



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 187 OF 2016.**

**RKB.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from conviction and sentence of the appellant by the Principal Magistrate Hon. Mararo delivered on 9<sup>th</sup> of December 2016 in Nakuru Cr. Case No. 176 of 2015.)*

**JUDGMENT**

1. The appellant was charged with one count and with alternative charge. Count 1 is offence of **defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between January 2014 and December 2014 at [particulars withheld] Estate within Nakuru County, intentionally and unlawfully committed an act by inserting his male genital organ namely penis into the female genital organ namely vagina of **MWK** a child aged 12 years old which caused penetration.
2. The alternative charge is the offence of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on diverse dates between January 2014 and December 2014 at [particulars withheld] Estate within Nakuru County, intentionally and unlawfully committed an indecent act by touching private parts namely vagina, breast and buttocks of **MWK** a child aged 12 years old.
3. The appellant denied the charges and the case proceeded for full trial, the prosecution called 4 witnesses in support of their case while the appellant gave sworn defence and called one witness. The trial magistrate found the appellant guilty of the offence of defilement and convicted him. He was sentenced to serve life imprisonment.
4. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal on the following grounds: -
  - i. *That the learned trial magistrate erred in law and fact in failing to find that the age of the complainant was not conclusively established.*
  - ii. *That the learned trial magistrate erred both in law and facts in dismissing the Appellant's defence of alibi which was strong and unchallenged.*
  - iii. *That the learned trial magistrate erred in law and fact in convicting the appellant in reliance of fabricated and contradicted evidence.*
  - iv. *That the learned trial magistrate erred in law and fact in convicting the appellant yet failed to find that penetration was not proved.*
  - v. *That the learned trial magistrate erred in law and facts by convicting the Appellant on cooked evidence that was out to settle a marriage feud.*
  - vi. *That the trial magistrate erred in law and fact by imposing a mandatory sentence of 20 years as the only sentence and did not consider the mitigation of the appellant.*
5. The appeal is strongly opposed by the prosecution through its state counsel. On 19<sup>th</sup> of February 2020 the matter proceeded for oral hearing where the Appellant fully relied on his filed submission and the counsel for the prosecution gave his oral submissions.

**APPELLANT'S CASE:**

6. The appellant submitted on the amended grounds of appeal. On grounds 1 and 6 the appellant submitted that the age of the complainant was not conclusively established and proved. As per the charge sheet the appellant was charged with defiling a child aged 12 years while the trial magistrate proceeded to convict him to life imprisonment without the prosecution amending the charge sheet the sentence imposed on him was harsh and excessive as the offence he was being charged of attracts a sentence of 20 years yet the trial magistrate sentenced him to life. The age assessment report produced in court was produced by the PW4 the Investigating officer and she was the maker of the document. The same is not admissible before court.

7. On the grounds 2, 3 and 5 the appellant submits that he raised *alibi* defence; that in his defence of *alibi* he stated as follows:-

*“I am a musician at Club 3 Ways...I go to work from 6 pm. I return at 6 am. I do not go home at night.”*

8. Appellant argued that his defence of *alibi* was not considered by the trial magistrate. He said he was convicted because the court relied on fabricated and contradictory evidence. He told the court that he and PW2 had a dispute that goes to root of the case. He stated that he married DW 2 after separating with PW2 and this brought bad blood between the two and PW2 is using the complainant to get at him. He said PW2 framed him and plotted the whole story to keep him away from DW2.

9. On ground 4, the appellant submitted the trial magistrate convicted him yet the prosecution failed to prove that there was penetration. That the ingredient of penetration in defilement was not proved as the medical evidence showed that PW1's hymen had been torn in the past and the trial magistrate shifted the burden of proof to the Appellant to prove how the complainant's hymen had been torn.

10. On ground 6 the appellant submitted that the sentence imposed on him was harsh and excessive as the offence he was being charged of attracts a sentence of 20 years yet the trial magistrate sentenced him to life imprisonment.

#### **PROSECUTION'S CASE;**

11. On whether the prosecution was able to prove their case beyond any reasonable doubt, the state counsel submitted that all the ingredients of the offence of defilement were proved.

12. On whether there was a grudge between the complainant's father and himself, the state counsel submitted that PW1 the complainant stated before court that she was not forced to lie, she stated she had been defiled by the appellant; that the appellant did not raise the issue of grudge during the cross examination of PW2, the complainant's father. The appellant stated he had been chased with a knife by PW 2 and filed report with the police but he never produced occurrence book (OB) extract to confirm the Appellant never corroborated the grudge.

13. On ground 4 the state counsel submitted, PW3 the doctor appeared before Court and stated he had examined the minor and noted she had an old torn hymen. She submitted that the doctor stated the complainant had been defiled on diverse dates between January 2014 and December 2014. She was 12 years old and her age indicated in the P3 form was approximately 11 years. Further that PW4 the investigation officer had taken the complainant for age assessment and produced the report in court. The state counsel urged the court to consider the age assessment and the medical evidence placed before court.

14. On ground 8 the state counsel submitted that the standard of prove was never shifted from the prosecution. They relied on the case of **Republic Vs Mkendeshwa (2002) KLR 461** where the court stated that, the burden of proof remains upon the prosecution and can only be shifted in special circumstances such as where the accused is called to explain a matter which is within their personal knowledge.

15. On ground 10, the prosecution submitted that the appellant's mitigation was considered as it is recorded in the judgment.

16. On ground 6, she submitted that the appellant was given opportunity to tender defence before court and his evidence was inconsistent and evidence by DW1 and DW2 were never corroborated and no exhibits were produced.

17. She submitted that on identification, PW1 stated she had known the appellant for a considerable period of time as he was married to her mother (DW2) she had lived with the Appellant and DW2 as a family then they separated for seven years. She stated appellant was a step father to the complainant and at the time of the offence, the complainant and the mother were living with the appellant along with 2 brothers. That at the time of the incident, she was able to see the appellant clearly; and she stated it was not the first time the accused defiled her. This was corroborated by PW2.

#### **DETERMINATION AND ANALYSIS.**

18. I will first start by appreciating the duty of a first appellant court which has been well settled on, a role that this court is about to engage on now. 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** it was held that;

**“the first appellant Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze 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.”**

9. Further in the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336** the court stated as follows: -

**“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to**

rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

10. I have perused and considered proceedings before the lower court and submissions filed herein and find the following as issues for determination

- i. Whether the ingredients of defilement were proved.
- ii. Whether the appellants sentence was harsh and unreasonable.

**(i) Whether the ingredients of defilement were proved.**

11. Ingredients for the offence of defilement are prove of age, penetration and whether the appellant was identified as the person who defiled the victim. I will look at each of the ingredient of the offence alongside evidence adduced.

10. In respect to age of the PW4 was taken to Nakuru PGH as the mother of the victim could not avail birth certificate. He produced assessment report dated 10<sup>th</sup> July 2015. I have perused the age assessment report and note that the child’s age was assessed as between 9 to 10 years. The child said she was 12 years old but without birth certificate or clinic card, it is not certain that she was 12 years as she stated. From record I note that the child’s mother who was living with the appellant as a wife after separating with the child’s father was cooperative and that could have explained why she never availed birth documents to the court. In the absence of any document showing when the child was born it is safe to rely on the age assessment report by the doctor. The appellant never challenged the age assessment report. I will therefore take the finding of age by the doctor as the age of the complainant. I don’t see merit on the ground of appeal.

11. Whereas many Courts have held the best evidence to establish age of a victim is by production of a birth certificate, birth notification, age assessment report, clinic card or baptism card it has also been held that that the prosecution may establish the age of the victim by medical examination through age assessment or in the medical reports produced before court. In this appeal the age assessment report shows that the victim was aged between 9 to 10 years at the time of the defilement. It is my conclusion that the prosecution proved the age of the complainant beyond reasonable doubt that she was 11 years of age as no evidence was produced to the contrary.

12. In the case of **Hadson Ali Mwachongo Vs. Republic** [2016] eKLR, the Mombasa Court held that:

**“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that 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 age of victim...”**

13. In the case of **Joseph Kieti Seet Vs R** [2014] the Court held that:

**“It is trite Law that the age of a victim can be determined by medical evidence and other cogent evidence.”**

14. In **Francis Omuroni Vs. Uganda, CR. Appeal 2/200** it was held:

**“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 a birth certificate, the victim’s parents or guardian and by observation and common sense. ....”**

15. In **Hadson Ali Mwachongo Vs R** [2016] eKLR C.A. (Mombasa) per **Makhandia, Ouko & M’Inoti, JJA** the learned Judges of the Court of Appeal stated; and concur that:

**“Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 10 years, 13 years etc., as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is at victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old or as more than 11 years old? If the victims treated as 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed? In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?”**

**On the face of it, an attractive argument is that there is doubt as to the age of the victim and that the benefit of the doubt ought to be given to the accused person, so the less severe sentence is imposed. Thus, where the victim is say, 15 years and 2 months, she would be treated as 16 years so that he accused person is sentenced to 15 years imprisonment, as though the victim was aged between 16 and 18 years, instead of 20 years, for a victim of 15 years.**

16. Indeed, in **Alfayo Gombe Okello Vs R.** (supra) this court went about the issue as follows:-

**“The evidence of the mother was that she (the victim) was born in 1992. No month or date is mentioned. If she was born between January and July 1992, she would obviously have been above 15 years of age but below sixteen when the offence was committed. It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years.**

**Section 8(4) caters for the age of sixteen to Eighteen years we must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant we so find.”**

17. I note that in the charge sheet the age of the child is indicated as 12 years. The accused was however convicted under **Section 8 (3)** which provide for defilement of a child aged twelve years to fifteen years. The magistrate noted that the victim was below 11 years at the time of defilement and imposed sentence of life imprisonment.

18. In respect to penetration, PW1 in her testimony stated she lived with the Appellant who is her step father and mother; and that the mother and the appellant would arrive home drunk; and in the night, the appellant would leave the bedroom and go to the sitting where she slept with her siblings and have carnal knowledge of her. She said the appellant would remove her pant and his inner wear and insert his penis which she called *dudu* into her genital organ which she also called *dudu*. That he would thereafter return her pant and cover her with a blanket and leave.

19. PW3 **Dr. Njoroge Kurgat**, on examining the complainant found her hymen torn. He said it was an old scar with no discharge from the reproductive. It was his conclusion that there was penetration and the complainant had been defiled; the doctors finding was corroborated by P3 form which had been filled.

20. That aside, **Section 124 of the Evidence Act** provide that a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth. The child testified that the defilement was repeated over a period of time which explained old scar found in the broken hymen. From the foregoing, I find that evidence of penetration was proved beyond reasonable doubt.

21. **On identification of the assailant**, PW1 testified that is that the appellant was well known to her. PW 1 testified to have known the Appellant as he is her step father and was living with him and her mother. There is therefore no doubt that the complainant knew the appellant.

22. From the foregoing, I find that the three ingredients for the offence of defilement were proved beyond reasonable doubt. I will not therefore interfere with conviction by the trial court. Appeal on conviction is therefore dismissed.

23. As to Whether the appellant sentence was harsh and unreasonable, I note that the appellant was charged for **Defilement** contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** which provides as follows:

**Section 8. (1) of the Sexual Offences Act No. 3 of 2006** states;

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

While **Section 8. (3) of the Sexual Offences Act No. 3 of 2006** states:

**“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”**

24. The Appellant was convicted for the offence of defilement and sentenced to a jail term of life imprisonment. The act under which he was charged indicated the minimum punishment of 20 years, however upon the case proceeding for the full trial and production of evidence it was proved that he had defiled a child aged 11 years which offence attracts punishment for life imprisonment.

25. I consider that the discrepancies of the age are not material and curable under **Section 382 of the Criminal Procedure Code**. The act of defilement was proved against the Appellant beyond reasonable doubt. It is therefore my conclusion that the trial magistrate did not error in law by imposing a harsh or excessive judgment. He was guided by the law and imposed the minimum sentence provided for by the law.

26. I am however alive to the determination of **Muruatetu** case where the court found that it is unconstitutional for statute to take away discretion of the court in sentence and that mitigating factors in a case should not be rendered superfluous. I note that in this case, the appellant mitigated though the trial courts hands were tied by the statute which provided mandatory sentence of life imprisonment. In view of **Muruatetu** case, I have considered appellant’s mitigation on record, I have also considered the age of the minor who was between 9 to 10 years and the fact that the appellant took advantage of a girl who looked up to him as a parent. In view of the above, I find sentence of 15 years’ imprisonment would be appropriate.

## 27. **FINAL ORDERS**

1. Appeal on conviction is dismissed

2. Appeal on sentence allowed
3. Sentence reduced to 15 years' imprisonment
4. Sentence to run from the date he was sentenced in the lower court.

**Judgment dated, signed and delivered via zoom at Nakuru This 28<sup>th</sup> day of May, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

Appellant in person

Rita for State