



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 17 OF 2019

STEPHEN MUTHIANI SILIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal arising from the Judgment, conviction and sentence of the Senior Resident Magistrate, Makadara, (Hon. E. Kanyiri) on 27.11.2018 in Makadara Chief Magistrate's court Sexual Offence Case No. 30 of 2017)

JUDGMENT

The appellant herein **STEPHEN MUTHIANI SILI**, was charged in the above case with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that on 6.2.2017 in Embakasi Division Sub-County, he intentionally caused his penis to penetrate the genital organ, namely vagina of MW, a child aged 15 years.

The appellant faced an alternative charge of Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006. Than on 6.2.2017 in Embakasi Division, Nairobi County, he intentionally touched the vagina of MW, a child aged 15 Years.

Upon conclusion of this case, the appellant was convicted of the main charge of defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006 and sentenced to serve 20 years imprisonment. The said sentence was passed on 11.2.2019, with the Judgment having been read out on 27.11.2018.

The appellant has filed an appeal herein against the said Judgment and sentence. The petition of Appeal and Ground of appeal (dated 18.1.2019) lists upto 6 grounds as follows:-

1. **THAT** the learned trial magistrate erred in law and facts when he acted on defective charges to convict the appellant.
2. **THAT** the learned trial magistrate erred in law and facts when he relied on highly contradictory and in consistent evidence to convict the appellant
3. **THAT** the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that the factor of age was not proved beyond reasonable doubt.
4. **THAT** the learned trial magistrate erred in law and fact when he relied on insufficient evidence to convince the appellant.
5. **THAT** the learned trial magistrate erred in law and fact when he shifted onus of proof against the defence.
6. **THAT** the learned trial magistrate erred in law and fact when he conducted an irregular trial.

In the petition and grounds as filed, the appellant, without pleading for any specific orders, has prayed that his appeal be allowed. By agreement of the 2 sides, the court gave directions that this appeal be canvassed by way of written submissions. Both sides duly complied.

The appellant relied on **J. Heydon Evidence, Butterworths, London, 1984**, (I did not have the benefit of access to this piece), while challenging the evidence of a child. That;

- i) **THAT a child's power of observation and memory are less reliable than an adult.**

ii) THAT children are prone to live in a make believe world, so that they magnify incidents which happen to them or invent them completely.

iii) THAT they are also egoistic so that details seemingly unrelated to their own world are quickly forgotten by them.

iv) That because of their immaturity, they are very suggestible.

v) THAT children often have little notion of duty to speak the truth.

Some of the issues the appellant urged the court to consider in deciding in his favour were:

That when the child went home, she did not tell anyone. And that on cross-examination, (page 8), the child said she was not forced to have sex with the appellant. That there is no evidence that the appellant knew that the victim was a school going child. That the guardian (PW4) said she came and sneaked.

That the behavior of PW1 was that of an adult and that the appellant had reasonable belief that he had married a girl who had attained majority age. The appellant also challenged the authenticity of the birth certificate produced. He relied on section 8(5) of the sexual offences act, 2006, that;

“It is a defence to a charge under this section if;

a) It is proved that such child deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence, and

b) The accused reasonably believed that the child was over the age of 18 years.”

He relied on **Republic Versus JP (2014) NSCA, 29** that the court, apart from confirming penetration, age and identity of the accused must also consider the circumstance of the case, and that where the victim was enjoying the relationship, the accused should be accorded the benefit of doubt.

The appellant also submitted that age was not proved, and that the birth certificate produced was fake, as shown by the names MW on the birth certificate and MW on the charge sheet. He also submitted that PW1 could not have been in class 6 at 15 years and 9 months. He opined that PW1 was over 18 years or slightly under 18 years.

He also relied on **Hillary Nyongesa Versus Republic, Cr. Appeal No. 123/2009**, that

“Age is such a critical aspect in sexual offences that it has to be conclusively proved.... Because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

For the Respondent, it was submitted that the prosecution proved the elements of penetration, age of the victim and identification of the assailant. That PW1 testified as to the many occasions she had sex with the appellant. Also proved by PW2. And the age of PW1 was proved by way of the birth certificate (Exh.4) at 15 years. Identification of the appellant was also proved. Counsel disputed the defence of the appellant, asserting that he simply eloped with her, without bothering to inquire whether PW1 was a minor or an adult.

On sentence, counsel relied on **Ogolla S/O Owour Versus Republic (1954)EACA 270**, cited in **Republic Versus Stephen Mweizela Mutuku and 2 others (2020)eKLR**, that;

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

Counsel urged that this appeal be dismissed.

In the case of **David Njuguna Kariuki Versus Republic (2010)eKLR**, and indeed several other decisions, the duty of the 1st appellate court is defined as;-

“The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion.”

This court is therefore bound to consider the whole evidence on record, analyse and evaluate the same before arriving at its own conclusion. In doing this, this court must also bear in mind that it does not have the benefit of practically observing the demeanor of the witnesses who testified before the trial court.

The case of the prosecution commenced with the evidence of PW1, MW. This is a minor. Before taking her evidence, the court subjected her to *Voire Dire* process in which she stated amongst other things, that her name is MW, in class 6. The court then formed the opinion that she gives sworn evidence.

Her evidence was that she lived with her grandmother MN. That on 6.2.2017, she went to the house of the appellant and told him she was pregnant with his child and that he confirmed he would accept her and the baby. She stayed with him in his house for 4 days during which days they had sex. He was then arrested at his place of work, brought to the house, before both of them were taken away. She met accused at his place of work where he sells mutura near her grandmother's githeri shed. She gave history of how he seduced her. And how they had sex on many occasions. Upon arrest of the appellant, she was taken to Nairobi Women Hospital, examined and issued with both the PCR and P3 forms. She otherwise confirmed that she was not forced to sleep with the appellant.

PW2 Dr. Peter Ngatia, produced the PCR form of the complainant. He confirmed that on examination, her hymen had old tears and she was found to be pregnant (Exh. 1). And Dr. Joseph Maundu, PW3, produced the P3 form. He confirmed that complainant was 15 years old and had old tears of the hymen.

MN was PW4. Her testimony was that her grandchild, W (PW1) was then in class 7. That PW1 had disappeared for 4 days only to be found at the house of the appellant. Her testimony was that she was 15 years old.

The investigating officer, Corporal Regina Katalia (PW5), was one of the officers who arrested the appellant. Her evidence was that the appellant led them to his house where they found PW1. That the appellant had told them that he had married PW1 and duly informed her parents. She produced the birth certificate of the child (Exh.4)

On being put on his own defence, the appellant gave an unsworn defence in which he stated that he sells mutura. That PW1 told him that she was 20 years old and that she agreed to stay with him as his wife. He was to be arrested and charged.

The witness of the appellant, Raymond Sili Kiio (DW2), his father, confirmed that the appellant lived with the minor complainant. He asked for forgiveness of his son.

That is basically the evidence that came up before the trial court. The appellant faced and was convicted and sentenced on a case of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.

The ingredients of the offence of defilement are well settled by the courts. In ***George Opondo Olunga Versus Republic (2016)eKLR***, it was held;

“The ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim.”

In ***CA Versus Republic (2018)eKLR***, the Hon. Justice Mrima, similarly held:

“The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrators of the offence.”

The appellant in this appeal has admitted that he had sexual intercourse with the complainant leading to a pregnancy. With this admission, the issues of identification of the appellant and the fact of penetration are not issues in this appeal.

The only issue therefore left for determination is the age of the complainant. The evidence about the age of the complainant was first brought up by PW4, the grandmother of the complainant who testified that she was 15 years at the time of the offence. Apart from the evidence of PW4, there was more evidence of PW4 in the form of the P3 form produced by PW3, Dr. Joseph Maundu (Exh.2) clearly also noted the age of the complainant as 15 years.

And lastly the prosecution also produced the complainant's certificate of birth (Exh.4), confirming that she was born on 6.5.2001. The offence took place on diverse dates in February 2017. A quick calculation of her age put it at around 15 years of age. With all these pieces of evidence, I am convinced that the complainant was a minor at the time the offence was committed.

The appellant has however, maintained that it was in fact the complainant who misled him into believing that she was on majority age. He has relied on section 8(5) of the Sexual Offences Act, 2006, that;

“It is a defence to a charge under this section if

a) It is proved that such child, deceived the accused person in believing that he or she was over the age of 18 years at the time of the alleged commission of the offence.

b) The accused reasonably believed that the child was over the age of 18 years.”

The above section must be read together with Sub-section 6 of the said section, which states;

“The belief referred to in subsection 5(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

In my view, the above provision (section 8(6)) puts upon the accused (appellant) the onus of proving that the complainant indeed misled him on her actual age and that he reasonably believed that the child was above the age of 18 years. The evidence on record would shed light on the

relevant circumstances surrounding this case.

It was the evidence of the complainant that she was in class 6, a fact confirmed by her grandmother (PW4). The appellant had a mutura kiosk next to the stall of PW4. The appellant used to see the complainant as she came to her grandmothers' kiosk. They are also neighbours where they reside. And from the evidence, the appellant seemed to have eloped with the complainant, making her grandmother report about her missing at the police station.

To me, these circumstances were such that the appellant knew the complainant well and as a minor in standard 6. His defence that the child told her that she was not in school is not true. As a child living in the same neighbourhood, and who severally visited her grandmother's kiosk next to appellant's own kiosk, the appellant obviously knew that the complainant was a minor. The defence that the complainant told her she was 20 years and with an ID card is also unbelievable. Had the appellant been keen to know the age of the complainant, he would have insisted on seeing and scrutinizing the alleged ID card of the complainant. He never took any steps at all towards this end. And even the appellant's father, Raymond Sili Kiio, DW2 in his evidence, appreciated that the complainant was a minor and only called for forgiveness on behalf of his son, the appellant.

Further, whereas in the defence of the appellant and also in the submissions the appellant alleges how the complainant told him her age at 20 years and that she was not at school, it is worth noting that the appellant never raised these issues with the complainant when she testified in court. His cross-examination was only limited to confirming that she stayed with her as his wife. His defence was clearly an afterthought.

The Court of Appeal in the case of *Hadson Ali Mwachogo Versus republic, (2016)eKLR*, while expressing itself on the importance of proof of age in defilement cases held;

“The importance of proving the age of the victim of defilement under the Sexual Offences Act by cogent evidence cannot be gain said. It is not in doubt that the age of the victim is the essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victims.”

In this case, as stated above, I am convinced that the prosecution proved beyond any doubt that the complainant was 15 years old at the time of the commission of the offence. I am equally convinced that the appellant was aware that the complainant was a minor still in school. His defence that he reasonably believed that the complainant was 20 years old is unbelievable and not supported by any evidence. I find the defence of the appellant lacking in any merit. I accordingly therefore reach the same conclusion as that of the Honourable trial magistrate that the defence raised by the accused on this issue of age does not meet the necessary threshold (section 8(6) and must fail. I so find.

On the issue of sentence, I have considered the sentencing proceedings of the trial court on 11.2.2019. the court, took into account the period the appellant had spent in custody and sentenced him to serve 20 years imprisonment. This was proper and lawful.

In *Republic Versus Stephen Mweizela Mutuku and 2 other (2020)eKLR*, a case cited by the Respondent herein, the court held;

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

In line with this finding and having determined that the sentence passed herein was proper and lawful, I find no reason to interfere with the sentence meted out by the lower court.

The sum total is that the appeal of the appellant dated 18.1.2019 lacks in any merit. I accordingly dismiss the same. Orders accordingly.

D. O. OGEMBO

JUDGE

17.11.2021.

Court:

Judgment read out in court (on-line) in the presence of the appellant (Kamiti) and Ms. Ndombi for the Respondent.

D. O. OGEMBO

JUDGE

17.11.2021.