



**KWM Alias Uncle K v Republic (Criminal Appeal E091 of 2022)
[2024] KEHC 16026 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E091 OF 2022
REA OUGO, J
NOVEMBER 8, 2024**

BETWEEN

KWM ALIAS UNCLE K APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the conviction and sentence in the Chief Magistrate's Court at Bungoma in SO NO 049 OF 2021 by Hon. G. Adhiambo (PM) on 7/11/2022)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8 (3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars being that on 4th November 2021 within Bungoma County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of PW a child aged 12 years.
2. This being a first appellate court I have the duty to re-evaluate the evidence adduced before the trial court and arrive at my own conclusion.
3. The prosecution evidence before the lower court was that PW (Pw1) lived with her aunt FNN (Pw2) and her husband (the appellant) following the death of her mother. On 4/11/2021 Pw2 sent Pw1 to buy a matchbox from the shop at 7:00 p.m. Pw1 testified that security lights were outside the house. He saw the appellant before he started following her. The appellant continued following her and she could see him from the light on the headlights of motorcycles that passed them. The appellant had a bottle of energy drink and threatened Pw1 to drink it or else he would kill her. Pw1 drank from the bottle and realized the liquid in the bottle was alcohol as she quickly became tipsy and drowsy. She fell and the appellant lifted her skirt and removed her inner pants. She saw him remove his trousers and innerwear and put his thing for urinating in the part her the part she used to urinate. He then dragged



- her to the maize plantation by the side of the road and stopped talking to her. The appellant dressed up and left.
4. KMW (Pw4) testified that he was a student at [Particulars withheld] secondary school and that his 3 friends were heading home. They then heard groaning as if snoring in the maize plantation. Pw4 shone his torch and saw Pw1 who had a short dress and her genitals could be seen. She did not have her inner pants. They pulled the dress down and moved her to the road but realized she could not walk. Pw1 was staggering. She told them that she had been given alcohol. Pw4 and his friend John escorted Pw1 home where they met Pw2 and told her where they found the girl.
 5. Pw2 testified that the child was vomiting and the smell of the vomit was that of chang'aa. She noticed that the child did not have her inner pants. She was confused and could not talk well. The appellant came home and Pw2 told him what had transpired but the appellant told her that it did not concern him. She carried the child outside and it attracted a crowd. When the child started saying 'Uncle Kevin' the appellant would interject. Pw1 told them it was the appellant who had sex with her. Pw2 called her brother SNW (Pw3) to come home. Pw1 testified that Pw3 came home drunk and started canning the child but she stopped him. Pw1 took them to the maize plantation. Before heading to the police station the appellant asked Pw1 to report the matter to the subchief instead of the police station. Pw3 testified that his sister Pw2 informed him that his daughter was unconscious and he followed them to the police station. He learnt that Pw1 had been defiled. Pw3 explained that his house was opposite Pw2's house and that Pw1 lived with Pw2. Pw3 testified that the complainant is 12 years old.
 6. The clinical officer at Kimilili sub-county hospital, John Omondi (Pw5) testified that Pw1 was brought to the hospital with a history of defilement. She appeared not to be in a normal mental state. After examination, it was ascertained that the cause of her injuries was a human penis. The hymen was torn with old edges and she had a white vaginal discharge. A high vaginal swab showed that she had epithelial cells and sperms. Her pregnancy test was negative and urinalysis showed blood. HIV test was not done as there were no test kits. Pw5 recommended that HIV test be done the following day and that Pw1 should go for a mental/psychiatric assessment.
 7. No 106041 PC Catherine Nyongesa (Pw6) testified that she was assigned the case with Pw1 as the complainant. She took statements from all the witnesses and visited the scene to establish where the offence had occurred. Pw6 confirmed that it was by the road in a maize plantation. The appellant was arrested on the same day by the police on patrol and escorted to the police station. She later took the appellant to Kimilili Sub-County Hospital. She charged the appellant with the current charges.
 8. The appellant in his defence testified that on 31/10/2021 at 9:00 p.m. he went home and found that Pw2 was not home. The children had not eaten. Pw2 came home at 10:00 p.m. drunk in the company of a man. She asked her to tell her who the man was but she refused. The appellant went to prepare food but when he came back he did not find Pw2. The following day the appellant was told that his wife was spotted living with another man. He went to the said house and the man was angry that the appellant had come to his house without permission. The appellant took his wife and canned her. They argued and Pw2 insulted him. On 3/11/2021 the appellant returned home after work and found his wife sleeping. The following day he did not find his wife when he came from work and went to look for her and met her in the company of a man. The appellant testified that he was angry and he beat his wife thoroughly. His wife ran back home and police officers came to his house and told him he was required at the police station He was not informed of the reason for his arrest and was later taken to hospital. The appellant denied the charges.
 9. The trial magistrate found the appellant guilty of the offence and sentenced him to 10 years imprisonment.



10. The appellant appeals against the conviction and sentence on the following grounds:
 1. That the learned trial magistrate erred in law and fact to convict the appellant on contradictory inconsistency and uncorroborated evidence.
 2. That the prosecution failed to avail the complainant for DNA and HIV test despite that request the court's directions for the test to be undertaken because the appellant have HIV and would have shed light if the offence was committed by the appellant (sic).
 3. That the evidence was not credible to convict the appellant with the evidence in case file No E113/2022. The alleged father to the complainant, SNW, was sentenced to serve 60 days imprisonment or a fine of Kshs 10,000/- on 2nd September 2020. For the conspiracy to defeat justice and interfere with witness c/sec 117 (c) of the Penal Code on the sense case and this is clear evidence that the court didn't have enough evidence to warrant conviction against the appellant (sic).
11. The appellant seeks the conviction to be quashed and the sentence set aside.
12. The respondent filed a notice to enhance the sentence on the following grounds:
 1. That the appellant was convicted for the offence of defilement contrary to section 8 (3) of the *Sexual Offences Act* No 3 of 2006.
 2. That the appellant was sentenced to serve ten (10) years imprisonment.
 3. That the said sentence meted upon the appellant is lenient and does not serve the purpose of criminal law being, deterrence, punitive considering the victim is a child of tender age, 12 years.
 4. That the sentence does not take into account the impact of the offence being a permanent psychological effect on the victim.
 5. That the appellant is a self-confessed person living with HIV, he is HIV + thus the vulnerable minor was exposed to the incurable virus and this calls for a sentence that will protect society from such intentional exposure.
13. The appellant in support of the appeal submits that there were contradictions in Pw1's testimony as it was not clear where the crime scene was by the roadside or maize plantation. He also pointed out contradictions in Pw2's and Pw3's evidence. Pw2 testified that the complainant's father arrived at home and canned the child while Pw3 testified that he arrived and found Pw1 had left for the station. It was not clear from Pw1 whether this was the first time she was defiled or whether she had been defiled before. On the age of the child, he testified that there was contradicting evidence from Pw6 who stated that the child was 13 years old at the time of the offence. The evidence of Pw1, Pw2, Pw3, and Pw6 makes it unclear where the offence was first reported, whether it was at the police station or area assistant chief.
14. The appellant submits that he requested for DNA and HIV tests to be done to shed light on who committed the offence. The appellant submits that the prosecution evidence was not credible to sustain a conviction.



15. The respondent in their submissions contends that the prosecution called 6 witnesses who were consistent in their testimonies regarding the events that led to the appellant's arrest. Pw1 and her father Pw3 testified that the complainant was 12 years old at the time of the offence. In *Francis Omuroni v Uganda*, the court held that apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. On identification, Pw1 testified that he saw the appellant from the security lights and the lights from the motorcycles.
16. It was further submitted that section 36 of the *Sexual Offences Act* gives a trial court discretion to direct that an appropriate sample(s) be taken from the accused person at such a place subject to such conditions as the court may direct. The wording of section 36 states that the 'court may' and therefore courts in sexual offences don't need to invoke section 36. The trial court also considered the testimony of Pw5 who testified that not every sexual encounter with a HIV-positive person would cause HIV infection.
17. The prosecution also submitted that the defence of marital problems was an afterthought that did not arise during cross-examination raised by the appellant.

Analysis And Determination

18. I have carefully considered the appeal and the submissions by the parties. The issues before the court are whether the prosecution case met the required standard of proof and whether the absence of DNA and HIV tests weakened the prosecution's case.
19. I will first consider the issue of D.N.A. testing. I am guided by the Court of Appeal in *AML vs. Republic* (2012) eKLR, which authoritatively stated that: "The fact of rape or defilement is not proved by D.N.A. test but by way of evidence". A D.N.A. test didn't need to be done to prove penetration. The evidence of Pw1 was clear:

"When Uncle Kevo lay on top of me and he removed my inner pant after lifting my skirt up. Uncle Kevo removed his trousers and innerwear he used this thing for urinating thing and put it in the part I used to urinate as I lay on the ground."
20. Pw4 testified that they found the complainant in the maize plantation with her dress up and they could see her genitals. Pw5 testified that the hymen was torn, Pw1 had a white discharge and spermatozoa were seen after conducting a high vaginal swab. Pw2 also testified that the child told her it was the appellant who had sex with her and she confirmed the same before they entered the police station. The testimonies of Pw2, Pw4, and Pw5 corroborate Pw1's testimony on penetration.
21. On identification, Pw1 testified that he identified the appellant from the security lights and the lights from the motorcycles. Pw1 also testified that she lived with the appellant and his wife and before the incident, she spoke to the appellant who threatened to kill her and she recognized that it was her uncle. This was evidence of both visual identification and recognition (see *Wamunga v Republic* [1989]).
22. It is now settled that the age of the complainant can be proved by the testimony of the parents. In this case, Pw3 testified that the child was 12 years old and therefore below 18 years. The contradictions identified by the appellant in regard to whether the child had been defiled before and at what point Pw3 responded to Pw2's call were minor contradictions that did not go to the root of the offence.
23. There is no dispute that the complainant was 12 years old. Section 8 (3) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The appellant was sentenced to 10 years and I therefore allow the respondent's application to enhance



sentence. The trial court sentence of 10 years is hereby set aside and in its place, the appellant is sentenced to 20 years imprisonment.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 8TH DAY OF NOVEMBER 2024

R.E. OUGO

JUDGE

In the presence of:

Appellant in person - Present

Miss Kibet -For the Respondent

Wilkister -C/A

