



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 25 OF 2016

JAMES MUTHAMAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from the Chief Magistrate's Court at Kitui Criminal Case number 24 of 2014 Judgement that was delivered by Chief Magistrate on 5th May, 2016.

J U D G E M E N T

1. **James Muthama**, the appellant herein, was charged with the offence of defilement contrary to **Section 8(1) (3) of Sexual Offence Act No. 3 of 2016 vide Kitui Chief Magistrate's Court Criminal Case No. 24 of 2014**. The particulars were that on 11th March 2014 at around 9PM at [Particulars Withheld] within Kitui County he intentionally and unlawfully caused his penis to penetrate the vagina of (name withheld) a child aged 14 years.

2. The appellant was convicted after trial and sentenced to serve 20 years' imprisonment.

3. A brief look at the evidence presented at the trial court reveals that the appellant lured the complainant to where he was residing in at [Particulars Withheld]. The complainant's mother (PW1) was surprised when she failed to see her daughter (complainant) when she arrived home at around 7PM on the material date. She started looking for her around and got wind of the fact that the appellant, a water vendor in the locality, had locked her in his house. Incensed, she stormed the appellants house and found the appellant and her daughter (complainant) lying on a mattress on the floor, with both of them naked.

The appellant feeling concerned, stormed out and was followed closely by the complainant. Both of them disappeared into the darkness leaving the mother stranded and angry.

4. The following day, the mother reported the matter at the local police station. The girl (complainant) later went home and explained to her mum what had happened and later the Appellant was arrested by members of the public and was later charged with the offence of defilement.

5. The complainant (PW2) testified and corroborated the evidence of her mother (PW1). She told the trial court that the appellant pulled her inside his house and holding her neck, he placed her on the mattress, on the floor where he defiled her while placing a shirt in her mouth. She added that, while at it, the mother stormed in and that on seeing her mother, the appellant escaped and she also ran away and only went back home the following day. She further stated that she was taken to hospital where she was examined and treated.

6. Dr. Mutuku (PW4) testified on behalf of Dr. Makau and informed the court that the medical examination revealed that the girl's hymen had been broken and had no other injury on the body. She further testified that, the girl was bleeding in her private parts though the doctor could not tell whether the bleeding was because of her menses or defilement. She tendered P3 form as P Ex 2, and age assessment report as P Ex 4.

The age assessment report revealed that the girl was aged 14 years at the time.

7. When placed on his defence, the Appellant gave unsworn statement of defence denying the offence. He faulted the complainant and the doctor for lying in their testimonies.

8. The trial court evaluated the evidence tendered and found that the prosecution's case had been proved to the required standard and convicted the appellant sentencing him to 20 years' imprisonment as provided by law.

9. Aggrieved by the decision, the appellant filed this appeal raising the following six (6) grounds namely: -

1) *That he pleaded guilty to the charges.*

2) *That the trial magistrate erred in law and fact by relying on evidence of witnesses who belonged to the same family.*

3) *That the investigating officer never appeared before court to testify and give reason as to why he apprehended him.*

4) *That the Clinical Officer informed the court that the mother to the minor complained to the police and that the minor was defiled but the minor never gave any report of defilement.*

5) *That the investigating Officer never executed his mandate to the recommended standards since the accused was tested in the hospital together with the minor but no report was compiled by the clinician to affirm that the accused person was actually involved in the heinous act.*

6) *That the rights of the accused were violated since he was arrested on 12.03.2014 and later arraigned on 17.03.2014 which were 5 days after arrest.*

10. In his written submissions, the appellant raised two additional grounds relating to the age of the complainant and lack of proof in the prosecution's case. This court finds that the grounds were raised without leave but, because it touches on proof of the prosecution's case the same relates to the second ground in his initial grounds in the petition herein, and therefore will be considered in this appeal.

11. The appellant submits that the ingredients of the offence and specifically that the element of penetration was not was not proved beyond doubt. He contends that the complainant had no bodily injuries adding that the bleeding noted might have been due to her monthly periods. He avers that the hymen was broken but it might have been due to various activities not linked to sex.

He submits that the prosecution did not prove its case beyond doubt and urges this court to acquit him.

12. He further submits that the mandatory nature of sentence prescribing a minimum sentence deprives a judicial officer from exercising his or her discretion. This ground was however a new additional ground raised without leave of this court as provided under **Section 350 (2) (iv) of the Criminal Procedure Code.**

13. The Respondent has opposed this appeal through its written submissions. The Respondent avers that the appellant has raised new grounds in his written submissions without leave of this court.

14. It submits that its case was proved, and that all the ingredients of the offence of defilement to wit, age, penetration and identity of the perpetrator were proved.

It points out that the age was proved by Exb. 4 tendered by the doctor who also proved that penetration was positive.

15. The Respondent further submits that there was no violation of the appellant's constitutional rights as he was arrested on 14th March, 2014 which was a Friday and taken to court on 17th March, 2014 which was a Monday.

16. On sentence, the Respondent submits that the sentence meted out was not harsh or excessive owing to the seriousness of the offence. It urges this court to uphold the same.

17. This court has considered this appeal and the response made. The work of this court is to re-evaluate or re-assess the evidence tendered and come to own conclusion and make own findings. In so doing, I am minded of the fact that I do not have the advantage of the trial court which had the benefit of hearing the witnesses and seeing them first hand.

18. The appellant had observed above was charged with the offence of defilement contrary **Section 8(1) (3) of Sexual Offence Act** which provides: -

“A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and depending on the age of the victim is liable upon conviction to imprisonment for a term of not less than twenty years.”

19. Going by the above provisions for a charge of defilement to be sustained the following ingredients must be established and proved beyond doubt by the prosecution.

The ingredients are: -

(i) Penetration

(ii) Age of the victim

(iii) Positive identification of the perpetrator.

20. I will begin with the question of age. The age of the victim has been challenged in this appeal as the appellant submits that he was given a harsh sentence. This court finds that from the medical evidence tendered by Dr. Mutuku (PW 4) that is the P3, (Ex 2) and the age assessment report (P Ex 1) the age of the minor (complainant) was established and proved beyond doubt. The girl was aged 14 years at the material time of defilement though she testified when she had turned 15 years. She was 14 years when she was defiled.

21. On the question of penetration, this court has re-evaluated the evidence of PW1, PW2 and PW4. The victim's mother (PW1) literally found the appellant and the complainant in the act lying on the floor on a mattress stark naked. The complainant herself testified and confirmed that she was defiled and that her mother found them in the act. PW4 (the Medical Officer) who testified on behalf of his colleague found that there was penetration because the hymen was broken.

22. This court has re-evaluated the evidence keenly and find that the appellant and the complainant may have a consensual sexual engagement. The only problem is that in cases of this nature (defilement) consent is immaterial. The complainant was a minor and had not reached the statutory age of consent (18 years). So while I inclined to agree with the appellant that the bleeding noted by the doctor when he examined the complainant may have been due to her menses, the question of penetration was certainly proved by the doctor's finding that the hymen was broken. The evidence of the victim's mother (PW1) and the complainant herself is consistent with the medical finding and opinion that the element of penetration was proved. So though the broken hymen does not necessarily prove penetration as submitted by the appellant, the corroborative evidence by the victim's mother who found the two naked lying in the act on the floor clearly indicates that penetration was established and proved beyond reasonable doubt.

23. I am also satisfied that the identity of the appellant was proved beyond doubt. The issue was not contested at the trial or in this appeal. PW1 got the appellant in his house defiling her daughter and her daughter (PW2) confirmed the same. The appellant was a well-known person in the locality dealing with charcoal and as a water vendor.

24. This court finds that the prosecution's case proved the 3 elements of defilement beyond doubt. The trial court was correct to find the appellant guilty as charged.

25. On sentence, this court finds that through the sentence considering the age of the appellant (18 years) is a bit harsh but the law (*Sexual Offence Act*) provides for minimum sentences. The trial court hands were tied and one cannot fault it unless the statute prescribing the sentence is challenged on the legality or its constitutionality.

This court finds that the only way this court can intervene is consideration of the time the appellant spent in custody awaiting trial. The proceedings from the court below shows that he was charged in court on 14th March 2014 and judgement was delivered on 5th May 2016. This means that the appellant spent approximately two (2) years in custody. Under the provisions of **Section 333 (2) of the Criminal Procedure Code**, this court hereby subtracts the two years from the 20 years' sentence meted out against the appellant. This means he will therefore spend eighteen (18) years in jail from 5th May 2016, when he was convicted.

In the end this appeal for the aforesaid reasons is dismissed. The conviction is upheld and the sentence is upheld. Save that the 2 years spent in custody is factored in the computation of the 20-year sentence. The appellant will therefore spend 18 years' imprisonment from the time he was convicted (5th May 2016).

Dated, Signed, and Delivered at Kitui this 10th day of November 2021.

HON. JUSTICE R. K. LIMO

JUDGE