REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 03 OF 2018

JIMMY MATHEKA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. A.G. Ndungu (RM) in Makindu Principal Magistrate's Court Criminal Case No. 66 of 2014 delivered on 8th January, 2018).

JUDGMENT

1. **Jimmy Matheka** the Appellant was charged and convicted of the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act. The particulars indicated were that the Appellant on 12th January 2014 at around 11.00 a.m. at Ilandi Village, Ngaamba Sub-location, Ngaamba Location in Mukaa District within Makueni County, intentionally caused his penis to penetrate the vagina of **MJ** a child aged 14 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) Sexual Offences Act No. 3 of 2016. The particulars were that the Appellant on 12th January 2014 at around 11.00 a.m. at Ilandi Village, Ngaamba Sub-location, Ngaamba Location in Mukaa District within Makueni County, intentionally touched the vagina of **MJ** a child aged 14 years.

3. He pleaded not guilty and the mater proceeded to full hearing with the prosecution calling five (5) witnesses. The appellant gave an unsworn statement and called one witness for his defence. He was found guilty, convicted and sentenced to twenty (20) years imprisonment.

4. He was aggrieved and filed this appeal citing the following grounds;

> ***(i) That*** *the learned Resident Magistrate erred in law and in fact when she convicted the Appellant against the weight of the evidence.*
>
> ***(ii) That*** *learned Resident Magistrate erred in both law and in fact by finding that the prosecution had established its case beyond reasonable doubts when in fact these were glaring contradictions.*
>
> ***(iii) That*** *the learned Resident Magistrate erred in law and in fact by finding that the necessary ingredients of the offence had been established when actually they were not.*
>
> ***(iv) That*** *the learned Resident Magistrate erred in law and in fact in failing to appreciate that the Appellant had a barrier problem of language and thus failed to provide an interpreter thus making him not participate succeeding in proceedings.*

5. The complainant MJ testified as PW1. She stated that on 12th January 2014 which was a Sunday, she was headed to church when the appellant came to their home. He asked her to accompany him to their home and she accepted. At their home they went to his house and onto his bed. He removed her underwear and his and inserted his penis into her vagina for five (5) minutes. She did not scream. She added that prior to this date she had, had sex with the appellant over five (5) times. Her father found them in bed naked. They were taken to Salama police station where the matter was reported.

6. They were also taken to Sultan Hamud hospital and a P3 form was filled for her (EXB1). In cross examination she said her relationship with the Appellant started in the year 2012.

7. **PW2 JM** is PW1's father. He testified that on 12th January 2014 while in church he was called by his wife who informed him that PW1 was not in church. They went to search for her. They went to the appellant's place and met him coming out of the house. He then heard a child crying. He went and got the child who was PW1 from appellant's house. They discovered that the child had had sex. He said the appellant is a neighbour but he had not seen them together before. Later it was found the child was pregnant.

8. **PW3 D J** is the mother of PW1. On 12th January 2014 she left for church and had asked PW1 to lock the house and follow her. She did not come as expected. She left to go and look for her and informed the father (PW2).

9. PW1 was later found at the appellant's house. She saw him come out of the house. PW2 asked him if he had seen PW1 and he ran away. They heard PW1 crying in the house and PW2 went in and found her. On inquiry she told them she had, had sex with the Appellant. A report was made at Salama police station and she was referred to Sultan Hamud hospital where she was examined and treated. She added that PW1 told her it was not the 1st time the appellant and her had engaged in sex.

10. **PW4 Dr. John Tukei** produced the P3 forms (EXB1as) on behalf of Dr. Hussein Givanji who had examined PW1

Findings

Her urine had been checked on 12th January 2014 and found to have an increased number of bacterial cells but no spermatozoa were found therein.

Further findings.

11. There were no injuries on the hymen, no discharge or blood from the vaginal organ. The hymen was intact. There was no evidence of defilement on 12th January 2014. The P3 form was filled on 14th January 2014. She was further examined on 5th February 2014 when all results were negative save for the pregnancy test which as positive. The positive pregnancy test was an indication that PW1 had had sexual intercourse. He produced the P3 form and treatment notes as EXB1a & b.

12. In cross examination he said the pregnancy was about 3 weeks old as at 5th February 2014. He added that it was not possible to get positive pregnancy results a day after a woman is raped or defiled.

13. **PW5 P.C. Margaret Wanjiku Gitau** took over the investigations after the investigating officer P.C. Abdi Safar was transferred. She said PW1 was aged 14 years at the time of incident.

14. The appellant gave a sworn defence. He denied the charge explaining how he had spent the day herding cattle at his sister Judy's place. He then showered and went to Kiu market for a shave at 3.00 p.m. While at the barber's he was arrested by an elder and taken to the AP's post and thereafter taken to Salama police station. It's there he learnt of the charge against him.

15. **DW2 Judith Mwelu** Leonard is the appellant's sister. She confirmed that the appellant had gone herding and returned at 2.00 p.m. – 3.00 p.m., afterwhich he took a shower and went to the market. At 5.00 p.m., she received a phone call and was informed that the appellant had been arrested by a police officer at Kiu and taken to Salama police station. She did not know what happened next.

16. M/s Agina & Associates for the appellant filed written submissions which were highlighted.Mr. Ojwang who appeared for the appellant on the hearing date submitted that they entirely relied on the written submissions. the same identified 3 issues for determination namely;

(i) Whether the offence of defilement was proved.

(ii) Whether the age of the complainant and appellant was proved during the hearing.

(iii) Whether the conviction and sentence should stand.

17. On the first issue he faults the trial Magistrate for assuming that the absence of the hymen alone confirmed penetration, even when there were no injuries and spermatozoa in the genitalia. He cited the case of **Langat Donyo Domokonyang –Vs- Republic [2017] eKLR** where Justice S. M. Githinji with approval quoted the Canadian case of **Queen –Vs- Manuel Vincent Quitanilla 1999 ABQR 769** where it was held that;

> ***"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female intact are born. In most cases of the sexual offences we have dealt with court tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not born with hymen. Those who are, there are times when hymen is broken by factors others than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation injury and medical examination can also rapture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastic there can also be natural tearing of the hymen."***

18. He further submits that the trial court's finding is not supported by the medical evidence. He argued that the trial court took one year after close of the prosecution case to ascertain the age of the appellant.

19. He argues that the 1st pregnancy test was negative, while the 2nd one taken 3 months later while the appellant was in custody was positive.

20. Finally he contends that there was no evidence on the age of the complainant yet Section 8(2) is key on age. He also submits that the Appellant had contended that he was a minor. His age was also not confirmed.

21. The respondent through learned counsel Mrs. Monica Owenga opposed the appeal, saying the evidence on record is sufficient as PW1 gave an account of her ordeal. That even without the medical evidence her evidence was good enough. Failure to have the appellant taken for medical examination does not mean that the offence did not take place.

22. It was her submission hat there was interpretation by a clerk during the hearing. Further there was no ill motive on the issue of the appellant's age and there was no need of indicating it in the charge sheet. The court saw him and proceeded with the case since he was aged over 12 years.

23. Finally she submitted that a pregnancy manifests after a while and moreover the appellant was charged with defilement and not causing pregnancy. It is her submission that the court was convinced that the complainant was below 18 years.

Analysis & Determination

24. This is a first appeal and this court is therefore guided by the principles set out in the case of **David Njuguna Wairimu –Vs- Republic (2010) eKLR** where the Court of Appeal stated;

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

25. In a much earlier decision the Court of Appeal similarly held in **Okeno –Vs- Republic [1972] EA 32** that;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424."***

26.I have carefully considered the evidence on record, grounds of appeal, submissions by both parties and the authorities cited. I find the issues falling for determination to be as follows;

(i) Whether the appellant's right to fair trial was violated by failure to avail an interpreter.

(ii) Whether there was proof of the complainant's age.

(iii) Whether the complainant's vagina was unlawfully penetrated.

(iv) Whether the appellant was positively and properly identified as the person who caused the penetration.

Issue No. (i) – Whether the appellant's right to fair trial was violated by failure to avail an interpreter.

27. In ground No. (iv), the Appellant claims that he was not able to follow proceedings due to a language barrier. That there was no interpreter to assist him. Article 50(2)(m) of the constitution provides this;

> ***"(2) Every accused person has the right to a fair trial, which includes the right –***
>
> > ***(m) To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

In response to this counsel for the respondent submitted that there had been interpretation in the court.

28. The record shows that the trial magistrate Hon. P. Wambugu SRM who took the evidence of PW1- PW3 did not indicate the language that the witnesses gave their evidence in. There was however a court clerk going by the name of Kyalo present throughout. The evidence of PW4 and PW5 was taken by Hon. A.G. Ndungu.

29. It's clearly shown that the two witnesses testified in English. Also present on those two occasions is a court clerk called Kithinji. When the appellant made his defence it is Kyalo/Kithinji who were the court clerks in court. The interpretation is in Kikamba/Kiswahili though it's not indicated the language in which the appellant's evidence was taken. His witness DW2 testified in Kikamba.

30. From the record I am satisfied there was a court clerk present in court. The work of the clerk is to do interpretation. The appellant was able to cross examine the witnesses and even communicate with the court by answering questions. Secondly he never expressed to the court of any difficulty he may have experienced in following proceedings. I find no merit in this ground.

Issue No. (ii) – Whether there was proof of the complainant's age.

31. The appellant was charged with defilement under Section 8(1) (2) of the Sexual Offences Act which is a non-existent provision of the law. Most probably it was meant to be Section 8(1) as read with section 8(2) of the Sexual Offence Act. Section 8(1) and Section 8(2) of the Sexual Offences Act 2006 provide 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.***

From the particulars in the charge the age of the complainant is shown as 14 years. The age of 14 years is covered under Section 8(3) and not Section 8(2) of the Sexual Offences Act as shown in the charge sheet and the judgment.

32. The issue is whether the complainant's age was established. The Sexual Offences Act 2006 defines "child" within the meaning of the Children's Act No. 8 of 2001 which defines a "child" as ***"……any human being under the age of eighteen years."***

33. Under the regime of the Sexual Offences Act the proof of age is very important for purposes of sentence. In the case of **Martin Okello Alogo –Vs- Republic [2018] eKLR,** Justice R. Aburili on a similar issue stated thus;

> ***"On the issue of whether the age of the complainant was proved, the importance of proving the age of a victim of defilement under Sexual Offences Act by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms, an important part of the charge because the prescribed sentence is dependent on the gage of the victim."***

See **Alfayo Gombe Okello –Vs- Republic Cr. Appeal No. 203 of 2009 (KSM)** where the Court of Appeal stated;

> ***"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 891)……."***

34. In the case of **Francis Omuroni –Vs- Uganda, C.O.A Cr. Appeal No. 2 of 2000** it was held thus;

> ***"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. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense……"***

See also the Court of Appeal decision in the case of **Hadson Ali Mwachogo –Vs- Republic [2016] eKLR.**

35. From the evidence I note that PW1 (complainant) and her parents (PW2 & PW3) did not mention anything about the complainant's age. The P3 form shows she was 14 years and that must be what the police were told when the matter was reported.

36. **PW5 P.C. Margaret Wanjiku Gitau** who testified on behalf of the investigating officer said the investigating officer in his statement said the complainant was aged 14 years. There was however no evidence placed before the court to show when the child was born. Even her own parents did not state when she was born. The respondent's counsel submitted that the child was below 18 years of age. That could be the position but which of the penal provisions of the Sexual Offences Act apply without proof of age?

37. The learned trial magistrate acknowledged that neither PW1, PW2 nor PW3 stated the age of PW1. She relied on the estimated age in the P3 form to confirm PW1's age. How was this age estimated and by who? She found the P3 form to have been filled by a senior medical officer who is an expert. I want to believe she was talking about Dr. Hussein Givanji.

38. The record shows that PW1 – PW3 testified on 13th March 2014. Getting Dr. Givanji who had gone for further studies in Kenya and at the University of Nairobi was such a big issue. The medical evidence was finally taken on 13th June. 2017. Infact in between the appellant has jumped bail from 17th November 2016 until 7th March 2017 a period of 4 months.

39. When Dr. Givanji could not be availed to testify, Dr. Tukei came to his rescue on 13th June 2017. The record shows the following to have transpired on 13th June 2017 at page 40 of the Record of Appeal.

> ***Prosecutor:*** *I wish to make an application to call a doctor who is not the maker of the P3 form to produce the P3 form on behalf of his colleague. The P3 form was filed by Dr. Givanji who is currently pursuing post graduate studies at Nairobi University. The doctor has worked with Dr. Givanji and knows his handwriting. I request that Dr. Tukei be allowed to produce the P3 form.*
>
> ***Accused:*** *Object to the current doctor producing the P3 form. He is not the one who filled the P3 form.*
>
> ***RULING***

Dr. Givanji who filled the P3 form went for further studies at the University of Nairobi. It will occasion delay contrary to Article 159 of the constitution to adjourn the case and wait for Dr. Givanji to complete his further studies the court does not even know when Dr. Givanji will complete further studies and whether he will return back to public service.

A P3 form is a public document and can be produced by another doctor who knows the handwriting of Dr. Givanji. Dr. Tukei who is in court knows the handwriting of Dr. Givanji. I find that the application by the prosecution meets the requirements of the Evidence Act. I allow Dr. Tukei to give evidence and produce the P3 form.

D. M. NDUNGI

SENIOR RESIDENT MAGISTRATE

40. It is therefore clear that the appellant objected to the production of the P3 but was overruled by the court. PW4 who did not know or even see PW1 could not have explained how Dr. Givanji arrived at an estimated of the complainant to be 14 years. There is no evidence that he did any age assessment. In any event it is the doctors who have done dentistry who are experts in age assessment.

41. There are no notes by the trial court indicating why he could have believed that PW1 was fourteen (14) years. He made no observations on this. My finding is that PW1's age could not be ascertained from the evidence on record.

Issue No. (iii) & (iv) – Whether the complainant's vagina was unlawfully penetrated & whether the appellant was positively and properly identified as the person who caused the penetration.

42. From the results of the examination by Dr. Givanji the hymen was intact. I have confirmed this form the original and typed proceedings. The P3 form makes no mention of the hymen. PW4's evidence is very clear on this. He states at page 41 lines 15-19 what the results were. This is clearly set out at paragraphs 10-11 of this judgment.

43. In her judgment the learned trial Magistrate states this at page 7 lines 5-14;

"PW4 confirmed upon examination of the genitalia revealed the hymen was not intact but there were no injuries on the vagina, no discharge and blood from the vagina as well. There was no spermatozoa seen. The pregnancy test done on 05/02/2014 turned out to be positive. For the offence of defilement to be proved there has to be an act of partial or complete penetration. Although there was no spermatozoa and injuries on the genitalia the absence of hymen confirmed there was penetration. The evidence of the complainant proves penetration.Her evidence of penetration is corroborated by the medical evidence. I find that there is evidence of penetration of the genital organs of the complainant."

44. According to the said judgment the court found that PW1's hymen was not intact. That its absence confirmed there was penetration and on the basis of that she confirmed penetration. I have read both the original and typed record and I have not found where PW4 said PW1's hymen was not intact or was missing. That is not the evidence on record.

45. I am however not surprised at the doctor's results because PW1 told the court that prior to this incident she had actually had sexual intercourse with the Appellant over five (5) times. Further that they started their relationship in 2012. That being the case one would not expect to find bruises and lacerations in her genitalia especially when no force was applied.

46. The evidence of PW2 and PW3 who are the parents of PW1 is that they found PW1 in the appellant's house. PW1 says she was still naked when her parents came. She however adds that she had consented to the encounter. The appellant denied all this explaining where he had been herding cattle. That exercise of herding cattle alone could not tie him to one place. Him and his witness (DW2) did not deny that PW1 – PW3 are known to them.

47. I have not found any reason why PW2 & PW3 who had to leave church to look for PW1 would lie about the place where they found her. PW1 confirms she was with her friend the appellant who had picked her from her home. She also confirms that her parents came there and found her in that house where she had just had sex with the appellant. This evidence and that of her parents add up well. The mere fact that the pregnancy test results were negative on 12th January 2017 does not mean she had not had sex with the appellant.

48. Upon evaluating the evidence on record, I am satisfied that PW1 and the appellant were involved in sex on 12th January 2014. The charge of defilement was proved.

49. The next issue for determination is the penal provision applicable. Is it Section (2) or Section 8(3) Sexual Offences Act. In the absence of proof of PW1's age this becomes a challenge. This court would not rubber stamp what is in the charge sheet without proof of the same.

50. The trial court went out of its way to try to confirm the appellant's age at the time of the offence. The first trial court was the best placed to do that but did not. The probation officers reports indicate that as at the time of doing the reports in 2018 the appellant was about 19 years. Which clearly means in 2014 when this incident occurred he was less than 18 years of age.

51. The court sent him to the hospital and the reports from the x-rays and dental check up show that he was 18 years as at 2018. This confirms he was a minor at the time of commission of this offence.

52. In her ruling on sentence the trial court seemed to investigate the child health card and to determine when the appellant was born. The prosecution had a duty to assist the court in determining the appellant's age at the time he was being charged. That was never done.

53. The probation officer's reports bring out this well. PW1 and the appellant were minors let loose by their parents. That's why PW1 was not even finding it a dishonor on how she had consented to the sex which she had become used to.

54. The appellant having committed the offence while under 18 years even though above 12 years would not be sent to a prison term however serious and prevalent the offence was. The trial court should have but failed to consider the several options under the Children's Act.

55. The appellant has been in prison for almost two years now. I will consider that as sufficient punishment. **I therefore allow the appeal on sentence only but uphold the conviction.**

56. **The sentence of 20 years imprisonment is set aside and substituted with the period already served. Appellant to be released unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 30th day of January 2020, in open court at Makueni.

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H. I. Ong'udi

Judge