



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 171 OF 2019

JACKSON BUNDI MWITHIA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

1. Jackson Bundi Mwithia, the Appellant was charged with the offence of 'Defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006' with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006' in Tigania Criminal Case No. 23 of 2018

2. The particulars of offence for the offence of Defilement were as follows: -

'On the 5th day of December 2014 at [particulars withheld] Sub-location Nkomo Location in Tigania West District within Meru County, intentionally caused his penis to penetrate the vagina of NKM, a girl child aged 15 years.'

3. The particulars of offence for the offence of Committing and Indecent Act with a Child were as follows: -

'On the 5th day of December 2014 at [particulars withheld] Sub-location Nkomo Location in Tigania West District within Meru County, intentionally caused his penis to touch the vagina of NKM, a girl child aged 15 years.'

4. He pleaded not guilty to both charges and the matter proceeded for trial. By Judgement delivered on 23rd January 2020 by Hon P. M. Wechuli SRM, he was convicted for the offence of Attempted Defilement and was sentenced to 15 years imprisonment. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended supplementary grounds of appeal. He raises the following grounds of appeal: -

- i) That the Learned Magistrate erred in law in convicting the Appellant on the charge of defilement contrary to Section (8) (i) (2) of the Sexual Offences Act No. 3 of 2006 when the evidence of the minor was not corroborated.***
- ii) That the trial Court erred both in law and fact by convicting the Appellant when the case against him had not been proven beyond reasonable doubt.***
- iii) That the trial Court erred both in law and in fact by convicting the Appellant in the absence of evidence to prove that the Complainant was a minor.***
- iv) That the Learned Magistrate erred in law in convicting the Appellant in the absence of any medical evidence linking the Appellant to the alleged offence.***
- v) That the trial Court erred in both law and fact by reaching conclusions based on his own opinions rather than on evidence.***
- vi) That the trial Court erred in both law and fact by failing to find and hold that the Prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the Appellant.***
- vii) That the trial Court erred both in law and fact by conducting the trial in a manner which violated the Appellant's constitutional rights to a fair trial.***
- viii) That the trial Court erred in law and fact by failing to find and hold that the Prosecution evidence did not support the charges facing the Appellant. The patent inconsistencies thereof created doubts which ought to have been resolved in favour of***

the Appellant.

ix) That the Judgment, conviction and sentence of the Appellant was against the weight of evidence, harsh and excessive and not in tandem with the evidence tendered.

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The Appellant filed written submissions on 31st July 2020. He highlighted the duty of a first appellate Court as per *Joseph Ndung'u Kagiri vs R, Criminal Appeal No. 69 of 2012* and as per *K. Anbazhagan vs State of Karnataka & Others*.

6. He urges that his conviction was wrong because the evidence of the minor was not sufficiently corroborated. That the Prosecution did not call witnesses or tender evidence to show that the minor was indeed defiled by him and that the mother and the investigating officer did not testify during trial to corroborate the evidence of the alleged minor who testified that she was well over the age of majority and was turning 19 years. The prosecution bore the burden of proof to establish that the victim was under age whilst the victim herself confirmed being of age of majority while she conceived.

7. He further urges that the alleged victim during trial on 28th December 2015 testified that she was 18 years turning 19 and that she had a child that was 2 months old. He urges that putting this into perspective, the child was born sometime in October 2015 and this means that the child was conceived sometime in February 2015 and this means that during conception of the child, the victim was still of the age of majority. He urges that no contradicting evidence was tendered to disapprove this position during trial and therefore he was convicted of an offence without proof beyond reasonable doubt and that he ought not be convicted on weaknesses of his defence but rather on the prosecution's case. He relied on the case of *Miller vs Minister of Pensions (1947) 2 ALL ER 372*.

8. He further urges that the trial Court found the victim to be a minor without satisfying itself on the credibility of this position. He relies on the case of *Kaingu Elias Kasomo vs R, Criminal Appeal No. 504 of 2010* for the proposition that the age of the victim of sexual assault under the Sexual Offences Act is a critical component and it forms part of the charge. He further relies on the case of *Francis Omuroni vs Uganda, Criminal Appeal 2/200* for the proposition 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. He thus urges that the prosecution's case was not proven beyond reasonable doubt.

9. He also faults the trial Court for convicting him despite there being no medical evidence to prove that he was indeed the father of the child and whether he indeed had sexual intercourse with the Complainant.

10. He urges that the prosecution's evidence was full of doubt in that during trial on 28th December 2015, the Complainant testified that he was 18 years old turning 19; The medical report dated 5th December 2014 alleged that the victim was 15 years old at the time of examination; That a report filed by the clinical officer from the Ministry of Labour and Social Services dated 20th January 2016 indicated that the victim was 16 years old.; That a report filed by a dentist under the Ministry of Medical Services dated 1st April 2016 alleged the victim to be 18 years of age. He urges that all these documents are contradictory on the age of the victim and that the prosecution thus failed to prove the age of the victim and the finding of the trial Court was based on doubtful evidence.

11. He further urges that during trial, he was never supplied with the prosecution witness statements or exhibits and that this was a violation of his constitutional rights to fair trial. He states that this failure to supply him with witness statements is not disputed as PW1 stated that she never recorded a statement and it was her mother who did. He invites the Court to question how the victim testified without a written statement and the trial Court never addressed itself to this issue.

12. On sentencing, he urges that his sentence is harsh, punitive and excessive. He urges that even if the conviction was to be upheld, the Court ought to have considered alternative punishment other than a custodial sentence. He urges that the circumstances of the case, including the fact that a child has been born out of the relationship between him and the Complainant, he had already been undertaken to maintain the child and had acknowledged that they were living as man and wife. He urges that the welfare of the child ought to have been a consideration when sentencing the Appellant. That once the Court decides that the accused deserves a custodial sentence, it must impose the minimum provided for. That in the present case, the trial Court ought to have considered a non-custodial sentence if for nothing else, for the welfare of the child born to him and the victim.

13. He urges that during trial, both the victim and himself testified that they were married and that the victim identified him as her husband. That she in fact testified that she went to live with him as his wife. That there was no evidence which was adduced by the prosecution witnesses to point to the fact that it was the Appellant who encouraged the Complainant to abandon school. That the evidence adduced points to the fact that it was the Complainant who voluntarily took herself to his house after she was chased away by her mother.

14. He urges that in the peculiar circumstances of the case, it is clear that the defence which was available to him under Section 8 (5) of the Sexual Offences Act was not considered by the trial Court. That by her own admission, the Complainant was no longer interested in schooling and she desired to get married and that she took herself to his house and started living there as his wife. He urges that the trial Court did not consider this factor. It is his submission that in criminal proceedings, what is intended to be punished is the intentional or negligent conduct of the accused. That the Prosecution must establish that the accused had requisite mental capacity to commit the offence. That in the present case, no evidence was adduced by the Prosecution to establish the fact that he enticed the complainant to abandon school and go and live with him. He relies on the case of *PKK vs Republic HCCR No. 460 of 2013*.

Prosecution's Submissions

15. The Prosecution filed submissions dated 24th June 2021. They urge that the Learned Trial Magistrate was believed the evidence of PW1 as truthful and honest and that PW1 had recognized the assailant and that PW1 had conceived a child as a result of being defiled by the Appellant. Relying on the cases of *J. W. A. vs Republic (2014) eKLR* and *Mohamed vs Republic (2006) 2 KLR 138* they urge that corroboration is not mandatory when the victim of a sexual offence is a child of tender years and the Court is satisfied that the child is truthful.

16. They urge that the witnesses who testified were sufficient to prove all the ingredients of defilement and there was no need for the mother of PW1 or the investigating officer to testify. They rely on the case of *George Muchika Lumbasi vs Republic (2016) eKLR* and *Julius Kalewa Mutunga vs Republic, Criminal Appeal No. 32 of 2005* for the proposition that whether a witness should be called by the prosecution is a matter of their discretion and an appeal court will not interfere with that discretion unless it is shown that the prosecution will be influenced by some ulterior motive. They further rely on the case of *Benjamin Mbugua Gitau vs Republic (2011) eKLR*. They urge that there was no prejudice caused to the Appellant for failure to call the mother of PW1 and the investigating officer.

17. Concerning the age of the child, they urge that they did prove the age of the child to be 16 years at the time of the offence, evinced by the age assessment report which was availed on 1st September 2016 to be 18 years and the offence occurred in the year December 2016 and this therefore shows that in the year 2014 PW1 was 16 years of age. They rely on the case of *JWA vs Republic (2014) eKLR*.

18. They further urge that the Appellant had stated that he and PW1 were husband and wife but since the offence occurred when PW1 was 16 years of age, she was not at all able to give consent to the Appellant. They rely on Section 43 of the Sexual Offence Act which defines an intentional and unlawful act as so if it is committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence including when the person is a child.

19. They further urge that there was medical evidence tendered by PW2 who stated in his testimony that PW1's hymen was torn and further that there were pus cells present on the torn hymen leading to the conclusion by PW2 that PW1 was indeed defiled. That PW2 also produced a P3 form and this medical evidence together with the testimony of PW1 and the Appellant and the fact that the child became pregnant as a result of being defiled by the Appellant proves that all the ingredients of the offence of defilement against defilement were proven.

20. They further urge that the Appellant was accorded a fair trial and he did not at all raise the issue of not being supplied with witness statements during his trial and that he was given time to cross-examine the Prosecution witnesses which he did.

21. They further urge that the prosecution evidence was not inconsistent. That the Appellant confirmed to Court that he stayed with PW1 and this shows that the identification of the Appellant as the perpetrator was proven.

22. Concerning the sentence meted out on the Appellant. They urge that this was lenient and was also as per the law taking into consideration the circumstances of the case. They urge that PW1 was a minor during the time of the offence and was therefore not capable of giving her consent. That the Appellant did not dispute the fact the fact that he had sexual intercourse with the child and that the Appellant went further and stated that he had sired a child with PW1. They urge that this clearly shows that the Appellant did take advantage of PW1 being a minor and not able to make decisions on her own.

23. They pray that this Court upholds both the conviction and the sentence.

Determination

24. This being a first appeal, as espoused in the case of *Okeno v Republic (1972) EA 32*, this Court is invited to look at both questions of fact and of law. This will involve an analysis of the evidence and the making of independent findings bearing in mind that it is the trial Court that had the advantage of observing the demeanour of the witnesses.

25. The Appellant's grounds of Appeal can be condensed into 2 points which form the gravamen of the Appellant's Appeal as per the issues hereunder: -

i) Whether or not the Prosecution proved their case beyond reasonable doubt.

ii) Whether or not the sentence meted out was excessive in the circumstances of the case.

Whether or not the Prosecution proved their case beyond reasonable doubt.

26. This Court has previously dealt with the offence of defilement in the case of *Gerald Muriungi vs Republic, Meru Criminal Appeal No. 41 of 2020*. The necessary ingredients for the offence of 'Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act' are as follows: -

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon

conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this Section if –

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act ([Cap. 92](#)) and the Children Act ([No. 8 of 2001](#)).

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

27. Defilement occurs when a person commits the act of **penetration** with a child. Penetration under Section 2 of the Sexual Offences Act is defined as follows: -

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

28. Genital organs under the very Section 2 of the Sexual Offences Act is defined as follows: -

“genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

29. Child under the very Section 2 of the Sexual Offences Act is defined as follows: -

“child” has the meaning assigned thereto in the Children Act ([No. 8 of 2001](#));

30. Child under Section 2 of the Children’s Act is defined as follows: -

“child” means any human being under the age of eighteen years;

31. Based on the above, the key questions to ask are whether the complainant was a child and whether there was penetration of the Appellant’s penis into the vagina of the complainant.

Evidence adduced at trial Court

Prosecution’s Case

PW1

32. This Court has had a chance to examine the evidence led at the trial. The Prosecution adduced evidenced from a total of 2 witnesses. PW1, the complainant testified first after the conduct of a *voire dire*. She said that she was 18 years old about to turn 19. That she left school in 2014 at class 7 and she used to go to M Primary School. That she left school since her mum and sister chased her away and that she decided to get married to Jackson Bundi with whom they lived together. That they had sex and got a child together which child is 2 months old. That she stays at home with her husband, the accused. She identified Bundi as the accused in the dock.

PW2

33. PW2 was Geoffrey Muthomi, a clinician at Miathene Hospital. He produced a P3 form for the child who he said was caught in a man’s house. He said that they child’s hymen was torn. That the labia majora and minora were intact. That pus cells were present based on torn hymen and pus cells. That he made a conclusion of defilement. This was the close of the Prosecution’s case.

Defence Case

34. The Appellant was placed on his defence. He stated that he is from Limauru and he is a boda drier. He states that since 2014, he has never seen the complainant. That eh has a child with the complainant and that the complainant stays with the child. That they are married.

Analysis

Age of the Complainant at the time of Offence

35. Concerning the complainant's age, the child testified to have been 18 years old at the time of giving her evidence on 28th December 2015. There was however no birth certificate which was produced to confirm this. An age assessment was however done and it was established that the complainant was 18 years old as at 1st April 2016. This means that as per the Prosecution's evidence, as at the date of the offence on 5th December 2014, the complainant was about 16 years and about 8 months of age.

36. The accused has contended that the child he sired with the complainant having been about 2 months old at the time of trial, this means that said child was born in October 2015 and was therefore conceived in February 2015 and this means that at the time of conception, the victim was of the age of majority.

37. This Court finds that although the complainant is said to have sired a child with the accused person, the date of conception of this child is not what is to be used to derive the age of the complainant at the time of the offence. Furthermore, the date of conception does not necessarily have to correspond with the date of the offence and in the present case, the date of offence was December 2015. Defilement does not depend on conception but rather on penetration. The accused person cannot manipulate the date of conception to his advantage. It is also noteworthy that at the point of giving the evidence, PW1 testified that she was living with the accused and this could explain why the date of conception was later than the date of the particular offence he has been charged with.

38. This Court is persuaded that the age assessment report by the children's officer, which was assessment was done at Meru Level 5 Hospital and showed that the victim was 18 years old as at April 2016 is credible evidence. As at the time of the offence, she was 16 years and about 8 months. This Court is inclined to believe the medical evidence from the hospital. A person of 16 years old falls under the definition of a child, both under the Sexual Offences Act and the Children's Act for purposes of proving the offence of defilement.

Act of Penetration by the Accused

Identification

39. On the matter of identification of the accused person, this Court observes that during hearing at the trial Court, the complainant was able to identify the Appellant as the assailant. She also testified that she knew him before and they lived together as husband and wife and that they used to have sex. Her evidence was not challenged during cross-examination. The Appellant in his defence testified that the two were married and he confirmed that he had a child with the complainant. Further, as pointed out by the trial Court, the complainant had at one point refused to testify saying that she was already married to the Appellant. This Court is satisfied that for a child who was living with her assailant as his supposed wife, she had sufficient time to identify the Appellant and this is admitted as her evidence of recognition which is stronger than that of identification.

Penetration

40. On the matter of penetration, this Court observes that PW1 confirmed to have had sex with the Appellant. The Appellant despite having an opportunity to do so in his defence failed to cross-examine PW1 on this issue. He did not deny committing the offence in his defence but merely states that they were married.

41. Furthermore, the clinical officer, PW2 testified that from the examination done, a conclusion was made that there was defilement by reason of the torn hymen which had pus cells. This evidence was again not challenged.

42. This Court is satisfied that the act of penetration was proven beyond reasonable doubt.

Whether purported marriage is a defence

43. The Appellant both in his defence and in his submissions appears to suggest that he was married to the complainant and it is the complainant who in fact wanted to be his wife after having left school and coming to live with him on her own volition. To begin with, there was no proof of marriage that was given. Section 4 of the Marriage Act clearly provides that the minimum age for marriage is 18 years. It expressly prohibits a person who is under the age of 18 years from marrying. Just because the complainant has now attained the age of majority does not make previous faults at the time when she was a child right. In fact Section 87 of the Marriage Act makes it an offence for a person to marry another who is below the age of 18. It provides as follows: -

87. Marriage to a person under minimum age

Any person who marries a person who is below the minimum age commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or a fine not exceeding one million shillings or to both.

44. This Court does not therefore accept the defence of marriage. This Court further finds that the minor was not in a capacity to rationalize the acts that were going on such that it matters not whether she had in fact brought herself to the house of the complainant. The definition of intention and unlawful act under Section 43 of the Sexual Offences Act is as follows: -

43. Intentional and Unlawful Act

An act is intentional and unlawful if it is committed-

(a) In any coercive circumstance;

(b) Under false pretenses or by fraudulent means

(c) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.

45. Section 43 (4) goes ahead to give the instances when an act may be committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. It provides as follows: -

The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act: -

(a) Asleep

(b) Unconscious

(c) In an altered state of consciousness

(d) Under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected

(e) Mentally impaired

(f) A child

46. A wrong and especially a criminal wrong does not become right for the reasons that the victim contributed to the offence being committed. In fact, the only defence which has been expressly stated in the Act is when the accused person genuinely believed that the child was of the age of majority, either through the child's own behaviour or deception or because of some other factors. Even then, the accused raising this defence has the burden of showing the steps that he took to ascertain the age of the child. The Appellant did not raise this as a defence. He only claims that the child must have been of the age of majority but he does not mention the fact of having had a genuine belief at the time of the offence that the child was of the age of majority. In fact, the issue of the age is raised for the first time in his submissions to this appeal. This Court is concerned with the failure by the accused person to raise this during hearing. This appears to have been more of an afterthought.

Right to Fair Trial

47. Another key issue that the Appellant raised is that during trial, he was never supplied with the prosecution witness statements or exhibits and that this was a violation of his constitutional rights to fair trial.

48. It is true that it is required of the Prosecution to supply an accused person with all the evidence they intend to rely on. This is the hallmark of a right to a fair trial.

49. This Court has perused the entire record of the trial Court and observes that the complainant never raised this issue at any point in the entire proceedings of the trial Court. This is definitely an afterthought.

Whether or not the sentence meted out was excessive in the circumstances of the case.

50. The leading authority on the question of interfering with sentence is that of *Wanjema v Republic, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494*, where Trevelyan J held as follows:-

'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'

51. The penalty section for the offence of defilement under the Sexual Offences Act is categorized according to the ages of the child. Section 8 (4) provides as follows: -

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

52. It was proven that the complainant child herein was slightly over 16 years at the time of the offence. The sentence imposed of 15 years was therefore within the confines of the law.

53. The Appellant has urged that in view of the fact that a child was sired, he had been undertaken to take care of the child and the Court ought to have considered this during sentencing. This Court finds that sentencing does not merely depend on the subjective circumstances of

a particular accused in the case. In sentencing, the Court is primarily required to give effect to the principles of sentencing which include deterrence, towards the prevention of the crime in future and denunciation to communicate the community's condemnation of the criminal conduct. This is of course in addition to the punitive and retributive and community protection objectives. This Court does not find any good reason to disturb the finding of the trial Court on sentence.

Conclusion

54. The complainant, a young girl of 16 years who may have been mistaken to suppose that she was married to the Appellant, aged 24 at the time of the offence, was repeatedly defiled by the very person she has referred to as her 'husband.' The law does not recognize a marriage between or to a person(s) under the age of eighteen years. The Appellant could not be said to have been ignorant of this provision of the law and he indeed took advantage of this young and vulnerable lady who testified to have been chased away from home by her mother and sister. Furthermore, the law does not anticipate that a child, being anyone under the age of majority has the capacity to give consent to sex. The complainant child and the accused were living together and it was confirmed by the complainant herself that they used to have sex. The Appellant did not deny this in his defence. The evidence of the complainant was corroborated by the evidence of the clinician. This Court finds that a weighing of the evidence adduced by the Prosecution and the Defence as a whole establishes all the elements of the offence of defilement beyond reasonable doubt, and the charge of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act against the Appellant was indeed proven. This Court also finds that the sentence meted out against the Appellant was in accordance with the law.

55. It is sad that the particular complainant girl in this case may have had children with the accused, and the imprisonment of the accused has deprived them of a provider. However, the policy of the law is for the protection from defilement for every child.

ORDERS

56. In the end, the Court makes the following orders: -

- i) The Appeal on conviction is hereby declined and the finding of the trial Court on conviction is affirmed.***
- ii) The Appeal on sentence is hereby declined and the finding of the trial Court on sentence is affirmed.***

Order accordingly

DATED AND DELIVERED ON THIS 30TH DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Jackson Bundi Mwithia, the Appellant in person.

Ms B. Nandwa, Prosecution Counsel for the Respondent.