



**IK v Republic (Criminal Appeal E026 of 2023)  
[2024] KEHC 4356 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4356 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E026 OF 2023**

**LW GITARI, J  
APRIL 23, 2024**

**BETWEEN**

**IK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant in this appeal was charged with defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3/2006) in the Chief Magistrate’s Court at Isiolo Sexual Offences case no. 5 of 2020. The particulars of the charge are that on 12<sup>th</sup> May 2020 at about 2000 hours in Isiolo County within Eastern Region, intentionally caused his penis to penetrate the vagina of DK a child aged ten years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3/2006 in that on the same date he intentionally touched the buttocks breast, vagina of D.K a child aged ten years. The appellant pleaded not guilty. After a full trial he was found guilty on the charge of defilement and was sentenced to serve twenty years imprisonment.
2. The appellant was dissatisfied with the conviction and sentence and filed this appeal which was initially based on five grounds. He however filed amended grounds of appeal which are as follows-;
  1. That the learned trial court magistrate erred in matters of law and fact by failing to note that the prosecution side failed to prove their case beyond reasonable doubt as required by law.
  2. That the trial court magistrate erred in both matter of law and also a fact where he failed to note that the birth certificate was not authentic.
  3. That the learned trial magistrate erred in law and also a fact where he relied upon the contradictory and uncorroborated testimonies adduced by the prosecution witnesses.



4. That the learned trial court magistrate erred in both matters of law and also a fact where he convicted and at the same time sentenced the appellant herein hence failed to note that the vital and crucial witnesses were not called by prosecution side to testify.
  5. That the learned trial court erred in law in upholding his conviction and by failing to consider the appellant was his right to a legal representation as stipulated or in violation of Articles 50(2) (g) (h) of the Constitution.
  6. That the learned trial magistrate erred in law and fact by misapplying the law and shifting the burden of proof to the appellant.
  7. That the trial court magistrate erred in both matters of law and fact where he failed to consider the time that was spent in custody while undergoing the trial as part of my sentence pursuant to Section 33(2) of the criminal Procedure Code. CPC.
3. The respondent opposed the appeal and filed written submissions. They urge the court to find that they discharged the burden to prove the charge against the appellant beyond any reasonable doubts and the appeal is without merits.

### **Summary Of The Prosecution's Case**

4. The complainant DK (PW1) who was aged thirteen (13) years testified that on 12<sup>th</sup> May, 2020 the appellant who she knew before went to her home and asked when her grandmother would come as he alleged that he wanted some seedlings. The complainant's mother told him that she would not come as there was corona. The complainant stepped out to go for a call of nature. The appellant followed her and dragged her outside the gate where he led her to a maize plantation and raped her. The complainant told the court that the appellant undressed her, removed her trouser and underpants he then removed his trouser and penetrated her vagina with his penis. The appellant then warned her not to tell anyone.
5. The complainant went home and reported to her mother what had happened. She in turn reported the matter to the police. The complainant was examined at Isiolo General Hospital where a P.3 form was filled. The appellant was arrested the following morning.
6. RM (PW 2) is the complainant's mother. Her testimony is that the appellant went to her house on 12<sup>th</sup> May 2020 at about 5.00 p.m and asked whether her mother would visit Isiolo. He wanted some Irish potatoes from her for him to plant. The appellant sat down and he served him tea and he was also chewing Miraa. The complainant who was her daughter said she was going to the toilet. The appellant also said he was leaving. The complainant stayed for about one hour before she returned. On coming back she declined to say where she was so she beat her up. Later she disclosed that the appellant dragged her to a shamba and slept with her. She checked the complainant and found out that she was not even wearing any under pant. She had on a trouser but the pant was with her. She went and reported the matter at Kiwanjani. She was examined at Isiolo General Hospital and a P.3 form was filled. According to PW 2 the complainant was thirteen years old as she was born on 10<sup>th</sup> December, 2006 as per her birth certificate which was produced as exhibit 4. PW 2 told the court that the appellant was a family member who she had known previously.
7. Doctor Daudi Dabasao (PW 3) testified on behalf of Doctor Karayu who had examined the complainant and filled the P.3 form. The witness testified that the complainant was fourteen years old. She alleged to have been defiled by a person who was well known to her. That according to the complainant the perpetrator used a condom. On examination the hymen was broken a fact which proved that there was penetration. The P.3 form was produced as exhibit 1. He also produced lab request, lab results and outpatient card as exhibit 2a, b and C respectively.



8. Police Constable Woman Grace Galgalo PW 4) is the investigating Officer. On 13<sup>th</sup> May 2022 she was informed of a case of defilement which was reported on 12<sup>th</sup> May, 2022 at Kiwanjani Police post. She was instructed to collaborate with the arresting officer I.O Sang from Kiwanjani Police Station. The report was OB/22/13/5/22 and was made by the complainant's mother one P who reported that her daughter DK was defiled by the appellant who had gone to their home that same night. The child was taken to hospital. She produced the birth certificate as exhibit 4.
9. The prosecution closed its case after calling the four witnesses and the learned trial magistrate ruled that the appellant had a case to answer.

#### **Defence Case.**

10. The appellant gave his defence on oath and stated that on the material day at 2000 hours he went to his home and was watching T.V. He then slept. The next morning that is 13<sup>th</sup> May 2022 police went to his house and arrested him. At Kiwanjani Police post he saw the complainant's mother. Later police officers went and told him that she was claiming that he had stolen her trees and was demanding Kshs.20,000/- to solve the matter. He declined. He was then taken to Isiolo Police station. She called her mother and informed her of the demand. He was then charged. He testified that the complainant said she was fifteen (15) years.
11. This appeal was canvassed by way of written submissions.

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

12. He submits that the findings of the Clinical Officer who examined the complainant remained unanswered through out the trial. That there was no clear evidence that the minor was defiled or not. It was the appellant's submission that the prosecution's case was not proved beyond any reasonable doubts. It is the appellants case that the birth certificate was not authentic as it did not bear the stamp of the maker and was obtained during the pendency of this case. Further that the age of the complainant was not known and remained unknown to date. He urges the court to find that the age of the complainant was not proved beyond any reasonable doubts. The appellant takes issue with the fact that the prosecution was given leave to amend the charge sheet but they did not. He submits that vital witnesses were not called. That the evidence tendered was contradictory and failed to proof the charge to the required standards. The appellant has relied on various authorities and urges this court to disallow the appeal and set him at liberty.

#### **Submissions By The Respondent**

13. He submits that the charge against the appellant was proved beyond any reasonable doubts.

#### **Analysis And Determination**

14. This is a first appeal and this court has a duty to analyze and evaluate the evidence which was adduced before the trial court and come up with its own independent finding. The appellate has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellant court's own independent finding. This principle has been considered in various decisions of this court and those of the Court of Appeal. The leading authority on the subject is *Okeno v Republic* (1972) EA 32.



In this case the court stated-;

“The duty of the 1<sup>st</sup> appellate court is to analyze, reevaluate the evidence which was before the trial court and itself come up with its own conclusion on the evidence. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified and must leave room for that. The Court of Appeal in the case of David Njuguna Wairimu v Republic (2010) while citing with approval the case of Okeno v Republic Supra, stated as follows:- The duty of the first appellate court is to analyze, re-evaluate the evidence which was before the trial court and itself come up with its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellant court may depending on the fact and the circumstances of the case, come to the same conclusion as those of the lower court. It may reverse 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 decision.”

The court of appeal further stated that – “an appellant on a 1<sup>st</sup> appeal is entitled to expect the evidence as whole to be subjected to a fresh exhaustive examination (Padya v Republic 1975 EA 336) and that the appellate court’s own decision on the evidence. the appellate court must itself weigh the conflicting evidence and draw its own conclusions.

In doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter’s v Sunday Post 1978 E.A 424”.

15. I have considered the evidence tendered by the prosecution before the trial court and the submissions. In this appeal I will first deal with the proof of age of the complainant which is one of the critical ingredients forming the offence of defilement.
16. The appellant is charged with defilement contrary to Section 8(1) and 8(2) of the [Sexual Offences Act](#). The Section 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.
  - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
  - (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.

It is clear from the section that what determines the provisions under which the person is charged under the section is the age of the victim. Under 8(2) the charge is preferred if the victim is below the age of twelve years. The victim is a child of tender years, Section 8(3) is where the victim is between thirteen and fourteen years and 8(4) is where the victim is between the age of sixteen and seventeen years. The charge sheet must therefore specify the section under which the person is charged.

It is clear from Section 8 of the Sexual Offence Act (supra) that age is one of the critical ingredients of the charge under that section see Charles Wamukoya Karam V Republic Criminal Appeal No. 72/2013. See also Dennis Njuki Muranga v Republic (2020) eKLR



where the court stated that in a case of defilement, the prosecution must establish the complainant's age, penetration as well as the identity of the perpetrator.

17. I will now turn to determine the question whether age of the complainant was proved. In cases of defilement, the three ingredients must be proved but age must first be proved as it forms the basis for charging the suspect with defilement even before the other two are established. The prosecution charged the appellant with defilement under Section 8(2) of the *Sexual Offences Act*. The particulars stated that the complainant D.K was a child aged ten (10) years. The Section 8(2) provides that a person commits an offence of defilement where the child is aged eleven years or less. For the offence to be disclosed under Section 8(2) the prosecution must prove that the victim was eleven years old or less.

18. The evidence which the prosecution placed before the court was that the victim was 13 years old. See page 16 of the record. Even when I consider that she testified nearly one year after the offence was committed, she could have been at least eleven (11) years not thirteen.

The other age was given by the complainant's mother who testified that the complainant was born on 10<sup>th</sup> December, 2006. This interpreted to 14 years as at 12<sup>th</sup> October, 2020. After the testimony of PW 2 the respondent applied to amend the charge for the age to read thirteen (13) years. Though the court allowed the prosecution to amend the charge, it was never done. The next age was given by the doctor (PW 3) who examined the complainant on 13<sup>th</sup> May 2020 a day after the offence was committed. According to him the complainant was 14 years old.

Finally, the investigating Officer testified that the complainant was aged fourteen years, the birth certificate showed the date of birth was 10<sup>th</sup> December, 2006 meaning she was 13 years old at the time of the incident.

The birth certificate was produced as exhibit 4. The birth certificate was obtained on 19<sup>th</sup> March 2021 which was during the pendency of this case. There is not much which can be said about the contradictions on the age of the minor other than that there are contradictions which were material in the prosecution's case. The charge sheet having stated the age of the complainant, the evidence on record ought to have proved without any shred of doubt that the complainant was ten years old when the offence was committed.

19. The courts have held that proof of age may be by age assessment report by a medical practitioner, a birth certificate a baptism card and any other credible evidence. The prosecution relied on a birth certificate which was obtained during the pendency of the case though the doctor said he had assessed the age as 14 years at the time the offence was committed. The P.3 states at section c (1) that the approximate age is  $\geq 10$  years. This shows that the doctor was not candid on the age of the complainant. His evidence contradicts the P.3 form. The state did not amend the charge sheet. It is therefore clear from the record that the evidence adduced did not support the charge.

20. The prosecution relied on the case of *Joseph Kieti v Republic* (2014) eKLR. I find that the authority is not relevant as the prosecution did not prove the age as stated in the charge. In this case the age was not proved with cogent evidence in view of the material contradictions. The appellant must get the benefit of doubt.

21. On Penetration the complainant testified that the appellant used a condom. The evidence of the mother (PW 2) was that the complainant had sperms on her genitalia. PW 3 the doctor stated that the complainant stated that the perpetrator used a condom. The P.3 form shows that no tears were noted on the genitalia, no discharge but hymen is broken- old. The broken hymen was therefore not relevant to the charge facing the appellant as it was old broken hymen. There was nothing relevant to support the allegations of penetration as the hymen was not freshly broken and there were no tears. The



evidence was also contradictory as the mother alleged she saw sperms while the complainant alleged a condom was used. I find that in the absence of positive evidence on the genitalia and hymen not freshly broken, the ingredients of penetration was not proved. On the identity of the perpetrator, there is no dispute that the appellant was well known to the complainant. I however note that the appellant gave a plausible defence and in the light of the contradictions in the evidence, I find that the prosecution did not discharge its burden to prove the charge against the appellant beyond any reasonable doubts.

### **Conclusion**

22. The appeal has merits. I allow the appeal. I set aside the conviction and sentence. The appellant be set at liberty unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF APRIL 2024**

**HON. LADY JUSTICE L. GITARI**

**HIGH COURT -JUDGE**

In The Presence Of

Court Assistant – Tupet

Applicant

