



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO 537 OF 2013

(Appeal against Conviction and Sentence in Murang'a CM Criminal Case No 12 of 2012 – E N J Osoro SRM)

STEPHEN KIRAGU MUGWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant Stephen Kiragu Mugwe was on 30/04/2013 convicted after trial of **defilement** contrary to **section 8(1) & (3)** of the **Sexual Offences Act, No 3 of 2006 (the Act)**. It was alleged that on diverse dates in the year 2011 in Murang'a County, he intentionally caused his penis to penetrate the vagina of one **RNM**, a child aged 14 years. He was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.

2. The main point taken in the appeal by learned counsel for the Appellant is that there was no proof to the required standard of the age of the complainant. Learned Prosecution Counsel does not support the conviction for the same reason.

3. The age of the victim is an essential ingredient of the various offences created by the Sexual Offences Act, including the offence of defilement under section 8(1) of the Act. Sub-sections (2), (3) and (4) of that section create separate and distinct offences that are dependent upon the age of the complainant, and they all attract different penalties ranging from mandatory life imprisonment (subsection (2)) to a possible minimum 20 years imprisonment (subsection (3)) and a possible minimum 15 years imprisonment (subsection (4)).

4. The **Court of Appeal** held in **Alfayo Gombe Okello –vs- Republic (2010 eKLR)** –

“...the age of the victim is a necessary ingredient of the offence (defilement) which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...

In this case the age of the child was never medically assessed or proved through any documentation”

And in **Kaingu Elias Kasomo –vs- Republic, Court of Appeal Criminal Appeal No.504 of 2010** (unreported) the **Court of Appeal** held –

“(The) age of the victim of...sexual assault under the Sexual Offences Act is a critical

component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence, for the sentence to be imposed will be dependent on the age of the victim.”

5. I have carefully read the record of the trial court. Apart from the complainant's (PW2) say-so, there was absolutely no evidence of her age, not even from her own mother (PW1) who did not at all refer to her age. The clinical officer who gave medical evidence (PW3) merely stated what the complainant had told him her age was. No birth certificate or notification of birth or baptismal card or immunization card (all documents that would have proved, or gone a good way towards proving, the complainant's age) were produced in evidence.

6. Without proof of the complainant's age beyond reasonable doubt the offence as charged under section 8(1) & (3) of the Act was not proved to the required standard. The conviction is unsafe and cannot stand.

7. In the event, I will allow this appeal in its entirety. The conviction is quashed and the sentence set aside. The Appellant is out on bail. He and his surety are hereby discharged from their cognizance. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 31ST DAY OF JULY 2015