



REPUBLIC OF KENYA



**KENYA LAW**  
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**TMK v Republic (Criminal Appeal 17B of 2020)  
[2024] KECA 686 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 686 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 17B OF 2020  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
JANUARY 25, 2024**

**BETWEEN**

**TMK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgement of the High Court of Kenya at Malindi (J. Mativo J) dated 13th January 2020 and delivered on 23rd January 2020 in Malindi High Court Criminal Appeal No. 17 of 2019 arising from the original trial in Kilifi Criminal Case No. 217 of 2015)*

**JUDGMENT**

1. Tamaa Mlila Kacharo, the Appellant herein, has lodged this appeal against the dismissal of his first appeal by the High Court at Malindi (Mativo J. (as he then was), that upheld his conviction for the offence of defilement and sentence of fifteen (15) years imprisonment that had been imposed by the Senior Principal Magistrate Court at Kilifi (Hon. L. N. Juma RM) (hereinafter ‘the Trial Court’). The particulars of the offence were that in the month of December 2014 at Bamba township within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JNK, a child aged 15 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
2. The facts giving rise to the appeal, as can be gleaned from the testimony of the five prosecution witnesses who testified in the trial Court, were that the complainant (JNK), who testified as PW1 after a voire dire examination, knew the Appellant as Tamaa Nalila and he was a relative. That on the material day during the school holidays in December 2014, she was going to her grandmother’s house, and at around 6 pm she found the Appellant in the company of his friends drinking liquor. The Appellant thereupon followed her and asked to take him to a friend of hers, and while on a road that passed through the forest he held her hand, pushed her to the forest, told her not to scream, removed her clothes, raped her, and told her not to report it while threatening her. PW1 was scared and did not



- tell her grandmother, and since her mother was not at home at the time, she went back to boarding school without reporting what had happened. JNK subsequently told her mother what had happened in April 2015.
3. Jackson Chengo Katana (PW5), a Nyumba Kumi (local community) elder and uncle to the Appellant testified that the Appellant had asked him whether “if you have sex with a child belonging to your sister it can bring a curse.” When PW2 asked who the child was, the Appellant told him it was his niece K, which was the complainant’s alias name. He then reported the matter to the village elders who called a clan meeting which the Appellant attended, and he thereafter learnt that the complainant’s mother had reported the matter to the police. PW1’s mother (KCJ) testified as PW3, and confirmed receiving a call from PW1 who told her that she had been defiled by the Appellant, who she explained was PW1’s uncle and PW3’s brother-in-law. That upon inquiring from the Appellant, he told her that he wanted to discuss what had happened. PW3 then took PW1 to Kilifi District Hospital and a P3 form was filled.
  4. Dr. Noorein Abdul Wahid (PW 4), a doctor at Kilifi County produced the P3 form which was filled by Dr. Hashim. PW4 stated that he knew Dr. Hashim’s handwriting and had worked with her, and that the examination of the complainant revealed her estimated age to be 15 years, her genitalia was normal, hymen open and rugged and there was discharge, with a high vaginal swab revealed pus cells, while the HIV and Hepatitis B tests were negative. Corporal Philip Dzombo (PW5), the investigating officer, testified that on 2<sup>nd</sup> May 2015, he was in Kilifi Police Station and he received a complaint from the Complainant that the Appellant had defiled her. He recorded the complainant’s statement and sent her to Kilifi Hospital, got the Complainant’s birth certificate and that the PRC and P3 forms were filled by a doctor. Further, that the offence had occurred in Bamba, however, because the Complainant had been threatened, the offence was reported to Kilifi, and that he wrote a letter to Bamba Police to assist in arresting the Appellant, who was arrested on 12<sup>th</sup> May 2015.
  5. The Appellant was put on his defence, and his sworn testimony was that on the material date of the offence he was at Mombasa on work-related trip and was not home. He stated that PW2 was his cousin who sold palm wine and they had a previous land dispute, and he denied going to PW2’s palm wine depot or having sex with the complainant, and stated that he never met the complainant.
  6. The trial Court (Hon. L. N. Juma SRM) was satisfied that the ingredients of defilement had been proved, and convicted the Appellant, and although the Court noted that he was remorseful, it held that its hands were tied by the law and since the complainant was 17 years at the time of defilement, sentenced the Appellant to 15 years imprisonment. The Appellant was dissatisfied with the judgment in the trial Court and proffered his first appeal to the High Court where he challenged the conviction and sentence on amended grounds of appeal, namely that the charge sheet relied upon was drafted contrary to the law, rendering it fatally defective, the charges against the Appellant were framed due to a land grudge, essential witness was not called to testify, the doctor’s report was not conclusive, the prosecution’s evidence was full of contradiction, inconsistencies and fabrication, and that the trial Court disregarded and wrongly rejected the Appellant’s credible defence.
  7. After considering the said grounds and submissions made by the Appellant and Respondent, Mativo J. in his judgment dated 13<sup>th</sup> January 2020 declined to uphold the objection that the charge sheet was defective on account of having differing ages of the complainant and held that the particulars therein disclosed the offence of defilement and the age of the complainant was proved by evidence, and the appellant understood the nature of the offence and the evidence against him. Therefore, that the charge sheet as drawn was not incurably defective or prejudicial to the Appellant. On whether the offence of defilement was proved to the required standard, the learned Judge found no basis to fault the learned Magistrate’s finding that the ingredients of the offence had been established as the age of the complainant was established by her birth certificate to be 17 years, the penetration was proved by



the complainant's testimony and medical evidence, and the Appellant was known to and identified by the complainant as he was a relative.

8. On the failure to call a key witness, namely the medical doctor who examined the complainant, the learned Judge found that the prosecution is not expected to call a superfluity of witnesses, and an adverse inference will only be made by the court if the evidence by the prosecution is not adequate. Further that the record showed that their prosecution's evidence was largely unchallenged, and the witness who was not called was going to corroborate testimony already presented and was to produce the same medical report. Therefore, that it was not shown that the evidence on record had gaps which needed further clarification. In addition, that the trial magistrate correctly placed reliance on the available evidence in rejecting the appellant's defence. Lastly, the learned Judge held that the sentence imposed is the minimum sentence provided under the law, hence, the court has no discretion to interfere with it nor did the learned Magistrate have discretion to impose a lesser sentence.
9. The Appellant is dissatisfied with the decision made by the High Court on the grounds of a defective charge sheet, that the prosecution did not prove their case beyond reasonable doubt, and that the legal provisions providing for a minimum sentence under section 8 (1) as read with Section 8 (3) of the Sexual Offence Act conflicts, contradicts section 216 and 329 of the Criminal Procedure Code in his grounds of appeal. The Appellant also raised an additional ground in his supplementary grounds of appeal, namely that the first appellate Court failed to consider that there were sharp contradictions and gaps in the evidence adduced by the complainant.
10. We heard the appeal virtually on 24<sup>th</sup> July 2023, and the Appellant who was unrepresented was present in person appearing virtually from Malindi Prison, while the Respondent was represented by the Learned Principal Prosecution Counsel, Mr. Alex Gituma holding brief for Ms. Valerie Ongeti. The Appellant relied on his undated written submissions, while Mr. Gituma relied on written submissions dated 18<sup>th</sup> January 2023. A perusal of the Appellant's submissions reveals that he appears to have only addressed the ground of the evidence adduced by the prosecution not having met the legal threshold of proof beyond reasonable doubt.
11. In commencing our determination, it is crucial to restate the role of this Court as a second appellate Court as set out in *Karani vs R* (2010) 1 KLR 73 as follows:

This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.
12. The Appellant placed reliance on sections 107 and 109 of the *Evidence Act* to submit that the burden and standard of proof in criminal cases is always on the prosecution to prove the case beyond reasonable doubt and challenged the evidence adduced by PW1 on account of it being contradictory in her statements that she did not inform her mother or grandmother of the alleged defilement when she reached home yet she was in constant communication with her mother by phone, and only informed her in April 2015. Therefore, that PW1 was not a credible witness and a person of doubtful integrity, and the first appellate court erred in law when it failed to establish the applicability of section 124 of the *Evidence Act* in admitting the evidence of PW1.
13. The Appellant also contended that the ingredients of penetration were not satisfied and stated that the medical examination was conducted by a different clinical officer, and the P3 form showed that no injuries, bruises, or spermatozoa was noted, and thus PW 1's evidence was at variance with the



medical findings. Further, that the examination revealed that the injuries were 1 day, yet the medical examination was done after 48 hours which was extraordinarily too long to determine the nature of the injuries sustained. The Appellant therefore urged that the first appellate failed in their duty to properly evaluate the evidence and the resultant conviction and sentence against the Appellant was unsafe, to the extent that there was a gap in the prosecution evidence and there was no cogent evidence to connect the Appellant to the offence of defilement.

14. The Respondent's submissions were that the Appellant was well known to the complainant, she stated that he was a relative from her grandfather's side and knew him before the incident; that PW2's evidence to the effect that the Appellant asked whether the act would bring a curse upon his family was more of a confession and corroborated the allegations that had been made by the complainant on the identity of the suspect; a birth certificate was produced in evidence indicating that the minor was born on 6<sup>th</sup> May 1997 and though there was discrepancies of age, with the production of the birth certificate, she was a child within the meaning of section 2 of the Sexual Offence Act at the time of the incident.
15. The Respondent further submitted that the discrepancies between the evidence and the charge sheet which read that the minor was 15 years while PW1 testified that she was 16 years of age while her birth certificate indicated that she was 17 years, these discrepancies did not go to the root of the issue and in any event the complainant was still a minor. On penetration, the Respondent referenced the complainant's evidence that the Appellant removed her clothes and raped her, that she clearly understood the meaning of sex and rape, and since there was no eye witness, section 124 of the [Evidence Act](#) gave guidance to the court where it opted to rely on the evidence of the victim. Further, that the doctor confirmed there was penile penetration and the complainant's hymen was torn, and although she was examined after passage of time, the minor clearly testified that the Appellant threatened her against reporting and the trial Court was satisfied that the minor spoke the truth.
16. The Appellant has raised a legal issue as regards the credibility of PW1's evidence and the reliance by both the trial and first appellate Courts on the said evidence pursuant to section 124 of the [Evidence Act](#) which provides as follows:

“Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. It is notable that the evidence of PW1 was in this respect from her own personal experience and knowledge, and the credibility of her evidence requires consideration of three attributes, namely its veracity, objectivity and observational sensitivity. As explained in the text *Analysis of Evidence*, Second Edition by Terence Anderson, David Schum and William Twining, with respect to veracity, a witness will be untruthful in testimony if the person testifies against his or her beliefs and sensory observations. Objectivity on the other hand is where a witness testifies in accordance with his or her beliefs, and the basis of that belief is based on an accurate and objective understanding of the evidence. Observational sensitivity on the other hand is where the adequacy of a witness's sensory systems such as vision, hearing, touch, smell and taste is affected and may be poor or not correct as a result of a witness's physical condition or the conditions under which an observation is made. These three attributes are



therefore both time and context dependent and in order to impeach a witness's credibility reliance is normally placed on ancillary evidence of these attributes.

18. Specifically with respect to the veracity or truthfulness of a witness, this can only be impeached by ancillary evidence of prior behavior of the witness related to dishonesty, of influence or corruption of witnesses, of the demeanor or bearing of the witness while giving testimony, and of testimonial bias in terms of a distinct preference for revealing certain types of evidence and not others, or of self-contradiction or prior inconsistent statements.
19. The Appellant has in this respect not pointed out any evidence where PW1 can be said to have been dishonest, or corrupted other witnesses or was self-contradictory or inconsistent, and has instead relied on the delay by PW1 in informing her mother (PW3) of the incident with the Appellant, which PW1 objectively explained as arising from the fact of the Appellant's threats not to disclose it and that PW3 was not residing with her at the time. In any event the occurrence of the incident was corroborated by the evidence of PW2 and PW4. The trial court was impressed by the evidence of the victim, PW1, which it found to be concise and cogent and unshaken and persuasive. It was held as follows in *Joseph Kariuki Ndungu & Another vs. Republic* [2010] eKLR as regards the assessment of the attributes of credibility:

“...the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law.”
20. The Appellant has also challenged the probative value of the evidence by PW4, but as we have already indicated, this was corroborative evidence, and did not in any way impeach the primary evidence by PW1, which was sufficient to prove penetration. Both the trial and High Court in this respect found that penetration was established through the evidence of PW1 as supported by the medical evidence of PW4; that the birth certificate produced in respect of the complainant established the age of the victim; and that the Appellant was positively identified as a relative and a person well known by the complainant. In our view, both courts properly directed themselves on the evidence and the law and we have no basis for interfering with their findings.
21. On the sentence meted on the Appellant, the Respondent submitted that the trial Court took into consideration the mitigation offered by the Appellant and correctly applied its mind to the minimum sentence as provide for by law, and the High Court could not alter a sentence unless the trial Court had acted upon wrong principles or overlooked some material facts, or took into account irrelevant factors, or where the sentence was illegal or so inordinately excessive or lenient as to be an error of principle, as was held in the case of *Wilson Waitegi vs Republic* [2021] eKLR. The Respondent conceded that Courts were departing from mandatory sentences in sexual offences, and submitted that this Court was therefore at liberty to interfere with the sentence bearing in mind the circumstances of this case and the sentencing guidelines.
22. We note that the learned Judge of the High Court upheld the sentence of 15 years' imprisonment on the ground that it was a mandatory minimum sentence under section 8(4) of the *Sexual Offences Act*. The Supreme Court of Kenya in its judgment in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR declared the mandatory death sentence as unconstitutional, and the reason for the decision was that mandatory sentences are unconstitutional to the extent that they deprive an accused person of the benefit of mitigating circumstances, and the courts of the discretion to impose appropriate sentence on a case-to-case basis.



23. This reasoning equally applies to the minimum mandatory sentence imposed on the Appellant, and we note in this respect that the Appellant indicated that he was a first offender and breadwinner for his family, but we have also taken into account the aggravating nature of the offence, given that he was a relative of the victim and threatened her after committing the offence. For these reasons, we uphold both the conviction of the Appellant for the offence of defilement contrary to section 8 (1) of the *Sexual Offences Act*, and the sentence of fifteen (15) years' imprisonment from the date of sentence by the trial Court on 3<sup>rd</sup> May 2019. This appeal is accordingly dismissed in its entirety.

24. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

