RKK v Republic (Criminal Appeal E047 of 2022)
[2025] KEHC 14465 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14465 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E047 OF 2022

JN NJAGI, J

OCTOBER 9, 2025

BETWEEN

RKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. N. Wasike, PM, in Kaloleni Principal Magistrate's Court Sexual Offence Case No.12 of 2020 delivered on 17/1/2021)

JUDGMENT

1. The Appellant was charged was convicted on an offence of defilement contrary to Section 8(1) as read with (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between November 2019 and 27/7/2020 at Mwanamwinga location Kaloleni Sub County in Kilifi County he intentionally committed an act which caused his penis to penetrate the vagina of MKK (herein referred to as the complainant/victim), a child aged 17 years.

2. The Appellant was sentenced to serve fifteen years imprisonment. He was aggrieved by conviction and the sentence and lodged an appeal on the following amended grounds of appeal:

    1. That the Learned Trial Magistrate erred in law in failing to find that the age of the alleged victim was not proved beyond reasonable doubt.

    2. That the Learned Trial Magistrates erred in both law and fact in failing to find that the prosecution's evidence was of doubtful credibility.

    3. That the Learned Trial Magistrates erred in both law and fact in failing to find that the whole prosecution case was riddled with material discrepancies.

    4. That the Learned Trial Magistrates erred in both law and fact in misdirecting herself that there was alleged forceful penetration yet the conduct of the complainant was consistent with one

of an adult and therefore the statutory defence contained under section 8 (5) and (6) of the *Sexual offences Act* obtained in this case.

3. The prosecution called 6 witnesses in the case after which the court found the Appellant to have a case to answer. The appellant defended himself and did not call any witness.

Prosecution evidence

4. The complainant who was PW2 in the case told the Trial court that the appellant had been her boyfriend since the year 2020. That sometimes in the month of April of the said year she engaged in sex with the appellant. She later realized that she was pregnant. She went to Gotani health centre in the company of the appellant and she was found to be pregnant. She went home and informed her mother. She was taken to Mariakani police station and made a report. Pregnancy was confirmed at Mariakani sub county Hospital. She later delivered on 19/1/2021. It was her evidence that she was aged 17 years at the time that she testified in court in April 2021.

5. The complainant`s father PW6 told the trial court that he came to know that the complainant was unwell in May 2020. That she ran away from home. He received information that she was at the home of the appellant. He went with the police to the home of the appellant and the appellant was arrested.

6. A clinical officer at Mariakani Sub County Hospital PW1 testified that the appellant was seen at their medical facility on 29/7/2020 on allegations that she had been defiled by a person known to her. That she had earlier on been seen at Gatoni Health centre. She had no injuries in her genitalia. An ultra sound report was done that showed that she was 15 weeks pregnant.

7. The arresting officer PW3 of Gotani post testified that on the 27/7/2020 the father to the complainant went to the police post and reported that his daughter had ran away from home and she was living with a certain young man. They went to the home of the young man. They found the girl, the complainant in the house of the appellants` parents. The appellant was not at home. They waited for him. When he got home they arrested him.

8. The case was investigated by PC Winnie Murei PW4 of Kaloleni Police station whose evidence was that she picked the complainant and the appellant at Gotani police post on 28/7/2020 and took them to Kaloleni police station. The girl reported that she had been defiled by the appellant. She took her to Mariakani sub county hospital for examination and she was found to be pregnant. Age assessment was done at the said hospital. The appellant was charged with defilement.

9. The government analyst PW5 told the court that their office received buccal swab samples that were said to been taken from three persons - the appellant, the mother to the child in dispute and from the child itself. They were requested to conduct a paternity test and ascertain whether the appellant was the biological father of the child born to the complainant. That he generated DNA profiles from the samples. He found that there was 99.99% that the appellant was the biological father of the complainant`s child. He prepared a report to that end.

10. During the hearing of the case in court, the clinical PW1 produced the following documents as exhibits – treatment notes, P 3 form, Scan images and age assessment report, P.EXh.1 - 5 respectively. The government analyst PW5 produced the exhibit memo and his report as P. Exh. 6 and 7 respectively.

Defence case

11. The appellant in his defence stated in a sworn statement that he was born in the year 2004 and was at that time aged 17 years. That he met the complainant in the year 2020 during school games at her school. They became friends. That they had sex. That he knew her age at the time as 17 years. However,

that he did not know that it was an offence to have sex with a girl of 17 years. He knew that she was at the time in school. He was also in school. He admitted that he is the father of the complainant`s child.

12. Upon the appellant stating that he was aged 17 years, the trial court ordered for him to undergo age assessment. He was taken to Mariakani sub county Hospital where his age was assessed at 20 years. The report was availed to the court after which the court gave a judgment date.

Analysis and determination

13. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174, thus:

    An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

    It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

14. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are: proof of the age of the victim, proof of penetration and proof of the identity of the perpetrator, see the *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013.

15. Starting with the element of the age of the complainant, the complainant herein told the trial court she was at the time that she testified in court in April 2021 aged 17 years. That she was born in the year 2004. Her father PW6 testified in June 2021 and said that the complainant was aged 17 years. That she was at the time in class 7. He however did not mention the year when she was born. The trial magistrate in her judgment relied on the age assessment report to hold that the complainant was at the time of defilement aged 17 years.

16. The appellant in his submissions argued that the age of the complainant was not proved. That the age assessment report was not produced in court by its maker. That the same though assessing the age of the complainant at 17 years did not state the method used to arrive at that conclusion.

17. The respondent conceded that the age assessment report was not produced in court by its maker and that the maker did not make an analysis of how he concluded that the girl was aged 17 years. They however submitted that the age of a person can be proved by other ways such as through documentation, by the oral evidence of the child or that of the parents. They in this respect relied on the case of *Musyoki Mwakavi v Republic* (2014) eKLR where the court cited the Ugandan case of *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000, where it was held thus:

    > "....Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

18. I have considered the issue of the age of the complainant. The law is that the age of a person can be proved in various ways. In the case of *Mwalongo Chichoro Mwajembe v Republic*, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

19. The age assessment report in this case was not produced in court by its maker. More so, the person who prepared the report was not disclosed to the court. No basis was laid out for the said report being produced in court by a person who was not the maker, as required by section 33 of the *Evidence Act*. In addition, there was no indication of the method used to arrive at the conclusion that the girl was aged 17 years. An expert`s report such as an age assessment report ought to be based on scientific reasoning. The court is not bound to accept a report that is bereft of such. I find that the assessment report in this case was not reliable in informing the court of the age of the complainant. The trial court erred in relying on such a report to hold that the age of the complainant was proved at 17 years.

20. The complainant was at the time in class 7. Such a person is, in my view, old enough to know her age. Besides that, her father PW6 confirmed that she was aged 17 years. The appellant himself stated that he knew that the girl was at the time aged 17 years. I therefore find that the oral evidence of the complainant and that of her father and even that of the appellant proved that the complainant was aged 17 years in 2021. That means that at the time the offence was committed in April 2020 she was aged 16 years. The age of the complainant was proved at 16 years. The complainant was therefore a child for the purposes of the *Sexual Offences Act*.

21. The second issue is whether it was proved that the appellant penetrated the complainant. "Penetration" is defined in section 2 of the *Sexual Offences Act* as follows:

> "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

22. The complainant testified that she engaged in sex with the appellant in April 2020 as a result of which she conceived. A baby was born in January 2021. A DNA test was done that confirmed that the appellant is the biological father to the child.

23. The appellant submitted that the age assessment report on him was not produced in court by its maker. That the maker did not state the method used to arrive at the conclusion that he was aged 20 years. That the report showed that he was in the year 2022 aged 20 years which meant that he was of the age of 17 or 18 years at the time the offence was committed. He argued that the sex between him and the complainant was consensual both of them having been of the age of 17 years. That the complainant had voluntarily moved to his home and there was therefore no forced sex on her. That this was an issue where two minors had engaged in consensual sex. That the trial court erred in failing to treat him as a minor in the case, yet both he and the complainant were at the time school going children.

24. The trial magistrate in her judgment held that the fact that the complainant got pregnant was proof that there was penetration into her vagina. That the appellant knew that the girl was a minor and went ahead to have a sexual relationship with her. That his age was assessed at 20 years and he was therefore an adult at the time the offence was committed. That his defence that he did not know that it was an

offence to engage in sex with a girl of 17 years was of no consequence as ignorance of the law is not a defence. Therefore, that the offence of defilement was proved against the appellant beyond reasonable doubt.

25. The appellant admitted that he engaged in sex with the complainant as a result of which she conceived. He admitted that he was the father to the baby born by the complainant. His argument that the sex was consensual does not hold water as the law does not recognize consent where the victim is under the age of 18 years. The end result is that the appellant unlawfully penetrated the complainant. Penetration was therefore proved against the appellant and consequently his conviction on the offence of defilement is upheld.

Sentence

26. The appellant raised the issue that he was a minor at the time that the offence was committed. The court ordered an age assessment report to be done and his age was assessed at 20 years.

27. The age assessment report for the appellant is dated 18/11/2021 wherein he was found to be at that time of the age 20 years. The offence was said to have been committed in April 2020. This would mean that the appellant was aged around 18/19 years at the time the offence was committed and not 20 years as stated by the trial court.

28. I have perused the age assessment report for the appellant. Just like that of the complainant, the report does not indicate the method used by the examining officer that led him/her to conclude that the appellant was at the time aged 20 years. The officer who prepared the report was not availed in court for cross-examination.

29. Upon the appellant raising the issue that he was of the age of 17 years at the time the offence was committed, it was the duty of the prosecution to prove that he was of the age of above 18 years. I find that this was not done by credible evidence. It was unsafe to rely on the appellant`s age assessment report to hold that he was aged 20 years. The age of the appellant at the time of commission of the offence was therefore not proved.

30. The appellant was a primary school pupil at the time the offence was committed. In the absence of evidence proving his age, it is possible that he was under the age of 18 years at the time the offence was committed. He should have been treated as a minor during sentencing.

> Section 8(7) of the *Sexual Offences Act* provides that:
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> Where the person 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* (Cap. 92) and Children's Act (Cap. 141).
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> Section 6 of the *Borstal Institutions Act* provides that:
>
> 6. Committal of youthful offender to borstal institution
>
> (1) Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years.

31. I therefore find that the trial court erred in sentencing the appellant under the *Sexual Offences Act* when it was not proved that he had attained the age of 18 years. He instead should have been dealt with under the *Borstal Institutions Act*. The appellant was sent to prison in the year 2021. He has thereby completed the 3 years that he should have served at a Borstal Institution. He cannot now be sent to a Borstal Institution as he is over 21 years.

In view of the foregoing, the alternative is to discharge the appellant. He is thereby discharged and set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 9TH DAY OF OCTOBER 2025.

J. N. NJAGI

JUDGE

In the presence of

Miss wambua for Respondent

Appellant present in person at GK Prison Malindi

Court Assistant – Ms Rahma