



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.83 OF 2012**

*(An Appeal arising out of the conviction and sentence of D.A. OKUNDI- SPM delivered on 13<sup>th</sup> July 2012 in Kiambu CM. CR. Case No.359 of 2011)*

**KYETHA MUTHIMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Kyetha Muthima was charged with the offence of **defilement** contrary to **Section 8(1) & (3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 2008 at an unknown date and time to 1<sup>st</sup> March, 2011 at *[particulars withheld]* Village in Kiambu Division within Kiambu County, the Appellant intentionally and unlawfully committed an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of N M K, a girl aged fifteen (15) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act**. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution called five (5) witnesses in a bid to prove the charge against the Appellant. The Appellant elected not to defend himself. After the conclusion of the case, the trial court found that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt on the main charge of defilement. The Appellant was sentenced to thirty-five (35) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on a charge that was defective. The Appellant was aggrieved that he had been convicted in proceedings that were conducted in a language that he did not understand. He was also aggrieved that his constitutional right to fair trial had been breached because the trial court did not give him an opportunity and time to defend himself. The Appellant faulted the trial magistrate for relying on the prosecution evidence which in his view had not established his guilt to the required standard of proof. Lastly, the Appellant faulted the trial magistrate for sentencing him to serve a custodial sentence that was illegal as it did not comply with **Section 145(1)** of the **Penal Code**. In particular, the Appellant was of the view that he should have been sentenced to serve fourteen (14) years and not thirty-five (35) years imprisonment. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his

appeal. He urged the court to consider the written submission and reach an appropriate decision acquitting him of the charge. Ms. Njuguna for the State opposed the appeal and submitted that the prosecution did establish to the required standard of proof that indeed the Appellant had defiled the complainant. Ms. Njuguna noted that the complainant confirmed that she was living with the Appellant as husband and wife. Further, that the Appellant admitted that he had been living with the complainant for three (3) years. Ms. Njuguna also submitted that a P3 form produced by PW4 indicated that the complainant's hymen was broken and that she was pregnant at the time she was rescued.

On the issue of the legality of the sentence imposed, Ms. Njuguna also submitted that the **Sexual Offences Act** imposes a mandatory minimum sentence of fifteen (15) years imprisonment. However, the trial magistrate has discretion to enhance the sentence. In this case the sentence was enhanced because according to the trial magistrate the Appellant was arrogant and that he did not appear remorseful. She urged the court to confirm the sentence. She urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic (1987) KLR 19** at P. 22:

***“ As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya V. R(1957) EA 336, Ruwala V. R (1957)EA 570)”***

A brief summary of the evidence adduced before the magistrate's court is as follows. The prosecution called five witnesses. The complainant in this case is PW1 N K, a girl said to have been fifteen (15) years of age at the time of trial. According to the evidence adduced before court, at the material time, the Appellant and the complainant were living together alone in a house in Ruiru. According to the complainant, she had travelled to Ruiru from Kitui on 3<sup>rd</sup> January 2011 to work as a house help for the Appellant. She testified that she knew the Appellant since they hailed from the same village. She told the court that the Appellant had offered to employ her as a house help for his children. The Appellant represented to her that he was a family man. PW1 testified that when she arrived in Ruiru, she found that the Appellant was living alone in his house. PW1's evidence was that the Appellant then asked her to be his wife. PW1 testified that she remained in the Appellant's house and continued to live together as husband and wife. PW1 gave evidence that on 1<sup>st</sup> March, 2011 three (3) men came to their house. The Appellant was in the house at the time. They inquired why the complainant was not going to school. The said men then called PW2 Michael Chege Mwangi, the area assistant chief to report the matter.

PW2 testified that on the material day, he received a phone call informing him that a man had been apprehended in **[particulars withheld]** Village for defiling a child. He told the court that he then rushed to the scene where he found a crowd of people. PW2's testimony was that both the Appellant and PW1 confirmed to him that they had been living together as husband and wife. A report was made to Kiamumbi Police Station resulting to the arrest of the Appellant. The complainant was taken to Kiambu District Hospital where she was examined by Dr. Mutahi. The medical treatment notes and the P3 form were produced into evidence on behalf of Dr. Mutahi by PW4 Dr. Wanjiku Njoroge. The medical report revealed that the complainant's hymen had been broken. Further, a pregnancy test conducted on PW1 revealed that she was pregnant. The case was investigated by PW5 Corporal Beatrice Mwangi. After concluding her investigation, she reached the conclusion that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted.

At the close of the prosecution case, the trial magistrate ruled that the Appellant had a case to answer and put the Appellant on his defence. However, the Appellant elected not to defend himself. On the strength of the prosecution evidence, the trial magistrate convicted the Appellant of defilement and proceeded to

sentence the Appellant.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **defilement** contrary to **Section 8(1) (3)** of the **Sexual Offences Act** to the required standard of proof beyond reasonable doubt.

The Appellant argued that he did not understand the language in which the trial was conducted. The Appellant in this case pleaded not guilty to the charges when he was arraigned in court. When each charge was read to him, he denied the charge in Kiswahili. The trial was therefore conducted in both English and Kiswahili. Although the record of proceedings show that the Appellant had indicated that he did not understand Kiswahili very well, the Appellant elected to proceed in Kiswahili and did not raise any issue while the trial was ongoing indicating that he followed the proceedings.

The Appellant was convicted essentially on the basis of the evidence by PW1 N K (the complainant), PW2 Michael Chege Mwangi, PW3 Police Constable Boniface Mathenge, PW4 Dr. Wanjiku Njoroge and PW5 Beatrice Mwangi, the investigating officer. This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal put forward by the Appellant and the submission made by Learned State Counsel during the hearing of the appeal. It was clear to the court that the prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt. In a case of defilement, the prosecution is required under **Section 8 (1)** of the **Sexual Offences Act**, to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. In the present appeal, evidence of penetration was established by the medical report. The complainant was examined by Dr. Mutahi at Kiambu District Hospital on 7<sup>th</sup> March 2011. He indeed confirmed that the complainant's hymen was broken and that she was pregnant.

The second issue that the prosecution was supposed to establish is the age of the complainant. The prosecution further established that the complainant was a child. Under **Section 2(1)** of the **Children Act**, a child is defined as **“any human being under the age of eighteen years.”** In the present appeal, the prosecution produced a medical report in which Dr. Mutahi assessed the complainant as being underage-below eighteen (18) years at the time of the sexual assault. As regard the identity of the perpetrator, the Appellant did not contest the medical evidence neither did he deny that he was the perpetrator. This court is of the view that the prosecution proved its case to the required standard of proof beyond reasonable doubt.

As regards sentence, it is certain that the complainant is below eighteen (18) years of age. **Section 8(4)** of the **Sexual Offences Act** provides that the minimum sentence for a person convicted of defiling a child of between the age of sixteen (16) and eighteen (18) is fifteen (15) years imprisonment. The trial court sentencing the Appellant noted that;

***“ a stiffer penalty than the prescribed minimum is called for in this case as a warning to those in the habit of exploiting the vulnerable in the society thinking that no one will be concerned about what happens to them, Moreover, the accused has adopted a defiant attitude and does not appear remorseful. Consequently I hereby sentence the accused to 35 years imprisonment and I hope that the period shall be sufficient for him to reflect upon what he did to the complainant thereby taking away the young girl's innocence”***

This court has carefully considered the reasons given by the trial court in sentencing the Appellant to serve a sentence other than the minimum one. It was clear from the evidence adduced that the Appellant duped the complainant into having a sexual relationship with him under the guise that they were husband and wife. There was no force or coercion used. While it is a fact that the Appellant took advantage of the complainant, in the circumstances of this case, the parents of the complainant are equally to blame for the sad state of affairs. No responsible adult seems to have tracked the whereabouts of the complainant and her then prevailing situation. The Appellant's conduct deserves the punishment but not in the aggravated manner that the trial court assessed it. The court is of the view that the sentence imposed was harsh and excessive in the circumstances. The sentence of 35 years imprisonment is set aside and substituted by a

sentence of this court. The Appellant shall serve fifteen (15) years imprisonment with effect from 16<sup>th</sup> March 2011 when he was sentenced to the custodial sentence by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE 2015**

**L. KIMARU**

**JUDGE**