



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

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

**CRIMINAL APPEAL NO. 52 OF 2019**

**CALVINCE OTIENO JUMA.....APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal arising from the conviction and sentence by Hon. J. O. Alambo Resident Magistrate in Kehancha Magistrate's Court Criminal Case No. 938 of 2016 delivered on 4/ 07/2018)**

**JUDGMENT**

1.The Appellant herein, Calvince Otiemo Juma, was charged with the offence of Defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006 and with an alternative offence of committing an indecent act with a child. The Appellant denied both counts.

2. The particulars of the offence of defilement were that 'on diverse dates between October 2017 and March 2018 at [particulars withheld], intentionally caused his penis to penetrate the vagina of I. A. O. a girl aged 15 years'.

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. PW1 was the complainant. PW2 was the mother of the complainant. The Area Chief of North East Kadenge Location testified as PW3. A Clinical Officer attached to Macalder Sub-County Hospital testified as PW4. The investigating officer was one No. 75016 PC David Kiprono who was attached to Piny Oyier Police Post under Migori Police Station testified as PW5. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as 'the complainant'.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence. He did not call any witness. Thereafter the court rendered its judgment on 27/06/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 08/07/2019 where the Appellant challenged the judgment and sentence on two main grounds that the court did not observe the complainant vis-à-vis her age and that his defence and mitigations were not considered.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant contended that Article 49(1)(a) and Article 50 of the Constitution were flouted, that he was not familiar with Kiswahili and English languages and that he was not supplied with written statements. The Appellant also relied on the defence under Section 8(5) and (6) of the Sexual Offences Act in arguing that the complainant behaved like a fully grown-up woman and enjoyed sex with other men. He relied on the persuasive decision in Martin Charo vs. Republic Malindi High Court Criminal Appeal No. 32 of 2015. He also contended that there was no D.N.A. examination undertaken to prove that he was the father of the child. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8.Mr. Kimanthi Senior Principal Prosecution Counsel supported the appeal on sentence. On conviction, Counsel submitted that the offence was proved in law. In respect to the sentence, Counsel submitted that in view of the age difference between the complainant and the appellant a non-custodial sentence was more befitting more so given that the appellant had undertaken to take care of the child.

9. 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 Okeno 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.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. As the Appellant strenuously submitted that he ought to benefit from the defence contemplated under Section 8(5) and (6) of the Sexual Offences Act, I will hence dwell on that defence.

11. I dealt with the said defence in Migori High Court Criminal Appeal No. 59 of 2015 Sammy Chacha Chacha vs. Republic (unreported). I disallowed the defence. The decision was appealed against. In allowing the appeal the Court of Appeal held that the standard of proof in relying on the defence under Section 8(5) and (6) of the Sexual Offences Act is on a balance of probabilities since the burden of proof never shifts from the prosecution throughout the trial. (See Kisumu Court of Appeal Criminal Appeal No. 107 of 2016 Sammy Chacha Chacha vs.

12. On how the Appellant demonstrated the defence on the balance of probabilities the Court of Appeal in Sammy Chacha Chacha case (supra) stated as follows: -

... the appellant was more likely than not to have been deceived by the appellant's express lie about her age. Moreover, the general conduct of both SBC and her mother PW2 was such as to cause the appellant to reasonably believe, on a balance of probabilities that the appellant was over the age of 18 years.

We think that had the learned Judge recalled that in a criminal trial the burden of proof ultimately and rests with the prosecution to prove its case beyond reasonable doubts, he would have avoided the approach that appears to have placed too heavy a burden on the appellant to prove his statutory defence.

13. Turning to the case, the Appellant denied ever knowing the complainant and stated that she met her for the first time in court. The appellant raised the issue of the statutory defence in his submissions on appeal.

14. The complainant on her part stated that she was a student in [particulars Withheld] Primary School. That, she befriended the appellant who was the school head boy in October 2017 and engaged in five acts of sexual intercourse upto March 2018.

15. It is surprising that the appellant denied any knowledge of the complainant during the trial, but changed his position on appeal. The defence came up too far late in the day. It also has no basis in the trial. The prosecution was denied the opportunity to challenge the defence. The defence cannot therefore aid the appellant.

16. On the language used during the trial, the record is clear that the appellant used Dholuo language from the time he took plea on 02/07/2018. That was the same language the appellant used in prosecuting the appeal. The ground fails.

17. The defence having not succeeded and the other grounds having failed, it goes that the offence of defilement was proved. The conviction was safe. The appeal on conviction therefore fails.

18. The appellant also challenged the sentence. The Appellant was sentenced under Section 8(3) of the Sexual Offences Act to 20 years' imprisonment. The sentencing court relied on the mandatory sentence under Section 8(3) of the Sexual Offences Act in its sentence.

19. The Supreme Court of Kenya in Francis Muruatetu & Another -vs- Republic 2017 eKLR and the Court of Appeal in Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR dealt with the mandatory nature of sentences. The effect of the said decisions, among many others, is that a sentencing court ought to exercise its discretion in sentencing. The mandatory nature of sentences was hence declared unconstitutional.

20. In this case, since the trial court relied on the mandatory provision of Section 8(3) of the Sexual Offences Act in imposing the sentence, the court, respectfully, erred. The appeal against sentence must therefore succeed. The 20 years' imprisonment sentence is hereby set-aside.

21. Prior to re-sentencing the appellant, I order that a Pre-Sentence Report be availed on 08/06/2020 for further orders on sentencing.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May, 2020.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court and in the presence of:

Calvince Otieno Juma, 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