



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 6 OF 2019**

**BETWEEN**

**BERNARD KIURU M'RIKURU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Maua*

*Chief Magistrate's Court Criminal SO Number 108 of 2016*

*by Hon. J.Wanganga (RM) on 10.12.2018)*

**JUDGMENT**

**Background**

1) **BERNARD KIURU M'RIKURU (Appellant)** was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed on 14.12.2016 against **SK** a child aged 6 years.

2) The prosecution called four (4) witnesses in support of the charges. PW1 the complainant stated that she was 7 years. She recalled that on 14.12.2016, her mother went to buy food and left her with her 3 years old brother. That they went and started playing outside the house of their neighbour Bernard and it was while there that Bernard took her into his one roomed house where he defiled her and only let her go after Mama Wanja found them and hit him on the head and took her home. Complainant's mother JM was returning home when she heard Mama Wanja screaming that Bernard was killing the daughter of J. She found complainant in bed and she informed her that Bernard had defiled her. She said she knew Bernard who had been employed by her immediate neighbour Martin for about 1 year. Complainant was examined on 16.12.2016 by Mary Kendi, a clinical officer who found that the hymen was broken and her labia was swollen from which she opined that complainant had been defiled. Shee tendered complainant's P3 form as PEXH. 1. PC Njiru Charity Muthoni, the investigating officer received complainant's report on 15.12.2016 and after investigations caused Appellant to be charged.

3) Appellant confirmed complainant's mother was his employer's neighbour. He said that complainant's mother had been his lover since her husband died and that she framed her after they differed.

4) *In a judgment dated 10.12.2018 the Appellant was convicted and sentenced to serve life imprisonment.*

**Appeal**

5) Being dissatisfied with the sentence, the Appellant lodged the instant Appeal on the grounds that:

1) *The magnitude of the offence was not explained to him*

2) *He was not able to plan well for his defence*

3) *The sentence is harsh*

### Analysis and determination

6) The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant.

### Age of complainant

7) The appellant was found guilty of committing an offence contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. The provisions stipulate:

**(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.**

8) It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010 the Court of Appeal stated as follows:

**“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.**

9) Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. Dire consequences flow from proof of the offence of defilement. (See Hadson Ali Mwachongo vs Republic Criminal Appeal No. 65 of 2015 [2016] eKLR & Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009[2010] eKLR).

10) Except for the complainant who said she was 7 years when she testified in 2018, her mother did not offer any useful information but the evidence contained in the P3 form assessed her age to be 6 years in 2016 when she was examined. The Court of Appeal in Evans Wamalwa Simiyu vs R Criminal Appeal No. 118 of 2013 [2016] eKLR held as follows in a similar case:

**“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”**

11) From the foregoing, I find that the trial court correctly analysed the evidence and came to the conclusion that the complainant was below the age of 12 years.

### Penetration

12) Section 2 of the Act defines penetration to entail: -

**“partial or complete insertion of a genital organ of a person into the genital organ of another person.”**

13) The P3 form **PEXH. 1.** reveals that complainant had a broken hymen and her labia was swollen from which it was opined that there was penetration. I am persuaded that the trial magistrate correctly found that penetration was proved.

### Identification of the assailant

14) Appellant who was employed by complainant’s mother’s neighbour does not deny that he was well known to the complainant. Although Mama Wanja who allegedly found the Appellant in the act was not called as a witness, the Evidence Act, Chapter 80, Laws of Kenya provides at **Section 143 THAT:**

**“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”**

15) This position was restated in Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005, where the Court of Appeal held,

**“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”**

16) As a general rule of evidence embodied in Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

**“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

17) The evidence on record reveals that the complainant identified the Appellant as the one who had defiled her. She knew him as he was a neighbor. With this evidence, the learned trial magistrate ruled, a finding which I agree with that complainant was telling the truth as to the fact that it was Appellant that defiled her.

18) Turning to the issue of defense, Appellant was represented by counsel throughout the trial and his contention that *the magnitude of the offence was not explained to him and that he was not able to plan well for his defence are rejected.*

19) As to sentence, the Appellant argues that the sentence of life imprisonment was harsh, excessive and without due regard to the circumstances pertaining to the offence. There is a myriad of Court of Appeal decisions which hold that the provisions of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Some of those cases include ***Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014 [2018] eKLR***, ***Christopher Ochieng v R KSM Criminal Appeal No. 202 of [2018] eKLR 2011***, ***Jared Koita Injiri v R KSM Criminal Appeal No. 93 of 2014 [2019] eKLR*** and ***Evans Wanjala Wanyonyi v Republic Criminal Appeal No. 312 of 2018 [2019] eKLR***. The Court in ***Christopher Ochieng (supra)*** reduced a sentence of life imprisonment to 30 years for the defilement of an 8-year-old girl. In ***Jared Koita Injiri (supra)*** the Court revised an imprisonment of life downwards to 30 years for the defilement of a girl aged 9 years.

20) Although the trial court indicated that it had considered the appellant’s mitigation, it seemed constrained by the mandatory minimum sentence provided in **Section 8 (2) of the Sexual Offences Act**. The aggravating factors in this case include the fact that the appellant was known to the minor he defiled and expected to protect. The fact that the minor was a child of tender years is also an aggravating factor. There is a need for society to eradicate such ghastly acts against children. I have weighed this against the fact that the appellant was a first offender. Taking all these into account and also bearing in mind the decisions of the Court of Appeal on comparative cases and the fact that the Appellant is over 75 years old, I set aside the sentence of life imprisonment and substitute thereof with a sentence of 5 years’ imprisonment to run from the date of the trial court’s judgment.

**DELIVERED AT MERU THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Kinoti**

**Appellant - Present in person**

**For the State - Ms. Mwaniki**