



**REPUBLIC OF KENYA**

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

**(CRIMINAL DIVISION)**

**CRIMINAL APPEAL NO. 12 OF 2019**

**JMM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal Against the Judgement of Hon. John Aringo-SRM delivered on 29<sup>th</sup> April, 2019 at Kyuso Law Courts)*

**JUDGEMENT**

1. The Appellant herein, **JMM**, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **8(2) of the Sexual Offence Act no. 3 of 2006**. The particulars of the charge were that on 26<sup>th</sup> December, 2018 at [Particulars Withheld] Location of Kyuso sub-county within Kitui County, he defiled (name withheld) a child aged **10 years**. He also faced an alternative count of committing an indecent act with a child but he was found guilty and convicted of the main count and sentenced to serve life imprisonment on 29<sup>th</sup> April, 2019.

2. The Appellant felt aggrieved and preferred this appeal and raised the following grounds namely: -

*(i) That the evidence adduced against was contradictory and violated **Section 163(2) of the Evidence Act**.*

*(ii) That the trial Magistrate erred in law by failing to appreciate that there was an existing grudge between him and the victim's grandmother.*

*(iii) That the trial Magistrate failed to note that he was framed.*

*(iv) That the trial court did not grant him sufficient time to prepare for trial.*

*(v) That the trial Magistrate erred by rejecting his defence of alibi and the fact that he was crippled and could not have defiled the minor.*

3. In this written submission, the Appellant contends that Prosecution Witness 1 and Prosecution Witness 2 gave contradicting evidence because while the victim (Prosecution Witness 1) indicated that the incident happened at 2PM Prosecution Witness 2 stated that it was 3:00 PM.

4. He also submits that, the victim testified that he was injured by a stick which in his view left doubts as to whether she was defiled. He contends that all ingredients of the offence which he lists as identification, recognition, penetration and age of the victim were not proved.

5. He pleads with this court to scrutinize the evidence tendered and make a proper determination. He submits that, the prosecution's case was not proved beyond doubt. He says the prosecution failed to prove the exact time the offence took place. According to him, the evidence tendered was not consistent with the charge that faced him. He faults the prosecution for failing to tender exhibits like birth certificate to prove the age of the victim.

6. He further contends that, his prosecution was out of malice on the part of Prosecution Witness 2, Prosecution Witness 3 and the Investigating Officer. He urges this court to find that he cannot spend the rest of his life behind bars.

7. The Respondent through Mr. Okemwa, learned Counsel from the Office of the Director of Public Prosecution, opposed this appeal insisting that the 3 crucial elements of age, penetration, and identification of the culprit were proved. He further submits that the 3 elements are key ingredients in the offence of defilement. He contends that the age of the victim was proved by production of birth certificate and that

the P3 form tendered proved that there was penetration.

In his view, the victim identified the Appellant well as her step-father and therefore, there was no question of mistaken identity.

8. He faults the Appellants for bringing up the issues of dispute with the victim's family belatedly as an afterthought, pointing out that he never brought it up during trial. He further insists that, the Appellant's defence was duly considered.

9. This court has considered this appeal and the written submissions mounted by the Respondent. The main issues for determination is whether the Prosecution was proved their case beyond doubt and whether the sentence was harsh.

10. On the question of standard of proof, it goes without saying that in criminal cases the standard of proof required is higher. It is beyond reasonable doubt and the prosecution normally has the burden of proof. Looking at the evidence tendered and the offence for which the Appellant was charged and convicted, it is true that the crucial elements required to be proved were established and proved by the Prosecution's case. The law requires the following elements to be established and proved; -

a) *Penetration.*

b) *Age of the victim and*

c) *Positive identification of the culprit.*

11. On the element of penetration, I find that the evidence of Vicky Nzomo (PW5), the Clinical Officer from Kyuso Hospital who examined the victim and filed the P3 told the trial court that the genitalia of victim were bruised on the walls and found bleeding with the hymen "freshly broken".

The P3 form tendered as Prosecution Exhibit 1 clearly indicates that there was penetration. That evidence was constant with what the minor/victim (Prosecution Witness 1) told the trial court. The victim's clothes tendered as Prosecution exhibits 4,5 and 6 were blood stained and the minor positively identified the clothes as her clothes which she had worn on the material day she was defiled. This court finds that the Prosecution's case in respect to penetration which is a key ingredient in the offence of defilement was overwhelming. I am not persuaded that the difference as per the time the incident took place whether it was 2:00PM or 3:00PM is significant. I find the Prosecution witnesses gave quite consistent evidence in regard to the question of penetration and that element was clearly proved beyond any doubt.

12. The Appellant contends that the age of the victim was not ascertained but I disagree because, I find that the prosecution proved that key element too through production of a birth certificate which was tendered as Prosecution Exhibit 7. That birth certificate serial number 9213287 issued on 11<sup>th</sup> April, 2018 indicates that the minor was born on 8<sup>th</sup> August, 2008. That shows that when the minor was defiled on 26<sup>th</sup> December, 2018, she was aged ten years and four months to be exact. That age bracket falls within the age bracket envisaged under *Section 8(2) of the Sexual Offence Act*. The evidence tendered therefore, contrary to the Appellant's submission was in tandem with the charge sheet because the Appellant was charged with defilement Contrary to *Section 8(1) as read with 8(2) of Sexual Offence Act*.

13. On identification, this court finds that the evidence of the minor to be sufficient. She clearly knew the Appellant by name and referred to him by name and the fact that he was her grandmother. I also find the evidence of Prosecution Witness 2 and Prosecution Witness 3 consistent on the question of identification of the Appellant as the culprit who committed the offence against the minor.

14. This court finds that with the 3 elements clearly exhibited and proved, the trial court was correct to find that the Prosecution's case had been proved.

The Appellant gave unsworn statement of defence and called 2 witnesses in his defence but I do not find anything tangible from his defence but I do not find anything tangible from his defence that could have casted any doubt on the mind of the trial court. The narrative trying to link the injury on the victim's genitalia with a stick or falling from a tree in my view, was farfetched and held no water. His attempt to rely on alibi as a defence was feeble at best could sway the weight of the defence which I have re-evaluated and I find that the trial court was also correct to give it the due weight it gave. The weight could not tilt the overwhelming evidence tendered by the prosecution.

In sum this court finds that the Prosecution's case was proved beyond doubt and it was sufficient to found a conviction.

15. On sentence, this court finds that though the court found that there was only one sentence prescribed by *Section 8(2) of the Sexual Offence Act*, which is life sentence, this court finds that, in view of the supreme court's decision in the case of **Francis Karioko Muruatetu (2017) eKLR**, court hands are no longer bound by mandatory sentence prescribed by law. The discretion of a mail court should not be taken and it is only on that basis that this court finds that life imprisonment may have been harsh but considering the gravity of the offence, a deterrent sentence was called for. In the premises, this court upholds the conviction of the Appellant for the reasons aforesaid but the sentence of life imprisonment is set and in its place the Appellant is hereby sentenced to serve 30 years in jail in view of the trauma and permanent nature of the effect of defilement is likely to have on the minor particularly considering the medical evidence (P3 form and treatment sheets) tendered in evidence.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF MARCH, 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

