



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 5 OF 2017**

**ANDREW NYAGWONO MORIBORI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the Judgment of the Chief Magistrate's Court at Malindi by Hon Y. I. Khatambi (SRM) delivered on 10<sup>th</sup> February, 2017 in CMCR Case No. 510 of 2012)*

**CORAM: Hon. Justice Reuben Nyakundi**

**Ms. Aoko Otieno for the appellant**

**Mr. Mwangi for the State**

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

The appellant was charged with the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act. The particulars of the charge in respect of the defilement were that on 22.6.2012 and 10.7.2012 in Watamu, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **HM** a child of seventeen (17) years.

The prosecution called seven (7) witnesses whose evidence can be summarized as follows: **(PW1)** the complainant testified that the applicant whenever she went to the river to fetch water in the compound of the appellant he got an opportunity to commit the offence. According to the complainant she was lured to the location by the appellant and in good faith she could heed to the request. The complainant maintained incidents of defilement particularized were on 10.7.2012 and on other diverse dates.

**(PW2)** – **N** an uncle to the complainant testified that on 10.7.2012 he went to search for the complainant after her father **(PW3)** asked for his assistance. The search led them to a plot called **K** That is where **(PW2)** came face with the complainant and appellant inside the house. The witnesses **(PW2)** and **(PW3)** told the Court that they made arrangements to have the appellant arrested.

According to **(PW4)** **C** she recorded witness statements and issued the P3 to the complainant. **(PW5)** **Dr. Abdullahi** a clinical officer attached to Malindi on examination of the complainant filled the P3 in which he opined the complainant had sexual intercourse.

**(PW7)** – **CPL. Ayuma** the investigating officer interviewed several witnesses including the complainant. It was her recommendation that the defilement offence had been committed.

The appellant placed on his defence denied the offence.

From these background the Learned trial Magistrate made a finding that the appellant was guilty of the offence convicted and subsequently imposed a minimum sentence of fifteen (15) years imprisonment.

Aggrieved with the conviction and sentence, the appellant preferred an appeal to this Court. I have review the evidence by the prosecution, the defence and grounds on appeal. At the heart of the appeal is the age assessment of the complainant by **Dr. Arua**. It is trite as stated in the case of **Francis Omuroni – Uganda CR Appeal No. 2 of 2008** that:

***“the age of a victim of defilement may be proceed by birth certificate. The victim parents or guardian or by observation and common sense.”***

It is apparent from the record that the age assessment determined the victim age to be seventeen (17) years. The age assessment was

admitted in evidence under Section 77 of the Evidence Act as being a crucial piece of evidence the prosecution given to meet the test of Section 33 of the Evidence Act.

Besides the age of the complainant assessed to be 17 by the medical officer, her father also confirmed the age to be 17 years in tandem with medical report.

The complainant testimony was that she had never had sex before. That the first penetration was that of the appellant. Blood was oozing from the vagina and in pain. She would not walk in a week's time. The medical evidence and treatment notes are at variance with the testimony of the complainant on the injury to the vagina which was said to have oozed blood.

That inconsistency was never explained the rupture of the hymen which the medical doctor stated to have been broken is scanty, when it was broken. I am aware that the medical evidence is not the decisive factor but here is a case for one time virgin. The medical evidence on what she told the Court is therefore crucial. That inconsistency is therefore fatal to the prosecution case.

The appeal on conviction of the appellant is hereby quashed. The sentence set aside. Would a first time victim of defilement have the courage to repeat the traumatic experience. The appellant is at liberty unless otherwise lawfully held. Accordingly, the appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF DECEMBER, 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Mwangi for the state
2. The appellant