KTI.NO.284/2018

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 14 OF 2017

DAVIE MWATU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case (S.O.) No. 34 of 2013** of by **S. K. Mutai Ag. P M** on **14/02/14**)*

J U D G M E N T

1. Davie Mwatu, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between **12th April, 2013** and **12th June, 2013** at unknown time, at **[particulars withheld] Market, Maluma Location** in **Ikutha District** within **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **EMN** a girl aged **17 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 **12th April, 2013** and **12th June, 2013** at unknown time, at **[particulars withheld] Market, Maluma Location** in **Ikutha District** within **Kitui County** intentionally touched private parts of **EMN** a girl aged **17 years** with his penis.

3. He was tried, convicted and sentenced to serve **fifteen (15) years imprisonment.**

4. Aggrieved by the conviction and sentence he appealed on grounds that:

- Evidence adduced regarding age of the victim was insufficient.
- Evidence adduced was uncorroborated.
- The defence was disregarded for no reason.
- The case was not proved beyond any reasonable doubt.

5. Facts of the case were that PW1 **EMN,** then a form three (3) student had consensual sex with the Appellant on several occasions until she conceived. When PW2 **AN** her mother discovered, they reported the matter to **Mutomo Police Station.** The Appellant was arrested and charged.

6. When put on his defence the Appellant who alleged that he is a Pastor at **Kamutei Repentance Ministry,** denied the allegations. He blamed his woes on people who did not like him following his progress. He called his wife as a witness.

7. This being a first Appellate Court I am expected to submit evidence adduced at trial to a fresh and exhaustive examination **(see Pandya vs. Republic (1957) EA (336);** and come to my own decision. I must weigh conflicting evidence if any and draw my own conclusion **(see Shantilal M. Ruwala vs. Republic (1957) EA 570)** then decide whether the Magistrate's findings should be supported making an allowance for the fact that the trial Court had the advantage of hearing and seeing witnesses **(see Peter vs. Sunday Post, (1958) EA 424).**

8. The Prosecution in the matter was duty bound to prove:

(i) Age of the Complainant.

(ii) Proof of penetration.

(iii) Identification of the perpetrator of the offence.

(See Charles Wamukoya vs. Republic, Criminal Appeal No. 72 of 2013)

9. Age of a victim is a critical factor in determining a case of defilement. It was submitted by Counsel for the Appellant, **Mr. Mike Muema** that evidence presented to Court of the age of the Complainant rested on a letter from school where the Complainant was learning. That the age was not proved as the information on the treatment card must have been given either by the Complainant or the parents.

10. In the case of **Kaingu Elias Kasomo vs. Republic, Malindi Criminal Appeal CA No. 504 of 2010.** The Court of Appeal held that:

> ***"The age of a minor is an element of a charge of defilement which ought to be proved by medical evidence, documents such as baptism cards, school leaving certificates."***

11. In the case of **Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000,** the Court observed that:

> ***"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

12. In her testimony the Complainant told the Court that she was seventeen (17) years old having been born in **1996.** PW2 her mother stated that she was born on **19th November, 1996** and that she was seventeen (17) years old. The defence did not dispute her age. The Investigation Officer PW4, **No. 75433 P C Japheth Kidiavai** stated that prior to preferring charges against the Appellant he obtained a letter from **[particulars withheld] Secondary School** where the Complainant was learning. The medical examination report (P3) has the age of the Complainant estimated as seventeen (17) years.

13. In the case of **Stephen Nguli Mulili vs. Republic (2014) eKLR** the Court of Appeal stated that:

> ***"From the facts of the present case we note that the complainant gave testimony that she was 13 years at the time of the offence. PW2 and PW3 corroborated the same. The Diagnostic HIV Testing and Counselling Patient/Client Card; the "General Out-Patient Record" and the P3 form, which were all presented as exhibits, stated the Complainant's age as 13 years. Therefore, applying the law to the facts of the present appeal, we are satisfied that the Complainant's age was proved to the required degree. This view is fortified by the fact that during trial the defence did not question the age of the complainant as offered before court."***

14. In the instant case the mother of the Complainant gave her age and date of birth. Even if they did not adduce evidence of a birth certificate the information on the P3 per the estimate of the Clinical Officer corroborated evidence of the Complainant and her mother in respect of her age. In the premises her age was proved to the required standard.

15. Regarding penetration, the Complainant testified that they had consensual sex. She was examined by PW3, **Daniel Mulwa,** a Clinical Officer who found her without a hymen. Laboratory test done confirmed that she was eight (8) weeks pregnant. The fact that her hymen was missing was evidence of insertion of a body part or other object into the Complainant's orifice and in this case vagina. It was her evidence that she engaged in penetrative sex.

16. Evidence adduced as to who was the perpetrator of the act of penetration was that of the Complainant. The Appellant was well known to the Complainant as a Pastor. This was confirmed by the Appellant who stated that he was a Pastor at **Kamutei Repentance Ministry.** The first time they engaged in sexual intercourse per the evidence of the Complainant was on **12th April, 2013** at **3.00 p.m.** This was at the Appellant's house. She kept it secret as requested by the Appellant. The second time they had another episode of sexual intercourse was at **2.00 p.m.** on the **12th June, 2013.** She discovered she was pregnant and told him but he advised her to abort. She denied having had a sexual activity with any other person.

17. In his defence the Appellant who made an unsworn statement stated that people at **Kamutei** held a grudge against him because he was progressing. That he received a letter threatening him and his wife and PW1 was the one who wrote the letter. DW2 **M K** his wife stated that she relocated to **[particulars withheld] Market** in **July, 2013.** On **25th August, 2013** they found a threatening letter and that some of the letters were found with the Complainant. DW3 **Anastacia Mutungi** confirmed that the Appellant was her Pastor and he got married in **September, 2012.** The alleged letters were not availed for perusal by the Court. When PW1 testified, it was not suggested to her that she wrote some letters to the Appellant that were threatening in nature. This allegation was disregarded by the trial Magistrate and he was justified in doing so.

18. In his defence the Appellant denied having been at the place where the offence was alleged to have been committed. There was a misdirection on the part of the trial Magistrate when he stated that his evidence did not controvert the evidence adduced by the Prosecution. In **Sekitoleko vs. Uganda (1967) EA 531** it was stated that:

> ***"As a general rule of the law, the burden of proving the guilt of a prisoner beyond any reasonable doubt never shifts whether the defence set up is an alibi or something else.....***
>
> ***The burden of proving an alibi does not lie on the prisoner and the learned magistrate misdirected himself."***

19. That notwithstanding, the learned Magistrate having heard the Complainant and observed her demeanor believed her. He reached a finding that she positively identified her assailant as the Appellant. Corroboration is not a requirement in a case of defilement. What was important was for the witness to impress upon the Court that she was speaking the truth.

20. The learned Magistrate is also faulted for arriving at a wrong sentence. **Section 8(4)** of the **Sexual Offences Act** provides thus:

> ***"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

21. The learned Magistrate imposed the minimum prescribed sentence for the offence the Appellant was charged with. This was in accordance with the law.

22. In the premises, I find the Appeal lacking merit. It is dismissed in its entirety. The Appellant shall serve sentence to run from the date of conviction in the Lower Court, in addition to the two (2) years that he has been out on bond pending determination of the Appeal.

23. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **8th** day of **February,** 20**18.**

L. N. MUTENDE

JUDGE