



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CRIMINAL APPEAL NO. E003 OF 2020**

**JOHN MULINGWA MAIRI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence from the original Criminal Case No. 10 of 2019 in a*

*Judgment delivered on 12.11.2020 by Hon. P. E. Nabwana – Resident Magistrate).*

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mwangi for the state**

**The Appellant in person**

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

The appellant herein was tried, convicted and sentenced to ten (10) years imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 ((3) of the Sexual Offences Act No. 3 of 2006.

Being aggrieved with the conviction and sentence, the appellant filed an appeal based on the following grounds:

*(a). That the sentence passed by the Learned trial Magistrate was punitive and excessive in the circumstances of the offence.*

*(b). That the Learned trial Magistrate erred in not considering the provisions of Section 333 (2) of the Criminal Procedure Code for the time spent in custody.*

The appellant in support of the appeal cited the authorities **Amedi Omurunga v R Petition 28 of 2016**.

In reply, **Mr. Mwangi** the prosecution counsel submitted as follows that the prosecution at the trial proved the elements of the offence for defilement beyond reasonable doubt. Learned prosecution counsel relied on the following authorities **Charles Wamukoya v R CR Appeal No. 72 of 2013**, **Mank Oiruri Mose v R {2013} eKLR**.

On the issue of identification, Learned prosecution counsel submitted that the appellant was properly identified by (PW1) who had prior knowledge before the material day of the offence with regard to this factor of critical importance. Learned prosecution counsel cited the following authority in **Abdallah Bin Wendo v R 20 EACA 166 at 168**.

From the facts set out in the appeal, Learned prosecution counsel submitted that there are grounds for this Court to interfere with the sentence, on this issue of sentence. He cited the cases of **R v Jeremiah Koilel {2021} eKLR** and **Thomas Mwambu Weloyi v R {2017} eKLR**. In prosecution counsel's submission the sentence imposed by the trial Court was within the limits of the statute.

**Resolution**

The question which arises is whether or not the Magistrate had evidence before him upon which to order for a conviction and sentence against the appellant. This Court is entitled to examine the evidence to re-hear the case, reconsider the material before it and reach its own conclusions thereon without disregarding the Judgment of the trial Magistrate but carefully weighing it. **Ruwala v R {1957} EA 370**, **Answar Kipnetich v R CR Appeal No. 141 of 1985**. The prosecution at the trial had the burden of proving the charge of defilement against the appellant beyond reasonable doubt. The burden never shifts to the appellant for he could only be convicted on the strength of the

prosecution case. The Court in doing so shall have regard to Section 107 (1), 108 and 109 of the Evidence Act on the burden of proof that evidence produced discloses a connecting factor between the appellant and the alleged offence.

For the appellant to be convicted of the offence of defilement in this appeal, the prosecution must have proven each of the following essential ingredients:

- (a). *The victim was aged below the age of 18 years.*
- (b). *A sexual act of penetration was performed on her.*
- (c). *That it was the appellant who committed the sexual act as alleged in the indictment.*

In order for the prosecution to discharge the burden of proving penetration as defined under Section 2 (1) of the Sexual Offences Act, (PW1) gave evidence on the episodes of sexual intercourse which took place between the month of October 2019. Besides the evidence by (PW1) its clear from the medical examination report of (PW5) there was a rupture of the hymen which symbolizes an act of penetration of the complainant's genitals.

I therefore concur with the findings of the trial Magistrate on penetration of the complainant. Second element the trial Court had to deal with on proof of age of the complainant, whether it was below eighteen (18) years. In the instant case, the complainant on oath told the trial Court that she was born on 20.9.2005. Her testimony was corroborated by the birth certificate no. xxxx admitted in evidence as an exhibit to prove the date of her birth. The appellant defence never controverted the twin issues of penetration and age of the complainant on identification.

The complainant alleged to have known the appellant four years prior into the dates when he committed the sexual acts of penetration. In response to this appeal the Court of Appeal in **Turnbull v R {1977} QB 224** laid down important guidelines on identification against an accused person:

*“which wholly or substantially depended on the correctness of a single identifying witness or any other corroborative evidence given by the prosecution. The circumstances to be examined by the trial Court constitute the following:*

- (a). *The length of the time the accused was observed by the witness.*
- (b). *The distance the witness was with the appellant.*
- (c). *The source and state of the light.*
- (d). *The length of time elapsed between the original observation and the subsequent identification.*

*It is also generally accepted that recognition is more reliable than identification of a stranger, however even when the witness appears to recognize someone, he or she knows, the Court should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”*

With regard to the instant case the prosecution prima facie- evidence came from the complainant (PW1) and (PW2) **Lameck Ngai**. The evidence when reviewed is capable of supporting positive identification of the appellant and directly placing him at the scene of the crime. The identification which essentially rested on the evidence of the two witnesses remained steadfast and not controverted by the appellant defence. It is therefore not disputed that the appellant was the one culpable for the offence of defilement.

As regards the issue on sentence, the appellant submissions was to the effect his mitigation as the sole breadwinner, of the family, and sickly mother, the fact of being a first offender and remorseful for the offence were never taken into account. He therefore invited the Court to address the period of sentence imposed as punitive and manifestly excessive. The ultimate question is whether the appeal presents plausible grounds upon which this Court could interfere with the sentence. In **Benard Kimani Gacheru v R {2002} eKLR** what stands out clearly is that:

*“an appeal Court can only interfere with the sentence imposed by a trial Court if its shown, that it overlooked some material factor, or took into account some wrong material, or acted on a wrong principle or even if the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, any one of the matters already stated is shown to exist.”*

In terms of this appeal, none of these factors have been shown by the appellant to warrant interference with the sentence. For all those reasons, I dismiss the appeal and the impugned Judgment of the trial Court be and is hereby affirmed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

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**R NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr Mwangi for the State
2. Appellant present