**REPUBLIC OF KENYA**

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

**HCCRA NO. 27 OF 2019**

**AMBROSE MUENDO KIMEU...................... APPELLANT**

**-VERSUS-**

**REPUBLIC.......................................................RESPONDENT**

*(Being an appeal from the Judgment of Hon. E.M (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Offence No. 70 of 2018 delivered on 22$^{th}$ March, 2019).*

**JUDGMENT**

1. **Ambrose Muendo Kimeu** the Appellant herein was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The offence was committed on 8$^{th}$ September 2018 and the complainant MM was a child aged 17 years. Upon conviction the Appellant was sentenced to serve fifteen (15) years imprisonment.

2. Being aggrieved with the judgment he filed this appeal raising the following grounds:

a) **That,** sentence meted on the accused was excessive putting into consideration the ae of the complainant.

b) **That,** the learned Magistrate erred in both law and fact when he convicted the Appellant on unproved charges of defilement without considering the key ingredients of the charge.

c) **That,** the learned Magistrate erred in both law and fact when he convicted the Appellant by failure to evaluate the evidence on record.

d) **That,** the learned Magistrate erred in both law and fact when he convicted the Appellant against the weight of evidence tendered by prosecution and failure by the prosecution to prove their case beyond reasonable doubt.

e) **That,** the learned Magistrate erred in both law and fact by failing to consider all the evidence on record and the defence.

f) **That,** the learned Magistrate's judgment fell short and /or failed to conform to the relevant laws.

3. A summary of the prosecution case is that the complainant (MM) who testified as Pw2 was born on 5$^{th}$ September 2001. The Appellant was her friend. It was her evidence that on 5$^{th}$ September 2001 the Appellant had sent her a text message asking if she had come from the shamba. She responded that she would not go. As she passed his hardware shop she was told the Appellant was calling her. She went and he told her to wait for him outside his house. She passed through the back door of the shop.

4. As she waited for him he sent her a text saying he should find her naked. She told him she would not remove her clothes. She however managed to enter his house as it was not locked. The Appellant came and forced her to remove her clothes and undergarments. They then slept together for about ten minutes and she left for home.

5. Pw2's mother who testified as Pw1 **DMM** stated that she came home from church on 8$^{th}$ September 2018 at about 6:00 pm and continued with house chores. At 8:00 pm

she saw Pw2 with a phone and asked her for it. She handed it to her and on checking she saw four (4) messages in the name of M. She kept the phone. On 10$^{th}$ September 2018 she went to the assistant chief of Upete to report. On the way she saw the Appellant. She called the number with the M messages and she saw the Appellant pick the call. She therefore confirmed he was the one.

6. The Appellant was called by the assistant chief and he came. He was asked why he was engaging with a school girl and he admitted it. The

messages were read to him and the assistant chief asked them to go out and agree on the matter. Reaching out the Appellant told her she could take whatever action she wanted. She then reported the matter on 12th October 2018 at Kilome police station. She accompanied Pw2 to Mutungu hospital where she was examined and a P3 form (EXB3) and a PRC form (EXB4) filled on 31st October 2018.

7. In cross examination, she denied ever seeing the Appellant with her daughter.

8. Pw4 **Eric Kasiamani** is the clinical officer who examined Pw2 on 31st October 2018. He said the examination revealed a perforated hymen. The urinalysis showed she had a fungal infection. He produced the P3 (EXB3) and PRC form (EXB4). EXB3 was filled on 31st October 2018 while EXB4 was filled on 22nd October 2018.

9. In his unsworn defence the Appellant stated that on 8th September 2018 he went to work at his hardware at Upete, until 10:00 pm. His phone had gone off earlier and he took it for charging and took it at 3:00 pm. In the evening he went home. On 10th September 2018 the assistant chief called him to his office. He went and found Pw1 who alleged she had seen a text from him in her daughter's phone. She claimed he had caused her daughter's derailment in her education and so demanded damages of Kshs.50,000/=. He denied being the sender of the text and explained how he had sent his phone for charging.

10. The assistant chief was unable to assist and asked Pw1 to seek assistance elsewhere. He was later summoned to Kilome police station where he was told there was a complaint of him having defiled Pw2. He denied committing the offence saying Pw2 said she had been told to say he had defiled her.

11. The appeal was argued by way of written submissions. Mr. Muthiani for the Appellant submits that it could be deduced from the birth certificate (EXB2), school identity card (EXB1), P3 form (EXB3) and PRC form (EXB4) that Pw2 was over 18 years of age as at 8th September 2018. On the importance of proof of age, counsel relied on the cases of **Pandya –vs- R (1957) E.A 336Hadson Ali Mwachongo –vs- R (2016) eKLR; Alfayo Gombe Okello –vs- R Criminal Appeal No. 203 of 209 (Kisumu Court of Appeal).**

12. It is his further submission that since Pw2 was not below 18 years at the time of the alleged offence the Appellant should not have been given a prison term of 15 years.

13. The Respondent through Mrs. Gakumu submits that the appeal lacks merit. That the prosecution sufficiently proved all the ingredients to support the charge of defilement. The said ingredients being age, penetration and identification of the perpetrator. On contradictions and inconsistencies, she submits that even where there are some not all such inconsistencies amount to rendering the prosecution case to fall below the required standards of proof. She has referred to the case of **Richard Munene –vs- R (2018) eKLR.**

14. On sentence she submits that the sentence he was given is a mandatory minimum sentence. It is justifiable and just. She urged the court to dismiss the appeal.

**Analysis and determination**

15. This being a first appeal this court has a duty to re-consider and re-evaluate the evidence and come to its own conclusion. It has also to bear in mind that unlike the lower court it has not had an opportunity of seeing and hearing the witnesses. An allowance must be given for that. In the case of **Kiilu & Anor –vs- R (2005) 1 KLR 174** the Court of Appeal stated thus: -

> ***"1. 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.***
>
> ***2. 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 findings and conclusions; 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."***

The same was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze 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."***

16. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act provides:

> **Section 8(3) of the Sexual Offences Act**
>
> *"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."*

**While section 8 (4) of the said Act provides:**

*"(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment f or a term of not less than fifteen years."*

17. The particulars show that the victim M.M was aged 17 years so the charge should have contained section 8(4) and not section 8(3) of the Sexual Offences Act as the penal section. I note that despite citing section 8(3) the trial court passed the sentence provided for under section 8(4) of the Sexual Offences Act. That was an error which I have corrected.

18. For a conviction to be secured in a charge of defilement the following ingredients must be proved by the prosecution:

a) Age of the complainant.

b) Penetration of the complainant's genital organ.

c) Identification of the perpetrator.

19. In this appeal the Appellant has centered his arguments on the age of the complainant. Defilement involves having sex with a child. *A child according to section 2 of the Children's Act is a*

*person below the age of 18 years.* It is the Appellant's contention that Pw2 was aged above 18 years.

20. Two documents were produced before the court to confirm Pw2's age i.e. EXB1 (*school identity card*) and EXB2 (birth certificate). The former shows the date of birth as 25th September 2002 while the latter shows it as 5th September 2001. It is not clear what the source of information in EXB1 was. The birth certificate has always been relied on as one of the most authentic official documents to confirm the date of birth. I therefore take it that Pw2 was born on 5th September 2001 as stated in her birth certificate (EXB2). So how old was she on 8th September 2018?

21. Simple mathematics shows that she turned 17 years on 5th September 2018. She was therefore 17 years plus 3 days on 8th September 2018 and not above 18 years as claimed by the Appellant. In the case of **Hadson Ali Mwachongo –vs- R (2016) eKLR** which has been cited by the Appellant, the Court of Appeal stated thus:

*"We are of a different mind for the following reasons. Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. This a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11*

*years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old."*

I do find that Pw2 was 17 years old on 8th September 2018. Age was therefore proved.

**Penetration of the complainant's genital organ**

22. Section 2 of the Sexual Offences Act defines penetration as the ***"partial or complete insertion of the genital organ of a person into the genital organ of another"***

23. The evidence of Pw2 on this was as follows at page 10 lines 7-12 of the Record of Appeal.

*"I went and he told me to wait for him outside his house. He sent me a text while there and told me that he finds me naked. I told him I would not remove. I entered the house because he had not locked with a padlock. He came and forced me to undress and he told me to remove my underclothes and I did. We slept together for ten minutes…….. I had sex with accused when I say we slept together"*

From this evidence, besides stating that the Appellant and her slept together she explained that sleeping together meant having had sex. Pw2 did not explain to the court what exactly happened between her and the Appellant.

24. She indicated that she went to wait for the Appellant in his house even after him sending her a text that he wanted to find her naked. Despite her responding that she would not remove her clothes she still waited for him in his house. Upon his arrival she

says he forced her to remove her clothes and under garments. The next thing was for them to sleep together or have sex as she said. She nowhere states that the Appellant removed his clothes or his male organ or whether he did anything with his genital organ and/or her genital organ.

25. Sex could mean anything including oral sex. It was the duty of the prosecution counsel who was in conduct of this case to poke and

produce Pw2 to say exactly what happened. The trial Magistrate assumed that it was enough for Pw2 to say they had sex and /or slept together to mean there was penetration. Proof of a criminal case cannot be based on assumptions. There are many unanswered questions hanging around the happenings in the Appellant's house on that day.

26. It is also clear from the evidence on record that Pw2 and the Appellant were friends. Pw2 did not complain of anything. It is her mother (Pw1) who found some messages in her phone and got concerned. The messages were not revealed to the court by Pw1 nor the assistant chief who allegedly read them to the Appellant.

27. Pw1 saw the messages on 8th September 2018 and she reported to the assistant chief on 10th September 2018. The said assistant chief only asked them to discuss and he took no further action. Even Pw1 did not take the child to hospital to confirm what was in the alleged text messages. It was not until 22nd October 2018 which was six (6) weeks after the incident that she made a report to the police.

28. When asked in cross examination why she took that long to report she said thus:

> "*I am a widow and I have to struggle to provide for my family hence I had to get time to report to station.*"

So to her reporting such a serious offence was not anything urgent.

29. The PRC form (EXB4) was filled on 22nd October 2018. It did not refer to any treatment notes as there were none. It also shows that this was not the first time Pw2 was having sex with the perpetrator. Whoever filled EXB4 noted that the lumen (vagina) was open and the hymen was not intact. In other words, it was missing. It says nothing more.

30. Pw4 who filled the P3 form (EXB3) on 31st October 2018, said the information in EXB3 is similar to that in EXB4. A perforated hymen is just the same as a missing hymen. He did not state whether it was an old tear or a fresh one. She was further found to have a fungal infection. Pw4 therefore concluded that Pw2 had been defiled. Defiled around what time or period? There was no mention or hint to this. My finding is that the medical evidence did not assist the court to determine the issue of penetration.

31. The particulars in the charge sheet are very clear that *"the Appellant intentionally caused his penis to penetrate the vagina of M.M a child of 17 years"*. The complainant (Pw2) in her evidence did not hint at any male organ having been inserted into her vagina. It is not the duty of the court to fill those gaps for her especially considering that Pw2 was not a child of tender years.

32. The delay in reporting the incident and going for medical treatment destroyed any value that would have been attached to EXB4 and EXB3 which were done six and seven weeks respectively after the alleged incident. The cause of the delay was not explained but from the conversation between the assistant chief, Pw1 and the Appellant, there appears to have been an unsuccessful attempt to negotiate. That is all the reason why Pw2 was not forthright in her testimony.

33. I find the credibility of Pw2 to have been abit wanting and despite the *proviso* to section 124 of the Evidence Act, I have a doubt in my mind as to what may have really transpired between them.

34. The Appellant gets the benefit of that doubt. The appeal is allowed as a result of which the conviction is quashed and sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.**

**......................**

**H. I. Ong'udi**

**Judge**