



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 73 OF 2016**

**(Consolidated with Nyamira HCCRA No. 80 of 2019, Kisii HCCRA No. 1 of 2014, Kisii HCCRA No. 2 of 2014, Nyamira HCCRA No. 26 of 2017 and Nyamira HCCRA No. 8 of 2019)**

**1. DENIS MAKORI NYAMWEYA.....1<sup>ST</sup> APPELLANT**

**2. CALVIN ONDIEKI.....-2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**{Being an appeal from the original sentence and conviction of Hon. J. MACHARIA - PM delivered on 23.12. 2013 at Keroka Principal Magistrate's court Criminal Case No. 1191 of 2013}**

**JUDGEMENT**

On 23<sup>rd</sup> December, 2013 the 1<sup>st</sup> and 2<sup>nd</sup> appellants having been charged separately with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006; and in the alternative with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006 were convicted and sentenced to twenty-five (25) years imprisonment on the offence of defilement.

The particulars of the offences were that on 26<sup>th</sup> November, 2013 in Masaba North District within Nyamira County the appellants intentionally caused their genital organs to penetrate the anus of SAO a child then aged fourteen.

In the alternative charges the particulars were that on 26<sup>th</sup> December, 2013 in North District within Nyamira County the appellants each intentionally touched the anus of SAO a child aged fourteen with genital organs.

Being aggrieved by the conviction and sentence, the appellants filed several separate appeals which this court consolidated in HCCRA 73 of 2016. The appeal was heard by way of written submissions.

It was the 1<sup>st</sup> appellant's submission that he was framed; that the complaint had in his first statement to the police indicated that he was defiled by persons unknown only to later fabricate names hence implicating him and that there was no evidence linking him to the offence as he was not present at the scene and neither was he requested to produce sperm sample for examination. He further contended that the prosecution's evidence was full of contradictions and uncorroborated evidence. He urged that his appeal be allowed, the conviction quashed and the sentence set aside.

The 2<sup>nd</sup> appellant's submissions were confined to the sentence prompting prosecution Counsel in conduct of the matter to inquire if he was abandoning the appeal on conviction. When this court put the question to him he confirmed that he wished to abandon the appeal on conviction and would only proceed concerning the sentence. He contended that his prayer is for this court to reduce his sentence to a much lesser one or to a community service order. He submitted that he is very much remorseful; that at the time of his conviction he was a student and finally that he is unmarried and seeks to put his life together.

Ms. Mokuia, Learned Prosecution Counsel, submitted that all the ingredients of the offence were proved beyond reasonable doubt. She stated that age assessment was done at Kijauri Sub-district Hospital and that on penetration, the complainant gave cogent evidence as to how he was lured by the 1<sup>st</sup> appellant who took him to the cells at Keroka Police Station where the appellants defiled him in turns, that the 1<sup>st</sup> appellant held him by the neck as the 2<sup>nd</sup> appellant defiled him after which the 1<sup>st</sup> appellant also defiled him. Miss Mokuia submitted that PW3, a police officer at the station, caught the 2<sup>nd</sup> appellant in the act and also that he saw the 1<sup>st</sup> appellant while still half dressed. Ms. Mokuia stated that upon medical examination bruises and spermatozoa were seen on the complainant's anal area hence confirming there was penetration.

On the issue of identification, Ms. Mokuia stated that PW2 and PW3 both eye witnesses placed the appellants at the scene of the offence. She submitted that PW2 saw the appellants leaving the cells with the complainant after he himself declined their advances for sexual intercourse. Concerning the defence, Ms. Mokuia contended that the same was considered by the trial court. She submitted that a part of that defence aided the prosecution case. She urged this court to find that the appellants were properly convicted and uphold the conviction.

On the sentence, Ms. Mokuia stated that the same is lawful and just in the circumstances of the offence committed. Further, that the appellants' mitigation was considered and therefore this court ought not to disturb the sentence in light of the circumstances and the age of the victim.

The issues for determination are?

- 1. Whether the offence was proved beyond reasonable doubt.**
- 2. Whether the conviction and sentence was lawful.**

This court sits in this matter as a first appellate court and the duty of the first appellate court was succinctly stated in **Okeno v Republic [1972] EA 32**.

Briefly put, this Court must reconsider the evidence before the trial court, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. I have endeavoured to do the same.

Section 8 (1) of the Sexual Offences Act defines the offence of defilement as follows: -

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

For the offence of defilement to be established therefore, the prosecution must prove the act of penetration and the fact that the victim was a child beyond reasonable doubt. **Penetration** is defined as: - **“the partial or complete insertion of the genital organs of a person into the genital organs of another person (See Section 2 (1) of the Sexual Offences Act) which also defines genital organs as: “Includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”** This means that any person who uses his genital organ to penetrate the anus of a child also commits the offence of defilement. Under our law, a child is any individual who has not attained the age of eighteen years (*See Article 260 of the Constitution and Section 2 of the Children Act*).

In addition to penetration and the age of the victim, the prosecution is required to prove the identity of the perpetrator. **Section 8(3)** prescribes the punishment for the offence of defilement and states that;

**“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.”**

In the case of **NNC v Republic (2018) eKLR** the Court of Appeal cited with approval the case of **Kaingu Elias Kasomo V Republic Malindi Criminal Appeal No. 504 of 2010**, where it was held that: -

**“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.” See also reported case of Court of Appeal Alfayo Gombe Okello Vs. Republic (2010) eKLR.**

In **Maripett Loonkomok v Republic [2016] eKLR** the same court observed: -

**“We can only reiterate what has been said before that at a certain age and in this day and age a child of a certain age bracket is able to give his or her age accurately.**

**The complainant was a pupil in a boarding primary school. So that her statement that she was 13 years in 2012 must be taken to be accurate. She repeatedly stated that she was born in 1999.....”**

In the instance case, the Complainant (PW1), gave evidence that he was 14 years at the time of the offence. Additionally, Joel Ongaro (PW4), the clinical officer who examined him opined that he was 14 years. I am therefore satisfied that age was proved beyond reasonable doubt and that the complainant was a child at the time.

On penetration, the complainant vividly described what the appellants did to him. It was his evidence that the 2<sup>nd</sup> appellant called him and took him to the toilet where he held him by the neck and wrestled him down; that it was the 1<sup>st</sup> appellant who removed his clothes whereupon the 2<sup>nd</sup> appellant removed his own trouser and underwear and inserted his penis into his anus. After the 2<sup>nd</sup> appellant finished the 1<sup>st</sup> appellant also inserted his penis into his anus. His evidence was corroborated by two witnesses Pw2 and Pw3. PC Daniel Toya (Pw3) gave evidence that when he heard noise in the cells he proceeded there and found the 1<sup>st</sup> appellant his trouser open and lowered to the knees. He suspected something was amiss and it was his evidence that when he opened the toilet he caught the 2<sup>nd</sup> appellant having anal sex with the complainant. PW4, the Clinical Officer, produced a P3 form in which it was confirmed that PW1 had neck injuries and bruises, faeces

and spermatozoa in his anal region indicative of penetration and ejaculation.

From the above evidence and relying on the case of **Raphael Mutunga Mutinda Vs. Republic (2019) eKLR** where it was held that: -

***“Therefore, for the offence of defilement to be proved, evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However, partial insertion suffices for the purpose of penetration as the said insertion need not be complete.”***

it is my finding that penetration was proved beyond reasonable doubt.

On the element of identification, I find that PW I positively identified the two appellants as the persons who defiled him. It was his evidence that before the ordeal he had stayed with them in the court cell for more than 4 hours and in the police cell for more than an hour. This was corroborated by Pw2 who gave evidence that he too was in that cell and that the two appellants first made sexual advances towards him but he rejected the same before they called PW1. It was also Pw2's evidence that he saw the 1<sup>st</sup> appellant and the complainant naked. PW3 PC Daniel Toya confirmed that when he went to the cells he found the 1<sup>st</sup> appellant with his trousers open and near his knees and that when he opened the toilet he saw the 2<sup>nd</sup> appellant having sexual intercourse with the complainant. DW3, Charles Okibo also gave evidence that he saw the 2<sup>nd</sup> appellant defiling PW1. Charles Okibo was a witness for the defence but his testimony corroborated that of the complainant. It is my finding that since the offence was committed in broad daylight and the victim (Pw1) had been with the appellants for a considerable period of time the circumstances favoured a positive identification that was free from any possibility of error. Moreover, the victim's (Pw1) testimony was corroborated by three other independent witnesses (Pw2, Pw3 and Dw3). In my finding the appellants were placed at the scene of the offence by all the three witnesses and they were positively identified as the perpetrators of the offence. Their defence could not therefore be possibly true.

In regard to the sentence, **Section 8 (3) of the Sexual Offences Act** prescribes a mandatory minimum sentence of imprisonment for a term of not less than twenty-five years. I am alive to the jurisprudence emerging from the decision of the Supreme Court in regard to such sentences in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** and also from the Court of Appeal in **Evans Wanjala Wanyonyi v Republic [2019] eKLR** and **Christopher Ochieng v Republic [2018] eKLR** and in **Jared Koita Injiri v Republic [2019] eKLR**. However, it is my finding that in the circumstances of this case the sentence imposed by the trial court was fair, reasonable and just. Accordingly, I find that the appeal lacks merit and the same is dismissed in its entirety. The trial court decision is upheld.

**Signed, dated and delivered in Nyamira this 23<sup>rd</sup> day of July 2020.**

**E. N. MAINA**

**JUDGE**

**Judgment delivered electronically via Microsoft Teams**