



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 181 OF 2012**

**FRED OKILAPA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the original conviction and sentence by Honourable J. Bartoo Resident Magistrate, dated 29<sup>th</sup> October 2012, in Eldoret Chief Magistrate's Court Criminal Case No. 1582 of 2012)*

**JUDGEMENT**

1. The appellant *Fred Okilapa* was tried and convicted of the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (2)* of the *Sexual offences Act*. He was sentenced to life imprisonment.

2. The particulars of the offence alleged that on unknown dates between the month of November 2011 and March 2012 at [particulars withheld] village, Lumakanda location, Lugari District within Western province, the appellant unlawfully and intentionally caused penetration with his genital organ into the genital organ of *F.N* (Name withheld), a child aged 6 years.

3. The appellant was aggrieved by his conviction and sentence. He lodged an appeal to this court vide a petition of appeal wrongly titled "memorandum of appeal" filed on 7<sup>th</sup> November, 2012. On 11<sup>th</sup> May 2017, the appellant sought and obtained leave to file amended grounds of appeal. In his amended grounds of appeal, he relied on three grounds which are reproduced verbatim hereunder;

***(a) That the trial magistrate erred in law by convicting me to serve life imprisonment without observing that I was a minor at the time of sentencing hence breach of section 8(7) of Sexual offence act and section 191 (1) of the children's Act.***

***(b) That the trial court erred in law by convicting me to serve life imprisonment while relying on the evidence of the complainant who was not sworn after voire dire examination which shown that she was intelligent to give sworn evidence.***

***(c) That the trial court erred in both law and fact by convicting me while believing that I infected the complainant with venereal disease without observing that the clinical officer failed to specify the type of the venereal disease.***

4. At the hearing, the appellant prosecuted his appeal in person. He relied entirely on written submissions which he presented to the court. In his submissions, the appellant expounded on his amended grounds of appeal. Besides maintaining that he was a minor aged 17 years at the time he was sentenced, the

appellant claimed that this fact was brought to the attention of the trial court but the learned trial magistrate ignored it instead of calling for an age assessment report; that the custodial sentence imposed on him was illegal as it violated *Section 8 (7)* of the *Sexual offences Act* which provides for the sentences that may be meted out against minors convicted of sexual offences. He also casted doubt on the credibility of the medical evidence adduced by PW2 in proof of penetration, an essential element in the offence of defilement.

On the whole, the appellant implored me to find that he was wrongly convicted and sentenced. He urged me to allow his appeal.

5. The appeal is contested by the state. Learned prosecuting counsel *Miss Kainga* in her submissions either deliberately or inadvertently failed to address the pertinent issue raised by the appellant regarding his age during the trial. She submitted that the appellant was correctly convicted as in her view, the prosecution had proved all the elements of the offence of defilement beyond any reasonable doubt. She invited the court to dismiss the appeal for want of merit.

6. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to revisit and to re-evaluate all the evidence placed before the trial court in order to arrive at its own independent conclusions regarding the soundness or otherwise of the appellant's conviction. In doing so, the court should be careful to remember that unlike the trial court, it did not have the benefit of hearing and seeing the witnesses and give due allowance to that disadvantage.

See: ***Okeno V Republic (1972) EA 32; Soki V Republic (2004) 2 KLR 21;***

7. I have carefully considered the amended grounds of appeal alongside the evidence on record and the rival submissions made by the appellant and the state. I have also read the judgment of the learned trial magistrate.

8. Having done so, I wish to deal first with the appellant's complaint that the complainant (PW3) ought to have given sworn as opposed to unsworn evidence given the result of her *voire dire* examination.

I have noted from the record that in the *voire dire* examination conducted on PW3 by the trial court, the complainant only confirmed that she understood the difference between truth and falsehoods and the importance of speaking the truth. She does not appear to have been examined on whether she understood the meaning and significance of an oath.

9. In the circumstances, the learned trial magistrate was right in allowing her to give an unsworn statement though the typed and handwritten record of the trial court indicates that the court directed that she was to give sworn evidence. This appears to me to have been a slip of the pen. In any event, the giving of unsworn evidence by the complainant did not occasion the appellant any prejudice since he was given an opportunity to cross examine the complainant in the same way he would have done had she given sworn testimony. Nothing therefore turns on this ground of appeal.

10. On the complaint that the appellant was wrongly convicted as the clinical officer did not specify the type of venereal disease he had infected the complainant with, I find that PW2 the clinical officer was clear both in his evidence and in his findings in the P3 forms produced as Pexhibit 1 and Pexhibit 3 that after examining and having forensic tests conducted on both PW3 and the appellant, he found both of them to be suffering from a similar genre of a sexually transmitted infection. This was about a week after the complainant's mother (PW1) found PW3's under pant dirty while bathing her and PW3 eventually owned up that the dirt was being caused by vaginal discharge after the appellant had carnal knowledge of her; that the appellant had warned her with death if she reported the incident.

I am satisfied as was the learned trial magistrate that the evidence of PW2, PW3 and the medical evidence in the P3 forms proved penetration beyond any reasonable doubt.

11. The question that then arises at this juncture is whether the prosecution adduced evidence to prove

beyond any reasonable doubt that it is the appellant who caused the said penetration using his genital organ. The complainant in her evidence identified the appellant as the person who sexually assaulted her at the material time. PW3 and the appellant were not strangers. There is undisputed evidence that the appellant had worked in the complainant's home for five years. It was therefore a case of recognition which is always more reliable than a case of mere identification of a stranger. Her recognition of the appellant as her assailant was therefore positive and free from the possibility of error.

12. This recognition was further buttressed by the evidence of PW2. As stated earlier, when both PW3 and the appellant were tested and examined, a similar sexually transmitted infection was found in both of them. It could not have been a coincidence that both of them were suffering from a particular kind of a sexually transmitted infection at the same time. In my view, it was not fatal to the prosecution case that PW2 did not expressly specify the particular type of infection the two of them were suffering from.

13. In convicting the appellant, the learned trial magistrate believed the evidence of PW3 finding that it was consistent and withstood cross examination by the appellant. She dismissed the appellant's claim in his defence that he had been framed by the complainant's mother with the offence allegedly because she was indebted to him.

14. Under *Section 124 of the Evidence Act*, the learned trial magistrate was perfectly entitled to convict the appellant on the evidence of PW3 alone if she believed that she was a truthful witness and indicated her reasons for that finding on record. This is exactly what the learned trial magistrate did in this case. I am unable to fault her findings on the credibility of PW1 or on her dismissal of the appellant's claim in his defence because had PW1 actually framed him with the offence, the appellant would have brought out the issue in his cross examination of PW1 which he did not. The appellant's defence appears to have been an afterthought.

For all the foregoing reasons, I have come to the conclusion that the appellant was properly convicted.

15. On sentence, the appellant has maintained that he was a minor aged 17 years at the time he presented his defence. Given this claim, it would have been desirable for the learned trial magistrate to call for an age assessment report to conclusively prove the age of the appellant before sentencing him. She did not do so but considering that the appellant's age as stated in the P3 form was found to be 18 years upon his examination by PW2 before the trial started, I find that he was an adult and not a minor either during the trial or at the time sentence was pronounced.

16. *Section 8 (2) of the Sexual Offences Act* prescribes a mandatory sentence of life imprisonment for persons convicted of the offence of defilement where the victim was eleven years and below. It is not disputed that the complainant was 6 years old at the time the offence was committed. The sentence that was handed down on the appellant by the learned trial magistrate was thus the mandatory sentence that was prescribed by the law. She did not have discretion to impose any other sentence. In the premises, I find that the sentence was lawful and the same is hereby upheld.

17. For all the foregoing reasons, I do not find merit in this appeal and it is accordingly dismissed in its entirety.

It is so ordered.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 27<sup>th</sup> day of July 2017.**

In the presence of:-

Appellant

Ms Mokuia for the state

Mr. Lobolia court clerk