REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E045 OF 2023

ALLAN BAYA KAHINDI…….
…….APPELLANT

VERSUS

REPUBLIC……
RESPONDENT

(Appeal from original conviction and sentence by Hon. R.M Amwayi, PM in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E002 of 2022 delivered on 11/15/2023)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(4) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 15 years imprisonment. The particulars of the offence were that on diverse dates between 29th December, 2022 to 31st December 2022 at (name withheld) village in Kaloleni Sub County within Kilifi County he intentionally and unlawfully caused his penis to penetrate the vagina of P.K.M. (herein referred to as the complainant), a child aged 17 years.
2. The Appellant was aggrieved by the conviction and the sentence and lodged the instant appeal on the grounds:
    1) That the ingredients of the offence of defilement were not proved beyond reasonable doubt.

2) That the learned trial magistrate erred in law and facts in failing to consider the contradictions and gaps in the evidence of the prosecution witnesses.
3) That the trial magistrate erred in law and facts by failing to comply with the provisions of Section 124 of the Evidence Act.

Cas for prosecution

3. The case for the prosecution is that the complainant was at the material time a secondary school student. She was aged 17 years and was living with her grandmother. The Appellant was her school mate and her boyfriend. That on the 29/12/2022 she had a quarrel with her grandmother over some lost money. She left the home and went to the house of the Appellant. She stayed with him at his house upto 3/1/2023. She was engaging in sex with him during that period. Policemen then went there on 3/1/2022, picked her and arrested the Appellant. They were taken to the police station.
4. The complainant was taken to Mariakani sub county hospital where she was examined by a clinical officer PW 2 who found her with a normal genitalia with a missing hymen. He formed the opinion that there was penetration on the complainant. The clinical officer filled a P3 form to that end.
5. The case was investigated by PC Kinyanjui PW4 of Kaloleni police station. It was his evidence that the complainant`s father PW3 reported at the police station on 1/1/2023 that his daughter, the complainant, had disappeared from

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home. That on 3/3/2023 PW3 reported that the complainant was living with the Appellant. That in the evening of the said night he PW4 went with other police officers and found the complainant with the Appellant in the Appellant`s house. They took the Appellant and the complainant to the police station. The complainant was taken to hospital for examination. He charged the Appellant with the offence.

6. During the hearing of the case in court, the clinical officer PW2 produced the complainant`s P3 form, treatment notes, lab request form and age assessment report as exhibits, P.Exh. 1 - 4 respectively. The age assessment report indicated that the complainant was aged 17 years.

Defence Case

7. In his defence the Appellant stated in an unsworn statement that he was a secondary school student in form 2 and was aged 19 years. That it is true that he had sexual intercourse with the complainant but that he did not force her. That it is the complainant herself who went to his house at night and he could not chase her away. That he knew that she was a minor.

Analysis and determination

8. This being the first appellate court in the matter, the court is guided by the principles established in **David Njuguna Wairimu v Republic [2010] eKLR** where the Court of Appeal held: -

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“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

9. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act which provides:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(4) A person who commits an offence of defilement with a child aged between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than 15 years.”

10. I have considered the grounds of appeal, the evidence adduced in the lower court and the submissions filed by the Appellant and the prosecution counsel. The

Appellant`s appeal is based on the grounds that the ingredients of the offence of gefilement were not proved; that the trial magistrate failed to consider the contradictions in the evidence of the prosecution witnesses and that the trial court did not comply with the provisions of section 124 of the Evidence Act.

11. The specific elements of the offence of defilement arising from section 8 (1) of the Sexual Offences Act which the prosecution must prove beyond reasonable doubt are: the age of the complainant; penetration on the victim and identification of the perpetrator, see **Charles Wamukoya Karani v. Republic, Criminal Appeal No.72 of 2013.**

12. The Appellant admits to have penetrated the complainant at the time charged. That issue having been admitted, the remaining issue is whether the complainant was under the age of 18 years at the time she engaged in sexual intercourse with the Appellant.

13. The trial court found the complainant to have been of the age of 17 years when the offence was committed. The court in arriving at that finding made reliance on the evidence of the complainant and her father coupled with the evidence contained in the age assessment report.

14. The complainant in her evidence in court stated that she was aged 18 years. Her father PW3 stated that the complainant was at the time aged 17 years though he did not produce any document to support it. The clinical officer who examined the complainant PW4 said that she was aged 17 years. He produced her age assessment

report done at Mariakani sub county hospital that showed that she was aged 17 years.

15. I have looked at the age assessment report, P.Exh.4. It is indicated to have been prepared by one Rajab Chaka Tui. There was no evidence as to the designation and qualifications of the person, i.e, whether he was a doctor, dentist or clinical officer, with qualification to do age assessment. And if he were so, the method used to determine that the complainant was of the age of 17 years is not indicated in the document. Age assessment being an opinion, a person doing such an assessment must show the grounds that made him/her arrive at the opinion reached. The person did not appear in court to produce the document and be cross-examined on it. The clinical officer PW4 who produced the document in court did not tell the court whether he knew the person who prepared the document and his qualifications. In my view, the document was not properly admitted in court and the findings contained therein were not reliable. Consequently, it should not have been relied upon to hold that the complainant was of the age of 17 years.

16. The complainant herself told the court when she appeared to testify that she was aged 18 years. She appeared in court just 2 months after the incident. In view of the fact that there were no documents to prove the date of birth of the complainant and taking into account the evidence of the complainant that she was at the time aged 18 years, there was likelihood that the complainant

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was above the age of 18 years when the offence was committed. In such borderline cases, the age of the victim must be proved beyond reasonable doubt. Otherwise there is the danger of convicting an accused person with defilement when the victim is above the age of 18 years. The Appellant was in the circumstances of this case entitled to the benefit of doubt.

17. The age of the complainant having not been proved, the Appellant was entitled to an acquittal. Consequently, the conviction entered on the Appellant is quashed and the sentence set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at GARSEN this 18th day of March, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Mutua for Respondent

Appellant – present virtually at GK Prison Malindi

Court Assistant - Janette