



REPUBLIC OF KENYA



KENYA LAW
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**AKJ v Republic (Criminal Appeal E070 of 2021)
[2024] KEHC 653 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E070 OF 2021**

KW KIARIE, J

JANUARY 25, 2024

BETWEEN

AKJ APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.07 of 2020 of the Chief Magistrate's Court at Mombasa by Hon. R. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. AKJ, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the 1st day of November 2019 and the 25th day of December 2019 in Changamwe sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of M.J.K., a child aged 14 years.
3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was in person. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact for not appreciating that the prosecution case was not proved beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
 - c. That the learned trial magistrate erred in law and fact for not noticing that the medical evidence did not corroborate the complainant's evidence.



- d. That the learned trial magistrate erred in law and fact for not considering that a crucial witness was not summoned in court.
 - e. That the learned trial magistrate erred in law and fact for dismissing the defence without any legal basis.
4. The state opposed the appeal through Ms. Maureen Anyumba, who contended that the appeal had no merits.
 5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR, Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they were proven.

1. The appellant contended that a material witness was not called. He, however, did not disclose which witness this was. Failure to call a material witness can lead the court to infer that had he/she been reached, he/she would have adverse evidence to the prosecution case. This was held by the Court of Appeal for Eastern Africa in the case of *Bukenya v Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, the evidence was overwhelming against the appellant.
8. This was a nauseating case. A trusted grandfather turned a tender granddaughter into a sexual toy. This is elicited from the harrowing narration by M.J.K (PW1), the complainant. Her evidence is that when one of her brothers visited the appellant, who is her mother's uncle, he sent her brother to buy a razor blade for him. This was in November 2019. When she wanted to accompany her brother, the appellant asked her not to because he wanted to give her some chores. When the two were alone, the appellant armed himself with two razor blades and ordered her to comply with what he wanted. He overpowered her. He defiled her by penetrating her anus and her vagina. After he was done, he applied coconut oil to her anus and the vagina. Her brother returned and found her crying. They went home, and she walked in difficulty. Due to the fear inflicted on her, she did not disclose what she had gone through to anybody. She had to feign sickness for fear of her grandfather's warning.



9. The ordeal was not yet over. In another instance, the appellant sent her brother to buy shoes. The appellant pushed her back into the house when she wanted to go with him. He went and defiled her. This time, he defiled her three times. He released her on hearing some footsteps.
10. This was a disturbed child. Her relatives asked her to tell them what was amiss because they realised she was not her usual self. This was when she disclosed what the appellant had been doing to her.
11. When Dr Saidi examined the complainant, he found that the hymen was broken with a healing scar. The P3 form was produced on his behalf by Dr Fadhil Hussein.
12. As is the characteristic of many sexual offence cases, there are hardly any eyewitnesses. Mostly, the evidence is circumstantial except that of the complainant. In the case of *Mohamed & 3 Others v Republic* [2005] 1 KLR 722, Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

13. After the complainant was questioned by her aunts, she opened up, and that is how her father (PW2) and grandmother (PW3) came to learn of the incident. The narrations by these two witnesses drew a picture of a girl who was very disturbed by the ordeal. Their evidence gave credence to her evidence. The proviso to section 124 of the *Evidence Act* states:

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.

At the trial, the complainant's evidence was not at all challenged. I am satisfied that she told the court the truth. The medical evidence further corroborated her evidence.

14. A copy of M.J.K.'s birth certificate was produced as an exhibit. It indicates that she was born on the 8th day of November 2005. At the time of the offence, she was fourteen years old. Section 8 (2) of the *Sexual Offences Act* provides: Section 8 (3) of the *Sexual Offences Act* provides as follows:

A person who commits an offence of defilement with a child between the ages of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The prosecution, therefore, proved the age of the complainant.

15. After the prosecution closed its case, the appellant exercised his Constitutional right to keep mum. There was no defence that the learned trial magistrate failed to consider.
16. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised



by a trial Judge unless as was said in *James v Rex* [1950], 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shersbewsity* [1912] C.CA 28 T.LR 364.

17. In the instant case, the learned trial magistrate did not act upon some wrong principle or overlook some material factor. The circumstances of this case are that had the prosecution been given the notice to enhance the sentence, I would not have hesitated.
18. The upshot of the preceding analysis of the evidence on record is that the appeal lacks merit and is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

