



**Mohamed v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 13579 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E004 OF 2023
JN ONYIEGO, J
NOVEMBER 4, 2024**

BETWEEN

ABBEY MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against conviction and sentence by Hon. P. Wasike in Sexual Offences
Case No. E019 of 2022 at Mandera a Law Court delivered on 25.01.2023)*

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between October 2021 and December 2021 in Mandera North Sub County within Mandera County, he intentionally caused his penis (male genital organ) to penetrate the female genital organ of RMA a child aged 15 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. Particulars were that on diverse dates between October 2021 and December 2021 in Mandera North Sub County within Mandera County, he intentionally touched the buttocks, breasts and vagina of RMA a child aged 15 years.
3. He pleaded not guilty to both the main charge and its alternative count. A trial thereafter ensued in which the prosecution presented the evidence of four witnesses.
4. PW1, RMA testified that she was in a relationship with the appellant and that they used to meet regularly to have sex. That they would meet at [Particulars Withheld] where they could go to a building that was still under construction and have sex. After some time, she noticed that she was pregnant consequences whereof she informed her aunt who proceeded to inform her father. The complainant's father thus reported the matter to the police where the complainant was referred to the hospital



- for medical attention. Upon examination, it was established that she was indeed pregnant. On cross examination, she confirmed that the relationship was consensual and they used to have sex severally whenever they met.
5. PW2, MAG testified that PW1 was his daughter. It was his case that she received information on PW1's pregnancy from one DA, PW1's maternal aunt. That he reported the matter to the police where they were given a P3 Form to be filled in the hospital. That upon examination, the complainant was found to be expectant. It was his testimony that, the appellant fled to Ethiopia after realizing that the police were looking for him. He was however arrested upon returning back. On cross examination, he reiterated that in as much as no force was employed, the appellant ought to have known that the complainant was a minor.
 6. PW3, Abdirahman Abass, a clinical officer stated that he examined the complainant upon being presented at the hospital. That he noted that she was pregnant at 20 weeks. Upon examination, there was a palpable mass up to the level of the navel. Genital examination showed that the hymen was absent in as much as the same was not freshly broken and further, a vaginal discharge was noted as an indicator of infection.
 7. PW4, No. 117034 PC Marun Ayunga, the investigating officer stated that on 06.06.2022, together with PC Kinuthia and PC Ruto, they were doing patrol around Rhamu town when they met one MA who informed them that there was a man who previously had impregnated his daughter and had run away but was back. The man produced OB No. 14/4.2022 which made them pursue the said man thus arresting him.
 8. Upon arrest, they took the suspect to the station and thereafter commenced investigations over the matter. After recording witnesses' statements, he preferred the charges before the court. It was his evidence that he established that the complainant and the appellant were in a relationship and further used to engage in sexual activities. He produced the complainant's birth certificate as Pex 1. On cross examination, he stated that upon the complainant giving birth, it was reported that the child passed on.
 9. At the close of the prosecution's case, the trial court found that the appellant had a case to answer thus placed him on his defence. He chose to give a sworn testimony without calling any witness.
 10. DW1, Abbey Adow Mohamed denied having knowledge of the complainant and that he was not responsible of the alleged offence. It was his case that in as much as PW2 alleged that he was responsible for the offence, the same was far from the truth. He averred that it could have been desirable for the prosecution to have conducted DNA to truly establish whether he was the father of the complainant's child.
 11. At the end of the case, the trial court found the appellant guilty of the charge of defilement contrary to section 8 (1) as read with section 8(3) and sentenced him to 10 years' imprisonment.
 12. Dissatisfied with the decision of the trial court, the appellant instituted the present appeal dated 06.02.2023 in which he mainly challenges his conviction while arguing that it was based on evidence that was not watertight. The appellant contends that the prosecution did not discharge its burden of proof.
 13. The court directed that parties file their written submissions but the respondent chose to argue the appeal orally while the appellant chose to rely on his written submissions.
 14. The appellant in his submissions dated 26-06-2024 urged that the trial magistrate did not consider the contradictions and inconsistencies in the prosecution's evidence. That a review of the credibility of



the witnesses remained questionable and therefore the finding of the court based on the very evidence remains impeached.

15. That the complainant on one hand testified that in the year 2021, she schooled upto class eight when she realized that she was pregnant and that she was already eight months into the pregnancy and on the other hand, she also stated that in April,2022 she was eight months pregnant yet she started engaging in sexual activities as from 16.10.2021. That the said inconsistencies could not be wished away as the same were material. In the end, he urged this court to quash the conviction and set aside his sentence.
16. The learned prosecutor opposed the appeal orally by stating that the prosecution proved its case beyond any reasonable doubt. That the evidence was not only cogent but also admissible and therefore, conviction of the appellant was regular. Counsel contended that the appeal herein is devoid of any merit as the evidence by the prosecution was overwhelming leading to a sound finding by the trial court. He urged this court to dismiss the appeal herein.
17. The duty of the first appellate court is to re-analyse and re-consider the evidence presented before the trial court with a view to arriving at its own conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. [See *Kiilu & Another vs Republic* [2005]1 KLR 174].
18. I have considered the grounds of appeal, the record herein and parties' submissions. The main issue for determination is whether the prosecution proved its case beyond any reasonable doubt.
19. The appellant was charged with offence of defilement contrary to Section 8 of the *Sexual Offences Act* which stipulates as follows: -

Defilement

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 2. ...
 3. 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.
20. The elements of the offence of defilement are therefore proof of; age, penetration and positive identification of the perpetrator. [See *George Opondo Olunga vs Republic* [2016] eKLR.]
 21. On age, the prosecution produced the minor's birth certificate which showed that the complainant was born on 30.06.2006. The offence in question was allegedly committed on diverse dates between October 2021 and December 2021. From the evidence tendered and more particularly the birth certificate, the complainant was aged 15 years at the time the offence was allegedly perpetrated. As such, I find that the first ingredient of the offence of defilement was proved to the required standard.
 22. On the ingredient of penetration. Section 2 of the Act defines defilement as follows: -The partial or complete insertion of the genital organ of a person into the genital organ/s of another person.
 23. The above definition connotes that penetration need not be complete. Penetration can be proven by either the sole testimony of the victim in line with Section 124 of the *Evidence Act* which provides that in sexual offences corroboration is not mandatory or the victim's testimony corroborated by medical evidence.



24. The minor testified that she used to have sex with the appellant severally as they were in a relationship. The appellant on the other side denied even knowing the complainant and as such, denied ever penetrating the complainant. Indeed, it was not denied that the complainant was pregnant during the material time and further, upon giving birth, the child passed on. The pregnancy was confirmed by the prosecution witnesses and further corroborated with PW3 who upon examining the complainant found that she was pregnant at 20 weeks as there was a palpable mass up to the level of the navel.
25. From the above, it is clear that indeed, the complainant was penetrated but the question that remains is by who? From the evidence of the medical officer, the complainant's hymen was missing but with no fresh evidence. In a nutshell, the only evidence available to prove penetration is the existence of the pregnancy. To that extent, it is obvious that pregnancy is the consequence or product of penetration which is not in dispute in the instant case. I have no doubt, there was proof of penetration.
26. The critical question therefore is, who was the perpetrator of the offence in question. It was upon the prosecution to prove that the appellant was responsible in impregnating the complainant hence proof of his culpability. In this regard, the prosecution was also required to prove the identity of the assailant. In the instant case, the appellant in his evidence denied responsibility of being the assailant. In fact, he stated that the first time seeing the complainant was when the charges herein were pressed against him as he met her at Rhamu Police station.
27. On the other hand, the complainant stated that the appellant was a person well known to her as they engaged in sexual activity severally and the same was not forceful as they were in a relationship. Pw1 gave elaborate history on how she met with the appellant severally and made love at various scenes. When she first made the report to the aunt about her pregnancy status she named the appellant. Equally, she revealed the name of the appellant to the father. Further, when she reported to the police she gave the appellant's name.
28. From the detailed chronological chain of events which is more detailed from the testimony of pw1, it could not be an act of fiction. Why would pw1 frame the appellant yet there was no prior grudge? Although there was no evidence to corroborate the testimony of pw1, the law has a cure under Section 124 of the *Evidence Act* which empowers a court to rely on the evidence of a victim alone in a sexual offence without requiring corroboration as long as the trial court is satisfied that the victim is truthful in her or his testimony.
29. The trial court found that pw1 was consistent and believable implying that she was truthful in her testimony. The learned magistrate was convinced and satisfied that the complainant was honest in her testimony. In the case of *Lumbasi v Republic (Criminal Appeal 17 of 2016) [2016]KEHC2942(KLR)(18 August 2016)(judgment)* the court held as follows;

“moreover, there is a long list of decisions affirming the position that in sexual offences where the victim is a minor, corroboration is no longer necessary as a matter of law...”.
30. Similar position was held in the case of *Mohamed v Republic (2006)2KLR 138* and *Julius Kalewa Mutunga v Republic, criminal Appeal No.32 of 2005*. Therefore, the mere fact that DNA was not done does not dislodge the fact that the appellant had sex with a minor. Unfortunately, there was some agreement between the two but the law does not permit a minor to give consent to such an illegal act. It is also unfortunate that male youths at their prime age are falling trap to their female counter parts who are equally willing to have sex freely. To



that extent the question of identification and the appellant's culpability is not in doubt hence properly settled by the trial court.

31. On sentence, it is trite that sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo vs R., and Wilson Waitegei v Republic [2021] eKLR].
32. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Act. The same 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.
33. In this case, the appellant was sentenced to serve 10 years' imprisonment noting that the trial court considered the circumstances of the case. Before this court, nothing has been shown that the trial magistrate erred in any way or fell in error when imposing the impugned sentence nor was the sentence excessive.
34. Taking into account the circumstances under which the offence was committed, I am convinced that the prosecution did properly prove its case beyond reasonable doubt. Equally, I am satisfied that the sentence imposed was lenient. Therefore, I do not find merit in the appeal. The same is accordingly dismissed in its entirety and the lower court's decision on conviction and sentence is up held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE

