



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 78 OF 2016
URBANUS MUTEMI MUTISO.....APPELLANT
VS.
REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Mwingi Senior Resident Magistrate Court in Criminal Case NO. 36 of 2016 by Hon. G.W. Kirugumi Resident Magistrate on 9th November 2016)

J U D G M E N T

1. Urbanus Mutemi Mutiso, the Appellant, was charged with the offence of **defilement** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**.

Particulars of the offence were that on diverse dates between November 2015 and **28.01.2016** at **[particulars withheld]** within **Mwingi Central District of Kitui County** did an act which caused penetration of his male genital organs namely penis into the female genital organs namely vagina of **MM** a **girl aged 15 years**.

2. In the Alternative Count, he was charged with 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 **November 2015** and **28th January 2016** at **[particulars withheld]** within **Mwingi Central District of Kitui County** intentionally touched the vagina of **MM** a **child aged 15 years**.

3. After full trial, he was found **guilty, convicted** on the **main count** and **sentenced to fifteen (15) years imprisonment**.

4. Aggrieved by the conviction and sentence he appealed on grounds that:

- There was a possibility that the complainant was engaging in coitus with other people.
- The enmity that existed between the Appellant and the complainant was not considered.
- No spermatozoa were found to confirm that sex occurred.
- The age of the girl was at variance with what was on the Charge Sheet.
- The alibi defence put up was disregarded despite the fact that it was strong.

5. Facts of the case were that **PW1 MM** lived with her uncle and grandmother. The Appellant was an employee of her uncle. They became lovers and engaged in sexual intercourse severally. On the **28/1/2016** after they engaged in coitus, **PW2 KM** went and found them inside the house. The Appellant

who went to open the door on being knocked lied that the complainant had gone to collect firewood. However PW2 saw her inside the house and raised an alarm. People, including **PW3 SMM**, her son answered her call and went to the scene. They reported the matter to **PW4 Nicholas Munyoki Muraba** the **area Assistant Chief**, who went to the scene and found both the complainant and Appellant who in turn reported to the police. Police officers from **Mwingi Police Station** arrested the Appellant.

PW5 NO. 66147 Corporal Lucy Murira Investigated the case. The complainant was examined by a Medical Officer who found that her hymen was not freshly broken. A few spermatozoa were detected in the complainant's vagina and pus cells were noted. The Appellant was subsequently charged.

6. When put on his defence the Appellant stated that on the **28/1/2016** pursuant to a request by **KM, J's mother (PW2)** he assisted her to tie goats and cows at the paddock on her compound. Then, he took a sack and proceeded to harvest beans on the farm. Later she left going to Kanzui Centre and instructed him to guard the compound. It rained that afternoon. At about 4.00 p.m he went to herd livestock. While some 100 meters away from the homestead she heard K screaming. He ran there to find her with **MM** her grandchild. They were struggling. Mwinza was pulling the door while K was pushing it. He intervened and members of Public arrived amongst them **Makau Musemba (PW3)**. When they sought to know why Kamene was screaming she alleged that he was defiling the complainant. He was arrested and taken to the Assistant chief. Thereafter he was taken to the Police Station, Mwingi.

7. At the hearing, the Appellant canvassed the appeal by way of written submissions. He stated that PW1's confession to her uncle that she had engaged in sexual intercourse with him was out of fear. That the hymen having not been freshly broken the issue of defilement could not arise. That the allegation that he used to give the complainant money was hearsay. That there was a variance between the age on the charge sheet and what was stated in court. Therefore the age of the minor was not proved. That the alibi defence should have been disapproved as stated in the case of **Karanja –VS- Republic (1983) KLR 501**.

8. In response, the state through Ms Matiru learned counsel for the state opposed the Appeal on the grounds that Evidence adduced by the minor put the Appellant at the scene of crime. PW2, the grandmother of the minor found the Appellant and complainant locked up in the room.

The complainant used to be offered money by the Appellant in exchange of Sexual favours.

Medical evidence adduced proved that the complainant was defiled. The age of the complainant was proved as she was a minor.

9. This being the first appeal, Evidence adduced at trial must be subjected to a fresh and exhaustive examination (**Pandya –Vs- Republic (1957) EA 336**) and this court's decision on evidence should be a reflection of conclusions drawn after the scrutiny, having in mind that I did not have the advantage of hearing or seeing witnesses who testified (**Okeno vs- Republic (1972) EA 32**).

10. In this case the prosecution was duty bound to prove;

i. Age of the minor

ii. The Act of penetration

iii. The perpetration of the act. (Also see Wamukoya Karani –vs. Republic CRA NO. 72 OF 2013)

11. In the case of **Hillary Nyongesa –VS. Republic (Eldoret Criminal Appeal NO. 123 OF 2009)** *Mwilu J (as she then was)* stated thus;

“Age is such a critical aspect in sexual offences that it has to be conclusively proved... And this becomes more important because punishment (sentence) under the sexual offences Act is determined by the age of the victim”)

12. In her evidence the complainant stated that she was **sixteen (16) years old**. A child Health Immunization card issued to the complainant as a baby confirms that she was born on the **15.11.2000**. This was proof that at the time the offence was committed the complainant was **15 years and 2 months old**.

In the case of *JWA –VS- Republic (2014) Eklr*

The Court of Appeal states thus;

“The gist of the appellant’s appeal is that there is Material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant. The medical report produced as exhibit signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1999... the P3 Form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part we see no reason to disturb the finding of fact made by the two (2) courts”.

13. The immunization card having been issued to the complainant at the point of immunization as a child is cogent evidence that she was fifteen years old at the time of the offence.

Any estimated age should be disregarded and the trial Magistrate rightly did so. Therefore taking into consideration facts as presented there is proof beyond doubt that the **complainant** was a **child aged 15 years old** and incapable of consenting to an act of Sexual intercourse (*see section 43 (4) (f) of the sexual offences Act*)

14. The complainant was subjected to medical examination and found to have engaged in sexual intercourse. Her **hymen** was **broken** but it was not freshly broken, which was proof that she had been engaging in coitus before the date she was found by her grandmother and subsequently examined. The complainant was examined on the **28th January 2016** the same day she was found at the house stated to have been in occupation of the appellant herein. A high vaginal swab done revealed the presence of spermatozoa. This was evidence of penile penetration.

15. It is contended by the Appellant that there was a possibility of the complainant having engaged in sexual intercourse with other persons and he was framed up because of some unpaid wages. He also contends that his alibi defence was disregarded. In the case of *Karanja –vs- Republic (1983) KLR 501* it was stated that the burden of proving the falsity of the accused’s alibi defence lies on the prosecution. The Court of Appeal also held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt take into account the fact that he had put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the evidence was an afterthought.

16. The Appellant admitted having been found at the scene of the incident by other people who responded to **PW2’s** call, but argues that just like them he ran there to find out what was happening.

17. In the course of cross examination it was established that when PW2 found PW1 and the Appellant locked up inside the house she beat up PW1. However, it was not suggested that PW2 tried to get a loan from the appellant but he did not have the money therefore she framed him up. This must be viewed as an afterthought. On cross examination he said PW1 had no grudge with him. The complainant herein was PW1. She was found inside the house with the Appellant and there was no breakage in the chain of events prior to being subjected to medical examination while it was confirmed that she had engaged in coitus. She identified the Appellant as the perpetrator of the act of penetration into her genitalia. Her evidence was not discredited therefore the trial court was correct in believing her.

18. On sentence the law provides for not less than twenty (20) years (*see section 8 (3) of the Sexual Offences Act*). Where the **minor** is between **sixteen and eighteen years**, the term provided is **not less**

than **fifteen (15) years**. Since no issue was raised by the state regarding the issue of sentence I cannot interfere with it. In the result I find the appeal devoid of merit. It is **dismissed in its entirety**.

19. It is so ordered.

Dated, signed and Delivered at Kitui this 24th day of October, 2017.

L.N. MUTENDE

JUDGE