



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.74 OF 2012**

*(An Appeal arising out of the conviction and sentence of C.A. OTIENO - SRM delivered on 16<sup>th</sup> February 2012 in Kikuyu SPM. CR. Case No.1002 of 2010)*

**J K M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, J K M was charged with the offence of defilement of a girl under the age of eleven (11) years contrary to **Section 8(1) & (2)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 2009 and August 2010 at *[particulars withheld]* Village in Kikuyu District within Central Province, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of M K, a girl aged 8 years. He was charged in the alternative with **indecent assault with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars were that on diverse dates between 2009 and August 2010 at *[particulars withheld]* Village in Kikuyu District within Central Province, the Appellant unlawfully and intentionally caused his penis to touch the vagina of M M K, a girl aged 8 years. When arraigned in court, he pleaded not guilty to the charge. The prosecution called six (6) witnesses. The Appellant was put on his defence. After full trial, the Appellant was convicted of the main charge of defilement. He was sentenced to life imprisonment.

Dissatisfied with the decision of the trial court, he appealed to this court. His appeal raised six grounds of appeal. The first ground was that the conviction was invalid because the charge sheet was substituted with another one on the 10<sup>th</sup> February 2011. He argued that this subsequent charge sheet was not the one that evidence was adduced to support the charge. The second was that the conviction was based on a defective charge sheet. The third was that the Appellant was charged with defilement under the **Sexual Offences Act** instead of **Incest** under the **Penal Code**. He could not therefore make an informed defence due to the confusion. The fourth ground was that the age of the complainant was not ascertained. The fifth was that the framing up of the judgment was unprocedural and was contrary to **Section 169(1)** of the **Criminal Procedure Code**. The sixth ground was that the medical evidence produced by PW5 was inconsistent with that of PW4.

During the hearing of the appeal, the Appellant relied on his written submissions. He stated that he was not arrested on the date the prosecution alleged was his date of arrest. The prosecution failed to connect him to the crime. He was not given an opportunity to defend himself properly. Ms. Kule for the State submitted that the prosecution's witnesses were credible and had adduced sufficient evidence to sustain

the conviction. Failure of the arresting officer to testify did occasion any prejudice to the Appellant. She argued that it was not for the Appellant to determine the number of witnesses the prosecution should call. There was no need to medically examine the Appellant. She submitted that the trial court took consideration of the Appellant's defence. The defence was dishonest and did not shake the prosecution's case. She urged the court to dismiss the appeal.

The background of the case was that the complainant PW1 M K was living with her parents and brother in G, Kikuyu. She was in class one when the father (the Appellant) on several times inserted his penis into her vagina whenever her mother was at work. The Appellant threatened to harm her if she told anyone. The complainant was at PW2's L K's house during the August holidays. On the 4<sup>th</sup> of September 2010 at around noon, she told PW2 that the Appellant had on several occasions taken her to the bedroom, removed her clothes and forcefully had sexual intercourse with her. On the same day, PW2 informed PW3 E N K, the mother of the complainant what the complainant had told her. On the 5<sup>th</sup> of September 2010, PW2 and PW3 took the complainant to Kinoo Hospital and Nairobi Women's Hospital for medical examination. The examination revealed that indeed the complainant had been sexually assaulted. She was given medication.

The complainant accompanied her mother and grandmother to the Kikuyu Police Station. She was issued with P3 form. PW3 stated that the complainant's birth certificate was with the Appellant but she recalled the date of birth of the complainant to be 18<sup>th</sup> October 2002. At Nairobi Women's Hospital, the complainant was examined by Dr. Liku, a colleague of PW4. The report showed that she had normal external genitalia, no vulva tears, the hymen was torn. There was neither vaginal discharge nor bleeding. She was not found to have had HIV or a Sexually Transmitted Disease. The vaginal swab revealed she had numerous puss cells indicative of an infection. The doctor's diagnosis established that the complainant had been defiled. The results from the medical examination that was done by PW5 Dr. Kavete Jackline from Tigoni District Hospital were in conformity with those from the examination that was done at Nairobi Women Hospital. PW5 filled P3 form for the complainant.

On the 27<sup>th</sup> October 2010, the investigating officer PW6 PC Stephen Odula, then attached to Kikuyu Police Station was instructed by Officer Commanding Station to investigate the matter. He recorded the complainant's statement and that of other witnesses which he used together with the P3 form and report from Nairobi Women's Hospital to charge the Appellant with the present offence. When the Appellant was put on his defence, he gave sworn evidence. He stated that on the 4<sup>th</sup> September 2010, he went to PW2's house to look for PW3 and was chased away without any explanation. At the time, he used to live with his wife and two children in Kanjuru and not in Gitaru. He was married to PW3. He sells clothes through hawking. Sometimes he did not go back home due to the nature of his business. PW2 wanted the Appellant to be his lover. That is why she framed him for this offence. The Appellant called one witness DW2 J N W, who is his neighbor. He stated that the wife of the Appellant worked at night. He had never heard the Appellant fight with his wife.

The first appellate court has the duty to re-evaluate and reconsider the evidence on record that is adduced by both the prosecution and defence before coming up with its own independent determination of the case. (**See Njoroge Vs Republic (1987) KLR 19**). This being the first appellate court, it also considers the grounds of appeal and the submissions made by both parties.

The first issue for determination is whether the Appellant was charged with the right offence. The Appellant was charged with the offence of **defilement** contrary to **Section 8(2)** of the **Sexual Offences Act**, which stipulates that a person who commits an offence of defilement with a child aged eleven (11) years and less shall upon conviction be sentenced to imprisonment for life. Under this Section of the **Sexual Offences Act**, the relationship between the Appellant and the complainant is immaterial. What is material is the age of the complainant. The Appellant's ground of appeal that he was charged under the wrong Section of the law does not therefore hold.

On the issue of a defective charge, **Section 214 of the Criminal Procedure Code**, provides that when at any stage of the proceedings, the charge appears to court to be defective, the court shall make an order for

the charge to be amended or altered. In such case, the accused person shall be called to plead again to the amended or altered charge. If there are any witnesses that were called, they should be recalled so that the evidence on record tallies with the amended charge. The Appellant in this case was called upon to take a plea to the amended charge. He opted not to have any of the witnesses who had testified recalled.

The other issue is that concerning the birth certificate. The complainant stated in her statement that she was eight (8) years. PW3 stated that the birth certificate of the complainant was with the father who is the Appellant. She further stated that the date of birth of the complainant was 18<sup>th</sup> October 2002. In **Jon Cardon Wagner Vs Republic (Criminal Appeal No. 404 of 2009)**, Warsame J (as he then was) emphasized that;

***“..in defilement cases, the age of the complainant is proved either by medical evidence or through other evidence since the Sexual Offences Act has different categories of ages and sentences for different ages”***

In **Musyoki Mwakavi Vs Republic Criminal Appeal No. 172 of 2012**, Mutende J elaborated that;

***“...Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”***

The complainant’s age was clearly ascertained when PW3, the mother of the complainant stated the date of birth of the complainant. This was confirmed by PW2.

In the present appeal, it was clear that the prosecution established penetration. This was proved by medical evidence. The age of the complainant was also established. She was eight (8) years old at the time of the sexual assault. The identity of the perpetrator was proved. The Appellant is the father of the complainant. The defence of the Appellant did not dent the otherwise strong cogent evidence adduced by the prosecution witnesses. The appeal brought by the Appellant lacks merit. This court therefore dismisses the appeal and uphold the conviction and sentence of the trial court. The sentence was legal. It is so ordered.

**DELIVERED AT NAIROBI THIS 23<sup>rd</sup> DAY OF JUNE 2015**

**L. KIMARU**

**JUDGE**