



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 41 OF 2014**  
**JOSHUA MUTUA NDOLO.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the  
Chief Magistrate's Court at Kibera Cr. Case No. 1674  
delivered by Hon. Juma, Ag. SRM on 23<sup>rd</sup> January 2014).*

**JUDGMENT**

**Background.**

Joshua Mutua Ndolo, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 21<sup>st</sup> May, 2013 at Kibera Laini Saba in Nairobi within Nairobi County, intentionally caused his penis to penetrate the vagina of VM a child aged 10 years. He was charged in the alternative with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** in that he intentionally touched the vagina of VM a child aged 10 years.

The Appellant was convicted of the main charge and sentenced to life imprisonment. He was dissatisfied with both the conviction and the sentence against which he preferred the instant appeal. In his grounds of appeal annexed to the written submissions filed on 30<sup>th</sup> October, 2017 he was dissatisfied that the charge sheet was defective, that witnesses were couched, that investigations were done when he was already under arrest, that crucial witnesses were not called, that the prosecution's case was riddled with loopholes and was speculative and that his alibi defence was not considered.

**Submissions**

In his written submissions, the Appellant submitted that the charge sheet was defective because there was variance in the names of the complainant as stated in the charge sheet and the name she gave in her testimony. In that case, he submitted that the evidence did not support the charge and that he ought not to have been convicted. Further, he faulted the fact that in the charge sheet, the age of the complainant was

stated as ten years which was contrasted by her mother PW2 who gave her age at twelve years. It was his view then that the age of the complainant not having been established, there was no basis on which he was convicted and a sentence of life imprisonment imposed. He urged the court to note that an age assessment was ordered but no report in that regard was filed in the court.

On prove of the case, the Appellant submitted that a key element of the offence of defilement namely, penetration was not proved. He submitted that no spermatozoa were found on the pants of PW1 that was taken to the government chemist for analysis. For that reason, it was the Appellant's view that the learned trial magistrate entertained extraneous issues in convicting him.

The Appellant did also fault the prosecution's failure to call crucial witnesses. He cited the children who were playing with the complainant prior to the incident whom he stated would have confirmed that he is the one who called the complainant into the house where she was allegedly defiled. He also cited the failure to call members of public who arrested him who were vital in confirming the reasons for his arrest.

The Appellant also took issue with the learned trial magistrate's failure to consider his alibi defence which he noted was dismissed without any cogent reasons. It was his view that the appeal had merit. He urged the court to quash the conviction, set aside the sentence and set him free.

Learned State Counsel Ms. Sigei in opposing the appeal submitted that the prosecution proved their case beyond a reasonable doubt. On the age of the complainant, she submitted that the same was established as ten years through the P3 form and the post rape care form. On the identification of the Appellant, she submitted that he was complainant's neighbor well known to the complainant and that the identification was by recognition. On the contention that the charge sheet was defective, Ms. Sigei submitted that upon examining the complainant, it was established that the name stated in the charge sheet and the one she gave in her evidence belonged to one and the same person. Furthermore, the Appellant failed to cross-examine PW1 on the discrepancy in the names. She added that all crucial witnesses were called as were necessary to establish the prosecution's case. It was also her view that the Appellant's defence was a sham and did not rebut the prosecution case. She urged that the appeal be dismissed.

### **Determination**

Before delving into summarizing the evidence on record, my analysis of the same points that the age of the complainant was not established as required by the law. I underscore the importance of proof of the age of the victim in a case of defilement because under **Section 8 of the Sexual offences act No. 3 of 2006**, the same determines the penalty against the offender. That is to say that, if the age of the victim is not established, there would be no basis on which a specific sentence would be imposed. In the present case, the Appellant was charged under **Section 8 (1)(2) of the Sexual Offences Act**. According to the complainant who testified as PW3 (but indicated as PW2 in the typed proceedings), she stated that she did not know when she was born. In her *voire dire* examination, she gave her age as ten years. Her mother who testified as PW2 gave her age as nine years but added that she was born on 10<sup>th</sup> July, 2001. Interestingly, no documentary evidence was adduced to confirm this date of birth. Further, both the P3 form and the post rape care form that were produced as exhibits indicated her age as ten years.

Whilst it is important to note that the mere indication of the age of a victim on either two documents may not sufficiently establish the age, oral evidence particularly from a close family member of the victim may be taken as proof of the age of the victim. In that case, the age that PW2 gave would be more convincing as the actual age of PW3. She testified that PW3 was born on 10<sup>th</sup> July, 2001. The court would not doubt that she did not know when her daughter was born. This then placed PW3's age at more than twelve and a half years as at the date of the incident.

The situation was confounded by the fact that on 18<sup>th</sup> July, 2013, the prosecutor applied for an order that PW3 be taken for age assessment. The court issued the order accordingly, which age assessment was to be done at Kenyatta National Hospital. What is intriguing is that the court did not follow up on this issue. The prosecution did not also inform the court whether the age assessment was done. This fact is an indicator that the prosecution was cognizant that sufficient evidence had not been adduced in proof of

PW3's age.

With the discrepancies of the age of PW3, my view is that the learned trial magistrate misdirected herself in imposing a penalty prescribed under Section 8(2) of the Sexual Offences Act. This is an error that rendered the entire trial a nullity. It can only be corrected by ordering a retrial. Before I do so, it is important to consider the circumstances under which a retrial can be ordered. See the case of **Opicho vs Republic [2009] KLR, 369** in which the Court of Appeal sitting in Nakuru held that:

***“In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice required it.”***

My analysis of the evidence drives me to conclude that if a retrial were ordered, there is likelihood to sustain a conviction. PW3 gave a candid account of how the Appellant lured her into a house belonging to his brother where he defiled her. She thereafter spoke out about the incident after which she was taken to Kenyatta National Hospital and admitted for treatment. The medical evidence on record adduced by PW1, Dr. Shako of Nairobi Women's Hospital and PW6, Dr. Mokeire Nyamache of Kenyatta National Hospital confirmed that PW3 was defiled. At the time she was examined by PW1, she had seminal discharge and her hymen was broken. Further, the identification of the Appellant was by recognition. The mere fact that no sperms were found on the shirt that the Appellant allegedly used to clean himself after the incident and PW3's pants does not lessen the fact that penetration was committed.

Therefore, a retrial would not be aiding the prosecution to fill up gaps in their case. Furthermore, the offence of defilement is serious and requires that a hearing be done in an objective manner so that a fair decision can be arrived at. I also take into account that since the Appellant took plea he has been in remand for four years. However, taking into account the length of the sentences under **Section 8 of the Sexual offences act**, he shall not suffer any prejudice if a retrial is conducted. I am convinced that on the whole, a retrial will serve the interests of justice.

In the result, the appeal partially succeeds. I quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Capital Hill Police Station not later than 19<sup>th</sup> December, 2017 for purposes of preparing him to take a fresh plea. It is so ordered.

**Dated and delivered at Nairobi This 11<sup>th</sup> Day of December, 2017.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant present in person.*
2. *M/s Sigei for the Respondent.*