



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. E002 OF 2021

JOSEPH KERAGE WANENE.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Joseph Kerage Wanene, the appellant herein, was convicted by the Resident Magistrate Kehancha Court on 31/12/2020, for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between 20/10/2021 and 31/10/2020, at Sumwa village, Wangirabose Location in Kuria West, the appellant intentionally caused his penis to penetrate the vagina of **EMS** a girl aged fourteen (14) years. The appellant denied the charge and the case proceeded to full trial. Upon conviction the appellant was sentenced to serve six (6) years imprisonment.

The appellant faced an alternative charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act, but no finding was made thereon.

The appellant is aggrieved by the conviction and sentence of the trial court, and filed this appeal through the firm of Muniko & Co Advocates on 22/1/2021. The appellant raised seven grounds of appeal which can be collapsed into two grounds as follows:-

- 1) That the offence of defilement was not proved to the required standard;**
- 2) That the sentence was harsh and excessive.**

The appellant therefore prays that the appeal be allowed, by quashing the conviction and setting aside the sentence.

The court directed that the appeal be canvassed by way of written submissions. Mr. Muniko filed his submission on 28/10/2021, while the prosecution counsel Mr. Kimanthi filed his on 3/11/2021.

Mr. Muniko submitted that the complainants' age was not proved, because there was no documentary evidence produced to prove the same; that the assessment report and health cards are not sufficient to prove age. Counsel dwelt on the issue of age at length in his submission. He also urged that the court failed to consider an option of fine to custodial sentence.

The appeal was opposed Mr. **Kimanthi** submitted that the complainant narrated in detail how the appellant took her to his house, asked her for marriage and had sexual intercourse with her; that PW1's evidence was corroborated by PW2'S evidence; that the appellant was arrested together with the complainant and he did admit in his defence that he had married the complainant and did not know that it was wrong. As for the sentence, counsel argued that it was lenient because under Section 8(3) of the Sexual Offences Act, the minimum sentence is twenty (20) years imprisonment. He urged the court to dismiss the appeal as there are no credible grounds in support thereof.

Being the first appeal, it behoves this court to exhaustively examine the evidence that was tendered in the trial court afresh. I am guided by the decision in **Okeno vs Republic (1972) EA 32**. This court has however to make allowance for the fact that it did not see or hear the witnesses testify.

PW1 EMS, told the court that she is fourteen (14) years and in class seven (7). She recalled meeting the appellant on 25/10/2020. He led her to his home and asked her to marry him which she accepted; that at night, they slept in the same bed and had sex. She said that he put his thing for urinating into her vagina. Next day, she slept in the appellants' grandmothers' house till the day police came to the home and arrested both her and the appellant.

PW2 Omaha Zachary James a clinical officer at Ntimaru District Hospital examined the complainant and the appellant on 2/11/2020. He did not find any injuries on PW1's genitalia but the hymen was perforated and injury was about a week.

PW3 LW, the appellant's mother confirmed that the appellant came home with the complainant and she found the complainant with her mother in law; that the complainant used to sleep with her mother in law; that the appellant said he wanted to marry the complainant.

PW4 Ayub Magaiwa Manga, the Chief of Wangirabose recalled the 31/10/2020 when he accompanied police officers to the appellant's home where they found the complainant who claimed to have married the appellant. Both the complainant and appellant were arrested.

PW5 PC Victor Lusasi corroborated PW4's evidence as to how they arrested the complainant and the appellant.

PW6 PC Sanga Edna was the investigating officer in this matter. She escorted the complainant and appellant for examination and age assessment on 26/1/2020.

In his unsworn defence, the appellant admitted to meeting the complainant. He asked her to marry him and she agreed and that they went with her bag because he wanted to marry her; that he took her home and made her his wife and he did not know that it was wrong.

I have considered all the evidence tendered in the trial court, and the submissions by counsel. The appellant faced a charge of defilement contrary section 8(1) of the Sexual Offences Act. The burden lies on the prosecution to prove its case beyond any reasonable doubt. In a charge of defilement, the prosecution has to prove:-

- 1) that the complainant is a minor;
- 2) that there was penetration;
- 3) the identity of the perpetrator.

The age of the complainant;

The defence counsel made lengthy submissions on the fact that the complainant's age was not proved. The complainant told the court that she is fourteen (14) years. An age assessment was carried out and the report confirmed that the complainant was fourteen (14) years old. The question is whether the evidence on record is sufficient to prove age. It is now settled law that in the Sexual Offences, age cannot only be proved by way of a birth certificate but that there are other ways in which age can be proved. In **Flappyton Mutuku Ngui vs Republic (2012) ECLR**, the court of Appeal held that:-

“Conclusive proof of age in cases under the Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other mode of proof of age are available and can be used in other cases.

In the **Ugandan case of Francis Omuroni vs Uganda** Criminal Appeal, no 2 of 200, the court held,

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”

In the instant case, the court saw the need to take the complainant through *voire dire* examination meaning that by the court's own observation, the complainant looked like a person of tender age. She is in class seven and she underwent medical examination which determined that she was fourteen years old. There is no better evidence that could be adduced by the prosecution. I am satisfied that the complainant's age was proved to be fourteen (14) years old.

On penetration;

The complainant vividly narrated how she slept with the appellant on the first night she went to his house. She said, “He used *mkiwake wakokojoa akaieka vagina yangu.*” that the appellant inserted his genital organ into her vagina. Penetration is defined in Section 2 of the Sexual Offences Act as **“The partial or complete insertion of the genital organ of a person into the genital organ of another person.”**

The complainant did not leave the appellants home till they were arrested on 31/12/2020. The appellant in his defence also admitted that he had married the complainant. PW4 examined the complainant and found that the hymen had been perforated and the injury was about a week and that is a sign that there was penetration. I agree with the trial court's finding that the act of penetration was proved.

Proof of identity of the perpetrator:

The complainant identified the appellant as the perpetrator. She spent seven days in his home. The appellant's mother confirmed that fact and so did the appellant himself. The appellant admitted to have married the complainant. There is no doubt as to who the perpetrator is. It is the appellant.

In the end, I find that the trial court properly found that the prosecution proved the offence of defilement against the appellant beyond all reasonable doubt and the conviction is sound. I affirm it.

The Appellant faulted the court's decision for the reason that the appellant was not given an option of fine. The appellant faced a serious offence of defilement. Under Section 8(3) of the Sexual Offences Act, the minimum sentence is twenty (20) years. In this case however, the accused's age was assessed at eighteen (18) years. He was therefore a minor. He was a first offender. The court called for a probation officer's report which recommended a non-custodial sentence. The court should have considered sentencing the appellant under Section 191 of the Children's Act which provides for the different sentences a minor may be sentenced to. The trial court was in serious error by not invoking the provisions of the Children's Act as respects sentence. For that reason, I set aside the sentence of six (6) years. The appellant has so far served one year imprisonment. He was a minor who is in need of Care and Protection. The court will therefore direct that the appellant placed on probation. I hereby place the appellant on probation for a period of twelve (12) months where he can undergo counseling. It is so ordered.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 24TH DAY OF FEBRUARY 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Kimathi for the Respondent.

Mr. Singei holding brief for Mr. Muniko for Appellant Present.

Nyauke Court Assistant