the vagina of LA a child aged 14 years.
3. The Appellant denied the charges and the case proceeded for full trial with the prosecution calling 4 witnesses in support of their case and accused testified in his defence. By the judgment delivered on 14.10.21, the lower Court found the Appellant guilty of the main charge, convicted him and on the 3/11/2021, the trial court sentenced him to serve 20 years' imprisonment.



4. The Appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal by Petition of Appeal on the 11<sup>th</sup> November, 2021 challenging conviction and sentence on the following grounds:
- i. That the Learned trial magistrate erred in law and fact by failing to consider the Appellants defence yet the same was cogent, plausible and strong enough to water down the prosecution's case.
  - ii. That the Learned trial magistrate erred in law and fact by failing to appreciate that the nature of the Appellants arrest was consistent with innocence.
  - iii. That the Learned trial magistrate erred in law and fact by relying on the evidence of a single witness without cautioning herself on the dangers of relying on such evidence.
  - iv. That the Learned trial magistrate erred in law and fact by failing to appreciate the prosecution evidence was marred with contradictions which greatly violated the credibility of the prosecution evidence.
  - v. That the Learned trial magistrate erred in law and fact by failing to appreciate that the medical evidence adduced by the prosecution did not support or corroborate the charge and neither create a nexus between the appellant and the alleged offence.
  - vi. That the Learned trial magistrate erred in law and fact by failing to afford the appellant an opportunity for mitigation before sentencing the Appellant because he is HIV positive while the report from the medical side of the complainant was proved not positive which shows that the Appellant never came in contact with her.
  - vii. That the learned magistrate erred in law and fact by concluding penetration was proved solemnly relying on the broken hymen only not considering other tests which all come back negative.
  - viii. That the learned magistrate erred in law and fact by according undue weight to the purported evidence of the prosecution, convicting the Appellant harshly while it is conspicuous that the prosecution's case was full of glaring gaps, inconsistencies and contradictions, uncollaborated evidence and the same was not proved beyond reasonable doubt.
  - ix. That the learned magistrate erred in law and fact by failing to appreciate that the case was a mere fabrication in that there were no formidable reasons given as to why the case was reported on a later date.
  - x. That the learned magistrate erred in law and fact by relying on extraneous matters to convict me.
  - xi. That the learned magistrate erred in law and fact by failing to consider the nature of the Appellants body and not giving him the chance to produce his medical documents in the court.
  - xiii. That the learned magistrate erred in law and fact by failing to appreciate that the prosecution case and the investigating side did not prove the case beyond reasonable standards.
5. The appeal was canvassed by way of written submissions, both the Appellant and the Respondent filed written submissions.



## **Appellant's Submissions**

6. The appellant filed amended grounds of appeal with written submissions. The amended grounds are as follows: -
  - i. That the learned trial magistrate erred in law and fact by convicting the appellant and sentencing him to serve a sentence of 20 years imprisonment which was awarded in mandatory form without considering the circumstances which prevailed during the commission of the offence and other constitutional provisions under Article 50(2) (p) of the constitution of Kenya 2010.
  - ii. That the learned trial magistrate failed to take into account the discretionary principles on sentencing following the decision in Philip Mueke Maingi Petition No. E017 and 16 of 2021 at Machakos.
  - iii. That the learned trial magistrate erred in law and fact by convicting the evidence of PW 1 the complainant and note that, this evidence was obtained under duress through inducement and threats thus her evidence remained questionable therefore inadmissible.
7. The Appellant submits that his sentence of 20 years imprisonment was passed by the court under section 8(3) of the sexual offences Act which is coached in mandatory terms leaving no room for the trial magistrate to impose a lesser sentence which is a bad law for depriving the trial magistrate discretion to consider mitigation and circumstances that might lessen the sentence; leading to harsh sentence and contravene provisions of Article 50(2) and Article 48 of the Constitution of Kenya, 2010.
8. The appellant urged this Honorable court to exercise its discretionary under Article 50(2) (q) and substitute Mandatory minimum sentence of 20 years imposed by the trial court with a more lenient sentence.
9. The appellant further submits that the evidence of PW1 was obtained through duress, inducement and threats which was unlawful and urge this court to find as such. The appellant submits that the complainant was beaten and upon being beaten, she said she had gone to Mbugua's house.
10. The appellant urged this court not to place much reliance and urged this court to allow this appeal, quash conviction and sentence set aside and the appellant be set at liberty.

## **Respondent's Written Submissions**

11. The respondents on their part submit that defence of alibi was raised at the defence stage and the prosecution had no opportunity to make possible inquiry into it and the appellant chose not to call witnesses he mentioned in court as witnesses to corroborate the *alibi*; the court therefore considered the appellant's defence
12. The Respondent proceeds to submit that the court can convict on single witness evidence if satisfied that the single witness is truthful; however there is a requirement that before a conviction is meted out to the accused, the court should warn itself on the danger of convicting on single witness evidence.
13. As to whether there were contradictions, the Respondent submits that there were no material contradictions in the prosecution's case as the complainant was categorical that she knew the appellant and she positively identified him; and given the facts and circumstances of the case, the Respondent submits that the environment was conducive for a proper and positive identification and if at all there were contradictions, the same were minor and did not go to the core of the prosecution's case.



14. The Respondent further submits that the medical officer carried out examination on the complainant and made observation that the complainant was defiled and the evidence of the complainant and other witnesses indeed corroborated evidence by the doctor and the doctor's evidence was not challenged or rebutted in cross examination.
15. On the issue of the delay in reporting the complaint to the police, the Respondent submits that there is no time limit within which criminal offences must be reported.

### **Analysis and Determination**

16. This being the first Appellate Court, I am obligated to reevaluate the evidence adduced before the trial court and arrive at an independent determination. This I do while aware of the fact that unlike the trial court, I never got an opportunity to take evidence first hand and observe the demeanor of witnesses. For this I give due allowance. The duty of the first appellate court was explained by the Court of Appeal in the case of *Kariuki Karanja v Republic* [1986] KLR 190 which stated as follows:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to re-evaluate evidence and adduced before the trial court with such materials as it may have decided to admit."

17. In view of the above I have perused and considered evidence adduced before the trial court together with submissions herein. From evidence on record, I find the following as issues for determination: -
  - i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt.
  - ii. Whether the prosecution's case was marred with contradictions and if at the contradictions affected the prosecution's case.
  - iii. Whether the trial court erred by convicting the appellant on single witness evidence.
  - iv. Whether sentence imposed was harsh and excessive.
  - v. Whether the court considered the Appellants defence.

#### **i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt.**

18. The Appellant has raised an issue that the trial magistrate erred in fact and in law by convicting the Appellant on the evidence that was not properly analyzed. There is no doubt that three ingredients need to be proved beyond reasonable doubt in respect to the offence of defilement; the ingredients being age of the minor, penetration and identification of the assailant.

#### **(a) Age**

19. PW 2 a mother to the complainant testified in court and informed the court that the complainant was born in May 2007. Age assessment report was produced in court as exhibit 2 which indicates that the complainant's age was approximately below 16 years which confirmed that the complainant was indeed a minor at the time of the said defilement.



## **(b) Penetration**

20. Penetration is defined under Section 2 of *Sexual Offences Act* No. 3 of 2006 defines penetration as follows:

“Partial or complete insertion of a genital organ of a person into the genital organ of another person.”

21. PW 1 who is the complainant testified that on the 11<sup>th</sup> September, 2020 she met the Appellant on her way home who asked her to escort him to his home and on reaching his home, the witness informed the court that the Appellant removed her under pants, and directed his penis to her vagina and they had sex and thereafter the Appellant gave her 200 shillings and she left for home.
22. She proceeded to testify that the next day at around 5:00p.m, she went to the Appellants house where he met him and they had sex again and she gave her Kshs.200.
23. The medical evidence adduced by the Clinical Officer (PW3) confirm that upon examination of the complainant, the hymen was broken and he formed an impression that the minor had been defiled. He produced the P3 form as exhibit 1 a and the treatment notes as exhibit 1b. From the evidence of the complainant and that of the doctor, it is comes out clearly that penetration was proved beyond reasonable doubt.

## **(c) Identification of Perpetrator**

24. The complainant testified that on the 11<sup>th</sup> September, 2020, while she was from escorting her friend, she met the Appellant who introduced himself to her, and the Appellant whom she referred to as Mbugua then asked her to accompany her to his house where he defiled her. She testified that the following day, she went to the house of the Appellant who defiled her again.
25. From the testimony of the complainant, it is clear that the complainant spent a long period of time with the Appellant hence she could positively identify him.
26. Further to the above, the complainant was the one who directed her mother and the neighbors to the Appellants home where he was arrested. In view of the above, there is no doubt that the Appellant was positively identified as the person who defiled the Complainant.

## **ii. Whether the prosecution’s case was marred with contradictions and if at the contradictions affected the prosecution’s case.**

27. On whether the prosecution witnesses adduced contradictory evidence, the court has a duty of weighing the alleged contradictory evidence against the whole evidence adduced. This position was stated in the case of *Erick Onyango Ondeng’ v Republic* [2014] eKLR as follows:-

“The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honored device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyze the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno v Republic* (1972) EA 32).”



28. In *Peter Ngure Mwangi v Republic* [2014] eKLR the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence, stated as follows;

“We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case.”

29. I have weighed the alleged contradictions against the whole evidence adduced and find that it is not sufficient to raise doubt as to whether the appellant herein defiled the minor herein.

**iii. Whether the trial court erred by convicting the appellant on single witness evidence.**

30. On argument that the trial court relied on evidence of a single witness, I have perused the evidence adduced in the trial court. The complainant testified as PW 1, her evidence was corroborated by PW 2 her mother and PW 3 the medical officer. It is not therefore true that the complainant’s evidence was uncorroborated.

**iv. Whether sentence imposed was harsh and excessive**

31. The Appellant submits that his sentence of 20 years imprisonment was passed by the court as per provisions of section 8(3) of the *sexual offences Act* which is coached in mandatory terms and the trial magistrate had no discretion to impose any lesser sentence. The appellant’s argument is that it is bad law as trial magistrate cannot consider mitigation and the victim’s circumstances that might lessen the sentence.

32. The Appellant urges this court to consider the circumstance of the case, the circumstances prevailing during the commission of the offence and any other favorable circumstances and impose an appropriate sentence.

33. The appellant seeks resentencing in view of decision by the Supreme Court in *Francis Karioko Muruatetu & 5 Others V Republic*, [2017] eKLR that all mandatory sentences prescribed by the law including the *Sexual Offences Act* were unconstitutional to the extent that they deprived the trial court of its discretion to mete out an appropriate sentence against an offender after considering his or her plea in mitigation; and the aggravating factors surrounding commission of the offence in question.

34. However, by directions issued on 6th July 2021 commonly known as *Muruatetu 2*, the supreme court clarified that the case applied only to the mandatory death sentence for the offence of murder under section 204 of the *Penal Code* and not to any other sentence. This decision is therefore not applicable to the offence of defilement hence the appellant cannot benefit from it.

35. The appellant was convicted of the offence of defiling a minor aged 14 years old. Section 8 (2) of the *Sexual Offences Act* which is the relevant penal provision for the offence of defilement where the victim was 14 years and below prescribes a mandatory sentence of 20 years imprisonment. I therefore find that the sentence meted upon the Appellant was just and within the law.



**v. Whether the court considered the Appellants defence.**

36. The appellant has stated on appeal that his defence was not considered by the trial court. I have perused the judgment and in the judgment, the trial magistrate stated that;

“I have considered the accused’s defence and his written submissions. In his unsworn defence, accused told the court that he was working with his employer on the material day. Interestingly accused did not call the said employer as an *alibi* to firm up his case. He further told the court that he lives with his wife at their matrimonial home and wondered how he could take complainant to a house where his family lives. Accused did not call his wife nor any member of his family to corroborate his allegation.

Having considered the accused’s defence, it is my view that the same are just mere denials which did not shift the water tight prosecution’s case. The accused made a decision to take advantage of a vulnerable child to satisfy his evil sexual desires.”

37. From the foregoing, it is clear that the trial court considered appellant’s defence of *alibi*. I see no merit in the appeal herein on conviction and sentence.

38. Final Orders:-

This appeal is hereby dismissed.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Kemboi - Court Assistant.

Accused – Present

