



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 64 OF 2019**

**JOSEPH ERUSTUS KAVITA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the Judgment of 7<sup>th</sup> June 2019 charged with defilement contrary to Section 8(1) and Section 8(2) of the Sexual Offences Act by Hon. D. Odhiambo RM at Senior Principal Magistrate Court at Shanzu.*

**J U D G M E N T**

1. The Appellant Joseph Erustus Kavita was an accused in Shanzu Chief Magistrate Court Sexual Offence Case No. 29 of 2018 where he was charged with offence of defilement contrary to Section 8(1) & (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that, Joseph Erustus Kavita on the 7<sup>th</sup> day of March 2018 at [particulars withheld] Township within Kilifi County intentionally and unlawfully caused his penis to penetrate the anus of FM a child aged 10 years.
3. Based on the evidence of the prosecution witnesses as well as defence of the appellant the trial Magistrate found appellant guilty, convicted him and passed a sentence of life imprisonment.
4. The appellant filed petition of appeal on 11<sup>th</sup> June 2019 but amended grounds which he filed together with his written submissions on 28<sup>th</sup> May 2021. The grounds were:-
  - i. That the learned trial Magistrate erred in law and fact by not considering that the charge sheet was incurably defective.**
  - ii. That the learned trial Magistrate erred in law and fact by not considering that the 1<sup>st</sup> report which appeared in the P3 form didn't indicate recognition whereas it indicated another person known physically.**
  - iii. That the learned trial Magistrate erred in law & fact by not considering that the prosecutions' investigations was frivolously approached to meet the rule of justice.**
  - iv. That the learned trial Magistrate erred in law by not considering that the doctor's evidence was to be left free from any Magistrates opinion.**
  - v. That the learned trial Magistrate erred in law & fact by not considering that the prosecution party failed to bring their evidence within a measurable instance to prove their case beyond all reasonable doubt.**
  - vi. That the learned trial Magistrate erred in law & fact by not considering appellants defence evidence which remained unshaken.**
5. Appellant prayed that appeal be allowed, conviction quashed and sentence set aside. The appeal was canvassed by way of written submissions.

6. Having considered the trial courts records the trial Magistrates judgement, the grounds of appeal and submissions by respective parties, I do find that there was an error in the Magistrates finding that there was penetration which medical report which was supposed to corroborate the evidence of the complainant indicated that there were no bruises or laceration at the anal region of the Complainant.

7. The appellant ought to have been found guilty for the offence of indecent act considering evidence of the Complainant and in consideration that penetration was not achieved.

8. The conviction for offence of defilement/sodomy is quashed and substituted with conviction for the offence in alternative count. The sentence for life imprisonment is also quashed and appellant sentenced to serve 10 years imprisonment with effect from 19<sup>th</sup> March 2018.

9. Orders accordingly.

Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT /ONLINE THROUGH MS TEAMS, THIS 29TH DAY OF JULY, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

*Ogwel – Court assistant*

*Ms. Karanja for Respondent*

*Appellant – Present in person*

***Hon. Lady Justice A. Ong'injo***

***Judge***