



REPUBLIC OF KENYA



**Kaige v Republic (Criminal Appeal 121 of 2023)
[2024] KEHC 2718 (KLR) (Crim) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 121 OF 2023
CM KARIUKI, J
MARCH 19, 2024**

BETWEEN

NOAH KAMAU KAIGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the original conviction and sentence by Honourable E. Wanjala-Principal Magistrate delivered on dated 3RD April 2023 and 18th April 2023 respectively in the Senior Principal Magistrate Court at Engineer Law Court Criminal Case No. E006 of 2022)

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to section 8(1) (4) of the [Sexual Offences Act](#), No. 3 of 2006.
2. Particulars being that on November 2020 at Nyandarua County. Intentionally caused his penis to penetrate the vagina of LWK a child aged seventeen (17) years.
3. In alternative committing an indecent act contrary to Section 11(1) of [Sexual Offences Act](#) No. 3 of 2006 on that same date place and time intentionally caused his penis to come into contact with the vagina of LWK a child aged seventeen (17) years.
4. The appellant pleaded not guilty and, in the hearing, the Prosecution called three (3) witnesses and the Appellant called two (2) defence witnesses.
5. The Appellant was convicted and sentenced to fifteen (15) years imprisonment.
6. The Appellant filed and set out in the Appellant submissions brief evidence on record.
7. Summary of evidence adduced



8. The complainant's evidence was that on a date she could not recall in November 2020 while seated outside opposite the accused person's home having left her home since her parents were quarreling, the accused person saw her, lured her into his wooden house which is one bedroom, but with a promise that nothing could happen.
9. However, while in the house, he started touching her and they engaged in sex after which he gave her Kshs 150/= and checked outside if any person was around, and since there was none he asked her to leave. she had her monthly periods in November 2020 before she had sex with the accused person in December she missed her periods in January.
10. when she went to school while girls were being tested for pregnancy she turned positive and was sent home that is when a report was lodged an examination was done by the doctor on 10.1.2021 and the P3 form and PRC were filled after a period of 2 months after the incident.
11. Dr Karanja testified as PW 1 and produced a P3 form and PRC whose contents were similar, he confirmed that he examined the complainant who had normal external genitalia, her hymen was broken no injuries were noted and there was no blood or discharge the doctor also noted that the victim was pregnant.
12. The accused person DW1 in his sworn testimony denied defiling the complainant and implicated another person Macharia but the issue of Macharia never arose during cross-examination, DW2 on the other had testified on how being a former village elder knew both the complainant and accused person and that the complainant used to move around with several boys who he could not establish how many and on cross-examination, he admitted that he was not in a position to tell whether suit defilement by the accused person took place or not.
13. From the evidence on record as tendered by the complainant that she had sexual intercourse with the accused person in November 2020 and she missed her periods in December 2020 and January 2021 tests conducted at school confirmed that she was pregnant, from the fact of pregnancy thus trial made a finding that there was confirmation that penetration took place, and relied on the case of; *DS v Republic* [2022] eKLR, which held that;

The fact of pregnancy, which the medical evidence, showed only goes further to re-confirm penetration as pregnancy per se is not necessary to prove penetration.
14. The trial court went ahead to hold that, further, the complainant's evidence was corroborated by the P3 form produced by PW1 a medical officer which confirmed that the complainant's hymen had been broken but did not give details when even though the court notes that examination was 2 months after the alleged defilement, from the evidence of the complainant as corroborated by the medical evidence thus a finding that the element of penetration had been proved by the prosecution beyond a reasonable doubt.
15. On Identification, the trial court held that, from the evidence of the complainant she stated that the accused person was their neighbor and she knew him very well, her evidence was corroborated by the accused person in his evidence when he stated that she knew the complainant whom he alleged was a lover to the accused person's friend one Macharia, and on cross-examination, the accused person confirmed that the complainant knew him very well, as such from the evidence of the complainant as corroborated by the evidence of the accused person trial court held that the element of identification is not disputed and it has been proved by prosecution beyond reasonable doubt.
16. The appeal was canvassed via submissions which Parties filed and exchanged.



17. Appellant Submissions
18. The appellant submitted that; there were evidential gaps in the prosecution case, in that, the evidence as adduced especially the statement of the victim was never corroborated by any evidence including medical evidence despite the prosecution having every opportunity to do so and in particular they failed to seek the victim's child paternity after it became apparent the victim was engaging in a sexual relationship with multiple men.
19. Equally, for the record, the birth certificate provided indicated that the plaintiff was born on 31st October 2004 while at the time of testifying on 26th October 2022, she was still a minor 4 days to her 18th birthday but still confirmed that she was happily married to a husband who she never wanted to disclose his name. The same reason why she fled sooner after the charges were being filed.
 - a. The defense testimony as to the demise of the appellant's grandfather in the same month of the alleged offense was ignored while the same challenged the victim's allegations which would have coincided with the burial preparations and with the influx of mourners, neighbors, and well-wishes in the appellants home, the appellant would have been exonerated.
20. It is submitted that the learned magistrate failed to appreciate the overwhelming gaps and proceeded to convict the appellant without any tangible evidence to support the conviction which ultimately shifted the burden of proof to the defense contrary to principles of criminal justice.
21. The medical evidence produced could not corroborate any evidence of the alleged month of the offense for obvious reasons that the victim had a line of multiple men whom she confirmed during her testimony that she had sexual encounters with thus the medical evidence without a paternity test/report no conviction would have been supported,
22. Without corroboration by medical evidence, the main ingredient of the offence of defilement failed tremendously, and thus the trial court misdirected itself around the Doctors' evidence without considering the victim's testimony which cast doubt and impeached the medical evidence in its entirety.
23. The appellant by being put to defence was called upon to prove his innocence against very scanty and shaky evidence in a poorly done prosecution case. It's the appellant's submission that the accused ought to have been saved from the embarrassment of being put to his defense by being acquitted under section 210 of the CPC on no case to answer. Reliance is made on the case of Criminal Appeal 52 of 2018 MM v Republic [2020] eKLR.
24. It is further submitted that the victim portrayed herself as an adult the entire time by admitting to multiple sexual encounters and her being married while still underage shows that she has treated and taken herself out as an adult, and no man should be held culpable for consensual sex to a 17year old who carries herself as an adult and ends up being married while still underage on her own free will.
25. On this point, in the unlikely belief, there was intercourse between the victim and the appellant. One can only deduce the victim proffered herself as an adult. In that case, we resonate with the Judgment in the case of Martin Charo v Republic [2016] eKLR where the judge stated the following;

“I do find that the appellant falls within the defence under section 8(5) of the [Sexual Offences Act](#). It is PW1 who behaved like an adult and engaged in sexual intercourse. The appellant was not expected to inquire from several people about the age of the complainant. The relationship continued for quite a long time to the extent that age became a non-issue. I do



find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.”

26. Similarly, in the case of *Eliud Waweru Wambui v Republic* (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR) (22 March 2019) (Judgment) the three bench judges J. R.N Nambuye, D.K Musinga and P.O Kiage.
27. Magistrate wrongly expressed her limitation of the law on minimum statutory sentence (see page 48 para -15-20 of the record of appeal) and ignored the recent jurisprudence and the locus classicus case *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17th May 2022).
28. The Respondent filed grounds of opposition in place of the submissions to the effect;
 - a. That age of the complainant was sufficiently proved as provided for under the [sexual offences act](#) and a birth certificate was produced as an exhibit.
 - b. That penetration was proved under the sexual offenses act through the evidence of the doctor examining the complainant and producing the P3 form and PRC form.
 - c. That the trial court considered the appellant's defence and subsequently dismissed it.
 - d. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the criminal procedure code.
 - e. That the sentence imposed by the trial court was proper and in line with the sexual offenses Act. Further, the court considered the mitigation and circumstances of the offence and used discretion in sentencing the appellant.
 - f. Thus, urges the court to dismiss the appeal and uphold both the conviction and the sentence
29. Issues, Analysis and Determination
30. After going through the evidence on record, I find the issue is; whether the prosecution proved its case against the appellant beyond reasonable doubt. Whether in alternative the defence under section 8 (5) of SOA obtained in the circumstances? - Was sentences excessive in the circumstances?
31. The duty of a first appellate court; a first appellate court must review and re-evaluate the evidence before the trial court and reach its conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. See *Pandya vs R* [1957] EA 336.
32. The victim testified that on a date she could not recall in November 2020 she had a sexual encounter with the appellant which she never reported to anybody nor complained to any authority yet she is said to have been 17 at the time. She missed her periods in December same year but never reported to anybody nor lodged any complaint to her parents or the authorities.
33. It was only in January when she returned to school and pregnancy tests for the girls were being conducted that she was discovered to be pregnant. This was the third month since the alleged sexual encounter with the appellant that she alleged that the appellant was responsible after she was sent home from school.
34. She was taken for examination it was found by a medical officer that, her hymen was broken no injuries were noted and there was no blood or discharge the doctor also noted that the victim was pregnant. Of course, the prima facie penetration was inferred by the aforesaid findings although scientifically, loss of hymens and contracting pregnancies have been happening without penile penetration. Penis is not



the only “deviser” which can render such phenomena of the loss of the hymens. However the trial court concluded that penetration was proved beyond a reasonable doubt,

35. But then who was the culprit assuming it was penile inflicted happening? The accused/appellant denied and called a witness to support his defence. This is where the corroboration was crucial. The evidence as adduced especially the statement of the victim was never corroborated by any evidence including medical evidence despite the prosecution having every opportunity to do so in particular they failed to seek the victim's child paternity after it became apparent the victim was engaging in sexual relationships with multiple men.
36. Equally, for the record, the birth certificate provided indicated that the plaintiff was born on 31st October 2004 while at the time of testifying on 26th October 2022, she was still a minor 4 days to her 18th birthday but still confirmed that she was happily married to a husband who she never wanted to disclose his name.
37. I agree with the appellant submissions that, the medical evidence produced could not corroborate any evidence of the alleged offence. There was testimony by the defense that the victim had a line of multiple men whom she confirmed during her testimony that she had sexual encounters with thus the medical evidence without a paternity test/report no conviction would have been supported.
38. In any event, the victim according to the evidence unrebutted by the prosecution, behaved like an adult and engaged in sexual intercourse. The appellant was not expected to inquire from several people about the age of the complainant. This is adequate defense under s 8(5) of the sexual offenses act see the case of Martin Charo v Republic [2016] eKLR.
39. The victim has portrayed herself as an adult the entire time by admitting to multiple sexual encounters and her being married while still underage demonstrating that she exhibited herself out as an adult and no man should be held culpable for consensual sex to a 17year who manifests herself as an adult and ends up being married while still underage on her own free will.
40. The court finds that the prosecution never proved its case beyond reasonable doubt and thus the appeal succeeds in its entirety, Thus the court makes the orders;
 - i. The appeal is allowed thus the conviction is quashed and sentence set aside.
 - ii. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 19TH DAY OF MARCH 2024

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C KARIUKI

JUDGE

