



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 80 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. A Onginjo – CM delivered on 31<sup>st</sup> March 2015 in Kibera CMC. CR.(SO) Case No.56 of 2013)*

**ERICK ANDOLE LUSENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Erick Andole Luseno was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 15<sup>th</sup> November 2013 at [particulars withheld] Estate in Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of J M M (the complainant), a child aged 14 years. He was alternatively charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully touched the vagina of the complainant with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main charge and sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of non-independent evidence that did not establish his guilt to the required standard of proof. He faulted the trial magistrate for failing to evaluate the evidence in his entirety and therefore arrived at the erroneous determination that the prosecution had established its case. In further grounds presented to the court, the Appellant contended that the charge as drawn was defective since the requirement of **Section 43** of the **Sexual Offences Act** had not been complied with. He took issue with the fact that he was convicted yet crucial witnesses had not been called to testify in the case. He was of the view that the evidence adduced by the prosecution witnesses was inconsistent and contradictory. He stated that part of the evidence that was admitted was obtained contrary to the provisions of **Article 50(4)** of the **Constitution**. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the custodial sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. In the said written submission, the Appellant stated thus:

The Appellant faulted the trial court for convicting him yet the element of age of the complainant was not proved beyond any reasonable doubt. The Appellant further explained that in defilement cases, the element of age and penetration must be proved, which were not proved in this case. He submitted that although the prosecution made efforts to produce a birth certificate, the same was not significant as according to PW1, the complainant had sat for her KCSE and thus there was no way she could be 14 years at the time of the alleged offence. He submitted that PW2 did not identify the birth certificate rendering it useless hence the age of the complainant remained unproved. He was aggrieved by the trial court for convicting him yet the charges were defective as they did not conform to **Section 43** of the **Sexual Offences Act**. He explained that the particulars of the charge did not describe the offence as unlawful as required by the said section and as a consequence the charges were defective. Thus, a conviction in the circumstances cannot be sustained. He further explained that the charge under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** was a defective because it only covered children under the age of 11 years. He further explained that PW1 had testified that the complainant was 14 years old. He referred to PW1's statement which indicated that the complainant was born on 5<sup>th</sup> January 1998 and thus confirming that the complainant was 15 years at the time of the incident. As a result, the Appellant submitted that the most appropriate charge would have been under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**.

The Appellant faulted the trial court for convicting him and yet the most crucial witnesses did not testify. He further explained that a certain lady who had allegedly assisted PW1's brother to look for the complainant and the complainant's brother were not called to testify in the case. In his view, the two were crucial witnesses who ought to have been called to testify in the case. The Appellant submitted that the

arresting officer was not called to court to testify regarding the circumstances, the time and the place his arrest. He submitted that the trial court erred in convicting him on contradictory and inconsistent testimonies of the prosecution witnesses. The Appellant explained that PW1 told the court that the complainant had sat for her KCSE while PW2 claimed she was a Form 1 student. He further explained that PW2 alleged that she was defiled by two people; according to him, the complainant contradicted herself by claiming that only one of them held her while the other defiled her. He submitted that PW2 did not identify who her assailant was. He submitted that if the complainant was telling the truth, he could have been charged with gang rape and not defilement. He further added that P3 forms that were produced had notable defects.

The Appellant faulted the trial court for convicting him on the evidence obtained contrary to the provisions of **Article 50(4) of the Constitution of Kenya, 2010**. He explained that P3 forms did not show any presence of blood stains, spermatozoa, and did not state the age of injuries, any treatment prior to filling of P3 forms or the degree of the injuries that the complainant sustained. As a consequence he was of the view that the trial court should not have admitted these documents as exhibits in the case. In conclusion, he submitted that the burden of proof was not discharged to the required standard of proof. He was aggrieved that the trial court failed to consider his defence. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Ms. Kimiri for the State opposed the appeal. She submitted that the prosecution had established that the Appellant indeed defiled the complainant. She admitted that there was a defect in the charge but it curable. The age of the complainant was 15 years and therefore the Appellant ought to have been charged under **Section 8(3)** and not **Section 8(2)** of the **Sexual Offences Act**. She submitted that the three ingredients to prove the offence of defilement, that is; penetration, age of the complainant and the identity of the perpetrator had been sufficiently proved. She submitted that Appellant's argument that a certain lady who sold chips and smokies in the neighborhood of the complainant's home should have been called as a prosecution witness was not valid because the prosecution called all the witnesses that were necessary to enable it establish its case. Learned State Counsel conceded that there is a possibility that the Appellant and the complainant had a relationship. However, she submitted that it was the complainant's evidence that she was abducted by the Appellant and taken to a house where she was held until the following day. She explained that according to the evidence adduced, it was clear that the abduction was stage-managed because the complainant was found in the Appellant's house watching TV. She was also eating chips. She submitted that even if there was abduction, the complainant remained in the Appellant's house voluntarily and did not try to escape.

Learned State Counsel further stressed that by the mere fact that they had a relationship did not mean that complainant had legal capacity to consent to the sexual act. She referred the court to **Section 42** of the **Sexual Offences Act** which sets out the age of consent. She submitted that post rape care form produced by PW4 proved that the complainant had immediately prior to the medical examination had her first sexual intercourse. She discounted the alibi defence of the Appellant. This was because the wife of the Appellant, who testified in the court, was away and only learnt of the Appellant's arrest after three (3) days. She explained that the Appellant's complaint to the effect that a *voire dire* examination was necessary was not sustainable since the trial court had properly assessed that the complainant was of sufficient intelligence to understand the meaning of the oath. In any event, the Appellant was not prejudiced by the trial court's failure to conduct the *voire dire* examination.

In summary, Learned State Counsel urged the court to find that the prosecution had sufficiently established all the ingredients of the offence of defilement including the identity of the perpetrator to the required standard of proof beyond any reasonable doubt. In conclusion, she submitted that the Appellant had been properly convicted by the trial court on the charge brought against him. The sentence that was imposed was legal. In the premises therefore, she urged the court to dismiss the appeal and uphold his conviction and sentence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see **Njoroge – vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties in this appeal. It was clear from the evidence, although it was not directly stated by the prosecution witnesses and the Appellant in his defence, that there existed a romantic relationship between the Appellant and the complainant. Although the complainant claimed she was kidnapped by people she did not know and taken to unknown place, it was apparent that she willingly entered into the motor vehicle that took her to the Appellant's house. She did not scream to alert the persons who were at the scene when she entered the vehicle. Indeed, it was her mother's testimony that a lady who sold smokies at the place that the complainant boarded the vehicle, noted that the complainant entered the vehicle without any duress or compulsion. If there was any doubt that the complainant willingly and without coercion accompanied the Appellant to his house, this doubt was removed when evidence was adduced on the circumstances the complainant was found.

According to prosecution witnesses, when the police went to the Appellant's house, they found the complainant relaxing in the house watching TV. She was also eating chips. There was no evidence to suggest that she was under any form of restraint that prevented her from leaving the house if she chose to. It was apparent that the complaint was lodged with the police by the mother of the complainant. The prosecution also established that at the time of the incident, the complainant was about 16 years old. The birth certificate produced in court indicated that she was born on 5<sup>th</sup> January 1998. The incident took place on 15<sup>th</sup> November 2013. The prosecution established to the required standard of proof that indeed the Appellant penetrated the complainant. The complainant "**consented**" to the sexual intercourse. That is the reason why this court makes the finding that there existed a relationship between the Appellant and the complainant.

Although the Appellant denied having any relationship with the complainant, this court holds that indeed such relationship existed. The Appellant arranged for the complainant to spend the night with him. The only problem was that the complainant lacked capacity to consent to the sexual intercourse. **Defilement** is an offence of strict liability. Sexual intercourse between any person with a person aged less than 18 years is prohibited. It is unlawful. The only exception is where the accused is able to establish that he thought that the complainant was over the age of 18 years at the time he had sexual intercourse with her. In the present appeal, the Appellant made no such suggestion.

In the premises therefore, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that

indeed the Appellant defiled the complainant. The three critical elements to establish the charge of defilement i.e. the age of the complainant, penetration and the identity of the perpetrator were established to the required standard of proof beyond any reasonable doubt.

As regard sentence, this court is of the considered opinion that, taking into consideration the entire and the surrounding circumstances of this case, that the sentence meted on the Appellant was harsh and excessive. As stated earlier in this Judgment, it was clear from the evidence that there existed a relationship between the Appellant and the complainant. This case is not the classic case of defilement where the accused brutalizes the victim of the sexual assault. There was an element of "consent" which is not however permitted by the law. In the premises therefore, the custodial sentence of twenty (20) years imprisonment imposed on the Appellant by the trial magistrate is set aside and substituted by a sentence of this court. The Appellant is sentenced to serve ten (10) years imprisonment with effect from 31<sup>st</sup> March 2015 when he was convicted and sentenced by the trial magistrate. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**