



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL APPEAL NO. 12 OF 2018**

**JWM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Mwingi Senior Resident Magistrate's Court*

*Criminal Case No. 84 of 2016 by Hon. G. W. Kirugumi (SRM) on 31/07/17)*

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

1. **JWM**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between **January, 2015** and **28<sup>th</sup> February, 2016** within **Mwingi** in **Mwingi Central District of Kitui County** intentionally caused his male genital organ namely penis to penetrate female genital organ namely vagina of **MNM** a child aged **14 years**.
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 diverse dates between **January, 2015** and **28<sup>th</sup> February, 2016** within **Mwingi** in **Mwingi Central District of Kitui County** intentionally touched the vagina of **MNM** a child aged **14 years**.
3. He was tried, convicted and sentenced to **twenty (20) years imprisonment**.
4. Aggrieved, he appeals on grounds that the trial Court failed to appreciate that he was also underage therefore deserved a non-custodial sentence; the Complainant was not recently penetrated therefore there was no proof that he was the perpetrator of the act of penetration; the case was trumped up due to enmity between families and his cogent defense was rejected.
5. Facts of the case as presented by the Prosecution were that the Complainant herein a student at [**particulars withheld**] **Secondary School** fell in love with the Appellant and they engaged in coitus severally. On the **28<sup>th</sup> day of February, 2016** they went to **Mwingi Town** where they slept in a lodging and engaged in penetrative sexual intercourse. The parents of the Complainant found them and took them to the police station where they were held for two (2) days. They were subjected to medical attention. Subsequently, she was released and the Appellant charged.
6. Upon being put on his defence the Appellant stated that on **29<sup>th</sup> February, 2016** he went to collect his cellphone that was under repair only to be arrested. He saw the Complainant with her mother who alleged that he was bad influence on the Complainant. He was beaten and taken to **Mwingi Hospital** for treatment.
7. It was the Appellant's submission that the outpatient treatment card clearly indicated his age as **16 years** therefore the Court should have considered his rights as enshrined in **Article 27(1), 30(1) and 48** of the **Constitution**. That the Complainant's hymen was not freshly broken therefore the perpetrator of the act could have been any other person. Alluding to some hidden enmity between the two (2) families he urged that being a minor his parents should have been informed after his arrest which resulted into a violation of his rights.
8. The State undertook to file written submissions in response but failed to do so.
9. This being the first Appeal, I am under a duty to subject evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. In doing so I must bear in mind the fact that I neither saw nor heard any of the witnesses therefore unable to comment on their demeanor (**See Kiilu & Another vs. Republic (2005) 1 KLR 174**).

10. The case being defilement the Prosecution had the duty of proving the following elements:

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

11. The age of the Complainant was proved by a Birth Certificate that was adduced in evidence. Per the document **Serial No. 2900941** the Complainant was born on **20<sup>th</sup> February, 2002**. The Complainant, a student in form one testified to her date of birth. PW2 **BWM** the mother of the Complainant confirmed the fact of the date of her birth (**See Mwalengo Chichoro Mwachemba vs. Republic Criminal Appeal No. 24 of 2015 (UR)**).

This was proof beyond reasonable doubt of the Complainant having been aged 14 years.

12. The Complainant was examined and found to have a torn hymen on the **29<sup>th</sup> February, 2016** but it was not freshly torn. She had infection but no spermatozoa were seen. The fact that the Complainant had a broken hymen was evidence of having engaged in penetrative sexual intercourse. To have such an episode means there was penetration of a male genitalia into her female genital organs.

13. The Prosecution's argument was that the perpetrator of the act was the Appellant. PW2 realized the Complainant was not home therefore she suspected she must have been with the Appellant because in **November, 2015** she found him at her home and caused the police to arrest him. On the **29<sup>th</sup> February, 2016** PW2 sought assistance of PW3 **FMK** her brother. They went in search and at **7.00 p.m.** they found the Appellant at **Mumbuni Stage**. The Appellant boarded a motorcycle which took him to **Mwingi** followed by PW2 and PW3. He entered the bar in which PW1, the Complainant was. PW2 and PW3 followed him and caused both of them to be arrested. Both PW1 and Appellant were placed in custody. PW4 **No. 66147 Corporal Lucy Murira** on being assigned the case to investigate found both of them in custody. It was ascertained that just like PW1 the Appellant was also a minor aged sixteen (16) years.

14. PW1 identified the Appellant as the perpetrator of the act that caused penetration into her genital organs. This was a witness who testified after being locked up in custody for two (2) days. She stated that she slept with the Appellant at a lodging but at the point of being arrested they were found at a bar. Medical evidence adduced established that the Complainant's hymen was not broken on the material date which was evidence of the fact that she had started engaging in sexual intercourse before the date in question.

15. PW4 stated that the Appellant denied having gone to the lodging. She interrogated the lady in charge of the lodging who allegedly denied having issued them with any receipts.

16. In its finding, the trial Court was of the view that medical evidence proved beyond doubt that the Complainant had sexual intercourse and she suffered from the same Urinary Tract Infection (U.T.I.). This therefore brings in the question as to what a Urinary Tract Infection is? This kind of bacterial infection can be caused by engaging in sexual intercourse, poor hygiene like failing to wipe the anus properly hence the bacteria entering the urethra. Some individuals are even genetically predisposed to Urinary Tract Infections. Although the Appellant also had the U.T.I., the minors were not found to have contracted a Sexual Transmitted Disease. Had this been diagnosed then it would have been stated with certainty that the infection was passed from one minor to the other, through sexual contact.

17. With this kind of evidence, there was need of some other evidence to confirm the allegations of the victim because she had been locked up in cells for two (2) days which was in contravention of her rights prior to being made to state what transpired.

18. At the outset, the minor Appellant was the suspect because he had been found hovering within the vicinity of the home of the victim previously. PW2 and PW3 traced him at **Munguni** which is some **18.4 Kilometres** away from **Mwingi**. They followed him until **Mwingi**. He entered a certain bar and inside was the Complainant. According to PW2, they had not ordered any drinks. They held them and took them to the police station. There was need to prove if these two had been in that particular place the previous day or if the Appellant was entering the bar to meet the Complainant on the material date that they were arrested. In that regard evidence of the bar attendant was crucial. In the case of **Bukenya vs. Uganda (1972) EA 549** it was stated:

***"... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent .... While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

19. The Complainant having been made to testify in the circumstances that I have alluded to and whose credibility was questionable, there was need of a testimony of the manager of the alleged lodging where they purportedly slept. PW4 alleged that she interrogated the management of a lodging near **Kanini Kaseo area** within **Mwingi town**. But the individual concerned was not called to testify. It is therefore viewed that their testimony may have been adverse to the Prosecution's case.

20. In the case of **Sawe vs. Republic (2003) eKLR**, it has been held that:

***"..... suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt...."***

21. The mother of the Complainant was justified in suspecting the Appellant who was not behaving well but the Prosecution had the duty of proving the case beyond doubt which they failed to do.

22. On the issue of sentence, at the point of being sentenced the Appellant herein was a child in conflict with the law. The trial Court was required to consider his best interests. He was a child who should have been taken to a Borstal Institution.

23. Having re-considered what transpired in the Lower Court, I find merit in the Appeal. It is allowed. In the result, I quash the conviction and set aside the sentence meted out. The Appellant shall be set at liberty unless otherwise lawfully held.

24. It is so ordered.

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

**L. N. MUTENDE**

**JUDGE**