



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO.46 OF 2016**

**BETWEEN**

**P G M ..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from original Conviction and Sentence of Hon. S.O.*

*Ongeri, SRM in Mbita SRM's Court Criminal Case No.686 of 2015*

*dated 19/2/2016)*

**JUDGMENT**

1. **P G M** (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1) and (2)** of the **Sexual Offences act**, and sentenced to life imprisonment. The case against him was that on 29<sup>th</sup> August 2015 at [particulars withheld] in **SUBA** Sub County, **HOMA BAY** County he willfully and intentionally did an act which caused penetration with his genital organ namely penis into female juvenile's organ namely vagina of [1] **RAP\*** a girl aged 11 years.
2. **RAP\*** told the court that on 29/08/2015 at 1330 hours she was alone at home, cooking when the appellant arrived and told her to follow him so that he could give her money. She declined, but he forcefully pulled her while holding her hand and took her to his house. He pulled down her skirt and removed it completely. He then removed her underpants so that the lower part of her body was completely naked. Then he lay her on his bed, removed all his clothes and inserted his penis into her vagina. She felt a lot of pain and started bleeding and crying. A woman passing by heard her voice and asked "**who is crying**" and the appellant stopped his sexual activity – **RAP** did not see the woman. She identified the appellant as the person who defiled her, saying she knew him by the name **M**.
3. On cross examination, she explained that the appellant lived alone just about 200 metres from their home although she conceded that it could well be 50 metres away. She reported the matter to her guardian mother.
4. **C O** (PW2) **RAP\***'s guardian confirmed that she returned home from a funeral to find PW4 lying down crying. The minor reported the incident saying the appellant **M** had defiled her after pulling her to his house. She lived with **RAP** who was her niece so on learning about the incident she escorted **RAP** to hospital for examination.
5. On cross examination, PW2 said the appellant committed the offence, taking advantage of the fact that

all the people had gone to a funeral. She denied that she lived with boys who were older than RAP or that she had disagreed with the appellant.

6. **RAP** was examined by **HYDEN CHANYOMA OMWOYO** (PW3) of **SINDO** District Hospital who found that she had a laceration of the labia majora and there was a discharge from the vaginal orifice containing pus.

The hymen was broken and the cervix was inflamed and reddened. The pruritic discharge was an indication of a sexually transmitted infection. HIV test was negative – she was given the 72 hours post exposure prophylaxis.

7. The appellant was also examined and found to be HIV positive and on ARVS from Sindo Hospital.

8. **PC PHILLIP KIPCHIRCHIR TERGUT** of **SINDO** AP Camp received a report about the incident and arrested the appellant after being shown his house by the mother.

9. This evidence regarding arrest was confirmed by **CPL JAMES RAGIRA** of **MAGUNGA** police station who collected him from **SINDO AP** camp. He was the one who escorted **RAP** to hospital and said her age was assessed at 12 years as per the report produced as **Exhibit 5**.

10. In his sworn defence the appellant stated that on 29/08/2015 he went to **[particulars withheld]** market at 6.00 a.m. and returned home late in the evening at 5.00 p.m. He knew **RAP\*** as his neighbor and stated that he found her quarrelling with some boys over some potatoes which his son had given the complainant.

11. When PW2 returned in the next day, she begun scolding the appellant claiming that he was occupying land which had been sold by her husband without her authority and she wanted him to move out. She threatened to use all means to have him imprisoned. She also seemed to have quarrels with her husband and the next morning he saw the said husband approach him and threaten him with arrest, saying the appellant had fled with his niece. Later 3 men came and the matter was discussed and left in the hands of the village elders who said there was nothing and they should stay in peace.

12. However PW2 was not satisfied with the outcome and vowed to have the appellant imprisoned insisting that both **RAP\*** and the appellant had to undergo an HIV Aids test. He also claimed that PW2 was a quarrelsome individual who had dictated to PW1 all the evidence she was to give.

13. He termed the charges as malicious propelled by the fact that he was a stranger in the community.

14. In his judgment, the trial magistrate noted that the appellant and the complainant were known to each other and had met on the material date but that the point of departure was the appellant claiming that he had very limited interaction with her on the date in question as he had found her quarreling with his son and some boys as to whether she had taken his potatoes.

15. The trial magistrate held that PW1's evidence could not be considered in isolation but in the context of the circumstances prevailing – namely that she was alone – and when examined there was evidence of sexual penetration. The trial magistrate wondered that if indeed the disagreement was over potatoes then at what point did it degenerate to a sexual assault necessitating the intervention of the village elders and even resulting in him being taken to hospital for examination.

16. The trial magistrate doubted the appellant's version of events saying that if indeed the whole matter stemmed from a disagreement between his son and **RAP\***, then he ought to have called his son as a witness to confirm his claims.

17. The trial magistrate held that **RAP's** evidence was well corroborated by PW2 and PW3 and that although, the charge sheet gave the complainant's age as 11 years whilst the age assessment report put her age at 12 years.

**“The difference is not quite significant to jolt the case of the prosecution.”**

18. The appellant challenged these findings on grounds that the trial magistrate erred in holding that contradictory age was not fatal to the prosecution case – as obviously the evidence did not support the facts stated on the charge sheet and age in fact affected the nature of sentence.

19. The appellant accused the trial magistrate of open bias saying he was ordered to proceed with the case despite not having witness statements. Further that there was no evidence of the nature of discharge detected in **RAP**'s vagina and or its contents.

20. The appellant relied on written submissions where he reiterated the issue regarding the conflicting age of **RAP**. He also pointed out that he was not subjected to a DNA test. Further, the trial court ought to have considered his evidence regarding a disagreement with PW2 (the minor's guardian). He suggested that the other boys living in PW2's home could easily have been the ones who defiled **RAP** then he was being used as a scapegoat.

21. The appellant argued that it was unreasonable for the trial magistrate to expect him to call his son as a defence witness as he was not in communication with the boy who had been left scared and desperate following the turn of events against his own father.

22. **MR. OLUOCH** on behalf of the **STATE** conceded the appeal saying the record of 15/10/2015 showed that the prosecution had informed the trial court that it had no P3 form or treatment notes as the police file had not been received.

23. When the matter came up for hearing again on 19/10/2015 the prosecution informed the trial court that the file had just arrived and sought an adjournment. Later on the same day the prosecution requested that hearing proceeds and appellant conceded but requested that it proceeds slowly. He pointed out that once the matter was adjourned, the appellant was not prepared to proceed with the matter.

24. **MR. OLUOCH** also pointed out that the appellant was not supplied with documents relied on by prosecution; namely the treatment notes and P3 form. Then at the end of PW1's evidence the prosecution prayed to recall PW1 to identify the treatment notes. This he submitted violated the appellant's constitutional rights under **Article 25 (1)**.

25. He however urged this court to direct for a retrial saying the prosecution was not to blame for the anomaly; and there was a real likelihood of a conviction upon retrial. He also indicated that witnesses were readily available; and to meet the ends of justice a retrial was the best option.

26. The appellant however said he had been supplied with the P3 form whose contents guided him in writing his submissions. He nonetheless did not receive treatment notes. However he asked court to examine the P3 form which seemed to suggest that medical examination was conducted before the event took place.

He was opposed to a re-trial wondering where witnesses who had already testified would come from.

27. **Article 25 (1)** of the **Constitution of Kenya** provides the right to a fair trial cannot be limited. That is not moot – yet the appellant seems to say this right was not violated and he suffered no prejudice as he was supplied with a copy of the P3 form. I think the matter is spent and I will not delve deeper into it and the question of a retrial does not arise.

28. The appellant suggested that **RAP** could well have been defiled by the three boys who lived in the same house with her. Was there any evidence to suggest that **RAP** had been involved in sexual trysts with the boys? I detect none and I think that is equivalent in reaching out for some fleeting piece of straw and it has no limb on which to advance.

29. The trial magistrate duly analyzed the evidence – there is no doubt that **RAP\*** was defiled – the

medical evidence produced confirmed as much and I find no fault in that finding.

30. Who was the culprit? **RAP\*** described how the appellant tried to lure her with money before pulling her to his house – her testimony was unshaken even on cross examination regarding the prelude and the completion of the act. This was confirmed by medical evidence.

31. The incident took place during the day, and appellant was someone very well known to her. Although the appellant stated there was an existing dispute between him and **RAP**'s guardian, there was no evidence to support this.

32. I am satisfied with the analysis by the trial magistrate as to why he believed the appellant was the one involved in the offence.

33. One aspect however remained – the charge sheet gave **RAP**'s age as 11 years – yet the evidence presented was that she was 12 years. Was this so fatal as to warrant the appellant's acquittal?

It is to be borne in mind that under the Sexual Offences act, age is a critical factor in determining the nature of sentence to mete out. Indeed penalty for an offence falling under **Section 8 (1) and (2)** of the **Act** is prescribed as follows:-

**“8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

[Emphasis mine]”

34. The 12 year victim falls outside this prescription and is catered for under **Section 8 (3)** that:-

**“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”**

35. Certainly the trial magistrate's finding on age ought to have reflected these provisions. Was it totally fatal to the prosecution case? I think not – refuge is offered by **Section 179** of the **Criminal Procedure Code** permits a court to substitute for a lesser charge where the evidence so discloses – that is in the lower courts.

36. I am of the view that the trial court ought to have applied **Section 179** of the **Criminal Procedure Act** and convicted the appellant under **Section 8 (3)** which I now hereby do. This affects the sentence and so the life sentence meted is set aside and substituted with a sentence of 20 years to run from the date of conviction.

**Delivered and dated this 16<sup>th</sup> day of October, 2017 at Homa bay**

**H.A. OMONDI**

**JUDGE**

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**[1] \*Initials used to protect the identity.**