



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 35 OF 2009**

***(Appeal arising from the original conviction and sentencing of the Principal Magistrate's Court Winam – Hon. P.C. Biwott Senior Resident Magistrate)***

**P O K. ....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

This is an appeal from conviction and sentence of 10 years passed against the appellant by the Senior Resident Magistrate Winam for the offence of defilement. The issues for determination are whether the offence was proved beyond reasonable doubt and if so whether the sentence should be reviewed.

The opinion of the court is that the appeal has no merits and the sentence should be enhanced.

**BACKGROUND**

The appellant was charged with the offence of defilement contrary to Section 8(i) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 17/6/2008 at **[Particulars Withheld]** village in Kisumu District, the appellant caused penetration with his genital organ to the child namely A A aged 13 years. In the alternative he was charged with the offence of indecent act with a child contrary to Section 11(i) of the Sexual Offences Act No. 3 of 2006.

The appellant denied the charges and the prosecution called 4 witnesses to support the charges. A A (PW1) was fetching firewood next to the appellant's farm along the fence on 17/6/2008 at 5pm. The appellant invited to pick firewood from his farm. When PW1 crossed the fence to collect the firewood, the appellant grabbed her took her to the maize farm and had carnal knowledge of her. He threatened her with death if she reported the ordeal. He gave her "adazi" and ksh.100/ to silence her.

One Odhiambo passed by and saw the appellant and PW1 and the appellant warned him against telling anyone. PW1 reported to her aunt the following day after bleeding persisted. PW1 was then taken to the police and later to the hospital.

Monicah Awino Lwande (PW2) was at home on 18/6/2008 at 4.00pm when her son victor told her that PW1 was defiled by the appellant on 17/6/2008. victor had learnt it from Odhiambo. She then looked for PW1 who admitted that she was defiled. The appellant however denied the offence and the matter was reported to the police and the PW1 taken to hospital. PW2 saw blood on the PW1's dress.

Doctor Midiku (PW3) produced a P3 on behalf of Dr. Andakalu. The two doctors had worked together at Nyanza Provincial Hospital and PW3 knew Dr. Andakali's signature. The P3 showed that PW1 had bruises and scratches on the neck. Her abdomen was tender. Her hymen was broken. PW3 also produced a P3 for the appellant on behalf of Dr. Andakali done on 7/7/2008. He had no physical injuries but was HIV positive.

Peter Berenge (PW4) was at Mbita patrol base when the appellant was brought by members of the public on allegation of defilement. He rearrested the appellant and escorted him to Kondele police station where he was charged. After considering the above evidence the trial court put the appellant to his defence.

### **DEFENCE CASE**

The appellant denied both the offence of defilement and indecent act. He blamed his arrest and prosecution on the grudge between him and the complainant's family. After the close of the defence case the trial court found him guilty and sentenced him to 10 years. The appellant was aggrieved and filed this appeal.

### **GROUND OF APPEAL**

1. THAT the learned trial magistrate gravely erred in law by passing on a conviction and sentence minus the investigation report that could give direction as far as the alleged offence was concerned.
2. THAT the learned trial magistrate gravely erred in law by relying on a medical report that did not meet the required standard of proof since it did not link the appellant to the alleged offence in any way and therefore did not in law amount to corroboration.
3. THAT the trial magistrate erred grievously in convicting the appellant basing on a single eye witness since the prosecution failed to avail "Odhiambo" who was alleged to be the eye witness in this case.
4. THAT the learned trial magistrate based the conviction conviction on a circumstantial evidence that was not corroborated not taking into consideration the fact that the appellant was known to PW1 could not mean that I defiled her.

### **APPELLANT'S SUBMISSION**

The appellant relied on his written submissions and in addition begged the court to deal with him leniently because during his imprisonment he has been reformed and obtained a lot of leaning in health and theology. He showed the court Diploma certificate.

### **RESPONDENTS REPLY**

Mr. Magoma learned state counsel opposed the appeal. He contended that the offence of defilement was proved by PW1 who identified the perpetrator because the offense occurred in broad daylight as she was fetching firewood. PW3 corroborated the evidence of PW1 by P3 evidence which confirmed that PW1's hymen had been broken and her neck bruised as a result of the ordeal. The state counsel prayed for dismissal of the appeal and enhancement of the sentence.

### **ANALYSIS AND DETERMINATION**

The court in this appeal is obligated with the review of evidence with a view to ascertaining whether the trial court made an error in convicting the appellant. The appellant submitted that there was no

sufficient evidence to warrant conviction. It is now trite that the prosecution must prove penetration and the minority age of the victim of the defilement. In this case the PW1 alleged that there was penetration into her vagina by the appellant's penis which led to pain and bleeding. The P3 produced confirmed that there was indeed breaking of the PW1's hymen which corroborated the allegation of penetration and bleeding by the PW1. PW2 also saw blood on the PW1's dress. To that extent this court agrees with the trial court that there was indeed penetration.

The production of P3 by PW3 was consented to by the appellant. A proper basis was laid by the prosecutor to justify the production of P3 by a person who did not author the same. As regards the issue of the minority age of the PW1, it is clear from the evidence that the age assessment was never done and no birth certificate or other documentary evidence were produced to prove the exact age of the PW1. The prosecution evidence however put the PW1's age as between 12 and 13 years.

The appellant who was her neighbour did not estimate the age of PW1 to be above what prosecution alleged. This court therefore finds that there was shoddy investigations done in this case faults the trial court for not ordering age assessment. That does not however mean that by any chance that the PW1 deceived anyone or even appeared to be 18 years old. To everyone even the appellant who was her neighbour she appeared to a child. Even to the court, she appeared to a child and that is why a **voir dire** examination was done by the court to ascertain her ability to appreciate oath-taking.

This court resolves the lack of documentary evidence of age the PW1 by applying the test of common sense. As such the court finds that the trial court before whom PW1 testified was able to estimate her age as below 18 years. Consequently, it is this court's finding that the elements of defilement namely, penetration and minority age of the victim was proved beyond doubt. The conviction was therefore proper.

As regards the sentence, this court agrees with the learned state counsel that the sentence of 10 years imprisonment should be enhanced. The minimum sentence for the offence of defilement is 15 years imprisonment. That is when the age of the victim is between 16 and 18 years. To that extent, the trial magistrate fell into error by passing a sentence without considering the provisions of the law. It is trite that when a sentence is passed without considering a relevant factor, the sentence is open to review on appeal.

### **DISPOSITION**

The appeal is dismissed and the sentence enhanced from 10 years to 15 years.

**Signed, dated and delivered this 21<sup>st</sup> day of November 2013.**

**ONESMUS MAKAU**

**JUDGE**