



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 72 OF 2015

M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal (S.O.) Case No. 42 of 2014 by Hon. Sandra Ogot R M on 17/04/15**)*

J U D G M E N T

1. **M M**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 81(4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between the month of **January, 2013** and **May, 2014** at **[particulars withheld] Location, Ikutha District** within **Kitui County** intentionally caused his penis to penetrate the vagina of **R K M** a girl aged **16 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 the month of **January, 2013** and **May, 2014** at **[particulars withheld] Location** in **Ikutha District** within **Kitui County** intentionally touched the vagina of **R K M** a girl aged **16 years**.
3. Facts of the case were that PW1, **R K M** met the Appellant in **January, 2013** and they became lovers. They engaged in sexual intercourse regularly until she became pregnant. On the **9th September, 2014** she gave birth to a baby boy known as **M K**. She returned to school to pursue her education but the matter was reported to the police who arrested the Appellant and charged him.
4. When put on his defence the Appellant who gave unsworn statement stated that the Complainant was his lover. When she got pregnant she wanted to abort but he told her not to. He promised to marry her after she gave birth. In **May, 2014** when her mother discovered that she was pregnant she had a discussion with his parents. They agreed that they meet all expenses during the pregnancy till when they would marry. On **8th September, 2014** he returned from **Mombasa** in order to make necessary arrangements to marry the Complainant. When he went to the home of the Complainant with his mother on the **10th September, 2014** they found the Complainant having gone to hospital to give birth. Thereafter he was arrested.
5. He called his guardian and uncle DW2 **E M M** as a witness who stated that when the Complainant gave birth he paid **Kshs. 15,900/=** being maternity costs. Later, upon the request of the Complainant's mother he provided money for milk on the **7th March, 2014** and he continues to do the needful.

6. The learned trial Magistrate considered evidence adduced, found the Appellant guilty, convicted him and sentenced him to **fifteen (15) years imprisonment**.

7. Aggrieved by the conviction and sentence he now appeals on grounds that:

- Evidence adduced was contradictory.
- The conviction was based on uncorroborated evidence.
- Conditions enabling recognition were not favourable.
- Evidence adduced was misrepresented.

8. This being the first Appeal, I am under a duty to subject the evidence adduced at trial to a fresh scrutiny and make my own conclusion bearing in mind the important fact that I never observed the witnesses who testified at trial therefore I am unable to that extent to assess their credibility or veracity of their evidence. **(See Okeno vs. Republic (1972) EA 32)**.

9. This is a case where the act of defilement is not in dispute. PW7 **Daniel Mulwa** a Clinical Officer examined the Complainant after delivery of the child. On examination there was presence of blood after delivery. He opined that the Complainant was defiled.

10. Although the Appellant came up with various grounds of Appeal, evidence adduced did not support them. It was Prosecution's case that he committed an act of penetration of the Complainant several times that resulted into her pregnancy. A child was born out of the union between them. His defence was an admission. He admitted being the perpetrator of the act that resulted into conception and subsequent delivery of the child.

11. In her testimony the Complainant stated that she was **sixteen (16) years old**. A child Health Card issued to the Complainant at birth was adduced in evidence to prove her age. She was born on **18th March, 1998**. In the case **Stephen Nguli Mulili vs. Republic (2014) eKLR** the Court of Appeal stated that:

“The Diagnostic HIV Testing and Counselling Card”, the general outpatient 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.”

12. In addition to the Child Health Card the Clinical Officers who filled the P3 estimated the age of the Complainant as **17 years old**. The Child Health Card establishes the fact that at the time of commission of the act the Complainant was between **15 – 16 years old**. She was below the age of **18 years** therefore a child.

13. In the case of **Kaingo 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. The Prosecution in this case proved the age of the Complainant beyond reasonable doubt.

14. The **Children Act** defines a child as any human being under the age of **eighteen (18) years**.

15. The Complainant having been a child, she had no legal capacity to consent to the act of sexual intercourse. Therefore the trial Magistrate did not misdirect herself.

16. Having re-evaluated evidence in totality I find the Appeal lacking merit. Consequently the conviction and sentence imposed is confirmed and the Appeal stands dismissed in its entirety.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of August, 2017.

L. N. MUTENDE

JUDGE