



KTI.NO.221/2017

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 74 OF 2015

STEPHEN MUTINDA MUSEMBI.....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. 54 of 2014 by Hon. S. Ogot R M on 10/04/15)*

J U D G M E N T

1. **Stephen Mutinda Musembi**, 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**. Particulars of the offence were that on the **16<sup>th</sup>** day of **December, 2014** at around **9.00 p.m.** at **Pembeni Bar, Mwangeni Shopping Centre, [particulars withheld] Location** in **Ikutha District** penetrated the vagina of **M M** a girl aged **16 years** with his penis.

2. Facts of the case were that in **November, 2014**, **PW1 M M**, the Complainant met and became familiar with the Appellant. On the **16<sup>th</sup> December, 2014** at **2.00 p.m** they met and made plans of going to **Pembeni Lodge** where they had consensual sex. He woke up at **4.00 a.m.** leaving her sleeping at the lodging. She woke up and had a bath. She went to sit outside the shop and was found by **PW3 Ann Nduku** a waitress at the **Pembeni Point Bar**. **PW3** confirmed from **PW4 Jane Mueni Peter** the bar and lodging Attendant who sold to the Appellant a room that indeed they were together. They reported the matter to **PW5 Munyalo Nako**, the Chief Athi. He investigated and established that the Complainant was a student who left home without the knowledge of her parents. They reported the matter to **PW6 No. 2008053023 P C Edwin Sikoyo** who arrested the Appellant. The Complainant was examined by **PW7 Daniel Mulwa**, a Registered Clinical Officer. He established that her hymen was missing. A high vaginal swab carried out revealed presence of spermatozoa and some bacteria that is sexually transmitted. He concluded that the Complainant had been defiled. **PW8 No. 101802 P C Njue Daniel Sinongwe** investigated the case and charged the Appellant.

3. When put on his defence the Appellant who made an unsworn statement, stated that on **16<sup>th</sup> December, 2014** he travelled from **Nairobi** to his home. He arrived at **11.00 p.m.** and hired a room at **Pembeni Bar and Lodging**. He went to his **Mwangeni** home in the morning. At **11.00 a.m.** some two Administration Police Officers went to arrest him. While at **Mwangeni** at **6.00 p.m.** Police Officers from **Ikutha** arrived with the Complainant and took them to **Mutomo Police Station**.

4. The Court analyzed evidence adduced and reached a finding that the Complainant identified the

Appellant as the person who defiled her. He was convicted and sentenced to **twenty (20) years imprisonment**.

5. Aggrieved by the conviction and sentence the Appellant appealed on grounds that:

- Evidence adduced was uncorroborated and contradictory.
- Conditions that existed did not favour recognition.

6. The Appeal was disposed off by way of written submissions.

7. Counsel for the Appellant, **Mr. Mwalimu** submitted that penetration was not proved, the Appellant was not properly identified; and the age of the Complainant was not sufficiently established.

8. In response, the Prosecution Counsel submitted that PW1 identified the Appellant positively, the Child Health Card adduced in evidence ascertained the age of the Complainant and the alibi defence put up did not disapprove the Prosecution's case. He cited the case of **Abdub Golicha Qancham vs. Republic (2015) eKLR** where it was held that in cases of defilement the Prosecution was required to prove three (3) elements of the charge namely: The age of the Complainant, penetration even if it is partial and that the Accused is the culprit or the person who committed the act.

9. This being a first Appellate Court, my duty is to analyze and re-evaluate evidence adduced at the Lower Court and come up with my own conclusions on evidence adduced without overlooking the conclusions of the trial Court. I must also remember that I did not have the opportunity of seeing or hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.

10. In the case of **Kaingu Elias Kasomo vs. Republic, Malindi Criminal Appeal No. 504 of 2014** the Court of Appeal stated that age is a key ingredient to the offence of defilement. It was therefore imperative on the part of the Prosecution to prove the age of the Complainant beyond reasonable doubt.

11. To prove the age of the Complainant the Investigation Officer adduced in evidence a Child Health Card issued to **M**. The father's name was given as **M**. The document had the date of birth as **22<sup>nd</sup> September, 1998**.

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

***“The ‘Diagnostic HIV Testing and Counseling Card’, the ‘General out patient record’ and P3 form were all presented as exhibits..... Applying the law and facts of the present appeal, we are satisfied that the Complainant’s age was proved to the required degree.”***

In this case other than the Child Health Card which cannot be disputed as having been issued at birth was adduced in evidence together with a P3 form which indicated the Complainant's age as **sixteen (16) years**. This was proof of her age beyond reasonable doubt. She was a minor of an apparent age of **16 years**. To be specific she was **15 years and 9 months old**.

12. It was the evidence of the Complainant that she was defiled on the **16<sup>th</sup> December, 2014** She adduced evidence that due to her familiarity with the Appellant, they agreed to meet. They went to **Pembeni Lodging** where they slept and had consensual sex. She was taken to hospital by her father PW2 **J M M** after the matter was reported to the police. Following an examination done it was established that she had engaged in sexual intercourse. PW7 who examined her confirmed that her hymen was missing. A high vaginal swab carried out established the presence of spermatozoa and some bacteria. This was proof that she had sexual intercourse with a male. In order for the presence of spermatozoa to be established this was proof of penetration of a male genitalia into her genitalia. The act of defilement was proved beyond any reasonable doubt.

13. The Appellant denied vehemently having penetrated the Complainant, he argued that although he travelled home and ended up sleeping at **Pembeni Bar and Lodging Room No. 2** he was alone. He

explained that he reached late and the 'bodaboda' operator who was to collect him did not turn up that is why he had to lodge at **Pembeni**. Further, he explained that after getting a meal at the restaurant he went to sleep at about **11.00 p.m.** He woke up at **8.00 a.m.**, had breakfast at the hotel and went home.

14. PW4 **Jane Mueni**, the Lodging Attendant who served the Appellant stated that he went to the counter at **9.00 p.m.** She left him at the room and went to serve other customers. Her evidence corroborated that of PW1 that they arrived at **Mwangeni** at **9.00 p.m.** and went to look for a place to sleep, which was at **Pembeni Lodge**. The witness however added that she did not see the Complainant on the material night but there were two (2) gates to the premises, the front gate and rear gate and when one enters the room it would be difficult to tell whether or not there is another person inside.

15. In her testimony the Complainant stated that the Appellant woke up at **4.00 a.m.** and left her. He told her that he was returning the motorcycle that they used as a means of transport but did not return. After bathing she went to sit with PW3 and the Chef. She went to where PW3 in particular was because she had given her water to bathe. PW3, a waitress at **Pembeni Point Lodge** stated that the Complainant requested her to take her to the bus stage to look for **Mutinda Musembi**. She asked why Mutinda had gone away from the Lodging leaving her but she did not answer. She (PW3) had the knowledge that **Mutinda Musembi** slept at the Lodging. She assisted the Complainant and took her to her house. When she asked whether she could facilitate her by giving her fare to go back home, she declined saying that **Mutinda** would go for her. Thereafter a Chief sent someone to look for her.

16. The Appellant was well known to PW3 and PW4. They saw him at the Lodging on the material night and the Appellant admitted the fact that he slept at the Lodging.

17. The Complainant was categorical that the sexual activity that happened between them was done willingly as she chose to. She had no reason to lie. The trial Magistrate was right in believing her. She recognized the Appellant as a person she got to know and they used to relate well. She travelled with him in broad day light and they slept together. She could not have been mistaken as to his identity.

18. Therefore he is the person who penetrated the Complainant and had consensual sex with her.

19. The Complainant herein having been a minor had no legal capacity to consent to any sexual activity. In the circumstances she was defiled. Therefore the case against the Appellant was proved to the required standard. The conviction was safe and I confirm it.

20. With regard to 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."***

In the case of **Ogola s/o Owoura vs. Reginum (1954) 21 270** the Court of Appeal stated that:

***"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs. Republic (1950) 18 EA CA 147,***

***"It is now settled law that sentence is a matter of discretion of the trial court and must be based on facts and circumstances of each case. An appellate court will not normally interfere with sentence unless the sentence is manifestly excessive or is based on wrong principles."***

21. In the instant case the minimum prescribed sentence is **fifteen (15) years imprisonment**. The Appellant was a first offender. He mitigated on sentence as required by law. It is a case where the learned Magistrate should have considered imposing the minimum sentence prescribed. In the

circumstances I find the Appeal on sentence meritorious. It is allowed. Therefore I quash the sentence meted out and substitute it with one of **fifteen (15) years imprisonment.**

22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 28<sup>th</sup> day of July, 2017.**

**L. N. MUTENDE**

**JUDGE**