**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KILGORIS**

**CRIMINAL APPEAL CASE NO. E016 OF 2021**

**(CORAM: F.M. GIKONYO J.)**

**(**Being an appeal from the judgment of Hon. R.M. Oanda (P.M) in Kilgoris SOA case No. 51 of 2018 delivered on 10/2/ 2020).

**SIMION KIPNGETICH ROTICH.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. It was alleged that the appellant on 9th November 2018 at [Particulars Withheld]Village Mogor Location in Transmara East Sub-County within Narok County intentionally and unlawfully caused his penis to penetrate the vagina of **MC** a child aged 14 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 9th November 2018 at [Particulars Withheld] Village Mogor Location in Transmara East Sub-County within Narok County, he intentionally touched the vagina of **MC** a child aged 14 years with his penis.

3. The appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.

4. Being dissatisfied with the said judgement the appellant lodged an appeal on grounds summarized as follows: -

**i. That the matter of defilement before court was out of domestic feud that existed between the girl's family and his family over land dispute.**

**ii. That the learned trial magistrate erred both in law and facts by convicting and sentencing the appellant to 20 years without any credible evidence from the doctor's evidence.**

**iii. That the learned trial magistrate erred both in law and facts by convicting and sentencing based on shoddy police investigation.**

**iv. That the learned trial magistrate erred in both law and facts by basing conviction out of coerced and intimated testimony given by the girl in question when put in custody for five days being grilled by police.**

**v. That the learned trial magistrate erred in both law and fact by not considering the girl was aged 20 years by the time of the allegation as stated by the doctor.**

**vi. That the learned trial magistrate erred in both law and fact failing to notice that the doctors evidence never prove penetration.**

**vii. That the magistrate further erred in both law and facts to have relied on non-factual evidence with any tangible or concrete supporting proof from the police or the witness who testified against him.**

**viii. That the learned trial magistrate erred in law and in fact in finding that the prosecution proved its case beyond reasonable doubt;**

5. Parties exchanged written submissions in support of their arguments.

**Appellant's Submissions**

6. The appellant submitted that the accusations against him was fabricated. PW1; the complainant was tortured and coerced through intimidation in the police cells.

7. The appellant submitted that the prosecution case was full of contradictory and inconsistencies in their evidence.

8. The appellant submitted that the evidence of the doctor did not connect him to the alleged defilement.

**Respondent's Submissions**

9. Mr. Ondimu OGW, senior prosecution counsel in opposing the appeal submitted that age of the complainant was proved by PW1, PW2 and corroborated by evidence of the clinical officer PW5 that she was 14 years old. PW5 produced an age assessment report **P Exh3.** The appellant has not placed any material before this court to dispute the age of the victim.

10. On the issue of penetration, the respondent submitted that penetration was proved to the required standards through the testimony of PW1 and PW5.

11. On the identity of the perpetrator, the respondent submitted that the appellant was well known to PW1 and therefore there was no mistaken identity. That the appellant had spent considerable time with the appellant.

12. The respondent further submitted that no questions as to grudge were ever put to PW1 by the appellant.

13. In conclusion, the respondent submitted that the prosecution did discharge its burden of proof. The conviction of the appellant was proper. They therefore urged this court to dismiss the appeal.

14. The respondent relied on the following authorities in support of its case;

**i. Section 107(1) of the Evidence Act**

**ii. Woolmington V Dpp [1935] AC 462**

**iii. Miller V Minister Of Pensions [1947]2 ALL ER 372**

**iv. Japheth Gituma Joseph & 2 Others Vs R [2016] eKLR**

**v. Florence Wanjiku Mwamunga & Another V Republic [2018] eKLR**

**vi. Kyalo Kioko V Republic [2016] eKLR**

**vii. Mwalango Chichoro Mwanjembe V Republic [2016*] eKLR***

**ANALYSIS AND DETERMINATION**

15. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See ***Okeno vs. Republic [1972] E.A 32.***

16. The issues that arise for determination in this appeal are;

**i. Whether the prosecution proved its case to the desired threshold;**

**ii. Whether there existed a grudge.**

**Elements of offence of defilement**

17. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act which provides:

**8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**8(4) "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

18. The specific elements of the offence defilement arising from Section 8 (1) of the Sexual Offences Act which the prosecution must prove beyond reasonable doubt are:

**1) Age of the complainant;**

**2) Proof of penetration in accordance with section 2(1) of the Sexual Offences Act; and**

**3) Positive identification of the assailant.**

19. See the case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

**"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

20. What does the evidence portend?

**Age of the complainant**

21. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

22. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

23. The appellant argued vehemently that the victim was aged 20 years at the time of the incident.

24. PW1 testified that she was in class 8 at [Particulars Withheld] Primary School. PW2 a brother to PW1 testified that her sister was aged 14 years. PW5 a clinical officer stated that, upon age assessment, it was found that PW1 was 14 years old at the time. PW5 produced the age assessment report as **P Exh 3.**

25. On this question of age, I am content to cite the case of ***Fappyton Mutuku Ngui vs. Republic [2012] eKLR*** where it was held:

**... That "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.**

26. I find the age of the victim was 14 years old.

**Penetration**

27. Section 2(1) of the Sexual Offences Act defines penetration as:

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

28. In the case of ***Mark Oiruri Mose v R [2013] eKLR*** the Court of Appeal stated that:

**"Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."** (Emphasis added).

29. In light thereof, it is totally indefensible the argument by the appellant that the trial court misconstrued the evidence of PW5, Clinical officer Samuel Sankey Tasur on penetration.

30. Samuel Sankey Tasur testified as PW5 and produced the P3 Form and the Post Rape Care Form (PRC Form) in evidence. According to the P3 Form, PW1 had injuries which were six days old. To the genitalia there was no visible injuries or injuries noted. The hymen was broken but not fresh. No possible injuries. The witness concluded that there was no signs of recent defilement.

31. PW5 was very clear that penetration did occur. Notably since the incident was reported late, the injuries were 6 days old. However, this does not rule out penetration. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I accordingly find so and reject the appellant's argument that since there was no possible injuries was not proof of

penetration.

32. PW1 testified that the appellant took her to Sotik at appellant's mother house where the two slept together and had sex and never used protection.

33. The submission by the appellant that there were no samples of either blood, sperms hair or clothes taken for forensic test or DNA to link him with the said defilement case may not yield much for purposes of proof of penetrations. I find that the medical evidence supports there was penetration of the child. But by whom? This is the mega question.

**Was the appellant the perpetrator?**

34. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

35. I am aware that the appellant claims that the complainant was tortured and coerced through intimidation by police. That the complainant was put in cells after she denied having had sexual intercourse with the appellant.PW2 and PW3 testified that PW1 was found together with the accused in their hide out in Sotik. On 20/11/2018 the complainant while testifying lied to the court and refused to cooperate with the state counsel and she was placed in custody till the next day. PW1 never stated that she was coerced to testify.

36. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim was proved beyond doubt. The conviction was therefore proper.

37. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

**Whether there existed a grudge.**

38. The appellant simply testified that the complainant's father wanted to take away their land which explains why they brought up the charges. I do not find anything which show that there was a grudge between the two families. The defence is mere afterthought. I dismiss this ground of appeal.

**On sentence**

39. The appellant argued that the sentence is manifestly excessive in the circumstances of this case. The trial court applied Section 8 (3) of the Sexual Offences Act to convict. The section provides:

> **"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

40. The offence is serious. I take into account that the accused is first offender. I also take into account that he showed no remorse at the trial as was observed by the trial court. In the circumstances, 20 years' imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

41. In the upshot, the appeal herein is dismissed.

**Section 333(2) CPC.**

42. The appellant was first arraigned in court on 19/11/2018. He was released on bond on 1/3/2019. There is not much benefit he can derive from this section.

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF DECEMBER, 2021**

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**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

1. Appellant

2. Ondimu for Respondent

3. Kasaso - CA