



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**EML v Republic (Criminal Appeal E031 of 2022)
[2023] KEHC 20314 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E031 OF 2022
MS SHARIFF, J
JULY 18, 2023**

BETWEEN

EML APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal arising from the conviction and sentence by Hon F. Rashid
(.P.M) in original Winam PMC S.O No. 74/2020 delivered on 6/07/2022)*

JUDGMENT

1. The appellant EML was charged with the offence of sexual assault contrary to Section 5(1)(a)(i)(2) of the *Sexual Offences Act*, 2006. The particulars were that on the August 7, 2020 in Kisumu East Sub county within Kisumu County unlawfully used his finger to penetrate the vagina of TAM, a child aged 5 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. The appellant denied the charges and the matter proceeded to hearing.
3. PW-1 was JVO who testified that on August 7, 2020, she was home at around 7 am, she was preparing breakfast for her children; the victim and another one aged 1 year were playing at the doorstep. Suddenly she could not find the victim. She went looking for her and located her in the appellant's house sleeping on the appellant's chest. She asked the minor what had transpired. The minor told her the appellant had taken her to his bedroom, undressed her and inserted his finger on her vagina. She then took the minor to Jootrh hospital for examination and later reported at Obwelo Police Station.
4. PW-2 was the victim who stated that she went to the appellant's home looking for her friend VN. She did not find VN whereupon the appellant took her to his bedroom, undressed her and inserted his fingers on her vagina. This witness said that the appellant had removed her skirt and pantie before her mother came in looking for her.



5. PW-3 PC Erick Okumu stated that he was at the police station on August 7, 2020 when PW-1 came with her daughter and reported that her daughter had been sexually assaulted. He recorded their statement and later arrested the appellant.
6. PW-4 Calvin Odhiambo, a Clinical Officer from Jotrh hospital stated that the minor was examined at the facility on August 7, 2020 and on genital examination, there was redness on the vagina, hymen was missing with a yellowish pus with stains.
7. PW-5, Dr Ombok stated that she filled the P3 form on August 11, 2020. Her findings on examination were that the genitalia was fairly normal with no presence of discharge or blood.
8. The appellant was put on his defence and gave a sworn statement to the effect that he was home on the said date. He left and came back a little later. He sat on the chair and the minor came. The mother came for her and he was later arrested. He told the trial court that the prosecution witnesses had lied.
9. DW-2, VO. stated that she was home with her father, the appellant when her mother sent her to a friend while the mother went to shower. The minor came and she talked to her. She left her in the house with the appellant. Coming back 15 minutes later, she met the minor running out followed by PW-1. The appellant was later arrested.
10. DW-3 MM stated that she sent DW-2 to a friend as she went to shower. As she was in the bathroom, she heard PW-1 calling PW-2 though she didn't see the minor in her house. Since DW-2 delayed in returning home, she went looking for her and as they were coming back, they met the minor followed by her parents. The appellant was later arrested.
11. Upon evaluating the evidence, the trial magistrate convicted the appellant and sentenced him to serve 10 years imprisonment. The appellant being aggrieved lodged the instant appeal raising the following grounds;
 - a. The learned trial magistrate erred in law by finding and holding that the age of the complainant had been proved beyond reasonable doubt.
 - b. It was a tremendous misdirection on the part of the learned trial magistrate to choose to ignore recent and binding decisions of the Court of Appeal on the case of proof of age of an alleged victim of defilement and state that the prosecution need not prove age of the alleged victim.
 - c. The learned trial magistrate erred by failing to consider the evidence of PW-5 who did not conclude whether the penetration was recent or not hence grossly misdirected herself in making a finding that the said penetration on the complainant was done by the appellant.
 - d. The learned trial magistrate erred in dismissing the appellant's defence on grounds that the same was not proved.
 - e. The learned trial magistrate erred in not finding that the prosecution had not proved its case beyond reasonable doubt.
 - f. The judgement of the trial court was against the weight of evidence.
12. The appeal was disposed of by way of written submissions. Both parties complied and the respective contentions have been taken into consideration.

Analysis and determination.

13. As a first appellate court, the court is mandated to subject the whole evidence to a fresh and exhaustive examination and at it's own decision based on the evidence on record and of course giving due



allowance to the fact it did not see or heard the witnesses testify. See *Kiilu & Another vs Republic [2005]1 KLR 174*.

14. The offence facing the appellant is found in Section 5 of the *Sexual Offences Act* (hereinafter the Act) which provides;

(1) Any person who unlawfully—

(a) Penetrates the genital organs of another person with—

(i) Any part of the body of another or that person; or

(ii) ;

(b) .

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

15. The ingredients of the offence were discussed in *David Ondanga Wanyama v Republic [2022] eKLR* where Githua J held;

'From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.'

16. In the instant appeal, it is alleged that the appellant inserted his fingers into the minor's vagina and was found in the act by the minor's mother.

17. Proof of penetration is normally by way of the victim's own account and corroborated by medical evidence. This is supported by the decision in *Mohamud Omar Mohamed v Republic [2020] eKLR* where it was held;

'The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate such testimonies.'

18. The proceedings at the trial court show that the minor testified that the appellant called her into his bedroom, removed her clothes and put his fingers into her private parts. That he removed her skirt and white pantie. The clinical officer who testified on behalf of Belinda stated that the minor was examined on August 7, 2020 and found that there was redness in the vagina, missing hymen and yellowish pus.

19. PW-5 Dr Ombok produced a P3 form filled on August 11, 2020 and she concluded that there had been sexual assault. The said P3 was produced into evidence. According to the P3 form, the doctor categorically concluded under part 'C' that the nature of the injuries was indicative of the offence of defilement.

20. On the element of penetration, the appellant contends that the same was not proved as the minor's clothing was not availed.



21. My analysis of the evidence presented at the trial court shows that indeed the minor was vaginally penetrated on the strength of the minor's own account and the medical evidence presented.
22. As stated above, proof of penetration is by way of witness own account and corroborated by medical evidence. There is no mandatory requirement that the victim's clothing be availed for examination in proof of penetration.
23. On the element of age, the appellant contends that the minor's age was not proved since the same was supported by notification of birth and a certificate of birth bearing different dates of birth and different names of the mother.
24. Going back to the evidence at the trial court, both the notification and birth certificate were produced as Pexh-3. The notification of birth indicates the minor's date of birth as October 25, 2014 and the birth certificate indicates her date of birth as January 25, 2014. Clearly, there is a discrepancy creating a difference of about 9 months.
25. Be that as it may, under the Section 5 of the Act, there is no distinction of age as the only elements needed in that Section is the act of penetration and assailant's identity. I thus find the learned trial magistrate correctly appreciated the import of that Section.
26. In the circumstances, I find the appellant's contention on the issue of age is incorrect.
27. The next element to be proved is the assailant's identity. The minor stated that she had gone to the appellant's home looking for her friend V whom she did not find at home. She identified the appellant as the father of 'Manu' and V and she identified him in court. Her mother, PW-1 stated that the appellant is her neighbour.
28. Clearly, I find the evidence of identification of the appellant by way of recognition was overwhelming. This is compounded by the fact that the offence was committed during the day.
29. On the issue of the trial court failure to consider his defence, the appellant in his testimony denied committing the offence. His case was supported by DW-2 his daughter and DW-3, his wife who both stated that the appellant did not commit the offence. They however testified seeing the minor leave the house followed PW-1.
30. The trial magistrate duly considered the appellant's defence and held that the appellant was at the scene of the crime and proceeded to dismiss it.
31. On my part I have reviewed the evidence on record and come to the conclusion that the appellant was with the minor at the time the offence was committed. PW-1 on entering the appellant's house found the minor sitting on the appellant's chest. This taken together with the minor's evidence and the medical evidence shows that the minor was alone with the appellant in the house.
32. In the end, I find that the appellant's defence was considered and the same was correctly dismissed by the learned trial magistrate.
33. The appellant also faults the trial magistrate for relying on the victim's unsworn evidence. I note that the trial court conducted a voire dire on the minor and concluded that the minor would give unsworn evidence as she did not understand her environment.
34. Voire dire is conducted on a witness to test the witness understanding of the importance to tell the truth. However, in the instant case, the appellant was accorded an opportunity to cross-examine the minor on the veracity of her testimony.



35. In *Paul Kinyanjui Kimauku v Republic [2016] eKLR*, the Court of Appeal addressed the issue of cross-examination of unsworn witnesses thus:

' (23) Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.'

36. From the above decisional authority, it appears that if an appellant was accorded an opportunity to cross-examine the witness, it cannot be said that there was miscarriage of justice.

37. In this appeal, there is evidence that the appellant put questions to the minor which were answered.

38. In the premises, I find no error in the trial court's reliance on the evidence of the minor as the appellant was accorded a chance to put the witness' testimony to test by way of cross-examination.

39. The appellant also faults the sentence meted on him. Section 5 of the Act as reproduced earlier provides for a prison term not less than 10 years but can be enhanced to life imprisonment.

40. There is a plethora of authorities that sentencing is a prerogative of the trial court and the appellate court can interfere with such sentence in the rarest of cases. The circumstances under which a sentence can be reversed on appeal was captured in *Shadrack Kipkoech Kogo - vs - R Eldoret Criminal Appeal No 253 of 2003* where the Court of Appeal stated thus:-

' Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka - vs- R (1989 KLR 306)*'

41. The trial magistrate after considering the appellant's mitigation which was to the effect that he is a family man, the only bread winner and a leader in his family sentenced him to 10 years.

42. Considering the above, I am unable to find any reason advanced to persuade this court to alter the sentence so handed down. The considerations taken into account by the learned trial magistrate were sound and legal.

43. For the above, I find no merit in the appeal which I hereby proceed to dismiss.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 18TH DAY OF JULY 2023.

MWANAISHA. S. SHARIFF

JUDGE

