



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 179 of 2005**

**From original conviction (s) and Sentence(s) in Criminal case No. 1002 of 2004 of the Senior
Principal Magistrate’s Court at Kikuyu (M. W. Mirage – PM)**

**MICHAEL MWAURA NJUGUNA.....
.....APPELLANT**

VERSUS

**REPUBLIC.....
.....RESPONDENT**

J U D G M E N T

MICHAEL MWAURA NJUGUNA was found guilty of **DEFILEMENT** contrary to **Section 145(1)** of the **Penal Code** and sentenced to life imprisonment. He was however acquitted of **INDECENT ASSAULT** on a female contrary to **Section 144(2)** of the **Penal Code**. The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

The particulars of the charge were as follows: -

“On diverse dates between the month of March 2004 and April 2004 in [Particulars withheld] Village in Kiambu district within Central Province, had carnal knowledge of NNM a girl under the age of sixteen years.”

I have carefully considered this appeal and evaluated and analyzed afresh the evidence adduced before the trial court as expected of a first appellate court. In the Appellant’s amended grounds of appeal, he relied on only two grounds, one that on 17th November 2004 the learned trial magistrate indicated the Coram of the court during the morning session but failed to do so during the afternoon session. Dealing with this ground first the Appellant is misconceived as to what renders a proceedings defective. Where the trial court indicated the court Coram in the morning session, then adjourned for lunch break and proceeded to hear the case in the afternoon, as occurred in the instant case on 17/11/04, there was no need whatsoever to repeat the court Coram again. In such circumstances it could safely be assumed that the court Coram on the given day remained the same throughout in the afternoon as it was in the morning. In **NASSORO MOHAMED MWABUJA vs. REPUBLIC CA No. 155 of 2004** it was held: -

“We consider that the use of the phrase “coram as before” in the judge’s or magistrate’s note of proceedings must, unless there is an express contrary indication, mean that the appearance are the same as in the immediate preceding entry. Where there is a record of the prosecutor being a named Inspector of Police and it is followed by an unbroken chain of one or more occasions where the phrase is used, the natural meaning of the use of the phrase is that on each occasion the initially named prosecutor was present.

It is only if there is a break in the chain of use of the phrase that it can validly be claimed that there is no evidence of the presence of the previously stated qualified officers.”

The Appellant's second ground of appeal was an omnibus ground that the learned trial magistrate made an error both in law and fact by holding that the charge of defilement had been proved yet there was no case made out. The State did not oppose the appeal. **Mr. Makura**, learned counsel for the State highlighted in his submission the various short comings of the case that he thought rendered the conviction unsafe.

Mr. Makura submitted that there were several material contradictions regarding the Complainant's age. That whereas the Doctor who examined the Complainant said that the Complainant was 13 years old, her mother PW3 said that she was 14 years old.

I have perused the evidence on record. The doctor, who was PW1, said that he examined the Complainant on 7th July 2004. At that time he formed the opinion that the Complainant was 13 years old. PW2, the Complainant herself and PW3, the Complainant's mother testified that the Complainant was 14 years old as of 30th September 2004. There was a contradiction in the evidence of the prosecution regarding the age of the Complainant at the time she testified and which time has relevance to the age at the time the offence is alleged to have been committed.

The case of **Joseph Maina Mwangi vs. Republic CA 73 of 1993 Tunoi, Lakha and Bosire JJA**, held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

In the instant case the contradictions regarding the Complainant's age at the time she testified are only matters of minute detail and do not affect the tenor and the substance of the prosecution case. The variations of age given are insignificant being so minimal, a difference of one year. The charge of defilement can only be proved if the girl child defiled is found to have been under sixteen years of age. The Complainant was shown to have been under the age of sixteen years. It is immaterial whether she was below sixteen years by a margin of three years or of two years. That contradiction is very trivial and inconsequential and is curable under **Section 382** of the **Criminal Procedure Code**. Besides I am satisfied that the Appellant did not suffer any prejudice by reason of the said contradictions.

Mr. Makura submitted that the month in which the offence was said to have been committed did not tally. Counsel submitted that the Complainant's evidence was that the offence was committed in March 2004 while PW2 said that it was in April. The Complainant's evidence was that she met the Appellant in March 2004 as she came from school and that he requested to speak to her. The Complainant stated that she excused herself that day but that the next day she met the Appellant at his Aunt's place where he told her that he wanted to befriend her. The Complainant said that was the day she had sexual intercourse for the first time in her life and that it was with him, the Appellant. The Complainant said that she continued to see the Appellant and had sex with him twice before he warned her to stop visiting him.

The doctor's evidence was that on 7th July 2004, when he examined the Complainant, he formed the opinion that she was three months pregnant and that she had been defiled three months earlier. The doctor's evidence was in tandem with that of the Complainant. If the Complainant had sexual intercourse for the first time in March 2004, by July 2004, there would have been a lapse of 3 months.

PW3's evidence was to the effect that her daughter, the Complainant in this case, did not spend the night at home on 16th June 2004. When she did not go home for 1½ weeks from 16th June 2004, PW3 started looking for her. Eventually PW3, the Complainant's mother got her daughter and on hearing she was expectant with a child, PW3 reported to the police and later took her to the doctor for examination. From PW3's evidence, it is quite clear that she was not aware of the date her daughter was defiled and

that by the time she knew about it, the Complainant was already pregnant. The evidence of PW3 is neither a contradiction nor a variation of the evidence of the doctor and the Complainant. PW3 did not at anytime purport to be estimating the actual day the Complainant was defiled. The relevance of PW3's evidence is only to the effect that she realized that her 14 year old child had been impregnated and that she took the action that was necessary to bring the culprit to book. PW3's evidence is therefore not contradictory to the doctor's or Complainant's evidence as learned counsel for the State submitted.

Counsel for the State took issue with the delay in reporting the matter to the police. I do not understand why a delay of 3 months is an issue especially considering the nature of the offence, the fact that the Complainant was a child and the trauma she must have gone through to discover she was expecting. The delay in reporting is especially irrelevant taking into account that the issue of consent to the sexual act on the Complainant's part is inconsequential and considering the Complainant's tender age. I find this a non issue.

Counsel also took issue with the Complainant's credibility submitting almost to the extent of giving evidence that the Complainant did not report the matter but instead after she realized that she was pregnant, run away from home. I fail to see how the running away by the Complainant would raise a credibility issue. In fact running away from home was a natural reaction that was motivated by two factors, one a realization that the Appellant had rejected her after taking advantage of her naivety and innocence for a couple of days and secondly the realization that she was pregnant and especially at her age. A finger cannot be pointed at the Complainant. She was a child. The issue of her consent to the sexual intercourse is inconsequential. That conduct in my view does not create any questions as to the Complainant's credibility.

On the Appellant's part in his written submission, he contended that since the Complainant had not disclosed to the doctor who defiled her and that since the doctor in cross-examination stated that medially he found no nexus between the Appellant and the Complainant in regard to the defilement, then the charge was not proved. The doctor's role in this case was not to investigate who defiled the Complainant but rather to establish whether she had been defiled at all. In the doctor's evidence his findings upon examining the Complainant were: -

“- 13 years old female. She had no injuries

- she had an old tear of hymen membrane, she was three months pregnant.

- There was no discharge.

Conclusion

- There was sexual activity three months earlier and conception had taken place. She had been defiled and became pregnant. This had been three months earlier.”

The evidence of the doctor was conclusive that the Complainant was under 16 years old and that she had been defiled both by reason of the torn hymen membrane and pregnancy.

The Appellant submitted that the Complainant's evidence that the Appellant had defiled her was a mere assertion and that there was need for other evidence to support hers. The Appellant relied on the case of **MUIRURI NJOROGI vs. REPUBLIC CA No. 115 of 1982** which held: -

“A court of law does not rely on assertion unless such assertions are proved by evidence before it.”

The Complainant's evidence that the Appellant had defiled her was not an assertion in the sense the Appellant submitted. It was in fact direct evidence of a statement of fact. The Complainant was saying that she had been defiled by the Appellant and she described vividly and candidly how that happened.

As to need for “support” or corroboration of the Complainant's evidence, **Section 124** of the **Evidence**

Act and its proviso states as follows: -

“Section 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years 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 corroboration 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 a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

The learned trial magistrate at page 2 of the judgment made the following observation of the Complainant’s demeanour.

“Complainant was 14 years by the time she testified. I have considered her evidence. She appeared truthful and I have no reason to doubt her testimony.”

I find that the learned trial magistrate viewed the Complainant’s evidence against the proviso to **Section 124** of the **Evidence Act** and found her to be a truthful witness. The learned trial magistrate was justified to believe her evidence having made that observation after testing the Complainant’s demeanour during the trial of this case. I see no reason to disagree or disapprove the learned trial magistrate’s finding of fact on the credibility of the Complainant and the truthfulness of her evidence. The Complainant’s evidence alone was enough to found a conviction if it passed the test set by the proviso to **Section 124** of the **Evidence Act**. I find that indeed the Complainant’s evidence passed the test.

The Appellant continued to submit that there was no evidence to support the charge and relying on the case of **Woolmington vs. The DPP AC 435**, he submitted that the appeal court ought to find that there was doubt in the prosecution case and acquit him. I am fully aware that the Appellant did not raise issue with the manner in which his defence was treated. I will however state that the issue of opportunity which he appeared to raise in his defence was sufficiently dealt with but I wish to reiterate it for purposes of completeness. The Appellant’s defence was that he moved to the Complainant’s home area long after April 2004 when the issue arose. The evidence of the Complainant’s mother was quite clear that the Appellant had started living in that area in December 2004, four or so months before the period in issue. The Complainant described quite clearly until the two of them met, which was at the Appellant’s Aunt’s place. The Complainant described the Aunt’s home as next to the Appellant’s home and that it was within the vicinity of the Complainant’s home. PW3, the Complainant’s mother also said that there were two homes between theirs and the Appellant’s home. The issue of opportunity to commit the offence and in the circumstances of the case that of identify both do not arise.

The learned counsel for the State submitted finally that the sentence of life imprisonment imposed on the Appellant was manifestly harsh and excessive. I have taken into account the Appellant’s filed petition of appeal in which in the fifth ground he raised the following issue: -

“May the esteemed court find interest from the proceedings and see that the penal servitude is not compatible with the prosecution evidence tabled at the trial.”

I have perused the record of the proceedings and found that the learned trial magistrate took into account the following: -

“Sentence

Accused is treated as a first offender. Mitigation is considered. Offence is serious, complainant conceived at early age and definitely this will affect her and her studies for the rest of her life. Offence therefore calls for custodial sentence.”

I think that the learned trial magistrate took into account all the relevant factors but overlooked an important one. The Appellant was a first offender. The offence was not aggravated in any way. I believe that to justify a sentence of the maximum penalty provided in the law, except in mandatory sentences, there must be a factor that can be said to have aggravated the offence such as use of aggressive force or infliction of injury or endangering of life etc. I am mindful that the act of defilement of a child is an act of physical aggression and cannot be trivialized at all. However, a sentence of quantified years considering Appellant's age and the fact that he was a first offender will serve the purpose quite well.

I set aside the sentence of life imprisonment and in substitution order a sentence of 24 years imprisonment with hard labour.

The upshot of this appeal is that appeal against conviction is dismissed. Appeal against sentence is allowed in part as indicated.

Dated at Nairobi this 3rd day of August 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Makura - State Counsel

Tabitha – Court clerk.

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LESIIT, J.

JUDGE