



**PEM v Republic (Criminal Appeal E007 of 2021)  
[2024] KEHC 4372 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4372 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E007 OF 2021**

**A. ONG'INJO, J  
APRIL 25, 2024**

**BETWEEN**

**PEM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence by Hon. M. S. Sindani (S.R.M.)  
in Tononoka Children's Court Sexual Offence No. 15 of 2019, Republic v PEM)*

**JUDGMENT**

**Background**

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006. Particulars of the offence are that on diverse dates between the year 2018 and 18.9.2019 in Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of RM a child aged 6 years.
2. In the alternative count, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars are that PEM on diverse dates between the year 2018 and 18.9.2019 in Mombasa County intentionally and unlawfully touched the vagina of RM a girl child of 6 years with his penis.
3. The trial magistrate considered the evidence of six prosecution witnesses and the sworn statement of the appellant together with two defence witnesses, and convicted the appellant who was placed on probation for 3 years.
4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -



1. That the Learned Trial Magistrate erred in law and fact in proceeding with a trial to conclusion on a charge that was defective.
  2. That the Learned Trial Magistrate erred in law and fact in finding that the charge as laid had been proved.
  3. That the Learned Trial Magistrate erred in law and fact in purporting to rely on the evidence of a child without any recorded reason.
  4. That the Learned Trial Magistrate erred in fact and in law in failing to appreciate that a child of such tender age would be liable to be misled and or couched.
  5. That the Learned Trial Magistrate erred in law and fact in failing to note that the charge specifically referred to a particular action reasons which was never proved.
  6. That the Learned Trial Magistrate erred in law and fact in basing a decision on speculation and guess work.
  7. That the sentence was manifestly excessive and harsh.
  8. That Learned Trial Magistrate erred in law and fact in making a finding of guilt on both counts as if the Appellant faced two charges which is a clear demonstration that the Learned Trial Magistrate did not fully understand the charges and the evidence as laid.
  9. That the conviction was not valid, and so was the sentence.
5. The appellant prays that the court sets aside the conviction and sentence and to direct that the appellant be at liberty. The appeal was canvassed by way of written submissions.

### **Prosecution Case**

6. PW1, RM the complainant herein underwent *voire dire* examination and the court established that the child was able to understand the meaning of oath and was intelligent enough to give a sworn statement but due to her tender age the court gave directions that she gives unsworn statement. PW1 testified that she was in class one and that when she came from school P grabbed her bag then put his private part, the one he uses to *susu* in her *bum bum*, the one she uses to *pupu*. That she was at the stairs walking home when he removed all her clothes then he removed his clothes and that on this day she was wearing the PE uniform while another day she was wearing the school dress. PW1 informed court that P kept her dress up then removed her pants and he put his private parts for *susu* in her private parts for *susu*. She stated that there was a time while she was swimming with her friends K, A, A, and A, P took her, kept her costume aside and put his private parts in her *bumbum*. That there is a time he took K and her to his house and removed all their clothes. That while he was sleeping on the ground facing up, he then made them sleep on him, K was facing down while the complainant was facing up but he did not put his *dudu* on any one of them.
7. PW1 stated that on another day at the tanks, he removed his clothes then removed her clothes. That he then sat on the ground and made the complainant sit on him while facing him. That he then put his private parts for *susu* in her private parts for *susu*. PW1 stated that there is another time he removed his private part and made her hand hit his private part and that it was at the stairs when she was going home to drink water. That there is another time he put his private parts in her mouth which happened on the stairs and that she did not tell anyone because he said he was going to kill her if she told anyone. PW1 informed court that he caught her *bum bum* at the stairs all the time and that there was a time Aunt



- F saw him touching her *bum bum* and told him to stop. PW1 stated that P's sister told her his name and that he lived in D8 while D7 was PW1's house. PW1 identified the P as the accused in the dock.
8. PW2, MKK, gave sworn statement that in September, she was working at [Particulars Withheld] Apartment as a house help for Caro and her husband and their house was D6. She informed court that on 18.9.2019 while coming out of the door when going downstairs, she found P with the complainant. That the offender had removed his penis while the complainant was bending looking at it. That she had her clothes on, which were her PE uniform. The PW2 asked them what game that was and the boy zipped up. She then told the complainant to go to the house. That the next day, on 19<sup>th</sup>, PW2 reported the children to their aunts, that she saw them doing something she did not like. She stated that that she saw the incident for the first time.
  9. PW3, LKL, gave sworn statement that on 19.9.2019, she met PW2 on the stairs who told her that the previous day she had found P and the complainant on the stairs and that P had removed his shorts. PW3 asked the complainant about it and she admitted that P had made her sit on his manhood. That PW3 went and explained the incident to B (P's father) who denied and said that P was home the whole day and that he did not come outside.
  10. PW3 testified that she summoned the complainant and PW2 and he still denied having done anything. That this was not the first time PW3 was complaining how P was handling the complainant. That one day in July, PW3's house help informed her that she had seen P touching R's buttocks. PW3 informed court that she had talked to Baba P about it. That PW3 had also been informed by the house help that P was carrying the complainant and K in the swimming pool around his waist and that the complainant had informed PW3 that P pushes their costumes aside. PW3 stated that he informed P's father about it but he said he might be doing it the way he carries his sister and he had raised him well and that he could not do anything wrong.
  11. PW3 further informed court that there was a time the children reported P that he was touching K inappropriately. That she recorded what the children had said and even gave it to the *askari* but when she asked P about it, he denied. That PW3 told P to leave the small girls alone. That in July, PW3 talked to Mama K about what was going on and she asked her to check on the two girls but when the September issue came up, she had to take action.
  12. PW3 went to Nyali Police Station and that she was referred to the gender desk where the complainant narrated her story to the officer. PW3 stated that they were referred to Coast General Hospital and they went there the following day where the complainant was taken through a brief counseling session. That the child was examined, they took some blood samples, checked the genital area and she was put on PEP although they had done HIV tests. PW3 stated that they were given some antibiotics and that the vagina had redness and an old scar. That they went back to Nyali Police Station and recorded their statements.
  13. PW3 testified that there was a time he found P carrying N on his laps and he told the kids that big mama had left just because PW3 told him to stop carrying small girls on his laps. That the complainant informed PW3 of when he took her and K to the house and made them lie on him and that he has ever forced her to lick his penis. PW3 stated that whenever the complainant went to drink water in the house after play, he waylays the child, hold her hand and places it on his penis and that every time they met, he had to do something to her. That PW3 complained about incidences at the swimming pool and the attendant separated swimming days for girls and boys.
  14. PW4, Dr. Saidi Buno, a Medical Officer at Coast General Hospital stated that he had a P3 Form that had been filled by Dr. Nafisa who was on maternity leave and that she had worked with her for two years and knew her handwriting. PW4 stated that the P3 Form was filled on 30.9. 2019 for the complainant



- and the allegations were that the complainant was undressed by someone known to her and attempted to defile her. That her clothes were changed, presentation was fair general condition, other parts of the body were normal, perennial examination on the female genitalia showed that the hymen had been broken with an old scar, and the approximate age was on diverse dates. That the type of weapon was blunt, PEP was given and HIV was negative. That the P3 Form was signed and stamped on 30.9.2019 which was produced as P Exh-1.
15. PW4 also stated that she had a PRC Form filled on 20.9.2019 at the Coast General Hospital for the complainant which was done on 20.9.2019 with the circumstance that the survivor is alleged to have been grabbed a person known to her and forcefully taken to the stairs and defiled. That on the genitalia, the hymen had a broken old scar, the vagina was hyperemic redness, the anal area was normal, she received PEP but no ECP pregnancy prevention or stitch done, urine results were not indicated, HIV was negative, there were no results for VDRL, and the Hepatitis results were not indicated. That the form was filled on 20.9.2019 and stamped on 3.10.2019 which was produced by PW4 as P Exh-2.
  16. PW5, FN stated that she worked as a house help for the complainant's mother. She informed court that there was time the complainant went to the swimming pool belonging to the apartments and that PW5 would watch her from the balcony or through the window. She stated that she saw P holding the complainant on one hand and K on the other caressing their breasts. That he would let one go then pull her towards his chest then let the other go and pull again towards his chest. That PW5 waited for the mother to come back and she informed her.
  17. PW5 testified that during another occasion in July, the complainant had gone out and that she was to come back by 6 pm so after 10 minutes past, PW5 went out to look for her and she met the complainant and P on the stairs and P was caressing her buttocks. That PW5 called the complainant inside the house and later informed her mother. PW5 further informed court that on 19<sup>th</sup> September, PW2 informed her that she found P with the complainant on the stairs and that P had only shorts on with no shirt and that he had pulled his shorts down and the complainant was looking at his penis. PW5 stated that she asked the complainant about it and she confirmed that it had happened. That PW5 informed the complainant's mother about it who went and asked P's father. PW5 identified P as the accused in court.
  18. PW6, No 86xxx Police Constable Winfred Nyange attached at Nyalii Police Station under gender desk stated that on 18.9.2019, a complaint of attempted defilement was brought in and that she advised the parents to take the child to Coast General Hospital for checkup which they did and went back to the station on 20<sup>th</sup>. The report was that a neighbour's help had seen the perpetrator trying to defile a minor. That when they started recording the statements, the complainant informed them that she had been defiled by the accused on several occasions. PW6 stated that she visited the scene and that when the PRC form was collected, it showed that real defilement had occurred. That PW6 summoned the offender's parents to take him to the station to record a statement but she was informed that they had been told not to go to the station on 24.9.2019. That the subject was arrested and taken to the police station then presented to court the following day.
  19. PW6 stated that she visited the scene and drew a sketch of the same. That it is at [Particulars Withheld] Apartments Block D and that there is a staircase leading to door 6 where the incident happened. That the house help who witnessed the incident lives in door 6, the victim lives in door 7 and the offender in door 8. PW6 produced the sketch as P Exh-3 and that from the victim's bedroom and balcony, one can see the swimming pool. That the complainant's parents brought a Birth Certificate and it showed that she was born on 9.1.2013.



## Defence case

20. DW1, VRNL a resident at [Particulars Withheld] Apartments stated that she lived at the apartments for 6 years and knows the offender. DW1 stated that she is the mother to the girl by the name K and that in 2019, she knew about the assault incident on her daughter and another girl. That she saw on WhatsApp from the complainant's mother that there were funny things happening that involved their girls and that DW1 should talk to the girls as she believed they were age mates. DW1 stated that she talked to K about the issue and she said that it was not true that something had happened to her. That DW1 asked her severally and she kept denying. DW1 stated that she would not keep silent if K was assaulted. She stated that K plays with most of the children in the neighbourhood particularly A and A. She informed court that she had never received a report from K about P.
21. DW1 informed court that she would see him come from school late and that she had never suspected him of such allegations as he is one boy you have to probe for him to talk. That K said the complainant was lying about being sexually assaulted. DW1 testified that K's brother is quite protective of his sister and if something happened to her, he would come in for her. That K is one child who would not keep quiet if something happened to her. That when the police contacted her husband, he told them that they had talked to the child and that the allegations are not true.
22. DW2, the offender stated that he was 17 years old and a student at [Particulars Withheld] High School in Form 2. That he left home at 5.30 am to 6.30 am as he was required to report to school at 7.00 am and would leave school at 5.30 pm and arrive home between 6.00 pm to 7.00 pm. He informed court that he lived in [Particulars Withheld] block D8 and that he knew the complainant who lived on the same block, door D7. That he also knew K, A, A, and A. He testified that his daily routine when he got back from school was to shower, change, finish his assignment, and sometimes sent to the shop. He stated that he stays with his parents, most of the time when he comes home from school, he finds them at home. That his mum works with the UN and comes home at 5.30 pm, latest 8.00 pm while his dad is always at home.
23. DW2 further informed court that he did not do anything alleged. That on 18/9/2019, he heard what was said about him and that on that day, he went home at around 10.00 am, it was a Tuesday and he had been sent home for school fees. That at around 12.50 pm, he went out of the house to go buy food which took him 20 minutes and on coming back, he saw the complainant coming from the school van and she was at the parking lot. That the complainant went to the house though they took the staircase together. That DW2 was carrying food following the complainant on the stairs and that they met Aunt C going down but DW2 did not speak to Aunt C.
24. DW2 stated that he never touched the complainant or go near her in respect to the swimming incident and allegations of inappropriately touching the complainant and K. DW2 testified that he usually went swimming with his friends and the kids would jump in the pool and wanted to be chased so they would play with them. He informed court that no one confronted him in the pool about the inappropriate behavior and that the first time to ever be confronted was when he met the complainant's mother at the parking lot and she asked him what he had been doing to her daughter. That she said DW2 had been doing bad things to the complainant and K and that on that day the complainant's mother was in the company of *askari* Sarah, the security officer. He stated that he went home and told his parents about the questioning. DW2 denied ever asking the complainant and K to ever sit on his manhood and that K would go play with his sister but he never saw the complainant at his home. That he has never attempted to sleep with the complainant, never touched her and never attempted to sleep with K.



25. DW3, BMB stated that in September 2019, he was living in [Particulars Withheld] Apartments with his wife and three children aged 16, 14 and 5 years. He informed court that the offender is his firstborn and that at the time, he had just come from Tanzania and was setting up a shop in Mombasa. That his wife was working, P went to [Particulars Withheld] High School, the sister schooled at [Particulars Withheld] Academy Mtwapa and the other had not started school. He stated that in September 2019, they had a house help by the name Rose and that on a normal day, P and the 14 years old would go to school and the 4-year-old would be left at home with the house help. That DW3 would be up and about during the day and would go home between 3 and 9 depending on how the day had been.
26. DW3 informed court that on the 18.9.2019 incident as alleged, he stated that he was unwell on the day, went to see a doctor and returned in the evening. He stated that on the next day, he was informed that he had a visitor where he went and found the complainant's mother who told her that a lady by the name Mary had told her that P had done bad things to her daughter. That when DW3 told her that his son could not do that, she was upset and left, and in the evening her husband went to him over the same thing. DW3 testified that he denied because the place and time does not make sense. That he was told his son was naked on the stairs but it was not possible as the said stairs are used by many people and that the maid said his son did not take long to get back to the house when he was sent to the shop. That when the maid talked to other maids, the girl went up and back down playing normally.
27. DW3 stated that he started seeing strange people in the compound and received calls from the police station. That he was told to take his boy to the police station but before going to the station, the police went for the boy with guns, he was taken away and placed in the cells. DW3 testified that apart from this incident, the complainant's mother also stated that P had manhandled the kids at the pool and was touching the girls inappropriately. That no other complaint was brought to his attention particularly the allegation that P asked the girls to sit on him. That the house is never empty and Rose the house help and the young child are always at home. That DW3 talked to P who was very particular that he never did it and that he was also questioned in front of the complainant's mother.

### **The Appellant's Submissions**

28. The Appellant submitted that the complainant's evidence was taken on 19<sup>th</sup> November 2019 and that after making an attempt at examination of the minor, the Magistrate noted that the child was able to understand the meaning of oath and was intelligent enough to give a sworn statement but due the tender age to give unsworn. The Appellant contends that this was a clear illegality as the law gives the court only two alternatives.
29. The Appellant averred that when testifying, the complainant gave so many indices not covered in the statement and not the subject of the charge which meant the police were not aware of them. The Appellant therefore questioned whether they were new creations, whether she had initially forgotten about them and whether it made her unreliable as a witness.
30. It was submitted by the Appellant that the court somehow believed the complainant and entered a conviction and that the court in her decision on page 62 line 3 to 13 showed that it entertained doubt. The Appellant submitted that the act itself required that the victim's testimony done would be relied on but for reasons to be stated in the judgment but the judgment contained no such reasons.
31. The Appellant pointed out that the Honourable Magistrate found corroboration in the Medical Report particularly the PRC form. That the form seemed to explain to her what the child really meant and that it was produced by Dr. Said Buno who had only sought to produce the P3 form authored by Dr. Nafisa, which was clear on page 25 of the proceedings. The Appellant also submitted that without



warning or leave, the doctor only proceeded and that the author of the document was not called as a witness and the Appellant urged that without the evidence, charges would not stand.

32. According to Submissions by the Appellant, he gave evidence and even called witnesses but their testimony was rejected without explanation. The Appellant therefore urged that the appeal be allowed and the conviction set aside.

### **The Respondent's Submissions**

33. The Respondent submitted on identity of the Appellant that he was positively identified by PW1, PW2 and PW3 who knew him as P. On Penetration of the victim, the Respondent stated that the medical evidence tendered by the Medical Officer shows that the victim suffered a broken hymen and hyperdermic and that the injuries were consistent with penetration. The Respondent indicated that the age of the victim was not disputed as a Birth Certificate was tendered to that effect.
34. On allegations of a defective charge sheet, the Respondent cited section 214 of the *CPC*. The Respondent Submitted that the charge sheet refers to diverse dates between 2018 and 18/9 2019. The prosecution submitted that the charge sheet was proper as the particulars were not at variance with the evidence and that particulars of the same were supported by the evidence of the minor, the doctor, the P3, and PRC forms.
35. On validity of the sentence, the Respondent cited section 8 (2) of the *Sexual Offences Act* which provides for a mandatory minimum sentence of life imprisonment where the victim is aged 11 years or less. The Respondent therefore submitted that the sentence was lawful and urged the honourable court to uphold the conviction and sentence.

### **Analysis and Determination**

36. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

37. After considering the grounds of appeal, records of the trial court and submissions, issues for determination are as follows: -
- i. Whether the charge was defective.
  - ii. Whether the charge as laid had been proved and whether the Appellant was properly convicted
  - iii. Whether the sentence was valid

### **Whether the Charge was Defective**

38. The Appellant alleged in the grounds of appeal that the trial proceeded to conclusion on a charge that was defective. However, in the Appellant's submissions, the defect was not identified and a perusal



of the charge sheet does not disclose any defect to warrant the proceedings being declared a nullity. According to the evidence on record, the Appellant understood the nature of the charge levelled against him and his counsel cross examined the prosecution witnesses exhaustively in relation to the charge against the Appellant. During trial, the Appellant who was represented by counsel did not raise the issue whether the charge sheet was defective or not and the same cannot be raised at this stage.

### **Whether the Charge as Laid had been Proved and Whether the Appellant was Properly Convicted**

39. The Appellant was charged under Section 8 (1) as read together with Section 8 (2) of the [Sexual Offences Act](#) which provides: -
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
40. The age of the complainant, penetration and identification of the perpetrator are the ingredients that are required to be proved by the prosecution beyond all reasonable doubt to establish that the complainant was defiled.
41. Age of the complainant was not disputed as the prosecution produced the complainant's Birth Certificate in court which showed that she was 6 years old at the time the offence was committed. The ingredient of penetration was proved by the P3 and PRC forms on record which were produced by PW4. On identification, the identity of the Appellant was not disputed as the Appellant and the complainant were next door neighbours.
42. The issue in dispute herein is whether it is the Appellant who indeed defiled the complainant. The complainant in her testimony clearly narrated having been defiled by the Appellant on various occasions. PW2 testified that the offender had removed his penis while the complainant was bending looking at it. That she had her clothes on, which were her PE uniform and that PW2 asked them what game that was and the boy zipped up. PW5 also testified that she would watch the complainant from the balcony or through the window whenever she went to the swimming pool and that she witnessed the appellant touching the complainant inappropriately. This court therefore finds that the charge as laid had been proved by the prosecution beyond all reasonable doubt.

### **Whether the Sentence was Valid**

43. The sentence for the offence as provided for under Section 8 (2) of the [Sexual Offences Act](#) is: -
- A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
44. The Trial Magistrate having found that the Appellant committed the offence herein considered the age of the offender and with provisions of Section 144 (v) and (bb) of the [Children Act](#) 2022 at the back of her mind which treats minors in conflict with the law as being in need of care and protection called for a Probation Officer's Report in which it was clear that the Appellant was 17 years old by the time he was found guilty of defilement.
45. After considering the Appellant's mitigation, he was placed on probation supervision for a period of 3 years. This court finds that the sentence passed by the trial court is one of those provided for under Section 239 (1) of the [Children Act](#) 2022 and is therefore lawful in the circumstances.
46. This appeal does not have merit and the same is dismissed.



**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for Respondent

Mr. Magolo Advocate for the Appellant

Appellant present in person

