



**JMK v Republic (Criminal Appeal E092 of 2022)
[2024] KEHC 17233 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 17233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E092 OF 2022
TM MATHEKA, J
NOVEMBER 19, 2024**

BETWEEN

JMK APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence by Hon J. Otieno (RM) in Makueni Resident Magistrate's Court Sexual Offence Case No. 34 of 2019 delivered on 31st August, 2019)

JUDGMENT

1. JMK was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 12th day of October 2019 at around 1330 hrs at [Particulars Withheld] Village, Mbuvo Location, Kathonzweni Sub-County within Makueni County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CM a child aged 4 years.
2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the same day, at the same time and place, the appellant unlawfully touched the vagina of CM, a child aged 4 years months.
3. The appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted him and sentenced him to 10 years imprisonment for attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006
4. Aggrieved by that decision, the appellant filed this appeal on the following grounds;
 5. That he was sentenced when there was no plea of guilty.



6. That he is in dispute with the conviction and sentence.
 7. That the prosecution did not prove their case beyond reasonable doubt.
 8. That the honorable magistrate overlooked the inconsistencies of the witnesses which were uncorroborated.
5. When he file his submissions he raised the following grounds:
1. That the learned magistrate erred in law and fact by convicting him on defective charge sheet.
 2. That the learned magistrate erred in law and fact by convicting him when there were inconsistencies in the prosecution evidence.
 3. That the learned magistrate erred in law and fact by convicting him when there was no corroboration in the prosecution witnesses.
 4. That the learned magistrate did not realize that the prosecution did not prove their case beyond reasonable doubt.
 5. That the complainant's DNA was of no value as it was presented in court 7 months after the alleged incident.
6. The prosecution's case was that; the appellant was accommodated at the complainant's home as he searched for a job. That on 12/10/2019, the complainant's mother was looking for her so that she could bathe her and when she could not find her , the other children informed her that the complainant had entered the Appellant's house. She knocked severally on the door and it took some time for the child to come out; That when she came out of Appellant's house she narrated what had happened to her, and how the appellant had laid her on the bed and lay on top of her. That the complainant's mother observed that the child's dress was very wet with sperms which were also on her legs. They went to Mbuvo police and were referred to Kathonzweni where the complainant was examined. Subsequently, the Appellant was arrested and prosecuted.
7. The prosecution called 5 witnesses to wit; the Clinical Officer (PW1), the complainant (PW2), the complainant's relative (PW3), the complainant's mother (PW4) and the Investigating Officer (PW5). The following exhibits were produced; PRC form (P.Ex 1), P3 form (P.Ex 2), Lab Results(P.Ex 3), under pant (P.Ex 4), torn floral dress (P.Ex 5), Exhibit Memo form (P.Ex 6),DNA Analysis Report (P.Ex 7) and birth notification(P.Ex 8)
8. When the appellant was put on his defence he took the silence option.
9. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

10. The appellant submitted that the charge sheet was defective as it disclosed the minor's name in full contrary to the law. He contended minors should be shielded from possible side effects of their identities being made public as a result of being embroiled in criminal proceedings.
11. He submitted that the evidence about ejaculation was a frame-up and wondered what a 4-year old could possibly know about sexual stimulation. That according to the complainant, 'mawe ngumu' was inserted in her vagina yet she did not cry and the medical evidence did not prove penetration. He contended that there was no new evidence to prompt amendment of charge sheet and that the amendment was prompted by the prosecution's failure to prove defilement in the initial proceedings.



12. He submitted that the prosecution's evidence lacked corroboration and had a lot of inconsistencies. He made specific reference to the evidence of PW2, 3 and 4. He submitted that contradiction means lack of agreement between two related facts.
13. He submitted that the DNA results were presented to court after 7 months and contended that according to Government policy, the same should be out within 24 hours to 12 weeks based on the analysis. He submitted that delay of results happens when the swab has been contaminated as a result of a mistake during collection of samples. He submitted that it did not happen in this case. To quote him verbatim, he submitted that; ‘.what might have been happening are this 7 months unless it was mean of making sure the frame up of the case is fully realized.’
14. He urged the court to allow the appeal and sentence him to time served considering that he is an old man of over 65 years.

Respondent's Submissions

15. The State, through Prosecution Counsel, Vincent Maina, relied on Criminal Appeal No. 88 of 2015; *Moses Kabue Karuoya v R* for the submission that; for there to be an attempt to commit an offence by a person, that person must;
 1. Intend to commit the offence,
 2. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfillment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve,
 3. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence.
16. He submitted that the complainant's age was proved to be 4 years through the production of a birth notification.
17. He submitted that the Appellant was found at the scene with the minor locked inside his house hence there was no error as to the identity of the perpetrator. That he was also identified by name by the minor.
18. He submitted that the evidence demonstrates the steps which were taken by the Appellant and that they manifested his deliberate action to defile the complainant. That the Appellant would have succeeded if it was not for the intervention by PW3 and 4.
19. He submitted that the inconsistencies were minor and did not affect the main substance of the prosecution's case. He relied on the case of *Richard Munene v R* (2016) eKLR where the Court of Appeal stated;

“It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in questions and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”
20. He submitted that the case was proved beyond reasonable doubt and the evidence adduced was solid.



Duty of Court

21. It is now settled that the duty of a first appellate Court is to analyse the evidence on record, make its own findings and draw its own conclusions always keeping in mind that it never saw or heard the witnesses.
22. Have considered the grounds of appeal, the entire record and the rival submissions. The following issues arise for determination;
 1. Whether the charge sheet was defective.
 2. Whether the DNA Analysis report was admitted properly.
 3. Whether the prosecution case was riddled with inconsistencies.
 4. Whether the offence was proved to the required standard.

Analysis and Determination

Whether the charge sheet was defective.

23. According to the appellant, the charge sheet was defective because the complainant's identity was revealed. Indeed, the *Children Act*, Cap 141 Laws of Kenya prohibits the revelation of a child's identity in any proceedings concerning such a child. The appellant is aware of the right to privacy, and the law that protects the identity of the child who gets into contact with the law. The question however is whether the Appellant was prejudiced by the revelation and whether the revelation is fatal to the prosecution's case. In *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], the Supreme Court of India held that: -

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.....We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”

24. The inclusion of the name of the child must have been inadvertence on the part of the prosecution and prejudiced the child and not the appellant. In *Erick Maina Mbulele v Republic* [2018] eKLR, the issue was that the minor's name had been misspelt and the Court of Appeal stated as follows;

“ 15. From the record, the appellant raised some grounds which were not raised in the High Court. These included the claim that the charge sheet was defective in that it bore a different name to that in the medical report.

16. In the case of *Isaac Nyoro Kimita and Another v Republic* i.e Criminal appeal No.187 of 2009, this Court stated;-

“He (the appellant) therefore understood the charge against him to have been that on the material date, while together with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross examined prosecution witnesses and



defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellant's constitutional right to fair trial."

17. From the record, it is clear that the misspelling of BA's name does not occasion a failure of justice. We therefore find that this was a mere misspelling of the name which did not prejudice the appellant and did not occasion any miscarriage of justice or violate the appellant's rights.
25. The Appellant also complained about the amendment of the charge sheet and alleged that it was for the purpose of cementing the framed-up case. Section 214 of the CPC allows the court to allow the amendment of the charge sheet as long as the prosecution has not closed its case. It also requires that an accused person be informed of his right to plead to the amended charge and to recall witnesses.
26. In this case, the Appellant pleaded to the amended charge and he was given an opportunity to cross-examine the only witness who had testified (PW1) but he chose to remain silent. The amendment was done procedurally and there was no prejudice to the Appellant. Consequently, this ground of appeal fails.

Whether the prosecution case was riddled with inconsistencies.

27. The inconsistencies highlighted by the Appellant are as follows; that PW2 (the complainant) said 'They were at home but not nearby' and PW3 said; 'I cooked and went to call him at the house.' The Appellant wondered how someone who was not nearby could cook at the same compound and proceed to knock at the house. Having keenly looked at the testimonies of the two witnesses, it is clear that PW2's statement was made in plural and was therefore not referring to a specific person yet the Appellant's claim is that PW2 was referring to PW3. PW2 had testified about her two friends who she would play with in the evening hence from that context, it is probable that she was referring to the two friends.
28. The Appellant also flagged the evidence of PW4 where she stated; 'I peeped, she was not in the sitting room.' 'I saw you in the house. You were however in the bedroom'. The Appellant wondered which statement, from the same source, should be believed. I have looked at the evidence of PW4 keenly and it is evident that she was referring to two different people in the two statements but the Appellant wants this court to believe that she was referring to one person.
29. The first statement was made during the examination in chief and she was referring to the complainant whereas the second statement was made during cross-examination and she was referring to the Appellant.
30. The Appellant also made reference to the evidence of PW3 which insinuated that the offence happened on the day that the Appellant went to look for a job. He also referred to the evidence of PW4 where she stated that the Appellant visited on Thursday 12/10/2019 but according to the calendar, the said date was Saturday.
31. PW3 talks about 'material date' in her evidence and does not give a specific date. Her evidence is that the offence happened on the day the Appellant arrived seeking for employment. On the other hand, PW4's evidence is that the offence happened on 12/10/2019 but she did not say that the date of 12/10/2019 was Thursday as claimed by the Appellant. She proceeded to testify; 'M the person is the accused. He is my mother-in-laws cousin. I saw him first when he visited on Thursday. He came looking for employment.'" My understanding of the statement is that the day of the alleged offence was not the first



time for PW4 to see the Appellant and there is nothing to show that the Appellant had not visited prior to the day of the offence. Consequently, I do not see any contradiction in the evidence of PW3 and 4.

32. After looking at the entire prosecution evidence, there is no major contradiction as alleged by the Appellant and courts have repeatedly held that minor contradictions are excusable. In *Philip Nzaka Watu v R* (2016) eKLR where the Court of Appeal stated;

“Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

Whether the offence was proved to the required standard

33. In order to prove this offence, the prosecution must establish beyond reasonable doubt all the ingredients of the offence of defilement except penetration. Therefore, the prosecution must prove the age of the victim, and that that the accused was positively identified. The prosecution must also establish the overt acts done by the accused towards committing the offence of defilement.

34. With regard to age, the complainant’s mother (PW4) testified that the complainant was five years old and the birth notification produced by the IO shows that the complainant was born on 19/10/2014. That means that on the date of the offence (12/10/2019), the complainant was exactly 7 shy of her 5th birthday. There are various judicial pronouncements to the effect that age can be proved in various ways. In *Mwalengo Chichoro Mwajembe v Republic*, Criminal Appeal No. 24 of 2015 (UR) the court stated that:

“... the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.

35. Consequently, the complainant’s age was proved sufficiently.
36. As to whether the appellant was positively identified, PW 3 and 4 testified that the complainant and Appellant emerged from the same house. Specifically, the complainant’s mother, PW4, testified that; “I was folding clothes. When I finished, I went in search for her so that she could bathe. I couldn’t find her though children told me that she had entered the house with M holding kifagio. I went found the door locked. I called, there was no response. I peeped, she was not in the sitting room. I tried opening by lifting metal flap but the door was locked at the bottom part. I called her aunt I called her again, she responded in a voice similar to crying. It old her to open the door. She did after abit of pushing.”
37. There were two eye witnesses who saw the complaint emerging from the same house as the Appellant hence my view that the Appellant’s identification was beyond reasonable doubt. Further, the Appellant was a relative of the complainant and had been staying with them in the same compound.
38. With regard to commission of an overt act, the complainant, PW2, testified that; “He carried me and placed me on the bed. I was facing up. He then removed me from the bed and told me to go.” PW4 testified that when the complainant emerged from the house, her dress was very wet. PW4 testified that; “I lifted her dress, it was wet with sperms which were also on her legs.” The complainant’s underpants



and dress together with a buccal swab from the Appellant were taken to the government chemist for analysis and it was confirmed that the discharge on the underpants was semen. Upon further analysis, it was confirmed that the seminal stains found on the underpants generated a DNA profile that matched the DNA profile generated from the Appellant's buccal swab.

39. The Appellant argued that the DNA was on no value as it was presented in court seven month after the incident. The Government Chemist report shows that the samples were received on 13/11/2019 which was exactly one month after the alleged offence. The record shows that on 06/02/2020, the prosecutor informed the trial court that; "Upon consultation with the investigating officer, he learnt that the reagents are few hence it may take over 6 months to do the profiling."
40. Thereafter, the matter was mentioned about five times whereupon the prosecutor informed the court that the DNA report was not ready. On 27/07/2020, the Investigation Officer informed court that he made a follow up on 22/06/2020 and was informed that the report was not ready. His information was supported by a Government Chemist stamp on the exhibit memo form. On 18/08/2020, the report was produced by the IO under the provisions of section 77 of the *Evidence Act*. He explained that they received the report on a Thursday and the time was not sufficient to bond the witness/maker.
41. From the foregoing, it is evident that this case was well investigated with the prosecution pursuing DNA evidence. Once the samples are submitted to the Government Chemist Laboratories, the investigative agencies have no control over the process and have to wait for the analysts to do their job and produce the report. While it is not desirable that results take more than 6 months to be availed to court, it is not within the court's powers to ensure bring them promptly. There are always reasons for the delay beyond both the prosecution and the court. Unless there would be proof of tampering with the specimens, the court has no reason to draw the conclusion that the delay is caused by a conspiracy to fix the accused person.
42. The Appellant's act of lying on top of the complainant and ejaculating on her leaving his semen on her panty, dress and leg is evidence of his intent. There cannot be more clear evidence of his intent than this and it is fortunate that he was interrupted in time before he could penetrate the child. Hence the act of defilement was not complete as per the testimony of the Clinical Officer (PW1) but the overt acts are evident and the offence of attempted defilement was proved beyond reasonable doubt.
43. Having found that I find that the appeal has no merit. The appeal is dismissed. The conviction is sustained and the sentence meted by the subordinate court be and is hereby upheld.
44. Orders accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY ON 19TH NOVEMBER 2024

MUMBUA T. MATHEKA

JUDGE

Appellant Present

Court Assistants Ms Nelima/ Ms Elizabeth Prosecutor Ms Nyakibia

Prosecutor Ms Nyakibia

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIVISION

