



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION- MILIMANI LAW COURT**  
**CRIMINAL APPEAL NO. 21 OF 2017**  
**CHRISTOPHER KIMATHI NJAGI.....APPELLANT**  
**VERSES**  
**REPUBLIC.....RESPONDENT**

(Being an appeal from the original conviction and sentence in Criminal Case No. 15 of 2015 at Chief Magistrates Court Milimani Law Courts by Hon. M. Mutuku (Ms) – SPM on 6<sup>th</sup> February 2017)

**JUDGMENT**

1. **Christopher Kimathi Njagi**, the Appellant, was arraigned in court following allegations of having defiled two (2) minors, JT and SO, in contravention of **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The offences were stated to have been committed at [particulars withheld] trading Center, within Kajiado County at unknown time during the month of August, 2014.
2. In the alternative, it was alleged that he committed indecent acts with the stated children by placing his male genital organs (penis) and fingers on the surface of their female genital organ (vagina).
3. In both instances the acts committed were stated to have been done unlawfully and intentionally.
4. To prove the case the prosecution called a total of eight (8) witnesses. **PW1 RT**, the mother of SO, the complainant in the 2<sup>nd</sup> count testified that in the month of December, 2014, the complainant, aged 15 years then, complained of pains in her genitalia. She took her to hospital (Karen Health Care) where a test was conducted at the laboratory and it was established that she was pregnant, and, had an infection. On enquiring who the person responsible was, the minor gave the name of a neighbor, "**Baba N**" as the perpetrator of the act. PW1 sought assistance of the minor's school Principal but no help was forthcoming, therefore, she sought assistance from CRADLE, a Non-Governmental Organization (NGO). Subsequently she learned of the Appellant's arrest.
5. **PW2 JSZ**, the father of JT, the complainant in the 1<sup>st</sup> count testified to have been told by her daughter that she was pregnant. When asked about the person responsible. She stated that it was Kimathi, his neighbor and acquaintance.  
  
He reported the matter to Ngong Police Station.
6. **PW3 SOT**, stated that during the month of August, 2014, on a date that she could not remember, she was sent by E to deliver vegetables at the house of the Appellant. When she attempted to leave, the Appellant locked the door and forced her on to the bed and removed her panty. The Appellant threatened to cut her with a knife hence she did not scream. He had penetrative sex with her and released her to go home. Three (3) months later, it turned out that she was pregnant.
7. **PW4 Dr. Joseph Maundu**, examined JT following allegations of having been defiled. He found her hymen having been broken and she was 16 weeks pregnant. He also examined S O who was 30 weeks pregnant whose genitalia was normal with a torn hymen.
8. **PW5 JTM**, the complainant in the 1<sup>st</sup> count recalled the 20<sup>th</sup> October, 2014 as the date when she went to the house of the Appellant to charge a cellphone as he was the only person with electricity where they lived. He locked the door and forced her to have penetrative sex with him. A month later she became pregnant. She told her father about the incident on realizing that she was pregnant. Subsequently she gave birth to a baby boy.

9. **PW6 Simon Nzambu**, a clinical officer, adduced in evidence a Post Rape Care Form, filled at Nairobi Women Hospital.
10. **PW7 Dr. Muendo Muthini**, of the Government Chemist conducted DNA analysis on the children who were sired by the complainants and following the examination, it was concluded that there were 99.99% chances that the Appellant was their biological father.
11. **PW8 No.42378** Corporal Francis Sangala investigated the case and caused the Appellant to be charged.
12. Upon being put on his defence, the Appellant denied having committed the offences. He stated that he was offered a job in Eastleigh which he took up from the 26<sup>th</sup> July, 2014. As he worked he used to go to his house in Ngong on Saturday, sleep and travel back on Sunday. That he worked until the 26<sup>th</sup> February, 2015 when he travelled to [particulars withheld] village. On the morning of 27<sup>th</sup> February, 2015 as he prepared breakfast prior to travelling to Meru to attend a funeral, he was arrested and taken to Ngong police station where it was alleged that he had not paid a certain lady a debt. On the 28<sup>th</sup> February, 2015, he was removed from police cells and he saw the complainants and their parents, persons who were known to him as neighbours. They alleged that he had defiled the complainants and demanded Ksh. 200,000/-. That he was arraigned in court and thereafter taken to the Government Chemist together with the complainants where tests were done.
13. The trial court considered evidence adduced and reached a finding that the defilement occasioned resulted into conception as DNA reports were irrefutable. Consequently, it dismissed the defence put up. It convicted and sentenced the Appellant to serve fifteen (15) years imprisonment on the 1<sup>st</sup> count and twenty (20) years imprisonment on the 2<sup>nd</sup> count, respectively. Sentences were ordered to run consecutively.
14. Aggrieved, the Appellant appeals on grounds that: elements of the offences (penetration) were not conclusively proved; the Appellant was not issued with statements as required by law; the prosecution's evidence was based on suspicion and that, the prosecution's case fell below the required standard of proof.
15. The Appellant canvassed the Appeal through written submissions. It was urged that there was no dispute of the fact of penetration and that the Appellant and the Complainants were known to one another. His contention is the fact of the perpetrator of the act of penetration. He argued that the DNA report adduced in evidence was tainted but he was not able to challenge it being a layman. That his rights to a fair trial were violated as he was not provided with witness statements.
16. Further, he complains that the prosecution did not rebut the defence put up, which the court never gave consideration to.
17. The State did not file any submissions in response.
18. This being a first appeal, I am duty bound to appreciate what transpired in the trial court by scrutinizing the evidence adduced with care and caution. In doing so I must reconsider the evidence afresh bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. In the case of **Okeno Vs. Republic [1972] E.A 32** it was captured as follows:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”**

19. The essential ingredients which must be proved in a case involving defilement is now trite that:

- (a) **The appellant must have committed an act of penetration against the victim.**
- (b) **The victim's age must be under eighteen years old.**
- (c) **That the appellant was the one who was the perpetrator of the offence.**

In the case of Charles **Wamukoya Karani v R CR Appeal No. 72 of 2013** the court held as follows:

**“The critical ingredients forming the offence of defilement are, age of the complainant, proof of penetration and positive identification of the assailant.”**

20. S.O. was stated to have been fifteen (15) years old while JT was indicated as having been sixteen (16) years old, at the time of the incident. In the case of **Francis Omuroni –vs- Uganda, Criminal appeal No. 2 of 2000**, the court of Appeal stated that:-

**“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...”**

21. In the case of **Mwalengo Chichoro Mwajembe vs. Republic Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

**“.....the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”**

22. A child Immunization card was adduced in evidence which showed that SO was born on 9<sup>th</sup> November,1999. The Complainant was in class eight (8) at the time of the incident, aged 15 years.

23. In respect of JT, a baptism card was adduced in evidence which had an entry indicating her date of birth as 5<sup>th</sup> October,1998.

This was proof that she was sixteen (16) years old then.

24. **Section 2** of the **Children Act** defines a child as a person under the age of eighteen (18) years. Therefore, both complainants were children, a fact not in dispute.

25. The contentious issue is whether the Appellant herein was the perpetrator of the act. In both cases, the complainants allege that the Appellant had coitus with them, and having threatened them, they remained silent until their parents discovered that they were pregnant.

26. In the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** the Court of appeal stated:

**“... the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”**

Needless to add that the fact of defilement can be proved solely by evidence of the complainant, as long as the court finds her/him to be truthful.

27. In the instant case the complainants’ evidence that the person who violated them sexually was the Appellant was confirmed by the DNA test that was conducted where the Appellant was found to be the biological father of the children sired by both of them.

There was no evidence to challenge the fact of paternity.

28. It is also urged that the Appellant’s rights were violated as he was not supplied with witness statements. In **Simon Githaka Malombe v Republic NYR CA Criminal Appeal No. 314 of 2010 [2015] eKLR**, the Court of Appeal quashed the conviction on the ground that the prosecution had failed to furnish the appellant with witness statements despite the appellant requesting for them.

However, it hastened to add thus:

**“We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case”**

29. Prior to the prosecution witnesses being called to testify, on the 21<sup>st</sup> May, 2015, the trial magistrate made an order for the Appellant to be supplied with prosecution witness statements. At one point in time, the Appellant was represented by an advocate. The issue of statements was never raised, therefore, the argument is not in accordance with the facts.

30. From the foregoing, it is apparent that the conviction was not founded on suspicion as alleged but on sound evidence, which I affirm. On sentence, I am called upon to unsettle the order of the trial court so that the sentences imposed can run concurrently.

31. **Section 14** of the **Criminal Procedure Code** provides as follows:-

**“... (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently...”**

32. In the case of **Peter Mbugua Kabui vs Republic (2016) eKLR** the Court of Appeal stated as follows: -

**“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same ”**

33. The Appellant herein defiled the complainants at different times, therefore, it was not illegal for the trial court to mete out a consecutive term. The consecutive term imposed, considered as a whole, amounts to 35 years, therefore, due to the severity of the sentence, I set aside the consecutive order which I substitute with a concurrent one. For avoidance of doubt, sentences imposed will run concurrently from the date of conviction and sentence, by the trial court.

34. *It is so ordered.*

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MARCH, 2021**

**L N MUTENDE**

**JUDGE**