FMM v Republic (Criminal Appeal E070 of 2023)
[2025] KEHC 4103 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E070 OF 2023

MW MUIGAI, J

MARCH 28, 2025

BETWEEN

FMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was arraigned before Kithimani Chief Magistrate court in Sexual Offences Case No E 009 / 2022 where he was charged with the offence of defilement contrary to Section 8(1. (3. of the *Sexual Offences Act*.

2. The particulars of the charge sheet are that:

> On diverse dates between December 2020 to July 2021 within [Particulars withheld] village , Ndalani location within Yatta sub county in Machakos county , the appellant intentionally caused his penis to penetrate the vagina of FNM a child age 16 years .

3. The appellant was charged with the alternative of indecent Act with a minor contrary to Section 11 of the *Sexual Offences Act*. The particulars were that on diverse dates between December 2020 to July 2021 at [Particulars withheld] village Ndalani location within Machakos the appellant intentionally touched the vagina of FNM aged 16 years.

4. The Appellant was convicted on the main charge and was sentenced to serve 15 years jail term.

Evidence at Trial.

5. The prosecution called 3 witnesses in proof of the charges.

    1. PW1 FN, the complainant was 17 years old when she testified in 2023 and she produced the Birth Certificate. She stated that in December 2020 she met the appellant Francis and they

knew each other at Mamba on the road . That he was a casual laborer and that knew each other. They used to have sex and she got pregnant on 15/3/2021. She continued with school.That her parents did not know about the relationship but later became aware and reported the case at Mamba Police Post. She told them that the Appellant was responsible for the pregnancy. She later gave birth on 13/12/2021.

2. That the appellant used to force her. PW1 went to Ndalani Hospital. She did not know how he was arrested.

3. She stated during cross examination that she informed the appellant about the pregnancy and he told her he would take care of the child .That the appellant did not run away. That she had differences with her mother and the appellant got her from the fence. He found her at 9 am on a farm.That he spent the whole day with her on a certain day he found her on a farm and he stayed with her for four days during the pregnancy.

4. She stated that the appellant forced her the first time when she was a virgin. She was not forced on subsequent days and the appellant talked to her mother's friend to return her home. The 1st time he forced her and she was virgin.

5. PW2, GN the complainant's mother stated that on 15/3/2021 she was at home. The Appellant went to a shop near a Club.The appellant got drunk and started saying that he made the complainant pregnant . PW2 did not know, that PW1 was drunk. Elders called Muli asked her if she knew PW1 was pregnant and she said she did not know. PW1 was getting drawn and vomited. She checked and found PW1 had not used her pads and she owned up that the pregnancy was FMM's.

6. The officers stated to look for the appellant. The girl gave birth in December when the appellant was still hiding .

7. She did not know about the relationship. The appellant was was arrested and identified at the dock.

8. PW2 stated during cross examination that she discovered the pregnancy [of PW1] in April but the appellant got drunk in May and made the statements. That the headmaster called her and said that the child was not going to school .That she reported the case in July and the appellant ran away .He was hiding in a river .

9. PW3, No. 10180 PC Dorothy Achieng from Mamba police Post and the Investigating officer of the case testified that the PW2 came to the station on 27/2/2021.She reported that her daughter FN who was in Standard 8 at [Particulars withheld] Primary school was pregnant . The report was recorded on the Occurrence book and the officer later visited the home. The appellant/subject had ran away with the victim. He was arrested after 5 months at Ithanga and was taken to Yatta police station.

10. That DNA test results confirmed that the appellant was the father of the child. The police carried out an identification parade and the complainant identified him . Pw3 produced the birth certificate as Exhibit 1 , the DNA report as exhibit 2 and the identification parade report as exhibit 3 .

11. PW3 was cross examined and she stated that she did not find him at home he ran away long time with the girl. PW3 did investigations and minuted in the OB. The complainant said that he was her friend. If the matter was not reported , she would not have arrested him.

The accused's defence

12. He gave unsworn defense on 27/6/2023. He admitted that he was the complainant's boyfriend and that she got pregnant. PW1 was not in school but was doing a course. He agreed to take care of the child and he also stayed with the complainant for long. That her mother and step mother also knew him. The step mother said that she would report him. That the mother later claimed that the complainant got lost.This was after 5 days. The appellant spoke to her mother and her mother's friend and the complainant returned home.

13. That his grandmother told him to give land. He also talked to the complainant and told her that his cousin was the one who reported since they had differences.

14. He testified that he did not know her age and knew that she was an adult. The doctor told her she was 17 years old on the day she was going to give birth.

15. The appellant was 27 years during his testimony.

The trial court's judgment

16. The court found that the appellant confirmed that he had sexual intercourse with the complainant since she was his girlfriend. Further that she became pregnant as a result of the relationship and he was willing to take care of the child .Penetration was proved by DNA tests results which confirmed pregnancy and birth of child was the Appellant's child.

17. That the appellant did not challenge the identification parade report .The identification parade was done after he was arrested. The evidence of PW1 Complainant and PW2 her mother coupled with DNA Report confirmed the ingredients of offence of defilement.

18. The appellant was heard on mitigation. He was remorseful .He also stated that he was willing to take care of the child and that he did not force the complainant.

19. The court found that the appellant knew she was a child and that he knew he was school going .The doctor also informed him about her age. The appellant defiled a 17 year old child and issue of consent did not arise.

The appeal

20. Aggrieved by the judgement of the trial court, the appellant filed GROUNDS OF APPEAL contending that :-

    1. The learned Trial Magistrate erred in law and facts by sentencing the appellant to 15 years imprisonment which was excessive in the circumstances

    2. The learned Trial Magistrate erred in law and fact by failing to make an independent opinion on the burden of proof as required in law.

    3. The learned Trial Magistrate erred in law and fact by failing to observe that the evidence fell short of the standard needed in law.

    The appellant prays for variation of the judgment of the court and that the sentence be reduced to a manageable prison term.

Written submissions.

21. The Appellant did not file submissions in the Court file but filed on CTS on 13/11/2024. This is one of the files referred to this Court after I left Machakos High Court in 2025. I did not get written submissions uploaded on CTS Machakos High Court.

22. The prosecution submitted on the appeal against sentence and reiterate that sentence was within the law. That the victim was 16 years old and the appellant was charged under Section 8(4. of the *Sexual Offences Act*. The ODPP relied on the case of Republic vs Joshua Gichuki Mwangi & 4 Others Supreme Court Petition No E018 of 2023

Analysis & Determination.

This Court considered Trial Court record and submissions by ODPP. The Petition is on conviction and sentence.

As the 1st Court on appeal ,In Okeno vs. Republic (1927. E.A 32 it was stated that;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336. 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570.. 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, see Peters v. Sunday Post, [1958] E. A. 424."

Burden & standard of proof

It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947. 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice

23. The offence of defilement is rooted in three key ingredients. The age of the victim, the evidence of penetration and positive identification of the perpetrator. See the case of George Opondo Olunga –Vs- Republic [2016] eKLR.

24. The burden of proof is on the prosecution and the evidence adduced must be beyond reasonable doubt.

25. The complainant was 17 years during her testimony , the birth certificate is on record and proves that the complainant was born on 23/12/2005 .She was 16 years old at the time of the offence .

26. She told court that she met the appellant at Mamba and that they became friend's .That they used to have sex and she became pregnant on 15/3/2021.

27. Pw1 gave birth to girl named GN and DNA test carried out on 20/6/2022 proved that the appellant was the child's biological father .The appellant also admitted that the child . In this case, penetration is not disputed the appellant having admitted that the child was his and that he was willing to take care of her.

28. The Appellant and the Complainant knew each other and had been in a relationship at the material time of the offence.The identification of the perpetrator was not in issue. The DNA tests also proved penetration that led to pregnancy.

29. In Evans Wanjala Wanyonyi vs. Republic [2019] eKLR, the court held that: "An essential ingredient in the offence of defilement is penetration and not impregnation." However, in the instant case DNA conducted results confirm paternity is the Appellant.

30. In the case of Williamson Sowa Mbwanga vs. Republic (2016. eKLR the Court of Appeal held that

> "...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence, does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See Twehangane Alfred Vs. Uganda, CR. APP. No. 139 of 2001.."
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> It is partly for this reason that section 36(1. of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."

31. I find that the burden of proof was attained in the case. PW1 stated the 1st time, the Appellant forced her into sexual intercourse. Thereafter, they were sexually active. The birthdate of PW1 was confirmed as below 18 years old. So legal consent was not obtained. PW1 was school going at the time.

32. The appellant gave unsworn evidence in his defense. He stated that the complainant was his girlfriend and that they stayed for long. He also admitted the pregnancy. He stated at page 37 of the proceedings that he did not know the complainant's age and that "..I just saw she was an adult " .That "When she was going to give birth the doctor told me she was 17 years old."

33. Unsworn evidence has very little or no probative value since it is not tested through cross examination. The appellant's option to defend himself includes the choice to keep quiet or to give sworn or unsworn evidence and forms part of his constitutional right. The evidence must be weighed against the entire case. The burden of proof does not shift to the appellant save that his defense must cast doubt on the prosecution's case.

34. The defense corroborated the prosecution's case on penetration and identification of the perpetrator. The main issue was age and the appellant seeking defense under Section 8(5. *Sexual Offences Act*.

35. The Trial Court assessed his defense during sentencing although this should have been part of the judgment. The Trial Magistrate's sentencing notes indicated that the appellant knew that the Complainant was a child. Therefore, Legal Consent was not obtained, it can only be obtained by one over 18 years old.

36. The Court did not appreciate the Appellant's defense. The appellant did not state that the Complainant was school going, instead PW1 at page 28 stated that they used to have sex and that she continued going to school. That she did not start the relationship with the appellant and also that he forced her the first time but she was not forced to have sexual intercourse on subsequent days. They also stayed together for four days when she was pregnant, with their child.

37. Section 8(5) of the *Sexual Offences Act* provides that;

> (5. It is a defense to a charge under this section if—
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

38. The Appellant ought to demonstrate steps taken to establish age of the Complainant. However, these steps apply disjunctively and there exists situations where the appellant could be deceived or given impression that the complainant was above 18 years old.

39. In the case of Eliud Waweru Wambui –Vs- Republic [2019] eKLR the Court of Appeal held at paragraph *36* that :-

> The burden of proving that deception or belief fell upon the Appellant, but the burden is on a balance of probabilities as is to be assessed on the basis of the appellants subjective view of the facts. Thus whereas indeed the complainant was still in school in form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is germane to point out that a child need not deceive by

way of actively telling a lie that she is over 18 years. We would give the term deceive the ordinary dictionary meaning which is to;

> "Deliberately cause (someone. to believe something that is not true or (of a thing. given a mistaken impression to" (As per the concise oxford English Dictionary, 12th Edition..

So understood, we would think that had the two courts below properly directed their minds to the Appellants defence and the totality of the circumstances of this case, they would have in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe."

The court also held at paragraph *35* that :-

We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 year

40. The requirements of proving defilement were met; penetration was proved by admission by both Complainant and 41. Appellant sexual intercourse on several occasions and they lived together at some point for 4 days.

42. Identification was proved through recognition, by Complainant's report to parent(s. PW2 who reported to Police. The Accused ran away but on arrest ID parade was conducted and contest was made on positive identification.

43. The age of the victim was by Birth Certificate produced as exhibit and she was born in 2005.

44. No report was made until PW2 mother of Complainant PW1 heard Appellant while drunk claim impregnating her daughter. The Complainant reported the matter to the Police. PW1 testified that the 1st time she was forced but they had sexual intercourse various times thereafter and stayed together for 4 days and later She was pregnant.PW3 stated on receiving the report from PW2, PW1 and the Appellant were not around and he had run with her.

45. The Appellant's Defense was that they were boyfriend and girlfriend, Pw1 was pregnant and he agreed to take care of the child They stayed together for long. When she gave birth to the child, he was arrested. The DNA was done and he did not know her age he just saw her as an adult.

46. From these evidence on record I find that the Trial Court considered both testimony by Prosecution witnesses and the Appellant's unsworn statement and the apparent defense invoked of Section 8(5. *Sexual Offences Act*, that either the Complainant deceived him that she was of age, he reasonably took it that she was of age 18 years and /or he made effort to establish the Complainant's age.

47. In the totality of evidence on record, this Court finds the evidence on record discloses commission of the offence of defilement.

48. The defense is not supported by the evidence on record, if the Appellant believed the Complainant was of age of majority and the relationship of boyfriend and girlfriend had flourished, he would have informed his family/parents and met the Complainant's parents undertaking to take care of the child as he promised.

49. Instead, he was drunk and claimed that he impregnated the Complainant, later he claimed to take care of the child but thereafter, he ran away until his arrest. These facts are not conclusive and consistent of an open relationship as he believed the Complainant was over 18 years old.

50. Apart from running away with PW1 as PW3 testified, no evidence of taking care of PW1 during pregnancy while at her home and/or arrangements for the coming baby were made. No approach was made by or with members of the 2 families, the Complainant's family and/or the Appellant's family. This court considers the insinuated defense of Section 8(5. of *Sexual Offences Act* was/is an afterthought.

The conviction is upheld.

Sentence

52. On the sentence, Section 8(3. of the *Sexual Offences Act* read that :

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.

53. The Trial Court could not consider a lesser sentence from what is prescribed in the statutory minimum sentence .The appellant prayer before this court is that the sentence be reduced to what is reasonable. In the case of Ogolla s/o Owuor, (1954. EACA 270 wherein the predecessor of this court stated:

The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

54. The nature of minimum sentence was best described in the words of Corbet CJ in the case of S vs. Toms 1990 (2. SA 802 (A. at 806(h.-807(b., Cited in Francis Matonda Ogeto –Vs- Republic 2019] KEHC 10896 (KLR. where judge of appeal noted interlia that:

> the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp."

55. This Court concurs with binding decision of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi & 4 Others on sentence based on the relevant Statute until or unless declared unconstitutional.

56. The appeal is dismissed conviction upheld and sentence upheld.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 28/3/2025 VIRTUALLY/PHYSICALLY.

M.W.MUIGAI

JUDGE