



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO.156 OF 2016**

**D M W.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appeal arises from the judgement of Hon. D.O. Onyango, Senior Principal Magistrate that was delivered on 4<sup>th</sup> July, 2016 in Kimilili in Criminal Case No. 26 of 2012 wherein the appellant D M W faced a charge of defilement of a child contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No.3 of 2006. There was also an alternative count of committing an indecent Act with a child contrary to Section II(1) of the Sexual Offences Act.

2. The Hon. Magistrate convicted the appellant on the main Count and sentences him to 20 years imprisonment. The particulars of the main Count were that on diverse dates between the 3<sup>rd</sup> and 4<sup>th</sup> of May 2015 within Bungoma County, he unlawfully and intentionally caused his penis to penetrate the vagina of C.B.W. a girl aged 15 years.

3. The grounds of this appeal may be summarized as follows;

the trial Court convicted the appellant without sufficient evidence; there was no sufficient proof of defilement by the appellant; the Court erred in believing the evidence of the victim; there was no corroborative evidence; the trial Court erred in failing to inform the appellant of his Constitutional right to legal representation; neither was he accorded the opportunity to seek legal representation; age of victim was not proved, the trial Court failed to inform the appellant of his Constitutional right to witness statements before hand; and the Court did not analyse the entire evidence.

4. This being the first appellate Court it will consider evaluate and analyse the evidence on record in order to arrive at an independent opinion; See **Okeno Vs Rublic (1973) E.A. at 322.**

5. There were no eye witnesses in this matter as would be in many other sexual offences related Cases. The other witnesses relied on information by the victim safe for the evidence of the Clinical Officer PW4.

**6. PW1 C.B.W.** gave her age as 15 and that she was a student in form 3 and that on a Sunday she left church with the appellant who was her boyfriend of 3 months as he had asked her to go with him to Kitale. They left at 1.30p.m. to the Appellant's brother's and since the brother was not there they were alone the brother came later but slept at a neighbour's. She undressed, slept with the appellant and had sex three times at night. She woke up at 6a.m. and told him they had to leave. She then went to her mother's place of work in Kimilili to get transport. Her father arrived and asked her to take him where she had been and she took him to Kitale where they found the appellant and came back with him to Kiminini police Station.

**7. PW2 E N L** the Complainant's mother confirmed that her daughter left her siblings in church on 3.5.2015 and at around 1 when she check on the children she learnt that PW1 had left with a young man. They looked for her in vain on the said day. On 4.5.2015 while at home she received a call from her place of work and was informed that PW1 was there. On interviewing the daughter the daughter confessed that she had had sex with the appellant on the night of 3<sup>rd</sup> and 4<sup>th</sup> May, 2015. This witness produced her daughter's birth Certificate as an exhibit.

**8. PW3 was Ignatious Okumu** a Clinical Officer from Tongareni Health Centre. It was his evidence that he examined both the victim and the suspect. He examined the victim on 5<sup>th</sup> May, 2015 while she was in her periods. He checked her genitalia and found a broken hymen and saw fresh blood in the vagina and labia minora.

He examined the appellant who was 20 years. The appellant had no injury but had pus cells in his urine.

**PW4 PC Ann Wafula** from Kiminini Police Station recalled receiving on 4.5.2015 at 5p.m., the Complainant and the appellant who were escorted to the police by members of public, with an allegation that the appellant had defiled the victim. Both were examined and a P3 form issued. The victim narrated how she was picked, taken to Kitale and defiled.

9. The appellant having been found to have a case to answer gave an unsworn statement on how while in Kitale he was arrested and escorted to the girl's parents and how he was surprised by the allegations.

10. Having considered the issues and the grounds of appeal raised I will consider the following;

*i. The age of the victim as well as the age of the appellant at the time of the commission of the offence.*

*ii. Whether or not the appellant was defiled and if so whether there is evidence connecting the appellant to the offence.*

*iii. Whether the appellant's Constitutional right was infringed for not being informed by the Court of his right to legal representation.*

*iv. Whether the appellant's Constitutional right was infringed for not being furnished with witness statement.*

*v. Whether taking into account ground 3 & 4 above the Case amounted to a mistrial.*

*vi. If 5 above is true what is the remedy.*

## 11. Age

### Victim

There is ample proof of the age of the victim. PW2 the mother to the victim produced her birth Certificate which ascertains her age to have been 15 years without any contrary evidence on record. It was therefore established that she was indeed 15 years at the time of the alleged crime.

### Appellant

At the time of giving his evidence the appellant did not speak to his age, save that he had just cleared his form 4. The P3 form produced gave his age as 20 years, this is not in tandem with a patient book from the hospital which gave his age at 18 years.

For the interest of Justice and devoid of undue technicalities and so as to establish the correct age of the appellant I have considered two documents that were part of an application the appellant filed in this appeal that is his K.C.S.E. result slip indicating that he sat his form 4 exams in 2015 and a Pentecostal Evangelistic Fellowship Africa Baptismal Certificate dated 20<sup>th</sup> April 2013 which gave his date of birth as 4<sup>th</sup> June, 1998 which places his age in 2015 at 17 years. In his affidavit in 2016 the appellant gave his age at 18 years.

The Clinical Officer and the doctor who first gave the appellant's age at 18 and the Police who gave the age at 20 years did not peg the same on any document or finding. The three sets of age no doubt create a doubt which must be resolved in favour of the appellant. I therefore find that the appellant was a minor at the time of commission of the offence.

12. Was the victim defiled. I am of the view the Complainant's evidence is credible, she came through as an honest girl who gave details of her relationship with the appellant and her encounter on the night of the 3<sup>rd</sup> of May 2015. The appellant did not challenge or deny any of the two which means the said evidence is clearly the truth. I am prepared to believe her evidence in line with **Section 124** of the evidence Act which permits a Court, in a sexual related offence where it believe the victim to proceed and convict based on the victims evidence.

**PW3 the Clinical Officer** found an old broken hymen. Secondly he found that the victim had her monthly period this explains the blood in the virgina. However the evidence of the victim and the fact that there was no denial from the appellant leaves me clear in my mind that the two engaged in sex three times as stated by the Complainant on the night of 3<sup>rd</sup> May, 2015.

13. Was the right of the appellant infringed for lack of legal representation. The **Constitution 2010** provide in **Article 50(2)h** that an accused has a right to fair trial which would among other things include a right to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result and be informed of his right promptly.

If the appellant herein was below the age of 18 years then the provision of the Children's Act would have applied.

**Section 77(I) of the Children's Act** provides;

***“where a child is brought before a Court in proceedings under this Act or any other written Law, the Court may, where the child is unrepresented order that the child be granted legal representation”***

The above Section ought to be read alongside **Section 4(2)** of the same in order to appreciate the intent of the Law

***“4(2) In all actions concerning Children, whether undertaken by public or private social welfare Institutions, Courts of Law, administrative authorities, or legislative bodies, the best interest of the child shall be a primary consideration.”***

It is my considered view that having in mind the seriousness of the allegation against the accused, the accused ought to have been accorded a counsel in line with the Law.

14. Was the appellant's right to fair trial hampered for not being furnished with witness statements?

Article 50(2) provides rights of an accused also to include

***“to be informed in advance of the evidence the Prosecution intends to rely on, and to have reasonable access to that evidence.”***

Clearly in this Case no such evidence was given to the appellant.

In the Case of **Thomas Patrick Gilbert Cholmondeley Vs Republic** the Court of Appeal said;

***“we think it is now established Law that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the Prosecution is now under a duty to provide an accused with, and to do so in advance of trial; all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”***

The sentiments of the Court of Appeal were fortified by the provisions of the Constitution which now make it a requirement.

15. Looking at all the circumstances of the Case it is quite obvious that many wrong doings as against the appellant occurred.

His age was not ascertained, he was not accorded legal representation, he did not get witness statements and he was sentenced as an adult. He was certainly a young offender.

16. Considering the evidence on record, having found that the accused had engaged in sex with another minor albeit 2 years younger than him the Case firstly ought to have been heard expeditiously so that he could have been punished as a minor, this did not happen instead he was treated as an adult and convicted as such. He has since served for 2 years and a few months. The punishment is by all means more than adequate though unlawful and I accordingly set him free unless he is otherwise lawfully held.

**DATED and DELIVERED at BUNGOMA this 21<sup>st</sup> day of December, 2017**

**ALI ARONI**

**JUDGE**