



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 106 OF 2011**

*(From the original conviction and sentence in criminal case no. 58 of 2010 of the Chief Magistrate's Court at Malindi before Hon. G. Sagero - RM)*

**ZULIA PATO KIRAGA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant had been charged with the offence of Defilement of a child contrary to section 8(2) of the Sexual Offences Act. The particulars of the offence were that on the 20<sup>th</sup> day of November, 2010, at [Particulars withheld] Area within Malindi district of Kilifi County he caused the penetration of his genital organ, namely penis, into the genital organ of K K a girl of 15 (fifteen) years. The appellant was found guilty sentenced to 15 years imprisonment at the close of the trial.
2. The appellant raised the following grounds:
  - I. *That the learned magistrate failed to consider that the charge sheet as laid against me does not define the felony of defilement under the Sexual Offences Act no. 3 of 2006 hence the same was fatal and incurably defective.*
  - II. *That the learned trial Magistrate erred in law and fact by not considering that the Minors evidence was of no value hence the same went contrary to the medical evidence adduced by the doctor thus renders my conviction unsafe.*
  - III. *That the learned trial Magistrate did not consider that Section 109 of the Evidence Act was not complied with hence my conviction was unsafe given that:- members of public and the administration police were not summoned before the court for testimonies.*
  - IV. *That the learned trial Magistrate did not consider my defence which the same was reasonably to created doubts upon the prosecution case. (sic)*
2. At the hearing of the appeal, Mr. Muranje for the Appellant submitted that he relied upon the appellant's written submissions. He submitted that the trial court made no specific finding in regard to the age of the minor which was critical in determining the appropriate sentence to be meted out. That the age on the charge sheet was unsupported by the evidence. That as the minor was allegedly 15 years of age, the charge should have been brought under section 8(3) of the Sexual Offences Act. That although Pw1, 2 & 4 stated that the minor was 15 years, there was no

- evidence of age assessment and no birth certificate tendered. The Dentist, Pw5 testified that the minor was above 15years.Hence the charge sheet was fatally defective. He contended that had the trial court addressed this issue, it would have directed its mind on issues such as need for corroboration as there was no eye witness to the assault.
3. He highlighted contradictions in the evidence of the prosecution such as the time when the minor went back home: Pw2 stated 9a.m while pw4 stated it was 6.a.m and PW1 stated it was 4.a.m. He further took issue with the medical evidence tendered. He relied on the finding of **Musikiri v R 1997 KLR**, which is a decision made prior to coming into force of the Sexual Offences Act.
  4. The appeal was opposed by the State as represented by Mr. Nyongesa who submitted that the doctor testified and tendered an age assessment report. He stated that the Appellant was charged under Section 8(4) of the Sexual Offences Act and the error cannot defeat the evidence of the prosecution as the same was curable, and no prejudice would be visited upon the Appellant.
  5. He argued that the evidence of Pw1 was corroborated by that of Pw3 and the issue of time did not go to the fundamental case. Besides the injuries were noted in the P3 form and Pw1 could not freely discuss her ordeal with her father.
  6. The first appellate court must re-assess the trial evidence and draw its own conclusion, bearing in mind of course that it is not privileged with the opportunity of assessing the demeanour of the witnesses who appeared before the trial Court. See **Okeno v Republic [1973] EA 322**.
  7. The prosecution case was that the Pw1, who was the alleged victim, was 15 years of age and on the material date at about 10pm she attended a birthday party/disco together with two older persons being Pw3 and another lady. That at about 11pm, Pw3 requested them to escort her to take a call of nature. While there, the appellant appeared. PW1 stated that she had seen him before in that area for some months. He spoke for a while with the her two while she stood aside. When he left, the two told her to follow the route the Appellant had taken and refused to tell her where they were going.
  8. As they walked the Appellant took her hand and begun pulling her. She pulled back crying. Her companions left her there. The appellant overpowered her laid her to the ground, undressed her, removed his trousers and defiled her for an hour. She bled. Because she had not had previous sexual encounters and it was painful. She dressed up and the appellant escorted her home. She informed her parents the following day at 10 a.m when they enquired as to why she was bleeding. They reported to the police and PW1 was examined at the Malindi Hospital.
  9. Pw2, the sister-in-law of Pw1 stated that Pw1 was 15 years of age and that on the material night Pw1's brother reported to her father-in-law that Pw1 was at the disco. Pw1 returned back home at 9.a.m the following morning and slept and refusing to come out. When she was asked what had happened she stated she had engaged in sex with the Appellant whom Pw2 did not know. That the father-in-law went to the Appellant's parents, and later to the chief and to the police station. Eventually she took Pw1 to hospital.
  - 10.Pw3 stated that on the material date at 10p.m she together with Pw1 went to a disco. In the course of time, they went out for a short call together with another lady. The Appellant who was known to her. He stated that he wanted to talk with Pw1 but Pw1 retorted that she could not leave Pw3 and the other lady alone so he requested them to escort her. It was then that he held Pw1 and asked if they could talk at the side of the road. PW1 went with him, while PW3 waited, but PW1 did not return. PW3 then went back to the disco and met the Appellant who informed them that Pw1 had bled and he had taken her home. He also escorted Pw3 home.
  - 11.Pw4's evidence was that Pw1 was his daughter and Pw3 his daughter-in-law. That the age assessment of Pw1 of being 15 years of age was correct. When his son reported to him that his school going daughter, Pw1, was at a disco he went out looking for her but did not find her there.

She came home at 6.a.m on the next day. She lied to him about her whereabouts, then apologised about it and went to sleep. At 11.a.m he was informed by the lady who had gone to her bedside that Pw1 had had sex with the Appellant was unable to walk and was bleeding. He went to report to the clan elder but did not find him. While Pw1 was escorted to hospital he went to the Appellant's parents, then to the chief and later to the police.

12.Pw5, a dentist testified that he carried out an age assessment examination on Pw1 via a physical examination and x-rays and found her to be above the age of 15 years. He produced the report as an exhibit. Pw6, the investigating officer stated the Appellant was brought in by members of the public and administration police to the police station on 28.12.2010. Earlier on, he had received information that Pw1 had been defiled and advised that she be taken to hospital for treatment.

13.Pw7, a clinician at Malindi District Hospital produced the P3 form which he had completed concerning Pw1 on account of her alleged defilement. He assessed her age at 15 years and found that she had no injuries although she had been penetrated.

14.The Appellant's case was that he was summoned by the chief, was arrested and taken to the police station and arraigned in court to answer to a charge of defilement. That he denied the charge.

15.To sustain a charge of defilement, there has to be proof of penetration and the age of the victim. Under Section 8(4) of the Sexual offences Act the child must be proved to be between the age of 16 and 18 years. Ground one of the appeal raised the issue of the definition of the offence the appellant was charged with. This touches on the defectiveness or otherwise of the charge sheet. Now the offence of Defilement has been defined at Section 8(1) of the Sexual Offences Act as follows:

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

The appellant was charged under Section 8(4) which provides that:

**“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”**

Section 134 of the Criminal Procedure Code states:

**“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for fixing reasonable information as to the nature of the offence charged.”**

16.Is the definition of the offence therefore omitted in the charge as submitted? I would think not. Section 8(4) of the Sexual Offences Act states the specific offence, being defilement and discloses the penalty. Further, the particulars of the offence in the charge-sheet reveal that the alleged act of penetration was with a child. Section 2 of that Act defines penetration as:

**“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

17.The particulars of the offence in the charge revealed succinctly the specific offence and the nature of the offence. The omission to cite Section 8(1) of the Act does not in any way fall in the purview of a defective charge sheet so as to be rendered incurable. Besides, Section 382 of the Criminal Procedure Code provides:

**“Subject to the provisions hereinbefore contained, no finding, sentence or order**

**passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.** (own emphasis)

It is evident from the record that the appellant appreciated the nature of offence as charged and the omission did not cause any injustice or prejudice his defense.

18. Was there penetration and by whom? PW1 stated that she recognized the appellant who was the alleged culprit. However, the evidence tendered by PW1 and PW3 seemed confusing: PW1 had stated that the scene of the crime was only 120 metres from the disco and PW3 had stated that she waited for PW1 and the appellant to complete their “talk” But how is it that PW1’s screams went unheard by PW3? If the appellant had pulled her away why did PW3 state that the two first talked and PW1 followed the appellant? And why did PW1 inform the investigating officer PW6 that she had not engaged in sex yet at no time did PW1 state that the appellant had threatened her life?

19. In submissions, the appellant’s counsel stated that the minor’s evidence was not corroborated. It is important to emphasize that in offences such as these, corroboration evidence need not be presented as provided by Section 124 of the Evidence Act which states:

**“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”**

20. However, in this case the trial court did not state whether or not it was satisfied that the minor was telling the truth save to make an observation of the appellant’s demeanor and in particular that:

**“I keenly watched the demeanor of the accused and created an impression that he knew the complainant well, the affair was consensual but backfired when the complainant bled and was discovered.”**

Generally speaking PW3’s evidence is similar to that of PW1 to the extent that PW1 and the appellant were left alone. The rest of the evidence raises reasonable doubt. For example, PW3 stated in cross-examination that PW1 referred later back to the disco and appeared normal. PW6 also testified that PW1 had stated that she had not had sex. The initial treatment notes were not produced in evidence though PW7 was a clinician from the same hospital where PW1 was apparently examined. The credibility of the star witnesses (PW1 and PW3) is at best dubious.

21. There is more difficulty regarding the issue of the age of Pw1, PW2, PW4, PW6 and PW7 gave PW1’s age as 15 years. The matter should have been settled by the PW5’s expert opinion that she was above 15 years. This however was not a helpful finding as it fails to state the precise age of PW1, raising more doubt. According to the Court of Appeal finding in Malindi C.A. Cr. App. No. 504 of 2010 Kaingu Elias Kasomo v R [UR] age is a key ingredient to the offence of

defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. In that case the conviction was quashed and sentence set aside on such a ground.

22. Be that as it may, there was no requirement in this case to prove any fact by calling a certain number of witnesses, as alluded to in ground 3 of the appeal. (See Section 143 of the Evidence Act). The evidence led by the prosecution in my considered view was wanting and the resulting conviction cannot stand. In the result the appeal is allowed and conviction quashed. The sentence is set aside and the appellant set at liberty unless otherwise lawfully held.

Delivered and signed this **31<sup>st</sup>** day of **March, 2014** in the presence of Mr. Nyongesa for the State, and Appellant

Court clerk – Samwel

**C. W. Meoli**

**JUDGE**