



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 125 OF 2014

JOSEPHAT GITHU GACHOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **Josphat Githu Gachoka** has filed this appeal challenging this conviction and sentence by the learned Senior Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been charged with the offence of **DEFILEMENT CONTRARY TO SECTION 8(1)(3) OF THE SEXUAL OFFENCES ACT**. The particulars of the charge were that:-

“On diverse dates between 13th August 2010 and 14th January 2011 in Nakuru District of the Rift Valley Province intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of WW, a child aged 16 years.”

The appellant also faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT**. The appellant who was arraigned before the trial court on 17/1/2011 entered a plea of ‘Not Guilty’ to the charge. His trial commenced on 21/3/2011 and the prosecution called a total of four (4) witnesses in support of their case.

The complainant **MW** told the court that she was 14 years old. She told the court that after the death of her mother on 7/7/2010 she stopped going to school and went to live with her sister called **MN**. Her sister then took the complainant to live with the appellant as his wife. The complainant told the court that she and appellant lived together for two weeks and engaged in sexual intercourse. A theft occurred in the house in which appellant lived with his brother. The appellant’s brother **David Kigo** who lost some money reported the matter to police. Police raided the said house and found the appellant living with the complainant. The police realized that the complainant was a minor and charged the appellant with the offence of defilement.

The appellant who was found to have a case to answer gave an unsworn defence in which he denied the charges. On 9/6/2014 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of defilement and thereafter sentenced him to serve thirty (30) years imprisonment. Being aggrieved the appellant filed this appeal. **Mr. Mwallo** Advocate argued the appeal on behalf of the appellant. **Ms Rugut** learned state counsel opposed the appeal.

Being a court of first appeal, this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same. (see **Ajode vs Republic [2004]2 KLR 2**). Counsel for the

appellant raised two main grounds for the appeal:-

- i. **Lack of proof of the complainants age;**
- ii. **No proof of defilement.**

On the question of age it has been stated severally by our superior courts that in cases of defilement, conclusive proof of the age of the victim must be tendered in court. This is crucial because the age of the victim will determine the sentence to be imposed upon conviction. The best evidence on age would be a birth certificate. However, the courts have taken judicial notice of the fact that out in the country side not many parents will seek to obtain this crucial document for their children. Thus other documents like the Ministry of Health Immunization Card, Baptism Card, School Reports etc are equally sufficient as proof of age. I do not agree with counsel that the only acceptable proof of age is an age assessment report prepared by a medical doctor. In this case the complainant's Immunization Card was tendered as an exhibit **PExh.2**. It clearly indicates that the complainant was born on **6th September 1996**. Therefore in August 2010 when this offence is alleged to have commenced she was aged 14 years old. Indeed the complainant herself told the court that she was 14 years old.

Mr. Mwallo for the appellant argues that the charge sheet is defective in that it gives the age of the complainant as 16 years whereas she was actually 14 years. This in my view is a curable defect. The evidence clearly shows that the complainant was aged 14 years. I do agree with the trial magistrate that this defect did not occasion any prejudice to the appellant since the charge of defilement would still hold even if the complainant was aged 16 years. In my view this was not a defect/mistake which would be fatal to the prosecution case. I therefore dismiss this first ground of the appeal.

The second ground of appeal raised by counsel was that the act of defilement was not sufficiently proved. It must be remembered that sexual offences are normally committed in private and thus there would unlikely be any witness to the same. The complainant told the court that after her mother died she dropped out of school. She went to live with her sister who handed her over to the appellant as a wife. The complainant told the court that she lived with the appellant for several weeks. During that time they would like any man and wife engage in sexual intercourse. In her testimony the complainant stated at page 10 line 1:-

“I was living with Josphat (the accused herein) in a single room. There was 1 bed, 2 seats and 1 table. I used to live with the accused and we used to have sex. At times I used to agree and at times he used to force me. My stomach used to pain and also I used to bleed. We had sex twice”

Under cross examination by the appellant the complainant stated that

“I started sleeping with you in August 2010.”

The complainant was very categorical that sexual intercourse and therefore penetration did occur. The other evidence that corroborates her testimony is that of **PW3, Corporal Priscah Mochama** who went to the appellant's house confirming that she found the appellant together with the complainant inside the house living as man and wife. The appellant protested to the police that they could not arrest his **'wife'**.

PW1, Dr. Justus Nondi, a medical practitioner at Nakuru Provincial General Hospital told the court that his colleague **'Dr. Onchere'** examined the complainant. He produced her PW3 form **PExh.1** which indicated that her hymen was missing and a whitish discharge was noted. The missing hymen provides proof of penetration. The medical examination on the appellant revealed that he was suffering from a urinary tract infection. The complainant was found to have a similar infection. This points to the conclusion that the two were engaging in sexual relations with each other.

The complainant did identify the appellant as the man who defiled her. This was not just one encounter. She had lived in the same house with the appellant for several weeks and thus knew him well. The two were found by police living in the same house. I find no possibility of a mistaken identity. It matters not

that the complainant may have consented to the sexual activity. Being a minor she had no legal capacity to give such consent. I am satisfied from the complainant's own testimony as well as from the supporting and medical evidence that penetration did occur.

In his defence the appellant claimed that he did not know the complainant at all. Why would a girl that he does not know say he had defiled her? Why would the police claim to have found the appellant living with the complainant if this was not the case? As did the learned trial magistrate I reject this defence as a mere denial. Based therefore upon the foregoing I am satisfied that the charge of defilement was proved beyond reasonable doubt. The appellant's conviction was justified and I do confirm the same. The law under Section 8(3) of the Sexual Offences act provides for a minimum sentence of twenty (20) years. In this case the trial court sentenced the appellant to serve thirty (30) years imprisonment. In as much as the sentence was lawful I find the same to have been excessive. The minimum sentence was in my view adequate. I therefore allow the appeal against sentence, and I hereby set aside the thirty (30) years sentence imposed by the trial court and in its place I substitute a jail term of twenty (20) years. The sentence to run from the date of first conviction in the lower court. It is so ordered.

Dated and delivered at Nakuru this 16th day of December 2015.

MAUREEN A. ODERO

JUDGE

PRESENT:

Appellant in person

Mr. Rabera for State