



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 38 OF 2014

JOSEPHAT KIPKURUI CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original Conviction and Sentence in Criminal Case No.154 of 2014, Chief Magistrate's Court Kericho – Hon. Lilian Kiniale - SRM)

JUDGMENT

The appellant above mentioned was convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No.3 of 2006.

The particulars being that on the 10th day of June, 2013 at about 4.00pm in Kericho County, intentionally and unlawfully caused his penis to penetrate the anus of B K K a child aged nine (9) years.

This appeal is conceded on the ground that there was no proper age assessment of the complainant and the charge of defilement could not be sustained.

A perusal of the particulars of the charge indicate or show that the alleged defilement took place on the 10th day of June, 2013. The complainant is shown to be B K K a child aged nine (9) years.

When the complainant testified in court on 11th February, 2014 he stated that his age was five (5) years. The learned trial Magistrate did observe in the proceedings that the witness did not look five (5) years old.

PW2 who is the mother of the complainant in her evidence gave the age of the complainant as ten (10) years. She produced in court a clinical immunization card (P exh no.2).

That card bears the child's name as B K. The date of birth is shown as 10th May, 1994. Most of the other dates in the card refer to the year 1994. By mathematical calculation and deduction if the complainant was born in the year 1994 and the offence took place in the year 2013 then his age cannot be nine (9) years but nineteen (19) years. In that event he would be aged over eighteen (18) years hence an adult.

In addition to the issue of age, this offence is shown to have been committed on the 10th day of June 2013. The date of arrest shown as 16th January, 2014.

The evidence of the mother of the complainant is to the effect that after the incident she reported the matter to police.

Further, the evidence of the investigating officer is that upon the matter having been reported to her. She issued the complainant with a P3 form.

There is no evidence of arrest.

In his defence the accused had adduced alibi evidence as to where he was at the time of the alleged defilement and of how he returned home and was arrested while in his house and in the company of his family.

The learned trial Magistrate did not give proper weight to the appellant's alibi bearing in mind that there was no evidence of arrest to contradict his.

Further, there is no explanation by police as to the reason why they did not arrest the accused after the report was made to them only to arrest him after close to one year later.

Upon a careful evaluation of the evidence on record I am not satisfied that this case was proved beyond reasonable doubt.

The appeal has merit and it has been conceded on good grounds.

Its allowed as prayed. The conviction was not safe. Its quashed and the sentence set aside accordingly.

The appellant is set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED AND DATED THIS 30TH DAY OF NOVEMBER, 2016.

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M. MUYA

JUDGE

In the presence of:

1. Learned Counsel for the Prosecution - Miss Keli
2. The Appellant in person
3. Gladys - court assistant