



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 68 OF 2017**

PN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 68 of 2015 by Hon. K. Sambu (SPM) on 30/11/17)*

**J U D G M E N T**

1. PN, the Appellant, was arraigned in court to answer a charge of **Defilement** contrary to **Section 8(1)(4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **1<sup>st</sup> day of February, 2015** at **Mwingi Township, Mwingi Central District** within **Kitui County**, did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of **AP** a girl aged **16 years old**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **1<sup>st</sup> day of February, 2015** at **Mwingi Township, Mwingi Central District** within **Kitui County**, committed an indecent act with a child by causing the contact of his male genital organ namely penis to the female genital organ namely vagina of **AP** a girl aged **16 years old**.
3. Having been taken through full trial he was found guilty, convicted and sentenced to **15 years imprisonment**.
4. Aggrieved, the Appellant appeals on grounds that: The age assessment document produced was not authentic/conclusive proof of age; Evidence adduced was contrary to the **DNA Report**; the Court having found that the Complainant was defiled on the date stated on the charge sheet rendered the charge defective; the case was trumped up because of the enmity between him and his in laws and his defence that was strong was rejected.
5. Facts of the case were that the Complainant, **[Minor]**, a mentally challenged girl lived with her father and siblings after their mother passed on. On various occasions her father violated her sexually. She informed **PW6 CMK**, her maternal aunt who reported the matter to the police. **PW9 No. 101234 PC (W) Viola Kipkoech** escorted her to hospital for examination. It was found that she was pregnant. Further investigations were carried out that culminated into the Appellant being charged with the offence.
6. Upon being put on his defence the Appellant stated that on the material date he went to his place of business and worked as usual. He returned home at about **8.00 p.m.** to find the Complainant having left home. The following day he was confronted with accusations of having defiled his daughter. Subsequently he was arrested. He stated further, that his wife died, he was also HIV Positive and on ARV Drugs. That he buried his wife in the absence of his in laws who did not recognize him as her lawful husband having married her while she was pregnant with the Complainant. They also accused him of killing his wife.
7. The Appellant canvassed the Appeal by way of written submissions. He urged that the Court relied on an age assessment document for Kenyatta National Hospital which lacked authenticity, showed two (2) different ages namely, **17** and **16 years old** therefore there was no proof of age. In this regard he cited the case of **Hillary vs. Republic Eldoret Criminal Appeal No. 123 of 2009** where **Mwilu J.** stated thus:

***“Age is such a critical aspect in Sexual Offences that it has to be proved conclusively. Anything else is not good at all. It will not suffice. And it becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”***

And **JOH Cardon Wagner (Nbi High Court Criminal Appeal No. 405 and 408 of 2009)** where it was stated that:

***“Birth certificate is a conclusive proof that the age assessment was done.”***

That evidence of DNA was fabricated; medical evidence adduced showed that the Complainant was HIV negative therefore he could not have defiled her; The existence of enmity between him and the family of his deceased wife was not considered by the Court.

8. In response the State through learned State Counsel **Mr. Mamba** opposed the Appeal. He urged that a paternity test carried out established that the Appellant was the biological father of the child and the Complainant was expecting and the P3 form confirmed that the Complainant was defiled.

9. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. Having been a case of defilement the Prosecution was duty bound to prove:

- (i) The age of the Complainant.
- (ii) The act of penetration.
- (iii) Positive identification of the perpetrator of the act.

And as correctly submitted by the Appellant age is a critical aspect in a case of defilement, therefore it must be conclusively proved. **(See the Hillary Case (supra)).**

11. The Complainant was mentally challenged and a vulnerable witness such that she had to testify through an intermediary following leave granted by the Court but did not tell the Court her age. She was subjected to age assessment a document questioned by the Appellant. The Appellant also argued that a Birth Certificate would be a conclusive proof of age.

12. In the case of **Mwalengo Chichoro Mwajembe vs. Republic Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

***“.....the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable ...”***

13. The Doctor who examined the Complainant estimated her age as **16 years**. The Complainant was taken to Kenyatta National Hospital where her age was assessed by a Radiologist. The report and X-ray films in that regard were adduced in evidence. The Appellant was represented by an Advocate in the Lower Court who neither questioned the document nor objected to its production in evidence. **Section 77** of the **Evidence Act** provides thus:

***“(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***

***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***

***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof ...”***

14. The Appellant’s Advocate did not apply to question the author of the document. If indeed the Appellant believed the document was not authentic and did not emanate from Kenyatta National Hospital his Advocate could have applied to have the Radiologist summoned to testify. Otherwise what proceeded was procedural and the authenticity of the document cannot be questioned at this stage. In the premises that ground of Appeal fails. Consequently the Prosecution did prove the age of the Complainant to be **16 years**.

15. The Appellant faulted the learned trial Magistrate for relying upon the DNA Report which was purportedly showing that the samples that were examined were obtained from the child **AP** and **PN** while the Doctor stated that the child was known as **MK**. This in his opinion meant that the samples were for totally different person.

16. According to the report by the Government Analyst that was adduced in evidence samples that were submitted to the Government Chemist where Buccal Swabs of **MK** (child), **AP**(mother), **PN** (Alleged father).

Per the findings of the analyst there were **99.99%** chances that **PN** (Appellant) was the biological father of the child sired of the

Complainant.

17. The fact that the Complainant conceived was evidence of having engaged in penetrative sexual intercourse and with a male. The P3 form adduced in evidence also confirmed the fact of her hymen having been broken.

18. It was urged and demonstrated by the defence that there was enmity between the Appellant and the family of his deceased wife who viewed him as the person who must have killed their kin. He argued that he is HIV Positive and had he defiled the Complainant she could have been infected. DW2 **Rachael Munyao** an expert in HIV matters, a Clinical Officer, a holder of a Degree in Social Sciences and a Diploma from the Kenya Medical Training College confirmed that the Appellant was HIV positive and on medication (ARVS). On cross examination she stated that it does not follow that an HIV Positive victim can transmit HIV to another person. Transmission would depend on the viral load. From her evidence it does not follow that the Complainant having been HIV Negative meant that she did not engage in coitus with the Appellant.

19. It is also contended that on examination there was no evidence of spermatozoa. In the case of **Mark Oiruri Mose vs. Republic (2013) eKLR** the Court of Appeal stated that:

***“... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...”***

20. Lack of the presence of spermatozoa at the time of examination of the victim cannot absolve the perpetrator of the act from blame.

21. This is a case where the Complainant did not recall the exact date of the act of penetration but she stated that it happened on various occasions. The fact of the child having been sired by the Appellant perse was sufficient proof that he was the perpetrator of the offence.

22. The sentence meted out was legal as it was the minimum prescribed sentence for the offence.

23. From the foregoing, it is apparent that the learned trial Magistrate did not misdirect himself in reaching the decision to convict the Appellant. Therefore, I affirm the conviction and sentence. Accordingly, the Appeal stands dismissed.

24. It is so ordered.

**Dated, Signed and Delivered at Kitui this 24<sup>th</sup> day of April, 2019.**

**L. N. MUTENDE**

**JUDGE**