



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**HCCR. APPEAL 125 OF 2015**

**BETWEEN**

**JOSEPHAT GITAU NGUGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court*

*at Kigumo Cr. Case No. 2245 of 2014 delivered by Hon. A.Ogonda, RM on 17<sup>th</sup> November, 2015).*

**JUDGMENT**

1. The Appellant was charged with Defilement contrary to **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006** with the particulars of the offence being that on 22.10.2014 at about 3.30 pm at [particulars withheld] village in Kigumo sub-county within Murang'a County, he intentionally caused his penis to penetrate the vagina of MMO, a child aged 9 years.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** whose particulars were that on 22.10.2014 at about 3.30 pm at [particulars withheld] village in Kigumo sub-county within Murang'a County he intentionally touched the vagina of MMO, a child aged 9 years with his penis.
3. In its judgment the trial court found him guilty of the offence of defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006 and sentenced him to life imprisonment.
4. The Appellant has appealed against the conviction and sentence vide an undated Petition of Appeal filed on 01.12.2012 later edited into what he referred to as Amended Memorandum Grounds of Appeal filed on 01.09.2020. He set forth six grounds of appeal which I shall coalesce as follows;
  - a) That the sentence was harsh, manifestly excessive and unconstitutional on its mandatory maximum nature in view of the cases of **Francis Karioko Muruatetu & another v Republic [2017] eKLR and Yawa Nyale vs. R [2018]e KLR.**
  - b) That the learned trial magistrate erred in law and fact by convicting him without considering his defence in respect to there being nothing found on the complainant's private parts, that PW2 adduced hearsay evidence, the lack of initial report by the complainant and the failure of the investigating officer to come to court to testify.
  - c) That the Learned trial magistrate erred in law and fact in failing to appreciate that the critical element of the offence being penile penetration were not proved hence the case was not proved to the required standard.

**Submissions**

5. The Appellant was cognizant of the essential ingredients of the offence facing him that must be proved to the required standard as follows; age of the Victim, penile penetration and identity of the offender. It was his contention that the said ingredients were not proved to the required standard. He faulted the trial court for relying on the evidence of PW1 who used the words "the organ used to urinate" instead of penis and vagina respectively. He is of the view that if there was indeed penetration, breaking of hymen and considering the age of the victim there would have been profuse bleeding which was not so. Further that the absence of the hymen on its own would not suffice in proof of the offence of defilement. That the age of the injuries sustained by the Appellant was not ascertained. That the investigating officer did not visit the scene. In his view, absence of such proof casts doubts into the prosecution case. It was his submission therefore, that the case was not

proved beyond a reasonable doubt.

6. On sentence, the Appellant urged the court to invoke its inherent powers and consider his mitigation whilst being persuaded by the reasoning in **Karioko Muruatetu's case** [supra]. He further urged the court, in the event that the conviction is upheld, that sentence be tabulated from the date of his arrest.

7. Learned counsel for the Respondent, Miss Gichuru opposed the appeal on grounds that the prosecution case was cogent and the sentence given to the Appellant of life imprisonment was also lawful. She opined that the prosecution proved the case beyond all reasonable doubt. That the testimony on the age of the victim was stated to be 9 years by the victim herself, her mother and the clinical officer who examined her. That PW1 properly demonstrated penetration by the Appellant in her testimony. That he grabbed her on the neck and dragged her to a nearby forest where he inserted his penis into her vagina and defiled her which caused her pain. It was also her testimony that two people came along and found the Appellant defiling her. In that case therefore, the issue of the identification of the Appellant was not in question.

8. Counsel for the Respondent further submitted that the evidence by PW1 was corroborated by PW3 who testified as an eye witness who was at the scene. His evidence was that they heard noises coming from the wood while walking home together with another man and on going to check they found the Appellant on top of a school girl having sexual intercourse with her.

9. Counsel further relied on the P3 Form which showed that the Victim sustained some superficial bruises on the interior neck and back of the neck, bruises on the labia minora and the hymen was broken.

10. In reply to the Appellant's assertion that the age of the injuries was not indicated, Counsel submitted that PW4 who examined the Victim noted the injuries referred to above and that the examination of the Victim was done only one day after the incident, a fact that was restated by PW4.

11. The Respondent also found no fault in the mode of identification of the Appellant as the Appellant was positively identified by PW1, PW2 and PW3 all who had seen him before.

12. Counsel was unconvinced by the Appellant's contention that he was charged for failing to bribe the two men with kshs. 2,000/ and dismissed the same to be illogical.

13. In view of the foregoing the Respondent urged the court to uphold both the conviction and the Sentence.

#### **Summary of evidence**

14. I have read through the record of the trial court in order to evaluate for myself the evidence placed before the court. This is my duty as the first appellate court. I have borne in mind however that I did not myself see and hear the witnesses testify, and I have given due allowance for that fact. **See Okeno v Republic [ 1972] EA 32.**

15. This is a case in which the Appellant was caught red handed defiling the victim **MKM (PW1)** a girl aged nine years. On the material dated 22<sup>nd</sup> October, 2014, at about 3.30 pm, the victim who testified as PW1 was walking home from school with other children. She was still in her school uniform when the Appellant grabbed her by the neck on the sweater and dragged her into a nearby forest that was about 100 meters from the road. It is there that he forcefully stripped her naked after felling her to the ground after which he removed his trousers and underpants and started defiling her. She screamed for help. Two men who were walking on the road heard her screams and were attracted to the forest. There, they found the Appellant red handed defiling the PW1. They commanded him to stop and conducted a civilian arrest after ordering him to dress up. They then took him to a nearby shopping centre where PW1's mother **DN (PW2)** was. The men were also accompanied by PW1 where they reported the matter to PW2. There were many members of public who wanted to mob justice the Appellant but the father to PW1 who was present deterred them urging that the law takes its course. Accordingly, a village elder was informed and the Appellant was escorted to Kinyona Police Post and thereafter to Kigumo Police Station where the matter was formally reported. PW1 in the company of her mother were referred to Kigumo Health Centre where she was examined and treated.

16. According to both PW1 and 2, the Appellant was known to them. PW1 had seen him around the village for about one month. According to PW2, he was a farmhand employed in the neighbour's farm where she and her husband were routinely engaged to pick tea. It was her testimony that on this date, they went to pick tea as usual but the Appellant was not present at the home. He had sought three days off duty. She was surprised when he was on the material date frog matched to Boro shopping centre where they were selling the tea. According to PW2 the **Appellant did not deny that he was caught red handed defiling PW1.**

17. **PW3, SMM** was a villager and one of the eye witnesses to the incident. Whilst corroborating the evidence of PW1 and 2 he testified that he and another man were walking on the road when they heard cries of a little girl inside trees. They moved into the thicket where they found the Appellant on top of the little girl defiling her. They gave him time to dress up after which they conducted a civilian arrest and thereafter escorted him to where the parents of PW1 were.

18. **PW4, James Mwangi Karuga** was a Senior Clinical Officer from Kigumo Health Centre who confirmed that PW1 was treated at the facility on 23<sup>rd</sup> October, 2014. On examination, there were superficial bruises on the anterior neck region and her abdomen was soft and tender. There was mild bruising of labia minora, the hymen was broken with no active bleeding. Further, that the approximate age of the injury was assessed as one day. He adduced the P3 Form as well as treatment notes from Kigumo Health Centre as evidence.

19. After the close of prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement and called one witness in support of his defence. According to his statement, he stated that two men came to his place of work and wanted to know whether he had arrived. They insisted that he had done something and sought a disclosure from him. When he declined, they asked him to accompany them to the police station. Before that, he stated that they had demanded for a bribe of

Kshs. 2,000/= so that they could drop the matter. He stood ground that he had not done anything wrong and he was accordingly escorted to the police station. He claimed that he was beaten by the two gentlemen before he was handed over to the mother of PW1. He insisted that he did not resist the arrest because he knew that he was innocent.

20. **DW2, LWG** the mother to the Appellant stated that the Appellant left for work on 22<sup>nd</sup> October, 2014 at about 6.00 am. He called him at about 3.00 pm but he did not answer his phone. That later, the Appellant called her back to say that he had been arrested and accusations of defilement framed against him after he had failed to give a bribe of Kshs. 1,500/=. He also added that the people who wanted to arrest him wanted to sell his mobile phone and obtain money for a bribe. DW2 stated that she asked the Appellant to speak the truth because he was innocent. She added that the Appellant had offered to give money to the complainant's mother so that the case could be withdrawn but the same did not happen. She insisted that the Appellant was innocent.

### **Determination**

21. Section 8(1) of the Sexual Offences Act defines defilement as:

***“a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”***

To prove an offence of defilement, the following elements must be established:

***(1) Proof of penetration;***

***(2) Proof of the victim's age;***

***(3) Proof of the perpetrator's identity.***

22. PW1 vividly narrated how the incident took place, that as she was walking home from school at around 3.30 pm she was grabbed by the neck by the Appellant who was known to her as she had seen him before, who dragged her into a nearby forest where he removed his and her clothes and threw her on the ground, lay on top of her and inserted his organ that he urinates with into her organ that she urinates with which caused her pain and she was screaming. She went on to say that, while that was going on two men came to her rescue. That evidence was corroborated by PW3 who is one of the men who came and witnessed the Appellant having sexual intercourse with the girl dressed in school uniform. It follows that the Appellant was caught red-handed and that the issue of his identification cannot be in issue. Furthermore, PW3 recognized the Appellant as they had worked with him at the tea farm. PW2, the mother to the victim also recognized the Appellant as a co-worker at the tea farm.

23. The P3 Form and treatment notes of the Victim as produced by PW4 showed injuries sustained by the Victim as bruises and tenderness on the neck, bruises on the labia manora and absence of hymen, with a conclusion that there was defilement of the Victim. PW4 did confirm that the injuries were only one-day old. This was consistent with the testimony of PW1, PW2 and PW3.

24. The Appellant took issue with the fact that the Victim was not candid as to what organ of his body was inserted into the organ she uses for urinating. This was in reference to the Victim's testimony that the Appellant inserted his organ for urinating into the organ she uses for urinating. It is common sense that male human beings use the penis as the only organ for urinating. Female human beings too only have the vagina as the only organ they use for urinating. This interpretation does not require a technocratic or dictionary reference. For this reason, it is doubtless that the Appellant inserted his penis into the Victim's vagina which amounted to penetration, a key ingredient of the offence of defilement.

25. As regards to proof of the age of the Victim, this is a case in which no documentary evidence was adduced. The proof of the age is very critical in an offence of defilement as was held in the case of **HADSON ALI MWACHONGO vs. REPUBLIC [2016] e KLR** that;

***“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an 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 victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu), the Court stated as follows;***

*„In its wisdom Parliament chose to categorize the gravity of that offence 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).?”*

27. Nevertheless, age must not be necessarily established by documentary evidence. The standard of proof can still be satisfied even when aged is demonstrate by oral evidence or medical examination. Oral evidence may include the evidence of the victim or of a person close to him/her.

28. In the instant case, PW1 categorically stated her age as being 9 years and that she was a school going child in class three at the time of the incident. The same was repeated by her mother, PW2. No better person than the mother to PW1 could ascertain her age. PW1's age was also captured on the P3 Form as 9 years. I am in no doubt that that the element of age was also established.

29. In view of the above I find that the ingredients of the offence were sufficiently proved in respect to penetration, the age of the victim and the identity of the perpetrator. The prosecution thus met the required threshold of prove in this case.

30. As regards the sentence, Section 8(2) of the Sexual Offences Act states –

**“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”**

31. It suffices to state that following the Supreme Court decision in the case of **Francis Karioko Muruatetu & another v Republic [2017] e KLR** minimum mandatory sentences are no longer the norm. A trial court is enjoined to take into account the circumstances of the case in exercising its discretion in sentencing. The court must however apply the sentencing guidelines set out by courts. For instance, in the case of **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 it was held that:

*“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”*

32. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

*“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”*

33. The Appellant in mitigation only pleaded for leniency and asked the court to consider both sides. I do not find any evidence adduced by the Appellant to invoke the court’s discretion to interfere with the said sentence in the manner suggested by the Appellant. The Appellant committed a shameless act of defiling a very young girl who to his knowledge was school-going. I say so in view that the Victim was in school uniform at the time. He damaged her life entirely. He deserves no mercy.

34. I accordingly find that the prosecution proved its case beyond a reasonable doubt. I uphold both the conviction and sentence, consequent which I dismiss the appeal in its entirety.

**DATED AT MURANG’A THIS 3<sup>RD</sup> DAY OF DECEMBER 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant in person.
2. Mr. Waweru For the Respondent.