

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. E104 OF 2023**

**VICTOR KAHINDI KARISA.....APPELLANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENT**

*(Appeal from original conviction and sentence by Hon. R. Amwayi, PM in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E002 of 2022 delivered on 24/11/2022)*

**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 10 years imprisonment. The particulars of the offence were that on diverse dates between 1<sup>st</sup> January, 2020 to 31<sup>st</sup> July 2021 at (name withheld) village in Kaloleni Sub County within Kilifi County he intentionally and unlawfully caused his penis to penetrate the vagina of KNK (herein referred to as the complainant), a child aged 17 years.
2. The Appellant was aggrieved by the sentence and the conviction and lodged an appeal on the following grounds of appeal:

- 1) That the learned trial magistrate erred both in law and fact by failing to consider that the prosecution case was never proved beyond reasonable doubt.
- 2) That the learned trial magistrate erred in law and fact by failing to find that crucial witnesses were never availed by the prosecution.
- 3) That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution's case was marred with numerous contradictions and inconsistencies.
- 4) That the learned trial magistrate erred in law by failing to appreciate that the evidence relied on was circumstantial and as such could not sustain a safe conviction.
- 5) That the learned trial magistrate erred both in law and fact by failing to consider that both the conviction and sentence were against the weight of the evidence adduced by the prosecution.

3. The prosecution called 5 witnesses in the case while the Appellant did not call any witness.

### **Prosecution's case**

**4.** The case for the prosecution was that the complainant, PW1, was a class 7 pupil and was at the material aged 17 years. She was residing with her grandparents and an aunt, all who

did not testify in the case. Her mother PW2 was staying away from home.

5. It was the evidence of the complainant that she on the 1/1/2020 she was from the farm with her aunt called Amina when on the way they met with the appellant. He stopped her and told her that he loved her. He gave her aunt his phone number and they started to communicate through her aunt's phone number.
6. That after one week, the appellant picked her from her home and took her to his friend's house. They had sexual intercourse after which he took her back home. After that they had sex again several times at the same place and after some time she was alerted by her class teacher that she was pregnant. The teacher alerted her mother who reported the matter to the police. She told the police that the appellant was responsible for the pregnancy. It was her evidence that she had sexual intercourse with the appellant 5 times.
7. The complainant's mother PW2 testified that she in November 2021 received a phone call from the complainant's teacher who alerted her that the complainant was pregnant. She travelled back home and confirmed from the complainant that she was pregnant. She told her that it is the appellant who had made her pregnant. She did not know him before. She reported the matter to the assistant chief and to the police. She took the complainant to

Mariakani sub county hospital where she was examined and found to be pregnant. The Appellant was then arrested and charged with the offence. It was her evidence that the complainant was born on 18/5/2004 as per her birth certificate, P.Exh.1.

8. The area assistant chief PW3 testified that on 6/12/2021 PW2 went to him with his daughter PW1 complaining that her daughter had been impregnated by the appellant. On 8/1/2022 he received a call from the complainant's father informing him that they had arrested the appellant and were with him at his home. He informed the police and rushed to the scene. He found the appellant surrounded by a crowd of people; he rescued him and rushed him to Kaloleni Police Station.
9. A Clinical officer at Mariakani sub county hospital PW5 told the court that the complainant was examined at their hospital on 7/12/2021 and found with a palpable mass on the abdomen with black linear nigra. A scan confirmed that she was 22 weeks and 2 days pregnant. The expected date of delivery was 10/4/2022. Examination of the outer genitalia showed that the hymen was broken. He formed the opinion that there was penetration on the complainant. During the hearing of the case in court he produced the complainant's P3 form, treatment notes, lab request and result and the scan and report as exhibits, P.Exh. 2, 3, 4 and 5 respectively.

10. The case was investigated by PC Winnie Murei PW3 of Kaloleni police station. She issued the complainant with a P3 form which was filled at Mariakani subcounty hospital. She recorded statements of witnesses. The Appellant was thereafter arrested and she charged him with the offence. She produced the complainant`s birth certificate as exhibit, P.xh.1. It indicated that the complainant was at the time aged 17 years.

### **Defence case**

11. In his defence, the Appellant stated in a sworn statement that he was a palm wine tapper. That there was a man who came to his home called Kahindi who was dealing with charcoal burning. He asked his mother for a place to spend the night. She allowed him to sleep in his brother`s house. His brother came and the said Kahindi left and said that he had been threatened. He, the appellant, went to work in Mombasa. That his brother became sick and almost became mad and he travelled home to take his brother for treatment. He travelled on 8<sup>th</sup> and received a phone call informing him that he was needed in Chanagande. He was directed where to go and he met Kahindi. People then started to beat him saying that he had threatened Kahindi. He was not given a chance to explain himself. They locked him in the house and threatened to take him to the police.

They called the police to take him to the station. The assistant chief took him to Kaloleni police station. He was taken to court and charged with an offence he knew nothing about. It was his evidence that he did not know the complainant and only met her for the first time in court.

## **Submissions**

12. The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution was obligated to prove the charge against him beyond reasonable doubt. He submitted that the prosecution relied on suspicion and failed to prove penetration but instead purported to prove pregnancy.
13. The Appellant submitted that the sentence meted on him was harsh and excessive considering that he had a family of which he was the breadwinner.
14. The Respondent on the other hand identified three issues for determination; whether the offence of defilement was proved beyond reasonable doubt to warrant a conviction, whether the trial court failed to consider the appellant's defense and whether the sentence imposed by the trial court was justifiable.
15. On whether the offence was proved to the required standard, counsel submitted that the age of the complainant was proved vide the birth certificate which indicated that she was born on 18<sup>th</sup> May, 2004 therefore making her 16 years and 17 years as the time the offence was allegedly

committed between 1<sup>st</sup> January, 2020 and 31<sup>st</sup> July, 2021. On whether penetration was sufficiently proved, counsel submitted that the sole evidence of the minor was sufficient to prove that penetration occurred. Further, that the testimony was corroborated by that of PW5 who examined her after the offence was committed.

16. On whether identification was positive, he submitted that the minor's testimony was that she had engaged in a sexual relationship with the appellant for a long time and was therefore best placed to positively confirm the appellant as she had known him very well.

17. On whether the sentence imposed by the trial court was justifiable, counsel submitted that the sentence issued by the trial court of ten (10) years imprisonment was extremely lenient as the Act under Section 8 (4) provides for a sentence of not less than fifteen (15) years for the offence the appellant was convicted of.

### **Analysis and determination**

18. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusions while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

**"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 whole 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; it must make its own findings and draw its own 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..."**

**19.** It was the duty of the prosecution to prove the charge against the Appellant beyond reasonable doubt.

20. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006. The section provides as follows:

**(1 A person who commits an act which causes ) penetration with a child is guilty of an offence termed**

**defilement.**

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

21. In the case of **Dominic Kibet Mwareng v Republic** (2013) eKLR, it was held that the ingredients for the offence of defilement are: proof of the age of the victim, proof of penetration on the victim and positive identification of the assailant.
22. The Appellant in his grounds of appeal stated that the ingredients of the offence of defilement were not substantiated in the case against him. As far as the age of the complainant was concerned, the investigating officer PW3 produced the complainant's birth certificate, P.Exh.1 that showed that the complainant was born on 18/5/2004. The offence was said to have been committed between January 2020 and July 2021 during which time the complainant was aged between 15 and 17 years. The age of the complainant was therefore proved at that age during the time the offence was said to have been committed.
23. It was the evidence of the complainant that she was in a love relationship with the Appellant and that he penetrated her

several times between January 2020 and July 2021 when she discovered that she was pregnant.

24. Section 2 of the Sexual Offences Act defines “penetration” as:

**“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

25. Penetration can be proved by way of oral or circumstantial evidence which can be corroborated by medical evidence. The clinical officer who examined the complainant PW4 found her to be 22 weeks pregnant. Her genitalia was normal with a missing hymen. He formed the opinion that there was penis penetration.
26. The trial magistrate in her judgment stated that the clinical officer confirmed that there was penetration. More so that there was no other evidence of how the complainant became pregnant other than by way of penetrative sexual intercourse.
27. The issue was not whether the complainant was pregnant or not. The issue was whether she was penetrated by the Appellant. There was no medical evidence that he was the cause of the pregnancy. There was thus no medical evidence to support penetration by the Appellant. The trial magistrate

erred in finding that the evidence of the clinical officer confirmed the act of defilement by the Appellant.

28. However, lack of medical evidence in support of defilement is not decisive as a charge of defilement can be proved by other ways such as the oral evidence of the victim and by circumstantial evidence, see **Kassim Ali Versus Republic Criminal Appeal No. 84 of 2005** where it was stated that: -

**“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”.**

29. Additionally, Section 124 of the Evidence Act allows a court in sexual offence cases involving children to convict on the oral evidence of the child victim if the court is satisfied that the child is telling the truth and gives reasons for finding so. The question then is whether the evidence of the complainant was credible that the Appellant defiled her over the stated period.
30. The trial magistrate in convicting the Appellant of the offence stated that the Appellant was in a sexual relationship with the complainant for over a period of one year and therefore that there was no room for mistaken identity. That the Appellant`s defence was a make-up story.

31. I have on my part re-examined the evidence of the complainant. Her evidence was straightforward that she was engaged in a sexual relationship with the appellant and that they engaged in sexual intercourse on 5 occasions in a house belonging to a friend of the Appellant. There was nothing to suggest that she was lying against the Appellant. His allegation that he was framed was farfetched. He did not show how the charges of defilement on the complainant had anything to do with the person called Kahindi. He did not raise the issue to do with the said person when he cross-examined the prosecution witnesses. His defence was therefore for dismissal. I agree with the finding by the trial court that the complainant was a credible and truthful witness. Her evidence that she was penetrated by the Appellant on the stated period was true. The evidence adduced by the prosecution was sufficient to sustain a conviction. The conviction is thereby upheld.
32. The offence the Appellant was convicted of attracts a sentence of not less than 15 years imprisonment. He was sentenced to serve 10 years imprisonment. The sentence was neither harsh nor excessive.
33. The upshot is therefore that this court does not find any merit in the appeal and the same is consequently dismissed.

**Delivered, dated and signed at GARSEN this 18<sup>th</sup> day of March, 2026.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

**Miss Ocholla for Respondent**

**Appellant- present virtually at G.K. Prison Manyani**

Court Assistant- Rahma