



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**(CORAM: CHERERE-J)**  
**CRIMINAL APPEAL NO. 31 OF 2019**

**BETWEEN**  
**COLLINS SIMIYU.....APPELLANT**  
  
**AND**  
  
**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in SO Criminal Case No. 44 of 2018*

*in the Senior Resident Magistrate's Court at Sirisia by Hon. C.M.Wattimah (SRM) on 14.02.19)*

**JUDGMENT**

**The Trial**

1. On 14<sup>th</sup> February, 2019, the Appellant herein **COLLINS SIMIYU** was convicted and sentenced to 20 years' imprisonment on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**) for allegedly defiling a 15-year-old girl between 17<sup>th</sup> to 21<sup>st</sup> September, 2018.

**The Appeal**

2. Aggrieved by this decision, the appellant lodged the instant appeal on 10.07.18.

3. When the appeal came up for hearing on 06.08.19, Ms. Mumalasi the Appellant's counsel submitted that she was wholly relying on the grounds of appeal and written submission filed on 31<sup>st</sup> July, 2019 and a list of authorities filed on 05<sup>th</sup> August, 2019.

4. Mr. Akello, Learned Counsel for the state opposed the Appeal and stated that the prosecution had proved complainant's age by way of a birth certificate, penetration by was of a P3 form and identity of the Appellant as the assailant

**Analysis and determination**

5. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

*“The duty of the first appellate court is to analyse the 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 decisions.”*

6. The appellant is appealing both on conviction and sentence. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

- i. Age of the victim.
- ii. Identity of the offender
- iii. Penetration.

7. Together with the ingredients, I will also consider the grounds of appeal raised by the appellant.

8. The trial court found as a fact that the complainant's age had been proved by a certificate of birth **PEXH. 1** which shows that she was born on 05<sup>th</sup> April, 2003 and was therefore 15 years old when she was allegedly defiled.

9. Concerning the identification of the Appellant, complainant told court that she knew the Appellant who had been their neighbor for about one month. Complainant also told court that she went to the Appellants house on 17.09.18 and stayed there until 22.09.18 which was a considerable length of time such there would have been no possibility of the complainant mistaking the Appellant for another person. The complainant's evidence that she left home on 17.09.18 and did not go to school until 22.09.18 is corroborated by her father PW2.

Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail: -

**“partial or complete insertion of a genital organ of a person into the genital organ of another person.”**

10. The P3 form **PEXH. 5** produced by **PW3 ESTHER WEPUKHULU**, a clinical officer who examined the complainant on 23.09.2018 which was two days after what can be said to be a prolonged period of 5 days of defilement found no injuries on the labia minora and labia minora. The complainant was however noted to have a missing hymen which according to clinical officer was a suggesting feature of post sexual intercourse. The clinical officer's failure to tell the age of the broken hymen so that it could be determined if it was broken within the period that the complainant alleges to have been defiled casts a doubt on whether the complainant had been defiled for a continuous period of 5 days as she alleged.

11. The trial court had an obligation to ensure that the prosecution case was proved beyond a shadow of doubt considering that the Appellant was facing a term of 20 years' imprisonment which is a substantial length of time. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts. In my considered view, this case fell short of that threshold of proof and the conviction cannot therefore be sustained.

12. *Having said that*, I agree with the Appellant that there are good grounds for allowing this appeal. Had the appeal not succeeded, I would have been obligated to interfere with the sentence of 20 years' imprisonment imposed on the Appellant for the reason that mandatory sentences have been declared unconstitutional. (See the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** and Court of Appeal decisions in **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**)

13. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

**DATED AND DELIVERED IN BUNGOMA THIS 09TH DAY AUGUST 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Brenda**

**Appellant - Present**

**For the Appellant - Ms. Mumalasi**

**For the State - Mr. Akello**