



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. E041 OF 2021**

**SAMUEL MUCHOZI LUDENYO alias SHAGGY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant herein is **Samuel Muchozi Ludenyo alias Shaggy**. He was convicted by SPM's Court Migori on 4/8/2021 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 unknown dates in November, 2020 and 2<sup>nd</sup> December, 2020 in East Kanyamkago, Location, Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of FAK a girl aged fourteen (14) years.

In the alternative, he faced a charge of committing an indecent act with a child contrary section 11(1) of the Sexual Offences Act. No finding was made on the alternative charge. Upon conviction the appellant was sentenced to serve fifteen (15) years imprisonment.

No finding was made on the alternative charge.

Being aggrieved by the conviction and sentence, the appellant filed this appeal on 11/8/2021, basing it on two grounds:-

- 1) That his constitutional rights under Article 50(2)(g) and (h) of the Constitution were violated when the court failed to explain to him the right to counsel;**
- 2. That the offence of defilement was not proved to the required standard.**

He prays that the conviction be quashed and sentence set aside.

The court directed that the appeal be canvassed by way of written submissions and the appellant filed his submissions on 29/11/2021.

**Mr. Kimanthi**, prosecution counsel filed his submissions on 2/12/2021, opposing the appeal. Counsel submitted that the offence of defilement was proved through the evidence of **PW1 Kosun Dola** a clinical officer; PW2 the complainant who confirmed that she had sex with the appellant; that the complainant's age was assessed and found to be sixteen (16) years and that the appellant was well known to the complainant.

As regards the second ground that the court violated his right under Article 50(2) (g)(h) of the Constitution, counsel agreed with the appellant that indeed the court failed to inform him of his right to counsel which was a violation of his right to fair hearing and it rendered the trial a nullity. He asked the court to consider ordering a retrial.

This is a first appeal and it is required of this court to re-examine afresh all the evidence that was tendered before the trial court, analyse it and arrive at this court's own independent conclusions. This court has however to make allowance for the fact that it neither saw nor heard the witnesses testify. I find guidance in the decision of **Kiilu v Republic (2005)eKLR**.

The Prosecution called a total of four witnesses. **PW1 Kosun Dola** a clinical officer based at Uriri Sub County District Hospital examined the complainant on 3/12/2020 and did not find any bruises or tear to her genitalia. The hymen was intact.

**PW2 FA K.**, the complainant, told the court that Shaggy, the appellant sent one Mary to call her to go to his house. She said it was in October, 2020; that she went to his house later and he told her he wanted to have sex with her. He took her to his bedroom, removed her pant and also his and they had sex with him till 11:00p.m. Later, the appellant opened the window to her house for her and she returned home.

When PW2's mother enquired where she had been, she revealed that she was in Shaggy's house, where they had sex. The mother confronted Shaggy but he denied and disappeared but later when he appeared, he was arrested. Next day on 2/12/2020, she was taken to the dispensary for examination.

**PW3 EMK**, the mother of PW2 recalled that on 1/12/2020, that after supper, the complainant disappeared. She later saw her opening the window to the house at 11:00p.m She enquired from PW2 where she had been and, PW2 claimed to have been from Shaggy's house and that they had sex. PW3 reported to the village elder next day, then reported to Uriri Police Station while the complainant was examined at the hospital.

**PW4 P. C. Luciana Akoth** of Uriri Police Station got a report from PW3 on 3/12/2020 that her daughter disappeared from home on 1/12/2020 about 9:00p.m and returned at 11:00p.m and claimed to have been with her boyfriend Shaggy with whom they had sex. PW4 interviewed the girl who named Shaggy as the culprit and she issued an arrest order; that the appellant was arrested and taken to the police station on 12/12/2020 where he was charged.

The appellant was placed on his defence and stated on oath that on 2/12/2020 he was at Uriri Police Station having been arrested on 29/11/2020 for failure to wear a mask and was released on 2/12/2020; that the incident occurred on 2/12/2020 and that on 12/12/2020, the village elder arrested and took him to the police station for an offence he did not know.

I have considered the grounds of appeal.

The appellant faulted the trial court's decision for violating his right to be informed of right to counsel. Article 50(2)(g) provides as follows: -

**50(2) Every accused person has the right to a fair trial which includes the right -**

**(g) to choose and be represented by an advocate, and to be informed of this right promptly;**

Article (2)(g) is couched in mandatory terms. The said right cannot be limited by dint of Article 25 of the Constitution. The court is mandatorily required to inform the accused person of his right to counsel promptly. This provision has been discussed in various decisions one being the case of **M.M. T alias Aunty vs Republic Migori Criminal Appeal No. 44 of 2019** where Mrima J said as follows:

*11. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.*

The same issue was discussed by Nyakundi J in **Joseph Kiema Philip vs Republic (2019) eKLR** stated as follows:

*".....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced....."*

*.... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings..."*

It is the duty of the trial court to inform an accused of his right to counsel promptly and record it on the court record. Promptly means before plea or soon thereafter but before the hearing. This is to enable the accused prepare for his case by deciding whether or not to get counsel to represent him or if he cannot, to apply to the Legal Aid Committee to avail him counsel if he qualifies. Failure to inform an accused of this right results in a gross violation of his right to fair hearing and the violation renders the trial a nullity. That is the fate of these proceedings.

**Whether the offence of defilement was proved:**

To prove an offence of defilement, the prosecution has to establish beyond reasonable doubt that:-

- 1) **The complainant is a minor;**
- 2) **That penetration is proved:**
- 3) **Proof of identify of the perpetrator.**

**Of Age:**

The complainant (PW2) did not tell the court her age. It means that the prosecutor never asked her how old she was. Similarly, PW1's mother, testified, but again the prosecutor did not enquire from her when the complainant was born or her how old, PW2 was. It is only the investigating officer who produced an age assessment report dated 25/5/2021 which indicated that she was sixteen (16) years old. It was following and dental assessment.

Evidence of age of the complainant in such a case is very crucial because it also determines what sentence will be meted on an accused if a conviction results. I think the Prosecutor was very casual and not keen on proving the offence of defilement because age is a key element in an offence of defilement and specific questions must be put to the victim or the mother / guardian about the age.

In the court of appeal decision of **Flappyton Mutuku Ngui v Republic (2012)EKL.R**, the court said 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 modes of proof of age are available and can be used in other cases.”**

In **Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000**, the court held that medical evidence is paramount in defilement cases to prove the age of the victim may be proved by birth certificate, victims' parents, guardian or by observation and common sense.

In the instant case, the medical evidence suffices as proof of the complainants' age which was found to be sixteen (16) years.

**Of penetration:**

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.”**

In this case, the complainant did not explain what exactly happened between her and the appellant. She said the appellant had sex with her. The description of what penetration entails being a legal term has to be specific. There has to be evidence of the genital organ of the appellant having either fully or partially penetrated the genitalia of the complainant. It is an error for the court accepting the word 'sex' as proof of penetration. The prosecution should have led evidence on what exactly took place between the complainant and the appellant after the act of removing the inner pants and lying on the bed. The trial court has a right to seek clarity from a witness if necessary which the court did not do.

In this case the clinical officer did not find there to have been any bruises or injury to the complainants' genitalia. Although the court recorded that the hymen was intact, the P3 indicates that the hymen was not intact. The clinical officer did not indicate whether the hymen was freshly torn or not. In any case, a missing hymen does not necessarily mean there has been penetration. A hymen may be missing for other different reasons. In this case therefore, there is no medical evidence to support what PW2 referred to as sex. There are different kinds of sex including what is referred to as oral sex and that does not involve penetration and does not constitute an offence under Section 8 of the Sexual Offences Act. In the end, I find that the act of penetration was not proved to the required standard.

**Whether the appellant was the perpetrator;**

The appellant was well known to the complainant. The complaint said that the appellant is her boyfriend. They are from the same neighbourhood. I believe and find that the complainant was at the appellants house on the night of 1/12/2020. However, what is not clear is what happened between them. There is not even a shred of evidence that the appellant touched any part of the complainants' body for him to have been convicted of the alternative charge of committing an indecent act. For the above reasons, I find that the prosecution failed to prove the offence of defilement to the required standard.

Since the offence of defilement was not proved, this court will not order a retrial having found that the trial was a nullity. This is because a retrial is not meant to fill in the gaps in the prosecution case. For that reason, I find the trial court erred in arriving at the conclusion that the offence of defilement had been proved. I will give the appellant the benefit of doubt and acquit him of that charge of defilement as charged and even the alternative. The appeal is allowed and the appellant is set at liberty forthwith unless otherwise lawfully held.

**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.**

**APPELLANT PRESENT IN PERSON.**

**NYAUKE COURT ASSISTANT**