



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CORAM: A.K NDUNG'U J**

**CRIMINAL APPEAL NO. 18 OF 2019**

**DANIEL KAGATHI MWANGI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. M.Wachira – CM dated 2<sup>nd</sup> April, 2019 at the Chief*

*Magistrate's Court at Murang'a in Sexual Offences Case No. 5 of 2017)*

**JUDGEMENT**

1. Daniel Kagathi Mwangi (appellant) was charged before the Chief Magistrate Court at Murang'a with **Defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of which were that on the 7.5.2017 at 1400hrs at [particulars withheld] Sublocation, Kimathi Location within Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of E.W.G a child aged 15 years.

2. He faced an alternative count of an **indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. That at the said time and place, he touched the vagina of E.W.G a child aged 15 years.

3. In a Judgement dated 2.4.2019, the appellant was found guilty and convicted on the main count of defilement and sentenced to 20 years imprisonment.

4. Aggrieved by both the conviction and sentence, the appellant has approached this Court on appeal and raised the following grounds;

**1. The learned trial magistrate erred both in law and facts by failing to find that the prosecution witnesses' narrations of evidence were unbelievable and illegal.**

**2. The learned trial magistrate erred both in law and facts by failing to give the appellant the benefit of doubt considering the flows in the investigations and generality of the circumstances of the case.**

**3. The learned trial magistrate erred both in law and facts by failing to note that the burden and standard of proof by the prosecutions was not discharged and this the prosecution case was not proved beyond reasonable doubt as provided for under the Law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence that on any ground it was a miscarriage of justice.**

**4. The learned trial magistrate erred both in law and facts by failing to note that the appellant's conviction was based on mere suspicion.**

**5. The learned trial magistrate gross by erred in law and facts by failing to observe that the prosecution case was full contradiction, inconsistency, malice and after thoughts.**

5. The appeal was canvassed by way of written submissions filed by the appellant and an oral response at the hearing by Mr. Waweru for the DPP.

6. This being the first appellate, I am enjoined to re-evaluate the evidence at trial and reach my own conclusions all the while alive to the fact that I neither saw nor heard the witnesses and give due allowance in that regard

7. A summary of the evidence at the trial court thus becomes helpful.

8. The prosecution's case as laid down by PW 1 is that PW 1 is a girl aged 15 years was in 'Love' with the appellant. It is a relationship that caused friction between the appellant and his father when he (the appellant) attempted to take the complainant to his home. PW 1 testified that she had sex with the appellant on 7.5.2018. It was painful when the appellant penetrated her since she was a virgin. PW 1's mother found the two at the house. The appellant was at the door and PW 1 was hiding under a bed.

9. Eventually when a medical examination was conducted, it was found that the complainant's hymen was broken, she had a fungal infection and it was clear that she was sexually active. In his defence, the appellant stated that he was beaten by his father and his (appellant's) brother and cousins. He was framed with defiling a girl.

10. The evidence on record clearly shows that the appellant and the complainant were in a relationship. The medical evidence shows that there was penetration of the complainant. The complainant has confirmed it is the appellant who defiled her.

11. The evidence by the complainant and her mother is materially corroborated by that of the appellant's own father. The complainant's age was proved as 15 years from the certificate produced. The evidence that the appellant and the complainant were in a relationship dispels any doubt about who defiled the complainant.

12. **Section 2** of the **Sexual Offences Act** defines a child as a person under the age of 18 years. In our instant case, the complainant is a child as she was 15 years at the time of the alleged act.

13. The circumstances of this case bring to the fore the now ever ranging debate about the criminalization of sexual conduct between teenagers. The Law is that a child has no capacity to give consent. Yet in reality a lot of sexual activity is taking place in Society among teenagers below 18 years. Parliament, perhaps, may in the fullness of time, find it necessary to revisit the current law to among other things re-align the Law to practical realities and more importantly protect teenagers who find themselves in these circumstances.

14. There is no evidence that the complainant deceived the appellant to believe that she was over 18 years. Indeed, he has not raised such a defence. The trial court was correct in finding that the appellant knew the age of the complainant to be below 18 years. In those circumstances, the complainant had no capacity to give consent.

15. I am satisfied that the trial court's finding is supported by the evidence on record. The conviction was safe.

16. As regards sentence, the appellant was sentenced to 20 years imprisonment. The trial court appears to have shackled itself to the minimum sentence under **section 8(3)** of the **Sexual Offences Act**. With the advent of the decision in the **Muruatetu Case**, the ground has shifted and a court is expected to exercise discretion in sentencing.

17. Looking at all the circumstances of this case, the nature of the offence, the position of the parties and the period the appellant suffered in pre-trial detention, I find good ground to interfere with the sentence herein. I set aside the sentence of 20 years imprisonment meted out on the appellant by the trial court and substitute thereof a sentence of 5 years imprisonment to run from the date of the trial court's judgement.

**Dated, Signed and delivered at Murang'a this 11<sup>th</sup> day of November, 2020.**

**A.K NDUNG'U**

**JUDGE**