



**SK v Republic (Criminal Appeal 110 of 2021) [2023] KECA 721 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 721 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CRIMINAL APPEAL 110 OF 2021**  
**AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA**  
**JUNE 9, 2023**

**BETWEEN**

**SK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Machakos (Ngenye-Macharia, J.) dated 22nd October, 2018 in HC. CR.A. No. 183 of 2017)*

**JUDGMENT**

1. This is a second appeal from the conviction and sentence of the appellant SK, who was charged before the Chief Magistrates Court at Kibera with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged in the charge sheet that on 23<sup>rd</sup> day of July, 2015 at the place named in the charge sheet he unlawfully and intentionally penetrated his male organ namely penis into the female organ namely by vagina of “SAS”, a girl aged 13 years. He was charged in the alternative with the offence of indecent act with a child contrary to section 11(A) of the said Act particulars being that on the said date and place he unlawfully and intentionally allowed his penis to get into contact with the vagina of the said girl. A trial took place where the prosecution called 7 witnesses and the appellant testified in his defence. He was convicted and sentenced on the main charge to serve 25 years imprisonment. An appeal to the High Court of Kenya at Nairobi was dismissed in a Judgment delivered on October 22, 2018 by G.W. Ngenye-Macharia, J. (as she then was), it being ordered that the sentence be reduced by 3 years and 25 days being the period the appellant was in remand custody prior to sentencing.
2. The appellant is dissatisfied with those findings and has preferred this second appeal. Our mandate in such an appeal is limited to considering issues of law only but not matters of fact which have been



considered by the trial court and re-evaluated by the High Court on first appeal – See the case of [Julius Kariuki Gikonyo vs. Republic](#) [2019] eKLR where this court stated of that mandate:

“(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213.”

3. We shall visit the facts of the case purely to satisfy ourselves whether the two courts below carried out their mandate as required in law and to see whether there are any points of law meriting our consideration.
4. The prosecution applied and the trial court agreed that the child victim of the offence was a vulnerable witness due to intellectual impairment and her mother was allowed to testify on her behalf under section 31(4) (b) of the [Sexual Offences Act](#) as an intermediary. We agree with the finding by the High Court on first appeal that it was wrong for the trial Magistrate to thereafter take testimony from the child victim after it had been found that she was intellectually challenged and after allowing her mother to testify on her behalf as an intermediary.
5. DSN (PW2) testified that her daughter was 13 years old; had a mental condition and attended (Particulars withheld) Special School HGM. When she arrived home from work at about 7 p.m. on July 23, 2015 she did not find her daughter SAS. She looked for her in the neighbourhood in vain that night and it was not until 30 a.m. the next morning 24<sup>th</sup> July, 2015 that she found her on the road at a place called (Particulars withheld) with visible signs that she had been beaten. She observed a swollen face and red eyes; one eye was bleeding. Her daughter told her that she had been defiled and could take her to the house where defilement had taken place. They went to that house but found it locked; the immediate neighbor to that house confirmed having seen the girl at that house the previous evening. Mother and child proceeded to Muthangari Police Station where a report was made and they were issued with a P3 Form and referred to Nairobi Womens Hospital where the child was examined. They had left the clothes the child had been wearing on the fateful night at the police station. These clothes some of which were soiled and tainted with blood were produced into evidence by the prosecution. Mother and child accompanied police later where the child once again identified the appellant’s house where he was arrested. Cross-examined by the appellant DSN stated:

SK The child took me directly to your house. We didn’t go to another house. She was clear on the place ... My daughter went straight to your house. There are many other houses... That is the first time she had gotten lost. She is an honest child and obedient ”SK

6. Joseph Mwanzia, a Clinical Officer at Nairobi Womens Hospital testified on behalf of his colleague who had since left the institution. He produced into evidence a Post Rape Care Form in respect of SAS who he testified was mentally challenged. On examination she had injuries on the forehead and her hymen was broken. His opinion was that she had been defiled on her vagina.
7. Corporal Stephen Mbuthia of Kawangware AP Post was with his colleague Sergeant Oketch on July 25, 2015 when they received a report from PW2 relating to a defilement case. PW2 who was



accompanied by her daughter took the policemen to the house which the child pointed out as the house where she had been defiled. He testified that:

SK... We approached the house. It was made of iron sheet. It is in a plot with many other houses there. The child had been pointing at the specific house. We went to the house. We found the accused and told him we were police ...”SK

8. He stated that there were many similar houses and that the girl took them directly to the appellant’s house and pointed out the appellant as her assailant when he opened the door.
9. Dr. Joseph Maundu of Nairobi Police Surgery on July 27, 2015 examined the appellant but did not find any injuries on him. On the same day he examined the girl (SAS) and found her to be mentally retarded. She had a bruise on her face and right side of neck; bruise on right breast and the hymen was broken.
10. PC Veronica Thuo of Muthangari Police Station investigated the case. She was a gender officer attached to that police station assigned the duty to assist complainants in sexual assault cases. She received SAS and her mother PW2 on July 24, 2015 and observed that the child was mentally retarded. She referred them to Nairobi Womens Hospital and received them again the next day July 25, 2015. She testified that she interviewed the child which required a lot of patience because of the child’s mental condition. The child narrated to her how she had been lured with french fries by a stranger who then took her to his house where he beat and defiled her after which he threw her out of his house. The police officer noted physical injuries on the girl. She is the one who took the appellant and the girl for examination at Nairobi Police Surgery and on July 27, 2015 the girl took her to the appellant’s house where she drew a sketch plan which was produced into evidence. She also produced the girl’s birth certificate as evidence of her age.
11. Henry Kiptoo Sang, a government analyst based at Nairobi Government Chemist on September 2, 2015 received from police various items including a biker (pant), under pant, blouse, skirt and pullover. On examination he found that the under pant was stained with semen which originated from an unknown person. According to him to get the most appropriate results of a DNA analysis the specimen should be taken for analysis as soon as possible as cells die with time and produce inaccurate results. In the case before him the items were taken for analysis about 3 months after the incident.
12. The trial Magistrate analysed that case made by the prosecution and found that a prima facie case had been made for the appellant to answer. In a sworn statement the appellant stated that he was a mason who was arrested on a charge which he knew nothing about and which he still denied. He stated that he worked for Villa Care in Westlands and was at work during the day on July 23, 2015 but when the court allowed the prosecution to verify that alibi defence the investigations officer was unable to find any construction site where the appellant allegedly worked. As we have seen the appellant was convicted and sentenced.
13. There are 4 grounds of appeal set out in Memorandum of Appeal drawn for the appellant by his lawyer Prof. Hassan Nandwa. It is stated that the High Court erred in law by affirming the conviction and sentence without finding that the prosecution had failed to prove its case beyond reasonable doubt; that the Judge on first appeal erred in not holding that the evidence of PW1 and PW2 required corroboration; that the Judge erred in law in not finding that the trial Magistrate had not observed section 124A (sic) of the *Evidence Act* and, finally, that the Judge erred in law by failing to re-evaluate the entire evidence.
14. When the appeal came up for hearing before us on a virtual platform on February 15, 2023 the appellant was present from Manyani Prison and was represented by learned counsel, Prof. Hassan Nandwa. Learned State Counsel Mr. Okachi appeared for the office of Director of Public



Prosecutions. The appellant had filed written submissions and in a highlight of the same learned counsel for the appellant submitted that the alleged victim of the sexual offence was of unsound mind who could not comprehend what was going on in court; that she testified through her mother and such evidence required corroboration. According to counsel the witness from Government Chemist had testified that semen sample found on the victim's pantie was found to be of an unknown male person which exonerated the appellant and, in conclusion, the appeal should be allowed.

15. In opposing the appeal learned state counsel submitted that the case was proved beyond reasonable doubt as the trial court had allowed the victim's mother who understood her daughter to testify as an intermediary; the victim was able to lead her mother and the police to the house where she had been defiled and the appellant was found to be the only person in that house. According to counsel there was medical evidence that the victim's hymen was broken and the semen being found to belong to an unknown male person did not exonerate the appellant as the witness had testified that the sample exhibits had not been properly stored.
16. In a brief rejoinder Prof. Nandwa submitted that even where the intermediary was allowed to testify on behalf of the mentally challenged victim there was still need for corroboration.
17. We have considered the whole record, the grounds of appeal, submissions made and the law. As we have stated this is a second appeal where we are to consider issues of law only. We recognize as points of law calling for our consideration whether the case was proved to the required standard which is tied to whether the evidence of PW1 and PW2 required corroboration.
18. As we have seen in this Judgment, the Judge on first appeal faulted the trial Magistrate for allowing the victim's mother to testify as an intermediary under provisions of the *Sexual Offences Act* and then having the victim also testify.
19. The Judge held that it was illogical to duplicate the mother's evidence after the trial court had found that the victim was a vulnerable witness. This was a sound finding. Having found the child victim to be mentally challenged there was no need to call the child after her mother had testified on what her daughter had informed her of the happenings when she was abducted and defiled.
20. PW2 (the victim's mother) testified how she arrived home from work and did not find her daughter at home and how all her efforts to trace her were in vain until the next morning when she found her by the road with soiled clothes and she observed injuries on her daughter. The daughter narrated to her how she had been abducted and taken to a house where she was defiled, beaten and thrown out to the dark night where she could not find her way home. She led her mother to the house where she had been defiled and also led police on 2 different occasions to the same house. The investigations officer was able to draw a sketch plan of the scene after being led there by the child victim. The Clinical Officer (Mwanzia) from Nairobi Womens Hospital testified on injuries suffered by the child during the assault and stated that there was defilement, evidence that was confirmed by Dr. Maundu of Nairobi Police Surgery.
21. The Judge on first appeal found that the evidence of PW2 was corroborated by medical evidence. We agree with this finding. Section 124 of the *Evidence Act* requires corroboration of evidence in circumstances that existed before the trial court and on first appeal. The evidence of the victim of defilement in the case before those courts was corroborated by medical evidence. The other evidence that existed was that the victim was able to lead, first her mother, then the police on 2 different occasions to the exact house where she had been defiled. That house belonged to the appellant who resided there alone. The house, made of iron sheets, was in a location where there were many other similar houses and at no time did the girl lead her mother or the police to any other house. The case against the appellant



was proved to the required standard and the appellant was properly convicted. There is no merit in this appeal which we dismiss in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

