



**Hassan v Director of Public Prosecutions (Criminal Appeal
E011 of 2023) [2024] KEHC 6397 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E011 OF 2023
TW CHERERE, J
MAY 30, 2024**

BETWEEN

ABDI HUSSEIN HASSAN APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal against judgment, conviction and sentence in Isiolo Criminal
S. O No. 3 of 2018 by Hon. E.Shimonjero (SRM) on 25th January, 2023)*

JUDGMENT

1. Abdi Hussein Hassan (Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with 8(3) of the [Sexual Offences Act](#) No 3 of 2006. The offence was allegedly committed between 14th and 15th February, 2018 against KAM a girl aged 12 years' old. Appellant also faced an alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006 by unlawfully touching A. M's vagina.
2. Complainant stated that she was defiled by one Ile whom she used to see on the road on her way to school. Complainant identified Appellant in the dock as the one that defiled her. PW2 stated she interrogated the complainant and she said she was defiled by Abdi. The witness together with members of public arrested Appellant and handed him over to the police.
3. Complainant's certificate of birth PEXH. 5 revealed that she was born on 16th August, 2004.
4. The P3 form PEXH. 4 revealed that complainant had a broken hymen and inflammation of the vaginal wall from which it was concluded that she had been defiled.
5. In his sworn defence, Appellant stated he was sick on the material date and did not leave home. He denied the offence.



6. After the conclusion of the trial, Appellant was convicted on the main charge and subsequently sentenced to 20 years' imprisonment.

Appeal

7. Dissatisfied with the conviction and sentence, the appellant lodged this appeal mainly on two grounds:
 1. Charge sheet was defective
 2. Medical evidence did not support the charge
 3. Prosecution case was not proved to the required standard
8. Ms. Rotich opposed the appeal on the grounds that all the ingredients of the charge were proved to the required standard and Appellant was properly identified as the assailant.

Analysis and determination

9. On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit. (See *Kariuki Karanja v Republic* [1986] KLR 190).
10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions filed for the Appellant and oral submissions by Ms. Rotich for the DPP.
11. Concerning the Appellant's contention that the charge is defective charge, it was submitted that the defect is in the fact that the charge sheet stated that the offence was contrary to Section 8(1) (3) of the *Sexual Offences Act*, a section that is non-existent.
12. The type of complaint by the Appellant should be decided on the test provided in Section 382 of the *Criminal Procedure Code* which provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the Complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice”.
13. A finding, sentence or order passed by a court of competent jurisdiction shall only be reversed or altered on appeal or revision if the error, omission or irregularity in the Complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial occasioned a failure of justice: And in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.
14. The section provides insulation from attack of such finding or sentence except on the basis that injustice resulted from the error or defect. (See *Samuel Kilonzo Musau v Republic Criminal Appeal No 153 of 2013*). The offence of defilement is known to law and is established in section 8(1) of the *Sexual Offences Act*. The appropriate penalty clauses are section 8(2) (3) and (4) of the Act.
15. In the absence of evidence to demonstrate that the defect occasioned Appellant any injustice, the ground that the charge sheet was defective fails.



16. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant. (See *George Opondo Olunga v Republic* [2016] eKLR).
17. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010 the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.
18. Complainant’s certificate of birth PEXH. 5 revealed that she was born on 16th August, 2004. The trial magistrate’s finding that she was 13 years and 6 months at the time the offence was committed and therefore a minor was therefore well founded.
19. Concerning medical evidence, the P3 form PEXH. 4 revealed that complainant had a broken hymen and inflammation of the vaginal from which it was concluded that she had been defiled.
20. Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”
21. From the foregoing, I find that the trial magistrate’s finding that penetration was proved was well-grounded and reject the contention that medical evidence did not support the charge.
22. Concerning the identity of the perpetrator, Complainant was the sole witness and she stated that she was defiled by one Ile whom she used to see on the road on her way to school.
23. In *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal stated as follows regarding reliance on Section 124 of the *Evidence Act* to convict:

“as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:
“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.” (emphasis added).
24. PW2 stated she interrogated the complainant and she said she was defiled by Abdi. Whereas Accused is indeed known as Abdi, the prosecution did not lead evidence that he was also known as Ile. At the close of the prosecution case therefore, there was no evidence to link Appellant with Ile that defiled the complainant.
25. I have considered whether identification of Appellant in the dock was satisfactory. In the case of *Gabriel Kamau Njoroge v Republic* (1982 -88) 1 KAR PAGE 1134, the Court of Appeal held as follows:

“Dock identification is worthless; the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should



be asked to give description of the accused and the prosecution should then arrange a fair identification parade.”

26. Whereas there is evidence that during the hearing complainant pointed at Appellant as the one that defiled her, I find that dock identification is without value and Appellant cannot be said to have been properly identified as the perpetrator. The Prosecution case was therefore not proved to the required standard and the court erred in rejecting Appellant’s defence.
27. In the end, the appeal succeeds and it is hereby ordered:
 1. The conviction is quashed
 2. The 20 years’ imprisonment term imposed on the Appellant is set aside
 3. Appellant shall be set at liberty unless otherwise lawfully held

DELIVERED AT MERU THIS 30TH DAY OF MAY 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For Appellant - Ms. Nyasani Advocate

For DPP - Ms. Rotich (PC-1)

