



**JKN v Republic (Criminal Appeal E002 of 2023)
[2023] KEHC 19582 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E002 OF 2023**

GMA DULU, J

JULY 6, 2023

BETWEEN

JKN APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Magistrate's Sexual Offence Case No. 16 of 2018 at Voi Law Courts delivered on 5th January 2023 by Hon. C. K. Kithinji (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of offence were that on the month of August 2018 at Voi Sub County within Taita Taveta County intentionally made his male genital organ (penis) to penetrate the female genital organ (vagina) of EKK (name withheld) a girl 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 in the same month, year and place intentionally and unlawfully touched the vagina of EKK a girl aged 16 years with his penis.
3. He denied both charges. After a full trial, he was convicted of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) and sentenced to imprisonment for twenty five (25) years.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-
 1. The learned Magistrate erred in law and facts when she misdirected herself.



2. The learned trial Magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the appellant.
 3. The learned Magistrate erred when she considered the evidence adduced by the prosecution full of massive contradictions.
 4. The learned Magistrate erred in convicting the appellant on poor investigation adduced by the prosecution.
 5. The learned Magistrate erred in convicting him to 25 years imprisonment without considering that the sentence meted to him was harsh and excessive.
 6. The learned Magistrate erred by convicting him to 25 years imprisonment without considering the period spent in remand custody prior to conviction and sentence as required under Section 333 of the CPC.
 7. The learned Magistrate erred by convicting him to 25 years imprisonment without considering his reasonable defence.
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. I note that the Director of Public Prosecutions has relied on the case of Mark Oimuri Mose v Republic [2013] eKLR, with regard to penetration a decision of the Court of Appeal.
 6. This being a first appeal, I have an obligation to reconsider the evidence on record, evaluate it afresh and come to my own independent conclusions and inferences – see Okeno v Republic [1972] EA 32.
 7. In proving their case, the prosecution called seven (7) witnesses. The appellant on his part tendered sworn defence testimony and did not call any additional witnesses.
 8. The elements of the offence of defilement for which the appellant was convicted and sentenced are firstly the age of the alleged victim who should be below 18 years of age. The second element is penetration of a sexual nature even if partial. The third element is the identity of the culprit.
 9. Under Section 107 of the Evidence Act (Cap.80), the prosecution had the burden to prove each of the three elements of the offence. This being a criminal case the standard of proof is beyond reasonable doubt see Sawe v Republic [2003] eKLR.
 10. I start with the age of the alleged victim PW1 EKK. She stated in evidence that she was 16 years old at the time of the alleged incident, and in Standard 7. Her mother PW3 MC, and her father PW4 JKN confirmed this position. A birth certificate was relied upon and produced as an exhibit by PW6 PC Mercy Njoroge the investigating officer. The date of birth of EK was recorded as March 2, 2002.
 11. In my view, the prosecution proved beyond any reasonable doubt that the alleged victim was aged 16 years at the time of the incident.
 12. With regard to sexual penetration, PW1 testified in court that she was sexually penetrated. Her alleged pregnancy was confirmed through medical examination as contained in the evidence tendered in court by PW7 Joto Nyawa a Clinical Officer at Moi Referral Hospital Voi. In addition, a child of the pregnancy AC was actually born.
 13. In my view, the prosecution proved beyond any reasonable doubt that sexual penetration on PW1 did occur.



14. I now turn to the third element of the identity of the culprit. PW1 is the only witness who stated that the appellant was the culprit. Her evidence being a victim of an alleged sexual offence, if believable can sustain a conviction under the proviso to Section 124 of the *Evidence Act* (Cap80) without further corroboration.
15. There is indeed, evidence on record from PW5 George Lawrence Ogada a Government Analyst from Mombasa, that he obtained buccal swabs from three people JKN, EKK, and a minor ACK and examined same and produced a report in court of DNA profiles. According to this witness, A the child, was on 99.99% probabilities fathered by JKN.
16. The evidential concern with genuineness of this finding however, in my view, is firstly that the escorting officer of the exhibit memo to the Government Chemist PC Joseph Waza, did not testify in court. Secondly, it is not clear how and at what point the physical exhibits – in this case three named human beings were identified to the Government Chemist and by whom. It is also not clear from the evidence on record, how the samples taken from the human persons were handled and by whom. It is also not clear whether the expert report was sent back to the police, from whom the request for the DNA tests came. Thus the chain of events and handling of samples and the technical report herein is surrounded in mystery.
17. In my view, the report from the Government Chemist herein does not satisfy the evidential test of integrity and genuineness. It cannot be relied upon, and the Magistrate should not have relied on the same, as there was a big gap created by the absence of the escorting police officer and the sequence of handling of exhibits or samples, involved, as well as the report therefrom.
18. From the above observations, and the fact that both PW1, and her mother PW3 admitted that there existed a family disagreement involving the appellant over alleged infidelity of a relative of PW1, and the whistle blower being the appellant herein, it is highly probable that this case was a frame up against the appellant just as he said in his defence.
19. The appellant also tendered sworn defence testimony which was not shaken in cross-examination. He denied committing the offence.
20. In my view, the trial court in these circumstances, should have given the benefit of the doubt to the appellant, as the prosecution was required to prove the element of the identity of the culprit beyond reasonable doubt.
21. I give the benefit of the doubt to the appellant and find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. On that account alone, I will allow the appeal, quash the conviction and set aside the sentence.
22. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF JULY 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

The appellant

Mr. Sirima for State

Mr. Otolu court assistant

