



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 140 OF 2014**

**MUTHOKA MWALYA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Senior Resident Magistrate's Court-Tawa, Criminal Case No. 322 of 2013 by Hon. W.K. Cheruiyot Ag. Senior Resident Magistrate on 15<sup>th</sup> July, 2014)*

**J U D G M E N T**

The appellant herein one **Muthoka Mwalya** was charged with the offence of Defilement of a child contrary to **Section 8(1)** as read with **Sub-Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars were that on diverse dates between the month of October, 2013 and 9<sup>th</sup> December, 2013 at Tawa Market Kiambwa Sub-Location Mbooni East District within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of **A N M** a child aged 15 years.

He was also faced with an alternative charge of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the alternative charge were that on diverse dates between October, 2013 and December, 2013 at Tawa market, Kiambwa sub-location in Mbooni East District within Makueni county intentionally and unlawfully did an Indecent Act to **A N M** a child aged 15 years old by touching her private part namely vagina with his penis.

The appellant denied the charges and the case was subjected to a full trial after which the trial magistrate found the offence proven and sentenced the appellant to serve twenty (20) years imprisonment.

The appellant was aggrieved by this conviction and sentence and has preferred the appeal. The appellant filed the petition of appeal on the 30<sup>th</sup> July 2014 and sets forth five (5) grounds of appeal and later presented to the court during the hearing of the appeal, amended supplementary grounds of appeal and written submissions. In this judgment I have captured both sets of grounds of appeal which I have understood as follows;

- a. *The trial magistrate erred in law and in fact in convicting the appellant on a defective charge sheet.*
- b. *The trial magistrate erred in law and in fact by upholding the conviction against the weight of*

*evidence.*

- c. *The trial magistrate erred both in law and in fact by not considering medical evidence availed did not support defilement charges.*
- d. *That the trial magistrate erred in law and in fact by failing to note that the case was not proved beyond the required standard.*
- e. *The trial magistrate erred in law and in fact by convicting the appellant on the charges of defilement while the complainant was married to another man before.*
- f. *The trial magistrate erred in law and in fact and misdirected himself by terming the appellant's defence as a sham and failed to comply with the provisions of Section 169(1) of the Criminal Procedure Code.*

In support of the case, the prosecution called five (5) witnesses. The complainant who gave evidence as PW1 told the court that she was aged 15 years at the time the offence was committed. She told the court how on the 16<sup>th</sup> October, 2013 she went to the market in Tawa and met the appellant herein who requested her to accompany him to his house. She went with the appellant to his house which is behind supa loaf supermarket in Tawa but on that particular day, she did not enter his house but she went to her home.

That the following day she went to the market and met the appellant who again called her to accompany him to his house to which she agreed. The appellant left her in his house and went back to work and came back at about 11.00p.m in the night and on that night they had sex. She told the court that she had had sex before with another man called Mutinda when she was 14 years old whom she had stayed with for two weeks and she had sex with the said Mutinda every night except one night and that he did not use a condom.

She told the court how as she was going to Tawa market at 1.00p.m she saw people in the market. She saw the appellant and hid herself and later while going to the appellant's house she found the appellant had been arrested by police. She was told to go to Mutinda's house from where she was ordered to collect her clothes and her together with the appellant was taken to Tawa police patrol base and were placed in the cells. She was later taken to Tawa sub-district hospital where she was examined and issued with a P3 form. She identified the appellant as the person she had had sex with.

The mother to the complainant gave evidence as **PW2 (E M)**. She told the court how the complainant left home but failed to go back forcing her to report her daughter's disappearance to the police. A certain man called Mutinda went to the police station and told the police he knew where the complainant was and he lead the police officers to the appellant's house at Tawa market where they found the appellant but the complainant was not there at that particular moment.

The police conducted a quick search in the house and found some skirts therein which PW2 indentified as her daughter's clothes and the appellant was arrested. The complainant was shortly found at Tawa market and a search was mounted by police officers. She was found on the same day the appellant was arrested and she accompanied the police to Tawa patrol base.

The evidence of PW3 confirms that of PW2. PW3 one **M M** is the father to the complainant. He accompanied his wife PW2 and the police officers to the appellant's house and was present when the officers searched the appellant's house and recovered the complainant's clothes from therein. The appellant was arrested by **PW4 (Cpl. Ngari Mwasaa)** who was accompanied by a fellow police officer namely **Cpl. Kinyatta** and on asking the appellant he admitted that he had been living with complainant in his house.

The investigations in this case were conducted by one **Samuel Odongo** who gave evidence as PW5. He told the court how the appellant was taken to the police station on allegations of living with a girl aged 15

years and that she was a school girl. She had disappeared from house and her mother had reported her disappearance in October, 2013. After investigations he got to know that the girl was staying with the appellant. In company of other police officers namely; **Corporal Ngai** and **Corporal Kinyatta**, they went to the house of the appellant and upon conducting a search, they found the complainant's clothes in the house. He took the appellant and the complainant for a medical examination. He issued the complainant with a P3 form which was filled by **PW6 Doctor Mwatha**. The complainant was subjected to age assessment which showed that she was aged between 15 and 16 years of age. He identified the appellant as the person he arrested.

On his part **Doctor Mwatha (PW5)** who was a medical superintendent at Tawa sub-district hospital then, told the court that he knew **Dr. Pius Mutuku** who he had worked with for three (3) years before then. He said he knew his handwriting and signature and on that basis he was allowed to produce the age assessment report of the complainant, which had been prepared by **Dr. Mutuku** which showed that the complainant was aged approximately 15 years. He produced the report as evidence before the trial court.

PW7 one **Linnet Chile** was a clinical officer at Tawa Sub-county hospital. On the 18<sup>th</sup> December, 2013 she filled a P3 form in respect of the complainant **A N** and in so doing she used treatment notes. According to her, there were no traces of blood stains on clothes, the genitalia had broken hymen but the same was not fresh, urinalysis was done and there was nothing and she concluded that there was penetration. She signed the P3 form and produced the same as an exhibit.

Upon the close of prosecution's case, the trial magistrate put the appellant on his defence. In his defence, the appellant admitted having defiled the complainant but he said he thought the complainant was over eighteen (18) years of age because according to him, the complainant was talking like an adult. According to him, he seduced the complainant and she agreed after which they went to his house and had sex with her the same night that was on 8<sup>th</sup> December, 2013. In the morning she sent the complainant to go and buy tea, she went back running saying that she was chased by a certain man she called Mutinda. At lunch time, the appellant again sent her to go and buy food but she overstayed and at 2pm he saw police officers, the mother to the complainant (PW2), the father to the complainant PW3 and Mutinda and it was then that he was arrested and later charged with the offence of defilement.

After considering the evidence adduced before the trial court the learned magistrate convicted the appellant to serve twenty (20) years imprisonment but the appellant being dissatisfied has appealed to this court.

At the hearing of the appeal, the appellant relied on his written submissions which he handed to court and which the court adopted. The submissions were annexed to an amended supplementary grounds of appeal. In addition to the submissions, the appellant pleaded with the court for leniency on the grounds that he is the first born in the family and that he is the bread winner and that his father is deceased.

**Mr. Schijenje** for the State made his submissions in opposition to the appeal. I have looked at the submissions by the appellant and the oral submissions by state counsel and I will consider them as I deal with the grounds of appeal.

The first ground of appeal is on the charge sheet which the appellant states was defective. The appellant was charged under **Section 8(1)** as read with **Section 8(3)** of the **Sexual offence Act No. 3 of 2006**. **Section 8(1)** as read with **Section 8(2)** relates to a child who is aged 11 years or less and the sentence provided for is life imprisonment. **Section 8(3)** relates to a child who is aged between twelve and fifteen years and the sentence provided for is imprisonment for a term not less than twenty years.

According to the complainant's clinic immunization card she was born on 30<sup>th</sup> September, 1998. The offence was committed on 16<sup>th</sup> October, 2013 which means the complainant was aged slightly over 15 years. PW5 who produced the age assessment report told the court that the complainant was found to be approximately 15 years old. The complainant may have been slightly more than 15 years at the time of the offence, the discrepancy in age which in my view was not big was not material as to cause any prejudice to the appellant. The complainant had not yet attained the age of sixteen years and so the

appellant could not have been charged under **Section 8(4)**.

The second ground of appeal does not hold any water. The fact that the complainant was married to another man before does not have any relevance to the case before the court. The complainant herself admitted that she had had sex with another man called **Mutua** before. The appellant and the complainant herein admitted in evidence as having had sex. It is not therefore material in this case that the complainant had had sex with another man before she had sex with the appellant herein.

On the third ground of appeal I hold that the weight of the evidence adduced in the trial court was sufficient to sustain a conviction.

On ground four, the medical evidence adduced supported the charges of defilement. PW7 told the court that there was penetration shown by semen on examination.

On ground number five (5), the court finds that the case was proven beyond reasonable doubt. This being an offence of defilement all the prosecution needed to prove was that the complainant was defiled, that she was a minor and the identity of the person who defiled her. In my view the evidence of the complainant is very clear that she was defiled by the appellant. In fact, in his defence the appellant admitted having defiled the complainant but relies on the defence that he thought she was above the age of 18 years but I will consider that defence later in this judgment. Though the complainant in her evidence told the court that he was not forced to have sex with the appellant, the law is very clear that a minor cannot consent to having intercourse with a man.

The last ground of appeal was that the magistrate erred in law and in fact in terming the appellant's defence as a sham. The appellant urged the court to consider the application of **Section 8(5)** of the **Sexual Offences Act No. 3 of 2006**. The said section provides as follows:

It is a defence to a charge under this section if:

- a. ***It is proved that such a child, deceived the accused person into believing that he or she was over the age of eighteen(18) years at the time of the alleged commission of the offence and***
- b. ***The accused reasonably believed that the child was over the age of eighteen (18) years.***

**Section 8(6)** provides that the belief referred to in **sub-section (5) (b)** is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

Under **Section 8(5)** the defence available to an accused person is not an absolute defence. There are certain conditions set out therein which the accused person wishing to benefit from that defence has to satisfy and/or explain to the trial court.

Upon reading the record of the lower court, there is nowhere in the evidence that the complainant is said to have deceived the appellant into believing that she was over eighteen (18) years. Even the appellant in his defence did not say that he was so deceived.

The appellant did not give any reasons to the trial court as the basis on which he believed that complainant was over eighteen (18) years. He gave a very general statement that he thought the girl was over eighteen (18) years because she was talking like an adult. He did not tell the court the steps he took to ascertain the age of the complainant.

In my view, he did not explain to the satisfaction of the court why he believed the complainant was over the age of eighteen (18) years and subsequently he cannot benefit from the defence. He did not tell the court how the complainant talked that made him believe that she was over eighteen (18) years.

This defence was available to him and when he choose to rely on it was his duty to meet the requirements

of **Section 8(5) (6)** of the **Sexual offences Act**. It is also worth noting that the appellant raised this defence when he was called upon to defend himself but even in cross-examination of the witnesses, the issue was never raised and therefore, at no time did the prosecution know before hand that he was going to raise that defence, furthermore, he gave unsworn statement of defence and was never cross-examined. I find no merit in that ground and the same must fail.

Infact **Section 8(6)** places the duty squarely on the accused to take steps to ascertain the age of the complainant.

After carefully considering all the evidence on record and the submissions by both the appellant and the State counsel, and analyzing the same as herein above, I come to the conclusion that the appellant was properly convicted and sentenced. This appeal lacks merit and the same is dismissed with the result that the appellant will serve the twenty (20) years sentence ordered by the trial court.

**Dated and Signed at Machakos this 18<sup>th</sup> day of August, 2015**

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**LUCY NJUGUNA**

**JUDGE**

**Delivered at Machakos this 21<sup>st</sup> day of September, 2015**

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**PAULINE NYAMWEYA**

**JUDGE**