



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 15 OF 2018**

**BETWEEN:**

**ALFASON NJULU.....APPELLANT**

**VERSUS**

**THE REPUBLIC**

***Being an Appeal from the an original conviction and sentence in criminal case No. 208 of 2011 of Hon Emily Nyakundi Resident Magistrate at the RM's Court sitting in Wundanyi on 2<sup>nd</sup> November 2018***

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

1. The Appellant before the Court is appealing against the Decision of Hon. K.I. Orenge Resident Magistrate sitting at the SPM's Court in Wundanyi on 2<sup>nd</sup> November 2011. The Appellant did not file his appeal until he filed a Petition of Appeal on 1<sup>st</sup> March 2018. The Appellant was granted leave to appeal out of time by Hon Lady Justice J. Kamau on 1<sup>st</sup> March 2012. The Appellant informed the Court that he had previously Petitioned to Appeal on 12<sup>th</sup> May 2012 in the High Court in Mombasa but the case did not proceed.

2. In his Petition he seeks leave to appeal against conviction and sentence. Attached to the Petition are 5 Grounds of Appeal. They can be summarized thus:

- (a) The Charge Sheet was defective and the Learned Trial Magistrate did not take that into consideration,
- (b) The Medical evidence upon which the conviction was grounded "totally failed to prove this case beyond reasonable doubt as required by law",
- (c) The Prosecution evidence was full of contradictions and hence not credible
- (d) The age of the victim was not established,
- (e) The Learned Trial Magistrate failed to consider the Defence evidence.

The Appellant prays for the conviction to be quashed and the sentence set aside. On 30<sup>th</sup> January 2019 the Appellant filed Aended Grounds of Appeal which relate mainly to the severity and the sentence and the offence not being proved beyond reasonable doubt.

3. The Appellant was charged with the offence of Defilement with an alternative Charge of committing an indecent act with a Child. Charge 1 on the Charge Sheet was Defilement of a Girl contrary to Section 8(1) as read with 8(3) of the Sexual Offence Act No. 3 of 2006. The Particulars of the first count were that "***ALFASON NJULU: On the 19<sup>th</sup> day of April 2011 at [Particulars withheld] Village, Mgange location within Taita Taveta County, had unlawful carnal knowledge of TK a girl aged 13 years***". The Appellant was also charged with an alternative charge being; "***Indecent Assault on a Female contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006..*** The Particulars of that Charge were that ***ALFASON NJULU: On the 19<sup>th</sup> day of April 2011 at [Particulars withheld] Village Mgange location within Taita-Taveta County unlawfully and indecently assaulting TK by touching her private parts namely vagina and buttock using his hands.***".

4. On 8<sup>th</sup> August 2011, the Learned Trial Magistrate found that the Accused had a case to answer and he was put on his defence. On 26<sup>th</sup> September 2011, the Accused gave an unsworn statement. The Learned Trial Magistrate found the Appellant was found guilty of the principal charge and sentenced him to a period of 20 years imprisonment. The Appellant is appealing against conviction and sentence. The Appellant was convicted and sentenced on 2<sup>nd</sup> November 2011.

5. As this is the first Appeal, this Court is charged with the duty to re-consider and re-evaluate the evidence presented before the Trial Court.

The Appellant was charged with the offence of defilement and it was alleged his victim was aged only 13 years of age. Section 8(1) of the Sexual Offences Act Section 8 provides; “

8. *Defilement*

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

(2) *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

(3) *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.”.*

6. In the circumstances, the Prosecution needed to prove that (1) there was penetration and (2) the age of the Child and (3) the identity of the perpetrator. As to the identity of the perpetrator. The Child PW-2 identified her assailant. It was not a first identification but recognition as the two are related. PW-1 told the Court that the Accused is the cousin of the Complainant. The Accused did not deny that relationship. Instead he chose to give an unsworn statement which seemed to put forward an alibi. He said that he came from Mgange but on 18<sup>th</sup> April he travelled to Kishushe and came back on 19<sup>th</sup> April 2011. Rather than providing an alibi that statement confirmed that he was in the vicinity of his home village on the day of the offence. The offence took place during the day time.

7. On the issue of defilement, the Court heard the unsworn statement of the Child. She said she was defiled and sodomised by the Accused. Her evidence was in part corroborated by the evidence of PW-1 (her Mother) that after the sexual assault she was in pain and reported that to her Mother. Section 124 of the Evidence Act provides:

*124. Corroboration required in criminal cases*

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in Evidence CAP. 80 43 accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*

8. The evidence of the assault was further corroborated by the medical evidence put into evidence by the Clinical Officer at Wesu Hospital. He put into evidence the P3 that he completed on 20<sup>th</sup> April 2011. It recorded that the the Complainant complained of being defiled by a person well known to her. It recorded ; “*hymen not intact. Swollen labia majora and inflamed clitoris. Inflamed anal orifice.*”. Those are all clear indications of sexual assault and penetration. Therefore, the evidence of the complainant was further corroborated. The Accused did not adduce any evidence to weaken that testimony. In addition, she was infected with a sexually transmitted disease and was prescribe antibiotics.

9. On the issue of age, the age of the Child was put into evidence by herself (PW-2), her Mother (PW-1) and the Clinical Officer (PW-5). Therefore, the finding of guilt is sound. On the alternative Charge, the record of proceedings show the Accused pleaded guilty.

10. The Parties filed their written submissions as directed and they have been taken into account but not repeated verbatim in the interests of brevity.

11. Moving on to the question of sentence. The Appellant complains that he is a first offender and the sentence was harsh and manifestly excessive in the circumstance. The Accused was sentenced in 2011. The sentence is the minimum sentence set by law at the time. In the circumstances, it cannot be said to be manifestly excessive. However, subsequent to the decision there has been some debate whether a prescribed sentence is an impediment on the discretion of the Court. In this case the Appellant has not demonstrated how that would be so in the circumstances of his case. The Accused has been incarcerated for 8 years. He suggests but does not explain fully whether he is saying he is rehabilitated.

12. In the circumstances, the Appeal against conviction is dismissed. The Appeal against sentence is similarly dismissed but treated as an application for review of the sentence.

13. It is further ordered that the National Probation Service do appoint a suitable officer to prepare a report on the appropriate sentence for the Appellant.

Order accordingly.

**FARAH S. M. AMIN**

**JUDGESIGNED DATED AND DELIVERED AT VOI ON THIS THE 20TH DAY OF DECEMBER 2019**

In the Presence of:

Court Assistant: JosephatMavu

Prosecution: Ms Mukangu

Convict: Present in Person.