



**HKK v Republic (Criminal Appeal 164 of 2019)  
[2020] KEHC 6050 (KLR) (14 May 2020) (Judgment)**

*HKK v Republic [2020] eKLR*

Neutral citation: [2020] KEHC 6050 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL 164 OF 2019**

**DAS MAJANJA, J**

**MAY 14, 2020**

**BETWEEN**

**HKK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. S. Mungai, CM dated 10th September 2019 at the Magistrate's Court at Isiolo in Sexual Offence Case No. 15 of 2018)*

**JUDGMENT**

1. The appellant, HKK, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) as read with section (2) of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on 13<sup>th</sup> July 2018 at around 0300Hrs at [particulars withheld] in Merti Sub-county in Isiolo County, he intentionally and unlawfully caused his penis to penetrate the vagina of AA, a child aged 7 years.
2. The appellant now appeals against conviction and sentence on grounds of appeal set out in the petition of appeal dated 1<sup>st</sup> October 2019 and the written submissions filed on 4<sup>th</sup> May 2020. The appellant contends that the prosecution did not prove its case beyond reasonable doubt and that the prosecution relied on inconsistent, extraneous evidence, speculation and conjecture to convict him. He states that charge sheet was defective and that he was denied the right to a fair trial. He also states that the sentence imposed on him was harsh and excessive and that the court ought to have taken into account that he was a child at the material time.
3. The respondent relied on its written submissions. It supported the conviction on the grounds that the prosecution proved all the elements of the offence.



4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32). This duty calls upon this court to outline the facts as they emerged before the trial court before dealing with the grounds of appeal.
5. The complainant, AA (PW 2), testified on oath after a *voire dire*. She stated as follows:

I recall on 13/7/2018 I was sleeping at around 3.00am, Hussein who is the accused (identified) came. He is a neighbour. He removed my pants. I was sleeping in the sitting room on the seat. The electric bulb was on. My siblings were in the bedroom. Hussein came through the door which was shut but not locked. He had a shirt and Kikoi wrapped around his shoulders. He held me by the waist and lowered my pants, he then had sexual intercourse with me. He held my mouth so that I could not scream. When he released me, I screamed and he ran out of the house. My mother came from the bedroom and I told her what Hussein had done. I told her he defiled me. I was bleeding from my private parts.
6. The complainant's mother, PW 1, who was in the next room recalled that on the material night she heard PW 2 screaming. When she went to check she found that the assailant had escaped. She found PW 2 bleeding from her private part and her underpants were blood stained. PW 2 told her that it is the appellant who had assaulted her. PW 1 told the court that the electric bulb was on and the door was shut but not locked. She took PW 2 to the hospital and later reported to Merti Police Station.
7. PW 4, the Investigating Officer, confirmed that he received PW 2's complaint on 13<sup>th</sup> July 2018. He was directed to the appellant's home where he was arrested. He also issued the P3 medical form to PW 2.
8. The P3 medical form was filled by PW 3, a Clinical Officer, who attended to PW 2 on the morning of 13<sup>th</sup> July 2018. He testified that he examined her and observed that the *labia majoria* and *minora* were bruised and tender and the vaginal wall was tender and painful. He also noted that the hymen was broken and there was a perineal tear and also a whitish discharge. The high vaginal swab revealed *spermatozoa*. He also assessed PW 2's age and concluded that she was 7 years old. PW 3 also examined the appellant and assessed his age to be 16 years. He noted that his penis and glans were bruised and lacerated and tender to touch. He opined that the penis was traumatized.
9. When placed on his defence, the appellant, DW 1, denied the offence. He stated that on 13<sup>th</sup> July 2018 at about 7.00am, he was awoken by PW 1 and her husband who told him that they had seen footsteps leading to his house. He was confronted with the allegation that he defiled PW 2 but he denied it. He was later arrested that evening by the police. The appellant's friend, DW 2, testified that he was with appellant from 5.00pm the previous morning upto around 5.00am in the morning. He later heard the appellant had been arrested at about 6.00am by which time he had returned home.
10. In order to prove the offence of defilement under section 8(1) of the Act, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. "Penetration" under section 2 of the Act means,

"the partial or complete insertion of the genital organs of a person into the genital organs of another person."
11. PW 1 gave graphic testimony of how she had been subjected to the act of penetration by the appellant. Of course the incident took place at night and our courts have emphasized the need to cautiously review evidence of identification in such circumstances lest it lead to conviction based on mistaken



identity. In a plethora of authorities; *Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004] 2 KLR 140 and *Wanjohi & Others v Republic* [1989] KLR 415, the Court of Appeal has held that the court must examine all facts and weigh the evidence in order to determine whether the identification is free from error. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see *Anjononi & Others v Republic* [1980] KLR 59).

12. This case was one of recognition of a person well known to the complainant and not of a stranger. PW 1 and PW 2 testified that the appellant was a neighbour, a fact admitted by the appellant. Moreover, both PW 1 and PW 2 testified that the electric light was on that night when the incident took place. The electric light, the fact that the appellant was known to PW 2, the proximity and length of interaction are all factors that lead me to conclude that identification of the appellant was positive and free from error.
13. The testimony of PW 1 was sufficient to establish the fact that the appellant committed the act of penetration. It was, in my view, capable of supporting a conviction as the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. In this case the trial magistrate was convinced that the child was telling the truth, he stated as follows:

The complainant, though a minor aged 7, gave evidence on oath and she impressed the court as a very honest and candid witness. She was categorical that it was the accused who defiled her. She promptly informed the mother when she managed to scream after the accused released her mouth. Her mother confirmed that in her testimony.

14. I also find that there was sufficient corroborative evidence to support PW 2's testimony. The medical evidence in the form of P3 medical report showed that the injuries sustained by PW 2 on her private parts were consistent with an act of penetration. In light of all this evidence, the appellant's defence that he did not commit the offence rings shallow as there were no reasons that emerged from either cross-examination of PW 1 and PW 2 or in his defence why they would implicate the appellant. Moreover, DW 2 admitted in cross-examination that although he was with the appellant, he could not tell whether the appellant could have left the house at 3.00am when he went to commit the felonious act.
15. The age of a child is a question of fact. It may be proved by oral evidence on oath as the parents are able to testify to the date of birth or even the child. The prosecution may also rely on birth certificates or health cards as evidence of the date of birth or even expert evidence. In this case, PW 3 conducted an age assessment and concluded that PW 1 was 7 years old.
16. From the totality of the evidence, I am satisfied that the prosecution proved every element of the offence of defilement. I therefore affirm the conviction.
17. I now turn to the issue of the sentence. The court's jurisdiction to review the sentence on appeal is circumscribed. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see *Wanjema v Republic* [1971] EA 493).
18. Since the age of the PW 2 was established to be below 11 years, the penalty prescribed under section 8(2) of the *Act* is mandatory life imprisonment. However, the Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; *BW v Republic* Ksm CA Criminal Appeal No. 313 of 2010 [2019] eKLR, *Christopher Ochieng v Republic* Ksm CA Criminal Appeal No. 202 of 2011 [2018] eKLR and in *Jared Koita Injiri v Republic*, Ksm CA Criminal Appeal No. 93 of 2014. In the circumstances the trial magistrate had discretion to impose an appropriate



sentence particularly in light of the fact that the appellant was 16 years old and hence a child at the time he committed the offence. It is noteworthy that the trial magistrate did not consider the fact that the appellant was a child for purposes of sentencing.

19. The sentencing of a child is governed by the provision of section 191 of the [Children Act](#) that entitles the court to fashion an appropriate sentence that fits the context of the case. Section 191(1) thereof provides as follows:

191

- (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
- (a) By discharging the offender under section 35(1) of the [Penal Code](#) (Cap. 63);
  - (b) by discharging the offender on his entering into a recognisance, with or without sureties;
  - (c) by making a probation order against the offender under the provisions of the [Probation of Offenders Act](#) (Cap. 64);
  - (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
  - (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
  - (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;
  - (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
  - (h) by placing the offender under the care of a qualified counsellor;
  - (i) by ordering him to be placed in an educational institution or a vocational training programme;
  - (j) by ordering him to be placed in a probation hostel under provisions of the [Probation of Offenders Act](#) (Cap. 64);
  - (k) by making a community service order; or
  - (l) in any other lawful manner.

20. The appellant ought to have been committed to a Borstal Institution but under the [Borstal Institutions Act](#) (Chapter 92 of the Laws of Kenya), a child can only be committed to a Borstal institution if he is above 16 years old and then for not more than three years. As the appellant was 17 ½ years old, committal to a borstal institution was *prima facie* out of the question. In [Dennis Abuya v Republic](#) Ksm CA Cr App. No. 164 of 2009 [2010] eKLR, the Court of Appeal seemed to suggest that a sentence of imprisonment was also out of the question for a child. It observed as follows:

Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen



years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the *Sexual Offences Act* to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on 19<sup>th</sup> June, 2007 when the offence was allegedly committed. Section 8(7) of the *Sexual Offences Act* which states,

“Where a person is charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the *Children Act*.”

The question of imprisoning a minor does not, therefore, arise under the provisions of the *Sexual Offences Act*.

21. The dilemma of young offenders who are on the cusp of adulthood yet they cannot be accommodated within the prison system was considered by the Court of Appeal in *JKK v Republic* Nyr CA Criminal Appeal No 118 of 2011 [2013] eKLR where it observed as follows:

The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

22. The same position was emphasized by the Court of Appeal *DKC v Republic* Nyr CA Criminal Appeal No. 189 of 2009 [2014] eKLR where it had to deal with a 15-year-old child who had been convicted of murder. It stated as follows:

Whatever the case, life imprisonment is not provided for under the *Children Act*, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.



23. From the aforesaid decisions, it is clear that the court is empowered to sentence a child offender, “in any other lawful manner” as provided by section 191 (1) of the *Children Act* by imposing a sentence of imprisonment and taking into account the status of the offender as a child (see also *SCN v Republic* Nvs HCCRA No. 55 of 2015 [2018] eKLR.)
24. For the reasons I have stated, I set aside the sentence. I now turn to consider the appropriate sentence. At the time the offence was committed, the appellant was a child. He is now 18 years old. The offence for which the appellant was charged is a serious one. From the Victim Impact Statement dated 18<sup>th</sup> September 2019, the appellant is PW 1’s uncle and he took advantage of his filial position to sexually assault PW 1. The report shows that families have reconciled. On the other hand, the court cannot ignore the fact that the child was affected psychologically by the felonious act.
25. The appellant is a first offender and had no criminal antecedents. He has been in remand custody since he was charged and in prison pending the hearing of this appeal. Given his age, I now sentence the appellant to four (4) years imprisonment.
26. The conviction is affirmed but the sentence of life imprisonment is quashed and set aside and substituted with sentence of four (4) years imprisonment to run from 16<sup>th</sup> July 2018.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY 2020.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.

