



REPUBLIC OF KENYA



KENYA LAW
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**HMM v Republic (Criminal Appeal 26 of 2017)
[2022] KECA 1182 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1182 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 26 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 21, 2022**

BETWEEN

HMM APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kisumu
(Riechi, J.) dated 14th November, 2016 in HCCRA NO. 145 of 2015)*

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between August 2013 to June 23, 2014 at [particulars withheld] in Kisumu and [particulars withheld] within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of MA (minor) a girl aged 14 years.
2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
3. The appellant denied the charges leading to a trial in which the prosecution called 4 witnesses. The minor testified as PW1 and produced her baptismal card which indicated that she was born on September 27, 2000. She narrated that in August 2013 she went to visit her sister and stayed with her for one month. On her way back home she found that she did not have enough fare and sought assistance from a lady by the name L, a relative of her mother's. While at L's place, the appellant approached her and promised to give her money for her fare back home. He did not. Instead, he took her and they went to a place known as [particulars withheld] where they stayed together for one month. PW1 added that the appellant would not allow her to leave the house. He would cover her mouth with clothes and



have sex with her. They later moved to a place known as [particulars withheld] where they lived “as husband and wife.”

4. PW2, the mother of PW1 confirmed her date of birth. She repeated PW1’s account that between August 2013 and June 23, 2014 she had travelled to see her sister at a place called [particulars withheld], but on her way back she lacked money for fare and the appellant lied to her that he would give her the same. PW2 explained that she received a call from the wife of the Chief of [particulars withheld], informing her of the whereabouts of PW1, whereupon she went to pick her. PW3, the investigating officer, gave evidence to the effect that on June 24, 2014, he received a report of defilement from PW1 and PW2 and he issued them with a P3 form. PW4, a clinical officer, produced the P3 form and treatment card for PW1. He testified that upon examination of PW1, he concluded that she was involved in active sexual intercourse due to her broken hymen. PW1 was also found to be HIV positive.
5. At the close of the prosecution case, the learned Resident Magistrate found that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied defiling the minor. He claimed that the minor was a street girl whom she met in Kisumu town and she asked him for a place to sleep. The appellant stated that the following morning when he asked the minor to leave she refused claiming that she did not have parents. The appellant further testified that he agreed to continue staying with the minor on the basis that she would be his house help.
6. The trial magistrate evaluated the evidence tendered, found the appellant guilty as charged, and sentenced him to serve 20 years imprisonment.
7. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Riechi, J re-evaluated the evidence on the record and delivered judgment on November 17, 2016 upholding the conviction and sentence meted on the appellant.
8. Still aggrieved, the appellant preferred the instant appeal based on 9 grounds, which are that the learned judge erred in law by;
 - a. Failing to comply with the provisions of section 211 of the [Criminal Procedure Code](#).
 - b. Not according the appellant adequate statements and legal representation at all stages of trial in the lower courts.
 - c. Failing to subject the appellant to medical examination as mandatorily required in offences under the [Sexual Offences Act](#).
 - d. Convicting the appellant on a fatally defective charge sheet.
 - e. Not appreciating that the uncorroborated evidence of a minor could not be corroborated by the evidence of a biased mother.
 - f. Relying on inconclusive evidence of an unqualified clinical officer.
 - g. Failing to resolve the inconsistencies in the prosecution evidence as to the HIV status of the complainant and the appellant.
 - h. Sentencing the appellant to an illegal and inordinately long and wrong sentence.
9. During the hearing of the appeal, learned counsel Mr Kasamani appeared for the appellant. There was no appearance for the state, nor did it file submissions in response to the appeal.
10. Mr Kasamani relied on his submissions filed before this court. He faulted the learned judge for failing to find that the trial court had not complied with section 211 of the [Criminal Procedure Code](#). The



section requires that where an accused is placed on his defence, the court should again explain to him the substance of the charge and inform him that he has a right to give evidence on oath upon which he is liable to cross-examination, or he can choose to give unsworn evidence. The court is also required to ask the accused whether he has any witnesses.

11. Counsel contended that at the commencement of the trial the appellant had been unrepresented and when he got counsel to represent him four witnesses had already testified, and only 2 were recalled. Mr Kasamani further argued that given that the complainant was found to be HIV positive upon examination by PW4, it was proper for the appellant to be also tested for HIV in order to reach a conclusive finding as to whether he had sexual intercourse with the minor. It was urged that the conduct of the minor was not such as would have put the appellant on notice that she was a minor.
12. Counsel submitted that considering the duration PW1 lived with the appellant, it seemed that she was a willing participant in the incident. He contended that the prosecution failed to call some crucial witnesses like, L, the lady who rescued the minor, and the Chief's wife who informed PW2 of her daughter's whereabouts. Counsel reproached the learned judge for sentencing the appellant to a term of 20 years imprisonment, arguing that based on the lack of age assessment, PW1's uncorroborated evidence, the absence of a cogent medical report and the conduct of PW1 leading to the appellant believing that she was over 18 years, the learned judge should not have convicted the appellant "to the maximum sentence provided by law."
13. This being a second appeal, the court restricts itself to consideration of questions of law only by dint of section 361(a) of the *Criminal Procedure Code*. This was affirmed by the holding of this court in *David Njoroge Macharia vs Republic* [2011] eKLR;

"That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v R* [1984] KLR 611."
14. We note that in arriving at his decision, the learned judge considered whether the three ingredients of the offence of defilement were proved, that is, the age of the complainant, positive identification of the accused and proof of penetration. Upon evaluation of the law and evidence, the learned judge found that all the three elements had been met. Specifically, the minor's baptismal card which showed her date of birth, the fact that the appellant admitted having met the minor in Kisumu whereupon she asked him for a place to sleep, went to show that there was no mistaken identity of the appellant. Penetration which was proved by the evidence of the minor and the medical examination. The learned judge having anchored his decision on the evidence that is plainly on record, we find no reason to fault him.
15. On the question of non-compliance with section 211 of the *Criminal Procedure Code*, the learned judge observed, rightly so, that the appellant was ably represented by counsel who, although coming on record later, recalled all the witnesses who had earlier testified and cross-examined them extensively. The appellant also proceeded to give his own sworn evidence. The learned judge further noted that although it is desirable that the address to the accused in explaining the provisions of section 211 of the *Criminal Procedure Code* should be recorded by the trial court, where an accused is represented by counsel, the omission of any such recording cannot be said to have occasioned prejudice, especially where the accused chooses to give sworn evidence as in the instant case and is cross-examined.



16. We concur with the learned judge's reasoning more so because, at close of the prosecution case, on April 10, 2015, there was a ruling. Although the nature of that ruling is not readily evident, it seems to be the point at which, the trial court put the appellant on his defence and explained the import of section 211. In our considered view therefore there was no failure of justice.
17. We observe that in mitigation the appellant pleaded for leniency, urging that he is disabled and has many siblings that depend on him. However, we are also mindful of the circumstances under which the offence was committed. Evidence was led to the effect that for a lengthy period of about a month, the appellant had locked up the minor in his house where he tortured and defiled her. Accordingly, we are not persuaded that he deserves leniency.
19. In the result, we find the appeal to be devoid of merit and dismiss it in its entirety.
Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

