



**MM v Republic (Criminal Appeal E003 of 2022)
[2023] KEHC 19554 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E003 OF 2022**

**RK LIMO, J
JUNE 13, 2023**

BETWEEN

MM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. MM, the Appellant herein was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the charge were that between January 2014 to September 23, 2014 within Kitui County he defiled MM (name withheld) a child aged 9 years.
The Appellant also faced an alternative charge of committing an indecent act with a child but after trial he was convicted of the main count and that is the basis of this appeal.
3. The Appellant was aggrieved by the conviction and filed this appeal but before I consider the grounds I will lay down a summary of evidence tendered at the trial court.
4. The complainant, MM (PW1) testified that the appellant defiled her on three occasions in 2014 promising her a mobile phone in return. She testified that on the 3rd occasion, on September 23, 2014 as she went looking for their cattle that had strayed, he met the appellant at [Particularas Withheld] Area and that he took advantage of the situation (adding that it was getting late) and defiled her this time promising to give her Kshs. 50 but as he was defiling her, someone passing by, found them. She stated that the appellant stopped and ran away adding that, she later went home and reported to her mother who later informed her father upon which a report was made to the police.
5. KM (PW2) the mother of the Complainant testified that she had sent her daughter to go for the cattle in the field after school at around 6 PM and was surprised when she saw her going back home without



- the cattle. She testified that her daughter then told her she had been defiled and she went and reported to her husband adding that the appellant was a step cousin to her and an uncle to the child (victim).
6. Dr. Cosmas Mutisya (PW3) testified and confirmed that the child had been defiled. He tendered P3 P Ex 3, appointment Card P Ex 2 PRC Form P Ex 4 and age assessment report as P Ex 1. The doctor further confirmed that the child had been defiled previously.
 7. CPL Regina Muchoki (PW4) the Investigating Officer in the case testified and informed the trial court the actions taken after a report of defilement was made. She added that the complainant was lured by the appellant with promises of money adding that, on the 3rd occasion he was caught.
 8. When placed on his defence, the appellant gave a brief unsworn statement of defence stating that he was framed up because of a land issue adding that the victim's family wanted to grab their land because his father reportedly was suffering from a mental illness.
 9. The trial court evaluated the evidence tendered and found that the prosecution's case against the appellant had been proved beyond doubt. The appellant was convicted and sentenced to serve 30 years in prison.
 10. As observed above, he felt aggrieved and lodged this appeal raising the following grounds namely: -
 - i. That the Prosecution's Case was not proved beyond reasonable doubt.
 - ii. That crucial witnesses were not availed.
 - iii. That the prosecution's case was riddled with contradictions, inconsistencies and fabrications.
 - iv. That his defence was not given due consideration.
 - v. That ingredients of the offence were not proved.
 - vi. That the medical report was riddled with inconsistencies.
 - vii. That the sentence meted out was harsh and excessive.
 11. In his written submissions, the appellant contends that he was not supplied with witness statements during trial and that violated his right to a fair trial. The appellant however has not shown or demonstrated that he applied for statements but was denied by the trial court. In any event, this is a new additional mark without leave of this court as stipulated under Section 350(2) of the *Criminal Procedure Code*.
 12. He submits that the element of age and penetration was not proved. He also wonders why the complainant did not report earlier that she had been defiled previously.
 13. He contends that unknown person is reported to have seen him defiling the complainant. He wonders why the unknown person never recorded a statement. He suggests that the victim may have been defiled by someone else.
 14. He faults the trial court for finding that penetration was positive because of absence of hymen. He submits that some children are born without one and that there was doubts about penetration. He relies on the cases of *John Mwaura Karau* (No citation) and *P.K.W. versus Republic* [2012] eKLR to back up his submissions.
 15. The State through Office of the Director of Public Prosecution has opposed this appeal through written submissions.



16. The Respondent submits that the prosecution proved the 3 crucial elements of age, penetration and the fact that the appellant was positively identified as the perpetrator of the offence.
17. The State submits that the age of the victim was established to be 9 years through age assessment report tendered as P Ex 1.
18. On penetration, the Respondent submits that the acts of defilement occurred on 3 different occasions and relies on the child's own account and the doctor's evidence that demonstrates that penetration was positive and had taken place over time.
19. It further submits that the provisions of Section 200 was complied with when a new magistrate took over the proceedings after the initial magistrate who had taken evidence from witnesses was transferred.
20. The State submits that there were no contradictions or inconsistencies in their case, adding that, the appellant was well known to the complainant as he was from the same locality with the minor.
21. The state submits that the defence was well considered and denied the appellant's contention that his right to a fair trial was infringed. It submits that the record of proceedings does not show that the appellant applied for statements and was denied.

This court has considered this appeal and the response made by the State.

22. As observed above, the Appellant was charged and convicted for defilement contrary to Section 8(i) (2) of the *Sexual Offences Act*.
23. For conviction to be sustained on a charge of defilement, the prosecution must establish and prove the following elements beyond reasonable doubt namely: -
 - a. Age of the victim
 - b. Penetration
 - c. Positive link or connection of the accused with the offence

a. Age

- 23A. This court has re-evaluated the evidence tendered at the trial court by the Prosecution. Apart from the evidence of the minor (PW1), there is the medical evidence tendered by Dr. Cosmas Mutisya. The age assessment report P Ex 1, P3 P Ex 3 and the treatment card P Ex 2, all demonstrate that the minor was aged 9 years at the time.

The evidence tendered on the question of age was overwhelming. It proved beyond any reasonable doubt that the complainant was aged 9 years old at the material time.

b. Penetration

24. The Prosecution case on this crucial element rested on the evidence of the complainant (PW1) and the medical evidence given by Dr. Cosmas Mutisya (PW3).
25. I have re-assessed the evidence given by the minor and find that the evidence or narrative given by the child was vivid and she gave such a detailed narrative to have been made up as claimed by the appellant.
26. The appellant in his defence claimed he was framed up by the victim's family because they wanted to grab his land but I find no iota of evidence to suggest that fact. It is evident that the incidents of defilement had happened over time but the child testified that the appellant every time he used to lure her with promises of either the mobile phone or cash. The failure by the victim to report



the earlier incidents cannot be used to cast doubts about the allegations especially in the face of the medical evidence tendered by PW3. The doctor was firm and positive that he examined the victim and established that penetration was positive albeit having taken place previously owing to old scars noted upon physical examination on the genitalia of the minor.

27. This court finds that the trial court evaluated the evidence well in respect to the element of penetration and reached to the correct verdict.
28. The minor was defiled and penetration was proved by among other evidence, absence of hymen, signs of inflammation on the vagina which had subsided. I am not persuaded by the appellant's antics that the minor may have been born without a hymen. The evidence tendered by the prosecution links his actions with the absence of that hymen.

c. Identification

29. The appellant was well known to the minor. The child knew him by name and the history given about previous incidents of defilement and promises for reward either in cash or phones in my view proves that the child was certainly not mistaken. She knew the perpetrator well and remembered all the empty promises made to her.
30. I am satisfied that the appellant's identification as the perpetrator was beyond any reasonable doubt.
31. The Appellant contends that crucial witnesses were not availed but the complainant and the doctor who examined her were sufficient in my view to prove the prosecution's case. The evidence of the mother (PW2) simply corroborated the evidence given by the minor.
32. The Appellant gave unsworn statement of defence simply denying the offence but the evidence against him was overwhelming. The trial court considered his unsworn statement of defence and gave it its due weight. As I have observed above, there was not much. It did not create doubts in the prosecution's case.
33. I am not persuaded by the Appellants contention that the Prosecution's case was full of inconsistencies or left gaps. The Prosecution's case was watertight. His claims that he was not supplied with statements are an afterthought because the proceedings do not show that he even raised an issue regarding statements.
34. On sentence, I find that the trial court meted out 30 years' jail term. The provisions of Section 8(2) of *Sexual Offences Act* prescribes life imprisonment. The appellant cannot term the 30-year sentence as excessive. As a matter of fact, it was lenient considering the age of the victim and the adverse impact the offence had on her. I would have enhanced the sentence if the Respondent had asked for enhancement but since there was no such request I will leave it at that.

In the premises, this court finds no merit in this appeal. The same is dismissed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 13TH DAY OF JUNE, 2023.

HON. JUSTICE R. LIMO-JUDGE

