



**JMM v Republic (Criminal Appeal E004 of 2023)  
[2024] KEHC 4246 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL APPEAL E004 OF 2023  
LW GITARI, J  
MARCH 21, 2024**

**BETWEEN**

**JMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. JMM, the Appellant herein, was charged with the offence of defilement contrary to Section 8(1) & 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of this offence were that in the diverse dates between 1<sup>st</sup> November, 2019 to March 2021 within Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of one DK, a child aged 17 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The particulars of the alternative charge were that on diverse dates between 1<sup>st</sup> November, 2019 to March 2021 within Tharaka Nithi County, the Appellant intentionally touched the vagina of one DK, a child of 17 years.
3. The Appellant pleaded not guilty to the said charge and the matter proceeded to full trial with the prosecution calling a total of four (4) witnesses in support of its case against the Appellant. The appellant was ordered to serve a sentence of fifteen (15) years imprisonment.
4. It was the prosecution’s case that on diverse dates between 1<sup>st</sup> November, 2019 to March, 2021, the Appellant spotted the complainant at the river. That on 15<sup>th</sup> November, 2019, the Appellant went and spoke to the complainant. The Appellant tried to seduce the complainant but she refused. The Appellant then insisted and followed her. The Appellant then removed the complainant’s panty and raised her skirt. He then caused the complainant to lie down and proceeded to have sex with her. After that sexual counter, the complainant headed home. The complainant did not tell anyone about the sexual



- encounter she had had with the Appellant until sometime in June 2020 when she discovered that the Appellant had impregnated her. The Appellant however denied the pregnancy.
5. After full trial, the Appellant was found guilty, convicted accordingly, and sentenced to serve 15 years' imprisonment.
  6. The Appellant has now come before this Court faulting the trial court for the aforesaid decision based on the following grounds:
    - a. That the learned magistrate erred on law and in facts in convicting the Appellant on insufficient evidence.
    - b. That the learned magistrate erred in law and facts in failing to find that the complainant was an adult at the time she started cohabiting with the Appellant who was her age mate.
    - c. That the learned magistrate erred in law and in facts in failing to consider the Appellant's age before convicting him.
    - d. That the learned magistrate erred in law and in facts in failing to use his discretion judiciously before sentencing the Appellant excessively in the circumstances of the case.
    - e. That the learned magistrate erred in law and in facts in convicting the Appellant against the weight of evidence.
  7. The Appellant thus prayed for the subordinate court's judgment and sentence to be set aside and he be set at liberty.
  8. This Court directed that this Appeal be canvassed by way of written of submissions.
  9. Notably, when this matter came up for mention on 25<sup>th</sup> January, 2024 to confirm the filing of submissions, both the counsel for the Appellant and the Respondent indicated that they had filed their respective submissions for the parties.
  10. On record are the Respondent's submissions that were filed on 23<sup>rd</sup> May, 2023. On the other hand, the Appellant's submissions were filed on 29<sup>th</sup> May, 2023.
  11. I have considered the respective submissions by both parties and noted that the Appellant's submissions are wholly in support of the Appellant's application dated 27<sup>th</sup> March, 2023 which is now spent as this Court pronounced itself on the said application by the ruling that was delivered on 7<sup>th</sup> November, 2023.
  12. That said, I am mindful that this is a first appeal. As a first appellate court, this Court is obligated to re-evaluate the evidence and make its own conclusions while bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. [See: *Okeno v Republic* [1972] EA 32]
  13. Guided by the holding of the Okeno's case (*supra*), the evidence that was adduced by the Appellant before the trial court will suffice in the determination of this Appeal.
  14. On the part of the Respondent, it was submitted that the prosecution proved its case against the Appellant for the offence of defilement to the required legal standard of beyond reasonable doubt. That the complaint indentified the Appellant as her boyfriend, and that the Appellant admitted to have known the complainant as his wife. Further, that the identification of the Appellant as the perpetrator of the offence in this case has not been challenged in this appeal.



15. On the issue of penetration, it was the Respondent's submission that the testimony of the complainant (PW1) was cogent evidence and that the same pointed to the fact that there was penetration as the complainant was pregnant at the time she was examined by a clinical officer. Further, that the evidence of the complaint in proving the element of penetration was further corroborated by the P3 form produced in evidence by PW3.
16. On the issue of the age of the complainant, the Respondent relied on the case of *Hadson Ali Mwachongo v. republic* [2016] eKLR and submitted that the complainant's birth certificate that was produced as P. Exhibit 2 was proof that the complainant was 17 years old at the time of the commission of the subject offence and that the said birth certificate was not challenged by the Appellant until the point he put in his defence.

### **Issues for Determination**

17. I have considered the grounds of appeal, and the evidence adduced in the lower court. I have also considered the Respondent's submissions and disregarded the Appellant's submissions for the reason given herein above. In my view, the the main issues for determination in this Appeal are;
  - a. Whether the prosecution proved its case beyond reasonable doubt.
  - b. Whether the sentence was manifestly harsh and excessive

### **Analysis**

#### **Whether the prosecution proved its case beyond reasonable doubt.**

18. Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* establishes the offence of defilement as follows:

“8(1)a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(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.”

19. The specific elements of the offence defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
  - a. Age of the complainant;
  - b. Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*;
  - c. Positive identification of the perpetrator.
20. Age of the victim of defilement is essential element because defilement is a sexual offence committed against a child who under the Children's Act is a person below the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed as per the penalty clauses in the *Sexual Offences Act*. The younger the child the more severe the sentence.
21. In this case, PW1 (the complainant) told the trial court that she was 17 years old. The complainant's birth certificate was produced in evidence and the same indicates that the complainant was born on 20<sup>th</sup> April, 2004. The subject offence is alleged to have occurred between 1<sup>st</sup> November, 2019 to March 2021. The complainant was thus aged between 15-17 years at the time of the commission of the alleged



- offence. As such, the trial court cannot be faulted for concluding that the complainant was aged 17 years.
22. On the issue of penetration, the complainant was categorical that the Appellant spotted her at the river on 15<sup>th</sup> November, 2019. That on diverse dates between 1<sup>st</sup> November, 2019 to March 2021, the Appellant went to talk to the complainant and seduced her but the complainant refused the Appellant's advances. That the Appellant then insisted and followed the complainant and had sex with her in the bush. The complaint gave further details on how the Appellant removed her panty and raised her skirt. She further stated that the Appellant then caused the complainant to lie down and proceeded to have sex with her. The complainant explained that the Appellant caused his penis to penetrate her vagina after he removed his long trouser.
  23. The complainant's testimony on the issue of penetration was corroborated by the evidence of PW3 who is the clinical officer that examined the complainant and found that she was 37 weeks pregnancy. According to the P3 form on record, the examination was conducted on 28<sup>th</sup> October, 2021. 37 weeks backwards from the date that the complainant was examined falls in February 2021 which is within the range of dates that the complainant alleges to have been defiled by the Appellant. The obvious conclusion that can be reached from the evidence of PW1 and the PW3 is that there was penetration of the complainant's vagina.
  24. As for the issue of identification, the Appellant admitted that the complainant was his wife. He stated that they got their first child in 2019 and their second child in 2021. There is therefore no dispute that PW1 and the Appellant were known to each other.
  25. No DNA was carried out to establish paternity of the baby. Therefore, the only evidence available to the prosecution for proof of its case is that of PW1. The learned trial magistrate considered this at page 6 of his judgment where he stated and found as follows:

“The victim confirms the accused had sex with and even impregnated her which facts the accused has not rebutted fathering victim's children.”
  26. Section 124 of the *Evidence Act* 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.”
  27. It follows that in sexual offences the court may rely on the victim's evidence only to convict somebody. Reasons must however be given to support that. That means the victim's evidence must be water tight and she/he must be believed of her/his truthfulness.
  28. In this case, the evidence adduced shows that the Appellant and PW1 engaged in sex on diverse dates between 1<sup>st</sup> November, 2019 and March 2021. In her evidence, PW1 stated that her mother found out that she (PW1) was pregnant, the Appellant went for PW1 and they ran away to Meru for 2 months where they stayed as wife and husband. That they delivered a baby girl in July and they then went back



and stayed with the Appellant's parents for 2 days because the parents did not know of the pregnancy. That subsequently, the Appellant then left for Kamalenge.

29. The Appellant admitted that the complainant was his wife and that they got their first child in 2019. This clearly shows that he sexually engaged with PW1 while PW1 was a minor.
30. My conclusion therefore is that the trial court was correct to find that the prosecution had proved its case against the Appellant beyond any reasonable doubt as the three fundamental ingredients of the offence of defilement were proved.

#### **Whether the sentence was manifestly harsh and excessive**

31. On the sentence meted out against the Appellant, I equally find that the trial court did not err as Section 8(4) of the *Sexual Offences Act* provides that:

“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.”

#### **Conclusion**

32. The upshot of the above, is that the present appeal lacks merits.  
I order as follows:-
  - a. This appeal is dismissed

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 21<sup>ST</sup> DAY OF MARCH 2024.**

**L.W. GITARI**  
**JUDGE**

