



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**HCRA. CASE NO. 6 OF 2015.**

**ELIUD SIMIYU MASINDE.....APPELLANT**

**VERSUS.**

**REPUBLIC.....RESPONDENT**

***[An appeal from Conviction and Sentence in Original Kimilili PMCR. No. 1035/2013 delivered on 190/2015 by M.A. Nanzushi (SRM)]***

**JUDGMENT**

The Appellant Eliud Simiyu Masinde was charged with the offence of defilement of a girl contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006 and Committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. (3) of 2006.

The particulars of Offence were; Between 14<sup>th</sup> July 2013 and 16<sup>th</sup> July 2013 at Kamukuywa location of Bungoma County intentionally caused his penis to penetrate the vagina of F N a child aged 15 years and between 14<sup>th</sup> July 2013 and 16<sup>th</sup> July 2013 at Kamukuywa Location of Bungoma County, he unlawfully and intentionally touched the vagina of F N a child aged 15 years with his penis.

After full trial in which four witnesses testified for the prosecution and the accused gave unsworn evidence, he was found guilty on main charge of defilement convicted and sentenced to 20 years imprisonment. Dissatisfied with the Conviction and Sentence he filed this appeal premised on the following grounds;

- (1) THAT the trial Magistrate erred in law and facts in conducting proceedings that violated my rights as per the provisions of the constitution of Kenya hence null and void.*
- (2) THAT the trial Magistrate erred in law and facts in putting extraneous factors into consideration in the decision making.*
- (3) THAT there was miscarriage of the law when the trial magistrate erred in law and fact in arriving at a Judgment that bared no birth certificate of the complainant in this matter.*
- (4) THAT the trial Magistrate erred in law and facts by failing to put into consideration the allegations of the clinical officer which had contradicted the incident.*

M/s Njeru for state opposed the appeal on the following grounds;

- (1) THAT the appeal lacks merit.*
- (2) THAT sufficient, cogent and corroborative evidence was adduced which was not dispensed with by the defence.*
- (3) THAT the appeal be dismissed.*
- (4) THAT conviction and sentence be upheld.*

The evidence before the trial Court was that F N a girl aged 15 years and a pupil in Standard 7 at [particulars withheld] Primary School was with her grandmother when accused whom she had known before called her on her grandmother's mobile number. He told her to meet him at Kamukuywa Market. She went there on 14.7.2013 and she met the accused. They then went to Kimimini and later to Makuserwa. The appellant took her to his brother's house where they spent the night and had sex for 2 days. On Tuesday she was at Kamukuywa Market when the complainant's mother met her. The complainant explained to the mother what had happened. On 17.7.2013, they reported the matter and accused was arrested by AP officers. They were taken to Kimilili Police Station and later to Kimilili Hospital where she was examined. Later further examination revealed that she was pregnant.

Pw2 O N the mother of the Complainant testified that on 14.7.2013 she received information that the complainant who was staying with the grandmother had escaped with the grandmother's mobile phone and had not returned. That was on a Sunday. On the following Tuesday while at Kamukuywa Market she saw the complainant. She interrogated her. Complainant informed her that it is accused she was with. The matter was reported to AP who arrested the appellant and the complainant were taken to Kimilili Hospital where she was examined and found to be pregnant. She confirmed the complainant was 15 years old at that time having been born in 1998.

Pw3 Cpl. Zailda Kilili attached to Kimilili Police Station received the accused from the AP officers on allegation of defilement of the complainant. She took them to Hospital where both were examined by the doctor. Pw4 Gitonga Kipnaye examined the complainant 9 days after the date of alleged defilement. He assessed her age as 15 years and found she was pregnant.

The appellant gave unsworn evidence. He testified that on 11.7.2013 he left his home to check on his property at Misikhu. He saw his property was damaged and went to report to West Kenya Company at Misikhu when he was arrested and charged with the present offence which he denied. It is upon this evidence that he was found guilty and convicted.

The appellant filed written submissions. He submitted that there the trial magistrate erred in relying on the evidence of a single witness the complainant; and that no other person saw them with her. He submitted that there was Mention of the one Diane who was never called as a witness, and therefore the evidence of the complainant has not been corroborated. Appellant submitted that the ingredients of the offence were not established; no penetration was proved as no bruises were noted or bleeding seen and the issue of pregnancy was only mentioned by the Clinical officer on Cross – examination. Appellant submits that the only evidence that it is appellant who defiled the complainant is that of the complainant only and that the court should be aware that recognition can also be erroneous. Finally appellant submits that the sentence is excessive and is not commensurable to the moral blame worthiness of the appellant.

M/s Njeru for the State submitted that no specific provisions have been shown to have been violated; that the magistrate clearly analyzed the evidence; the age assessment was done and found she was 15 years old, and penetration was proved by evidence. She prayed that the appeal be dismissed.

This is a first appeal. It is the duty of the first appellate court to re-evaluate the evidence and come to its own conclusions but always giving allowance that it does not seem to have the witnesses **[Okeno Vs. Rep 1972 EA]**

The appellant was charged and convicted on a charge of defilement Contrary to Section 8(4) of the Sexual Offences Act. The prosecutor is under duty to at all times prove by evidence all the ingredients of the offence. These ingredients are (1) The act of penetration (2) the age of the complainant and (3) that the appellant is the person who committed the act of penetration.

On identification of the appellant Pw1 the complainant testified that she had met the appellant and he had given him the complainant's grandmother's telephone number through which they would communicate. On 14.7.2013 the appellant called her through that number and asked her to meet him at Kamukuywa. She complied and met him at Kamukuywa, went to Kiminini, then to Makuserwa where they went to appellant's brother's house at 7p.m. They slept in the house and had Sexual Intercourse for two days. From Sunday to Tuesday. On Tuesday they left together for Kiminini where he left her. The accused in his Cross-examination or defence did not allude to the issue of mistaken identity. Evaluating the whole evidence on identification I am satisfied the for the 2 days the appellant was with the complainant, she properly identified him with no possibility of error on identification.

The appellant raised the issues of age of the complainant, and that the same was not proved. The complainant stated that she was 15 years old. Pw2 the mother also testified that she was 15 years old. Pw3 the Clinical officer assessed the complainant's age to be 15 years old. Non production of birth certificate was not fatal. I am satisfied that this was adequate evidence on proof of age of the complainant.

The appellant submitted in his submission that the element of penetration was not proved. The complainant in her evidence stated had sexual intercourse with her for 2 days when they slept at his brother's house. Upon examination by the clinical officer there was evidence of penetration. When later tested for pregnancy the complainant was found to be pregnant. The appellants' defence is that he does not know anything about the defilement, and that he was only arrested while he was checking on his property which had been damaged by the uncle.

The appellant's further submitted that there were contradictions in the prosecution evidence. No such contradictions were pointed out in the submissions by the appellant. The evidence of the witnesses are consistent and no evidence of contradiction in material particulars.

On sentence the appellant submits that the sentence must be commensurate to the moral blame worthiness of the offender and the court should look at the facts and circumstances before exercising its discretion in sentencing. This is a proper proposition in law on sentencing. Section 8(3) provides for a minimum sentence upon conviction of twenty years imprisonment. I find no reason to interfere with the same.

For the reasons, I find no merit in this appeal; I uphold the appellants conviction on defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act and affirm the sentence of 20 years imprisonment imposed. This appeal is hereby dismissed.

**Dated and Signed at Bungoma this 31<sup>st</sup> day of October, 2018.**

**S.N. RIECHI**

**JUDGE**