



**REPUBLIC OF KENYA**

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

**HCCRA NO. 13 OF 2019**

**MOSES MWENDA CYPRIAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***Being appeal from original conviction and sentence in the Senior Principal Magistrate's Court at Marimanti SO No.12 of 2018 delivered by HON. P.N. MAINA - (Senior Principal Magistrate (S.P.M) on 21<sup>st</sup> November, 2018).***

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

1. **MOSES MWENDA CYPRIAN**, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **8(3)** of Sexual Offences Act No. 3 of 2006 vide ***Marimanti Senior Principal Magistrate's Court Criminal Case No.12/2018***. The particulars presented alleged that on 14<sup>th</sup> June 2018 at Nkondi Location Tharaka South, Tharaka Nithi County, the Appellant defiled (name withheld) a child aged 12 years old. He also faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of **Sexual Offences Act**.
2. The Appellant denied committing either of the said offences but after trial he was found guilty of the main charge and convicted. He was then sentenced to serve 20 years imprisonment. He felt aggrieved and preferred this appeal.
3. A brief overview of the case against the Appellant as per the proceedings from the lower court indicates that the victim, a minor aged 12 years at the time as per the birth certificate tendered (P Exhibit 4) was waylaid after attending music competition at her local Primary School (Particulars withheld] Primary School) by the Appellant and defiled under a mango tree. The victim was in the company of her brother EM (PW2) who was sent away by the accused after being given a mango fruit. The evidence of the minor was corroborated by her brother (PW2), and a clinical officer (Benard Mwenda (PW3) who tendered a P3 (P Exhibit 1) indicating that the minor was defiled.
4. It is apparent from the evidence tendered that the Appellant and the mother of the victim (PW4) both employees of a neighbour and the minor had gone to look for her mother when she found the Appellant who took advantage of her because the mother had already left for home when the victim and PW2 reached there.
5. When placed on his defence the Appellant denied committing the offence stating that the victim's mother framed him up after he reported her to their boss for allegedly stealing eggs.
6. The trial court in its judgment found that the prosecution's case against the Appellant had been proved beyond doubt and dismissed the defence as a sham because there was no evidence tendered to prove that the victim's mother had a grudge to give incriminating evidence against him.
7. As noted above, the Appellant was dissatisfied with the finding of the trial court and preferred this appeal raising the following grounds in his petition namely:-
  - (i) ***That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced had irregularities and malpractices.***
  - (ii) ***That the evidence tendered by prosecution witnesses were inconsistent and not collaborative.***
  - (iii) ***That there was no independent witness to clear doubts.***
  - (iv) ***That the trial magistrate rejected his defence without giving cogent reasons.***
8. In his written submissions the Appellant submits that the trial magistrate failed to note that the case against him was not proved beyond

doubt. He points out that the medical evidence tendered by PW5 failed to support the allegations against him because the victim's hymen was not freshly broken. He claims that the allegations were a fabrication because of a grudge between him and the victim's mother.

9. He further contends that the complainant did not have injuries or blood in her private part and her clothes were intact. He has relied on the decision in ***PKW -vs- Republic [2012] eKLR*** where the court observed that a child's hymen can be torn by other activities and not necessarily through defilement. He asserts that a broken hymen in itself is not proof of defilement and that the medical evidence was inconclusive.

10. That Appellant further submits that the victim was coached by her mother to testify against him arguing that the same has become a common occurrence.

11. The Respondent on the other hand through the Office of the Director of Public Prosecution has opposed this appeal vide written submissions dated 19<sup>th</sup> February 2020. The Respondent contends that the prosecution's witnesses were consistent, candid and clear as to how the offence was committed by the Appellant herein.

12. The Respondent in summary submitted that the evidence tendered demonstrated that all the elements of the offence namely penetration, age and identification were proved. The State further submitted that the minor was believable and that the evidence on its own under **Section 124 Evidence Act** could stand the test.

13. On allegations that the defence was not considered, the Respondent insists that the same was considered and that the trial court felt that the same did not have any evidence exonerating the Appellant.

14. The Respondent contends that the medical evidence tendered supported the charge against the Appellant and that the sentence was fair given that the Appellant defiled the minor knowing that he had syphilis.

15. This court has considered this appeal and the grounds raised. I have also considered the response by the State. The Appellant herein as noted above was charged and convicted of the offence of defilement. Under the Sexual Offence the main ingredients of the offence of defilement are:-

(i) Penetration whether complete or partial.

(ii) Age of the victim (minor)

It is also necessary for the prosecution to positively connect the above elements with the accused person beyond reasonable doubt for a conviction to be sustained.

16. This court has carefully considered the evidence tendered by the complainant or the victim and finds that the same was candid about the events leading up to the defilement. She was escorted by her elder brother (PW2) and his evidence is clearly corroborative contrary to what the Appellant asserts in this appeal. PW2 clearly stated that he was sent away by the Appellant who enticed him with a mango fruit and the boy went away leaving the girl in the company of the Appellant. The Appellant in his action clearly showed that he created an opportunity to commit the offence which he did under a mango tree. The details given by the minor about the ordeal she underwent in my view in itself was sufficient to found a conviction. She was credible and the provisions of **Section 124** of the Evidence Act provides;

***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***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 minor's evidence as corroborated by PW2, PW3 (Clinical Officer) and PW4 (victim's mother). On the whole the evidence tendered proved all the ingredients of the offence of defilement.

18. The Appellant's allegation that his defence was disregarded by the trial court is not correct. The trial court duly considered the defence raised and found the same unfounded. The allegations of existence of a grudge was not supported by any evidence tendered by the Appellant. He did not call his boss to confirm the allegations that the victim's mother had a grudge against him after reporting her over alleged theft of eggs belonging to their employer. The Appellant's contention that the victim's mother fabricated a case against him in order to fix him is at best an afterthought. He never brought up the issue during cross-examination when PW4 testified.

19. Furthermore, even if the medical evidence showed that the hymen was not freshly broken, it still showed;

***"The blood cells seen in urine shows that the bladder was pushed with bruising during penetration."*** The fact that the hymen had been broken does not absolve the Appellant from blame because an offence is an offence. If one commits an offence of say defilement he cannot turn back and say that the victim's hymen had been broken earlier vide a previous encounter. As the Appellant readily concedes, a hymen may be broken by other activities other than sexual encounter. His contention that the hymen was not freshly broken does not and cannot absolve him from culpability. This court finds that the prosecution's case against the Appellant was overwhelming and the conviction

by the trial court was well founded.

20. On sentence, the minor was born on November 2006 as per the birth certificate (P. Exhibit 4) while the offence occurred on June 2018 which means she was yet to turn 12. The provision of **Section 8 (1)** red with **subsection 2** of **Sexual Offences Act** provides that a person who commits defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life. Of course the minor was aged between 11 and 12 years the trial court used its discretion in imposing the 20 years imprisonment. Given the fact that the Appellant was found to be suffering from a Sexual Transmitted Disease, he really put the minor at risk by defiling her. The sentence imposed therefore was appropriate and I find no basis to interfere with it whatsoever.

In the end, this court finds no merit in this appeal. The same is disallowed. Both the conviction and sentence are upheld.

**Dated, signed and delivered via skype this 29<sup>th</sup> day of April, 2020.**

**R. K. LIMO**

**JUDGE**

**29/4/2020**

Judgment delivered via skype in presence of Momanyi for ODPP and accused person.

**R.K. LIMO**

**JUDGE**

**29/4/2020**