



REPUBLIC OF KENYA



KENYA LAW
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**Mohammed v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 27442 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E017 OF 2022**

GL NZIOKA, J

JULY 24, 2023

BETWEEN

ISAKO HUSSEIN MOHAMMED APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. J. Karanja, Senior Principal Magistrate (SPM) delivered on 18th January, 2022 vide Criminal sexual offence case No. 45 of 2019 at the Chief Magistrate’s Court at Naivasha)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate’s Court at Naivasha charged vide criminal sexual offences case No. 45 of 2019, with the offence of defilement contrary to section 8(1) as read with section 8 (2) of *Sexual Offences Act* (herein “the Act”) and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Act*. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case was fully heard with the prosecution calling a total of five (5) witnesses. The prosecution case in brief was that PW1 “A.D” (herein “the complainant”) went to fetch firewood when she met the appellant next to Aquilla fence. That he greeted her and offered her Kshs. 20 which she declined and started walking away.
3. However, the appellant grabbed her hand covered her mouth and took her to the forest. That he lifted her dress and removed her panty before removing his trousers and proceeded to put his “makende” (penis) in-between her legs at the place used for urinating and as stated by the complainant “alinitomba” that is, defiled her.



4. That when the appellant was done he wore his clothes warned her not to tell anyone and went away. The complainant went home at about 7:00pm and her mother (PW2), L inquired where she was, and the complainant informed her that Kanate had defiled her. PW2 took her to hospital at Kwa Maiko.
5. In the meantime, PW4 No. XXX Corporal Samuel Kibet Langat was informed of the incident by one Pastor Jonathan and proceeded to the hospital where he met the complainant while she was being treated. That, the complainant informed him that she was defiled by Isako Mohammed.
6. That at around 7pm PW4 Corporal Kibet in the company of a Nyumba kumi elder went to the appellant's house and asked the appellant to accompany him to the hospital where the appellant was identified by the complainant identified as the person who had defiled her and he was arrested and charged after investigations.
7. At the close of the prosecution case, the appellant was placed on his defence. He gave an unsworn statement and denied committing the offence. He stated that, on 9th July, 2019 he was at work at Aquilla when at about 4:30pm he came across the complainant at the bush. That he inquired where she was heading and the complainant asked him whether he had seen his friends. The appellant informed her that he had not seen any other girls around and instructed her to go home.
8. That the appellant returned home and at about 6:30pm he heard a motorcycle outside followed by a knock on the door. That a police officer stated he was looking for Kanate and the appellant confirmed that he was the one. That he was taken to Ndabibi Police Post where he met with the complainant and the mother. He confirmed that he knew them as he had previously worked for them, and had met the complainant at Aquilla the same day. However, he was arrested and charged accordingly.
9. At the conclusion of the hearing of the case, the trial court delivered its judgment on 12th May, 2022 and held that the prosecution had proved the case beyond reasonable doubt. The appellant was convicted and sentenced him to life imprisonment.
10. However, the appellant is aggrieved by the decision of the trial court and has appealed against it on the grounds as here below reproduced:
 - a. That, the learned trial magistrate erred in law and fact to have convicted the appellant based on evidence which was otherwise contradictory and uncorroborated.
 - b. That, the learned trial magistrate erred in law and fact by not noting the charges laid by the prosecution on were defective and inconsistent.
 - c. That, the learned trial magistrate erred in law and fact to have found that the appellant's defence created a reasonable doubt as to oust the prosecution's case.
 - d. That, I am praying to be present during the hearing of this appeal.
11. However, the respondent appeal was opposed vide the respondent's grounds of opposition dated 23rd February 2023 which states: -
 - a. That the age of the complainant was sufficiently proved to the required standard 8 (3) of *Sexual Offences Act*, 2006. The birth certificate was produced as an exhibit.



- b. That penetration was proved under section 8 (3) of the *Sexual Offences Act* through the evidence of the victim and PW3, the doctor who examined the victim.
 - c. That the identification of the appellant was established as he was well known to the victim.
 - d. That the trial court considered the appellant defence and subsequently dismissed it.
 - e. That the trial court found the prosecution case was proved beyond reasonable doubt and convicted the appellant to life imprisonment.
 - f. That I pray the honourable court be pleased to dismiss the appeal and uphold both the conviction and sentence.
12. The appeal was disposed of by filing of submissions. The appellant filed submission on 16th March 2023 where he abandoned the appeal on conviction and conceded that the elements of the offence had been proved, and instead opted to appeal on sentence.
 13. He submitted that at the time of the commission of the offence he was 27 years old and is a first offender. That, he is remorseful and during his imprisonment he has enrolled in a course to become an imam. Further, his family conducted a cleansing ritual that was attended by the complainant's family and there is no disagreement. That, the final stage of the ritual is his return back home.
 14. The appellant argued that, the sentence is not definite and proportionate to the offence as provided for under section 26 (2) and (3) of the *Penal Code* and that the trial court did not compute his sentence in accordance to section 333 (1) and (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
 15. However, the respondent in submissions dated 23rd February, 2023 addressed both conviction and sentence arguing that the prosecution had proved its case beyond reasonable doubt. That, the complainant was able to identify the appellant who lived in the same locality with her and that he worked as a casual labourer in the local farms.
 16. That, penetration was proved by the evidence of the complainant which was corroborated by the medical evidence adduced by the doctor. Further, the complainant's age was proved by the production of clinic card that indicated she was ten (10) years old.
 17. Further, the complainant was truthful and her evidence was unshaken despite intimidation by the appellant during cross-examination, and that the trial court took note of her demeanour. Reliance was placed on the case of; *Fredrick Onyango Odeng vs republic* (2014) eKLR where the Court of Appeal held that section 124 of the *Evidence Act* was amended to allow the court to convict an appellant on the sole evidence of the victim of sexual offence where it is satisfied the victim was telling the truth.
 18. Finally, the respondent submitted that the sentence imposed by the trial court was provided the minimum sentence prescribed under the law and in line with the circumstances of the offence.
 19. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, the role of the first appellant court, 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, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32,.



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) EA 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] EA 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. Pursuant thereto I note that the offence of defilement which the appellant was convicted of is stipulated under section 8(1) of the [Act](#) it states: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

22. I further note that the appellant has in submissions pursued appeal on sentence alone but the grounds of appeal challenge both conviction and sentence. I shall address both.

23. The elements of the offence are settled as discussed by the Supreme Court of Uganda in the case of; *Bassita Hussein vs. Uganda* Criminal Appeal No. 35 of 1995, which laid down the ingredients of the offence of defilement, that the prosecution must prove beyond reasonable doubt as; (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.

24. On the element of age, the charge sheet states, she was aged 10 years old. PW1 the complainant testified she was aged 10 years old. The mother stated she was 12 years old and produced immunization card, P3 form states she is 10 years old.

25. The afore evidence is not rebutted by the defence. The age was thus proved by the immunization card satisfactorily. This court concurs and upholds finding of the trial court.

26. As regards the element of penetration, the charge sheet states the appellant caused his genital organs to penetrate the genital organ of the complainant. The complainant testified that:

“the appellant grabbed my hand and covered my mouth. He grabbed me when I had gone first a little but away. He took me to the forest and removed my clothes. I was wearing a green dress. He removed my pant and lifted his dress. He was wearing a black coat and green apron. He removed the apron. He had a “longi” trouser. He did bad manners to me. He removed the “longi” and did bad manners. He raped me “alinitomba”. He removed his thing and did bad manners. He removed his makende (genitals). It is used for raping I know what it is used for. It is used to make someone pregnant. He used it to rape me “alinitomba”. He put it between my legs. He placed it on the place I use to urinate. I did not scream.”

27. PW2, the complainant’s mother on her part testified that the complainant told her the appellant “caught her hand, took her to the bush and did bad manners to her. He removed her clothes and slept with her. He raped her.” That she showed mother her private parts and told her that was where he did bad manners.



28. PW3 Benjamin Kairu produced a P3 form which indicates the complainant had healing wounds on the neck. That, it was one day after the incident. That the other parts were inflamed, hyperemic and her hymen was missing. The conclusion thereof being that the injuries sustained were consistent with defilement. The PRC form was also produced showing similar findings.
29. The appellant did not adduce contrary evidence to counter or rebut the medical documents, save for evidence that, at another different time, the complainant may have been assaulted by a cousin.
30. But even, then although during cross examination it was revealed that the complainant may have been defiled also by the cousin at a different time, during re-examination, the complainant maintained that the appellant sexually assaulted her. Indeed the medical documents P3 form and the PRC form confirmed defilement. It is the finding of this court that the medical reports corroborate the complainant's evidence that she was defiled.
31. The complainant gave a detailed account of how the perpetrator defiled her. Her description of the organ used. Her ability to clearly state the purpose for which that organ is used for confirms the occurrence of defilement.
32. Further honesty is revealed by the fact that she did not attempt to conceal her earlier ordeal of sexually assault by her cousin when she could clearly have. Therefore, she was a very candid witness.
33. As to the offender's identity, the charge sheet states the appellant defiled her. The complainant's evidence reveals that she knows the appellant. She stated that; "the appellant used to herd cows at their home, at her grandfather's home in Ndabibi and that is where he lived.
34. The appellant's mother PW2 testified that when her daughter returned home late and she inquired as to where she was, and she told her "she met Kanate, who called her and she refused".
35. PW2 Lematare stated that "She told me it was Kanate. I know Kanate. He is the one there (accused in dock). I know him. He has even herded animals for us a lot."
36. PW4 PC Musau, testified that the complainant narrated the same evidence that, it is the appellant who defiled her. That he discovered that, the appellant was a worker at Aquila Flower Farm. Further he was given work of repairing a fence, which corroborates complainant's evidence that, she found the appellant at Aquila at a fence.
37. PW4 PC Musau further stated that the fence borders the home where the complainant stays. Furthermore, the appellant had previously worked at the complainant's home as a cow herder and so the complainant knew him well. That, the appellant's real names were as per the charge sheet not Kanate as well known.
38. The appellant admitted in his defence that he worked at Aquila. That he met a young girl at 4:30pm at the "beginning of a bush". He asked her where she was going and she inquired whether the appellant had seen her friends and the appellant replied in the negative and warned her not to enter the forest but go to her mother. Therefore, defence evidence confirms the appellant had met the complainant and hence had an opportunity to commit the offence.
39. The appellant has not denied the fact that he was well known to the complainant and even worked in their home. There is no reason advanced to explain why anyone would frame him or plant charges on him.
40. Therefore, I find sufficient evidence he committed the offence as held by the trial court. The conviction is upheld.



41. As regard sentence I note the appellant was sentence to life imprisonment. Section 8 (2) of the *Act* states: -

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

42. The charge indicates the complainant was 10 years old. Immunization card produced is not among the exhibits availed and it is important to establish the exact age of the victim therefore before I deal with sentence, I direct the Hon. Deputy Registrar to return the trial court file to the Chief Magistrate, to avail the exhibit forthwith.

43. Further orders on 31st July 2023

Dated, delivered and signed this 24th day of July 2023.

GRACE. L NZIOKA

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms. Ogutu court assistant

