



**VCK v Republic (Criminal Appeal E003 of 2023)
[2023] KEHC 20132 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL APPEAL E003 OF 2023
RN NYAKUNDI, J
JULY 10, 2023**

BETWEEN

VCK APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Ngigi Mbuga & Co. Advocates

Mr. Mugun for the State

Background

1. The appellant allegedly aged 17 years old was charged with an offence of defilement contrary to Section 8(1) of the *Sexual Offence Act* No 3 of 2006. The brief particulars being that on March 15, 2021 in Elgyeo Marakwet county intentionally and unlawfully caused his penis to penetrate the genitalia of CJM a child aged 15 years.
2. He was also charged with an alternative offence of committing an indecent Act of the same child by touching the vagina with his penis. At the time of indictment, the appellant denied both counts. He therefore put on notice the prosecution to prove all the ingredients of the offence beyond reasonable doubts.
3. The prosecution to summon the following witnesses. CJM the victim of the defilement who gave a narration of the chronology of events on the material day of March 15, 2021 when she met with the appellant. From her evidence the circumstances were very clear that the appellant known to her as a neighbor prior to the incident undressed her and penetrated the vagina and on accomplishing the mission he ran away the result of that sexual act was a pregnancy as confirmed by the DNA test. The



DNA report from the government chemist dated June 30, 2022 was produced as an exhibit 2. Besides the victim's testimony the prosecution also relied on the evidence of the minor SC (PW2). According to PW2, it came to pass that (PW1) pregnancy was to bring to her attention that is when she inquired from PW1 to reveal the perpetrator who happened to be the appellant. PW2 took up the matter with the police for the sole purpose to have an investigations commenced to arraign the appellant before court. The police on their part from the evidence of PW3 CPC Simon Yeri recorded witness statements and caused (PW1) to be examined by the medical officer and subsequently samples from (PW1) and the appellant were taken to the government chemist. PW3 produced before court the DNA test report and birth certificate as exhibits in support of the charge. At the close of the prosecution case appellant was placed on his defence. The answer to the charge is very clear that he had sexual inter course with the complainant on the May 15, 2021. All he wanted was to be released to continue with his studies as he takes care of the child a product of the offence. He concurred that the child at the time of the trial was aged one year. It's against this underlying circumstances the learned trial magistrate found the appellant guilty, entered a conclusion and imposed a custodial sentence of 10 years. Aggrieved with the findings of the trial magistrate learned counsel. Mr Ngigi on behalf of the appellant lodged an appeal based on the following grounds:

1. That the learned Trial Magistrate erred in law and fact by the fact of entirely relying on the prosecution cases evidence and totaling ignoring the strong defence presented by the Appellant and not giving urgent reasons for ignoring the same thus contravening Section 69(1) of the [Criminal Procedure Code](#).
 2. That the Learned Trail Magistrate erred in law and fact by convicting him on evidence which did not meet the required standard
 3. That the Learned Trial Magistrate erred in law and fact by relying on extrinsic evidence that was not adduced during trial.
 4. That the Learned Trial Magistrate erred in law and fact in failing to perceive that the prosecution at much deeper level failed to investigate the cause or rather address the root cause of the matter as regards to the offence imposed on the appellant.
 5. That the learned Trial Magistrate failed to observe that the sentence imposed was manifestly harsh and disproportionate considering the fact and background of the case
 6. That the learned Trial Magistrate erred in law and fact by not considering mitigating factors by the appellant
 7. That the Learned magistrate erred in law and fact by completely disregarding diversion attempts by the primary parties to the case in light of the unique facts of the case.
 8. That the learned Trial Magistrate erred in both and fact by failing to observe the appellant's fundamental constitutional rights enshrined in Article 50 as well as Section 165 of the Criminal Procedure Code.
4. Learned counsels canvassed the appeal by way of written submissions, the despondence counsel also submitted in response vehemently opposing the appeal, All the issues in the submissions by both counsels have been appraised, evaluated and weighted on the parameters of criminal justice scale as they relate to this appeal.
 5. This being a court of First appeal I am guided by the principles on *Okeno V Republic (1972) EAC 32 Kiiilu V Republic (2005) eKLR 174*. In a nutshell the ground of Appeal can be condensed he following key issues:



1. Whether the learned trial magistrate in convicting the appellant relied on probative material evidence or extrinsic evidence. As a consequence the charge of defilement was never proved beyond reasonable doubt
 2. Whether the learned trial magistrate in sentencing the Appellant erred in imposing a punitive harsh and excessive sentence.
6. The starting point used therefore to reflect on the standard and burden of proof historically would be beyond reasonable doubt. It is settled that the prosecution on behalf of the state must prove all criminal offences beyond reasonable doubt. That duty never shifts to the accused at any one time even with the statutory provisions in Section 111 of the *evidence Act*. The well settled principles are clearly stated in the dicta by Lord Denning in *Miller v Minister of Pensions 1947 (2 ALLER 372)* *Bakare V State (1987) INWLR 5879* See also section 107(1), 108 and 109 of the *evidence Act*, as of necessity the predominant issue to be answered by this court is whether the offence of defilement was proved beyond reasonable doubt it is not in dispute that the appellant was charged pursuant to section 8(1) as read with subsection (3) of the sexual offence Act. There are some primary elements set to be proved by the prosecution in an offence of defilement, facing the appellant
- i) (The unlawful act of penetration) This element is defined under Section 2 of the *Sexual Offences Act* as follows 'As the partial or complete insertion of the genital organ of a person into the genital organ by another person. In the case of *Dominic Kibet Mwareng V Republic (2013) eKLR* the court opined that the critical ingredients for the offence of defilement are: The age of the complainant, proof penetration, and positive identification of the assailant on penetration. The court of Appeal pronounced itself as follows: ' That the slightest penetration a female organ by a male set organ is sufficient to constitute the offence and is not necessary that the hymen be ruptured.
7. In the case at bar, there is cogent evidence from (PW1) on the victim of the offence who clearly demonstrated to the trial court on both direct and surrounding circumstances of the offence on this material day. This was corroborated by the testimony of her mother (PW2). It is crystal clear that (PW2) noticed that (PW1) was pregnant. The concerns caused her to inquire from her daughter (PW1) to name the person responsible. That is how the identity of the appellant came to the fore as the person who had committed the unlawful Act. It is not in dispute that (PW2) took positive steps to report the crime to the police station whose outcome led to the arrest of the Appellant to face the charge of defilement against PW1. Part of the investigation established through the DNA test that the Appellant was biological father of the fetus in question. The DNA test from the government chemist proved beyond reasonable doubt that the act of penetration against (PW1) was carried out by the appellant. It is logical from the DNA test that the male gamete of the appellant contributed to the embryo and placenta. That integrity of the sperm genome is essential for the initiation and maintenance of a successful pregnancy.
8. The appellant in this rejoinder admitted the fact of sexual intercourse with the victim in this proceedings. In the words of the appellant. 'I met the subject and we had sex., The issue is mine the child is now one year. I want to take care if the child after I finish school.' In effect therefore there is no challenge as to proof of the ingredient of penetration by the appellant into the vagina (PW1). In essence, the submissions by learned counsel for the appellant that the learned magistrate based his decision on extrinsic and unreliable evidence is neither here nor there to persuade this court to depart from the findings of the trial court.
9. The second element of the offence at hand is proof of age. There are many good reasons for this ingredient given the graduated scale on punishment of the offenders in terms of section 8(1) (2) (3)



and (4) of the [sexual offences Act](#) based on the age of the complainant or victim. The tender the age of the complainant calls for the higher and punitive sentences against the accused person or perpetrator. For this, the court of Appeal in *Edwin Nyambogo Onyango v Republic (2016) eKLR* stated as follows ' The question of proof of age has finally been settled by recent decisions of this court has finally been settled by recent decisions of this court, that it can be proved by documents, evidence such as birth certificates , Baptismal card or by oral evidence of the child sufficiently intelligent or the evidence of parents or guardians of medical evidence among other credible forms of proof. On this issue the main characteristics of proof came from the complainant PW1 which was also corroborated by the mother (PW2). In addition, the legality principle on age was embodied in the birth certificate produced as documentary evidence precisely ascertaining the age of PW1. What this means that the prosecution case on age having no challenge from the appellant discharged the burden of proof to one of the critical elements capable of establishing the guilty of the appellant. As suggested by the learned counsel for the appellant there is nothing to show any other age of the complainant other than what is captured in the birth certificate by the registrar of births and deaths in Kenya. This court takes judicial notice of the public record as authentic in absence of any other evidence to the contrary.

10. Thirdly, the prosecution has a duty to prove as a matter of evidence that the appellant was at the scene of the crime as described by the complainant (PW1). This potentially is evidence on identification which excludes any other person and to leave the appellant squarely at the scene throughout the circumstances which can hold him culpable. In [Cleophas Otineo Wamunga vs Republic \(1989 eKLR\)](#) and [Stephen Kariuki & 2 Others V Republic \(1986\) eKLR](#) the two courts laid down the guidelines as follows: On visual identification how did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way i.e by passing traffic or people, had the witness ever seen the accused before? How often? If only occasionally had she/he any special reason for remembering the accused? How long period elapsed between the original observation and subsequent identification to the police? In the instant case the complainant (PW1) identified the appellant as a person who is a neighbour where the family is domiciled. Similarly, according to PW2 she adduced evidence that the appellant has been a resident within the area where her family lives. The appellant in his defence did not dispute the evidence on identification by the complainant (PW1) & (PW2). The matter of the Appellant identification is undoubtedly not in dispute. I am satisfied that there was no evidence of obstruction or possibility that the visual identification of appellant was fabricated or tainted in any way to have a wrong perpetrator prosecuted for the crime.
11. It is also permissible from the record that the Appellant though below the age of maturity the prosecution established that at the time of committing the offence he was aged 16 years capable physically of committing defilement or rape in a woman or a girl positively identified as the complainant in the instant appeal.
14. The other limb complained of by the Appellant is the imposed sentence of ten (10) years imprisonment. Learned counsel Mr Ngigi for the Appellant reiterated the provisions of Section 18 & Section 143(1) of *Children's Act* to buttress his arguments in favour of the Appellant for the review and setting aside of the custodial sentence of ten (10) years sanctioned by the trial court as being in contravention of [the constitution](#) and enabling statutes governing children matters. In support of counsel's contention, he invited the court to apply the principles in *MBI v Republic (2018) eKLR* stated that: 'the essence of complying with Section 143(1) of the children's Act is to ensure that a child's not treated as an adult during the proceedings and the conclusion of the proceedings. At the conclusion of the proceedings, for example, a child who is adjudged to have defiled another is not to be sentenced as an adult. The court would have to deal with such a child in any of the way prescribed under Section 191(1) of the [children Act](#). Such way include discharging the offender under Section 35(1) of the Penal Code. Section 190(1) of the [Children Act](#) also expressly provides that no child shall



be ordered to imprisonment or to be placed in a detention camp.' In response learned prosecution counsel opposed the submissions by the appellant counsel seeking leave of the court to interfere with the custodial sentence imposed by the trial court.

13. Generally speaking, trial record indicates that the Appellant was arraigned before court on April 6, 2022 charged with the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act* No 3 of the 2006. The brief particulars shown in the charge sheet are that on the 15th day of March 2021 at Kipkaner location intentionally and unlawfully caused penis to penetrate the vagina of CJM a child aged 15 years. The evidence presented before the trial court by way of a birth certificate proved beyond reasonable doubt by the complainant at the time of the offence was aged 15 years old whereas the appellant age from his birth certificate committed the offence at the age of 17 years. On account of this age one cannot say that the Appellant had incapacities to know that what he was doing was wrong and against the law. First and foremost as an Appeals court principles in *Shadrack Kipchoge Kog v Republic criminal Appeal No 253 of 2003* are of significance in which the court observed as follows: 'Sentence is essentially and exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.'
14. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
 - a. To denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct
 - b. To deter the offender and other persons from committing offences
 - c. To separate offenders from society, where necessary
 - d. To assist in rehabilitating offenders
 - e. To provide reparations for harm done to victims or to the community, and
 - f. To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.
15. Having reviewed the record I take the liberty to reopen resentencing proceedings in this matter with a follow-up of the following reports to be availed for consideration in the sentencing scheme of the appellant:
 1. The victim impact statement
 2. The children's officer report for both the victim and the convict
 3. The Probation Officer's Report
 4. Resentencing on July 17, 2023.

DELIVERED, DATED, SIGNED AT ELDORET THIS 10TH DAY OF JULY 2023.

In the Presence of

Mr. Ngigi for the Appellant

Appellant VCK Present

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R. NYAKUNDI
JUDGE

