



**REPUBLIC OF KENYA**

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

**[Coram: A. C. Mrima, J.]**

**CRIMINAL APPEAL NO. 37 OF 2019**

**JCM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. L. N. Mesa Principal Magistrate in Kehancha Magistrate's Court Criminal Case No. 21 delivered on 14/5/2019)***

**JUDGMENT**

1. The appellant herein, JCM, was charged with the offence of *Defilement* contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** No. 3 of 2006. The Appellant denied the offence.
2. The particulars of the offence of defilement were that '*on the 8<sup>th</sup> day of July 2018 at [particulars withheld], intentionally caused his penis to penetrate the vagina of RN a girl aged 15 years old*.'
3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.
4. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 28/05/2019 in challenging the entire judgment.
5. Directions were taken and the appeal was canvassed by way of written submissions. The Appellant vehemently attacked the way the age of the victim was proved. He also contended that the victim presented herself, and he so believed, as an adult.
6. The State supported the appeal. They raised the issue of the age of the appellant. They contended that the age was not properly settled and that the sentence was too excessive and that the court considered extraneous matters in coming up with the sentence.
7. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
8. I have carefully read and understood the evidence adduced at the trial, the Petition of Appeal and the submissions. The trial court captured the evidence so well that I incorporate the part of the judgment herein by way of reference.
9. I will first consider the issue of the age of the appellant. The age of the appellant came to the fore for the first time during sentencing. The age was captured in the Pre-Sentence Report dated 09/05/2019. It was 18 years.
10. It therefore means that by the time the appellant was arrested and tried he was likely to be less than 18 years old. I say so because the report did not indicate that the appellant was above 18 years old. He was just 18 years old. There was no any other information on the age of the appellant. On the other hand, the age of the victim was 15 years old.
11. The appellant raised the defence contemplated in **Section 8(5)** and **(6)** of the **Sexual Offences Act** in his submissions and not during the trial. During the trial he maintained that he was framed up by one Nyamarwa whom they had fought and the said Nyamarwa was injured. The defence does not therefore come to the aid of the appellant.

12. I have carefully evaluated the evidence on record. I am satisfied that the offence of defilement was proved. The age of the victim was settled by way of a Child Health Card. Under **Rule 4** of the **Sexual Offences Act (Rules of Court) 2014** which came into force on 11/07/2014 under Legal Notice No. 101, a victim's age can be determined by way of a birth certificate, any school documents, a baptismal card or any other similar document. It is therefore this Court's holding that the Child Health Card fall in the category of "*any other similar document*" and can be safely used to confirm the victim's age. Therefore, the age of the victim was well settled.

13. Penetration was proved by the evidence of the victim and the Clinical officer. The Clinical Officer examined the victim and found spermatozoa in the vagina of the victim. That is proof of penetration.

14. There is as well no difficulty in finding that the appellant is the one who was found living with the victim. At the very least the appellant's submissions on the defence attest to that fact. The appellant was hence rightly found guilty of the offence of defilement. Since the appellant was a minor no conviction can be entered against him in line with **Section 189** of the **Children Act**. The conviction entered by the trial court is hereby set-aside accordingly.

15. On **sentence**, the appellant was sentenced to 20 years' imprisonment. As stated above the appellant was a minor when he committed the offence. He was around 17 years old whereas the victim was 15 years old. Under the **Children Act** the appellant ought not to be sentenced to an imprisonment term. I am however alive to the Court of Appeal decision in **Kisumu Criminal Appeal No. 52 of 2015 Duncan Okello Ojwang vs. Republic (2019) eKLR** on sentencing of an assailant who was a minor at the commission of the offence but turned to an adult by the time of sentencing.

16. I have considered the mitigations and noted the contents of the Pre-Sentence Report. I also note that both the appellant and the victim were, and are still, teenagers. I do not think the circumstances under which the offence was committed call for a custodial sentence. The appellant is a young boy who has just turned an adult. This is a case where the appellant ought to benefit otherwise. I therefore set aside the custodial sentence of 20 years.

17. The sentence proposed under **Section 191(1)(a)** of the **Children Act** appears to me to be the appropriate one in this case. The appellant shall henceforth be discharged on condition that he does not commit any offence within the next 12 months. In the event the appellant commits an offence within the said period of conditional discharge the appellant shall be liable to be sentenced for the original offence of defilement.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of February 2020.**

**A.C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Joseph Chacha Mbusiro**, the appellant in person.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant