



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E005 OF 2020**

**BETWEEN**

**JULIUS MUTETHIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court*

*Criminal SO Number 29 of 2019 by Hon. G.Sogomo (PM) on 02<sup>nd</sup> December, 2019)*

**JUDGMENT**

**Background**

1. **JULIUS MUTETHIA (Appellant)** herein has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed on 18.12.2019 against **RKM** a child aged 14 years.

2. The prosecution called 5 witnesses in support of the charges. **PW1** the complainant stated that she was 14 years and in class 8 when the offence was committed. She recalled that on 18.12.2019 at about 8.00 pm, her mother sent her to collect firewood from behind the house and Appellant who was a regular visitor at their home and had visited that day followed her there and defiled her. She stated that was rescued by her father who escorted them both to Mulika Police Station. **PW2 GNM** and **PW3 GM**, complainant's mother and father respectively confirmed that Appellant was a regular visitor at their home. Complainant's father stated that he returned home at about 09.00 pm and found the Appellant defiling the complainant near his gate. He called his wife **PW2 GNM**, who stated that on the material date at about 07.00 pm, she sent the complainant to collect grass to light fire and minutes later was called by her husband who informed her that he had found the Appellant defiling the complainant. It was her evidence that Appellant was half naked when she arrived at the scene of the incident. It was her evidence that complainant was born on 07<sup>th</sup> January, 2005. Complainant was examined on 19.09.2019 by **PW4 Absolom Wambua**, a clinical officer who found that her vaginal walls were inflamed and hymen was broken. He formed an opinion that complainant had been defiled and tendered her treatment notes and P3 form as PEXH. 1 and 3 respectively. **PW5 PC Caroline Mutanu**, the investigating officer recorded witness statements and later charged the Appellant. She tendered complainant's Health Card which shows she was born on 06.01.2005 as PEXH. 4.

3. When Appellant was placed on his defence, he opted to remain silent.

4. In a judgment dated 02<sup>nd</sup> December, 2019, the Appellant was convicted and sentenced to 20 years' imprisonment.

**Appeal**

5. Being dissatisfied with the sentence, the Appellant lodged the instant Appeal on the grounds **THAT:**

**i. His medical evidence was not tendered in court**

**ii. Complainant was not examined under Section 19 of Oaths and Statutory Declarations Act Cap 15 Laws of Kenya**

iii. Mitigation was not considered

iv. Sentence was harsh and excessive

6. The state submitted that the prosecution case was proved and urged that the appeal be dismissed.

**Analysis and determination**

7. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

**"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."**

8. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under ***the Act***. These are the age of the victim, penetration and identity of the offender.

9. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

**In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).**

10. The trial court found as a fact that the complainant was born on 06.01.2005 as evidenced by her Health Card PEXH. 4 and was therefore 14 years old when the offence was committed.

11. Section 2 of ***the Act*** defines penetration to entail: -

**"partial or complete insertion of a genital organ of a person into the genital organ of another person."**

12. The P3 form **PEXH. 3** illustrates that the complainant's vaginal walls were inflamed and hymen was broken. I therefore entirely agree with the finding by the trial court that defilement was established.

13. From the evidence on record, the Appellant was not a stranger to the complainant and her parents. Her father PW2 stated that he found Appellant in the act. Complainant's mother testified that he found Appellant with his trousers on his knees. I therefore entirely reach a decision like did the trial court that the prosecution case was corroborated and the conviction well founded. I also find that it was not necessary for the Appellant's medical report to be tender to prove that complainant had been defiled.

14. On whether Section 19 of the Oaths and Statutory Declarations Act was complied with, Section 2 of the Children's Act defines a child of tender years to mean **"a child under the age of 10 years"**.

15. In the leading case of **Kibangeny Arap Korir v Republic, [1959] EA 92**; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

16. Complainant was 14 years when she was defiled, she. She was not a child of tender years and *voire dire* examination was therefore not necessary.

17. Contrary to the Appellant's contention that the trial court did not consider his mitigation before passing the sentence, the court record demonstrates that the trial court not only considered the Appellant's mitigation but also the fact that he was a first offender and had been in custody since his arrest which issues the Appellant had not even raised.

18. Concerning the harshness and excess of sentence, Appellant was sentenced to is life imprisonment which is the mandatory minimum sentence under Section 8(1) as read with Section 8(3) of ***the Act***.

19. Mandatory minimum and maximum sentences were declared unconstitutional by the Supreme Court holding in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR**.

20. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act and observed as follows:

**[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not**

**deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**

21. Even though Appellant was a first offender, the psychological effect of the offences on the 14-year-old complainant cannot be underestimated.

22. From the foregoing, the Appeal fails except on the issue of sentence. The 20-year sentence imposed on the Appellant is hereby set aside and substituted with the sentence of **seven (7) years** which shall run from **02<sup>nd</sup> December, 2019** when he was sentenced.

**DELIVERED AT MERU THIS 15<sup>th</sup> DAY OF April 2021**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Kinoti**

**Appellant - Present**

**For the State - Ms. Mbithe**