



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 16 OF 2018**

**JACOB MUTINDA KINYAIKA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the Judgment of Hon. S.K. Ngii SRM delivered on 21/03/2018 in Mutomo SPMCR no. 20 of 2017).*

**JUDGMENT**

1. **Jacob Mutinda Kinyaika** the Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The complainant was aged 14 years.
2. Upon conviction, he was sentenced to twenty (20) years imprisonment. He was aggrieved by the judgment and filed this appeal on the following grounds: -
  - a) **That**, the learned trial Magistrate erred in both law and facts by failing to find that the Appellant was misled into believing that the complainant was under age(?).
  - b) **That**, the trial court faulted the points of law and facts that the prosecution side did not prove their case beyond reasonable doubts as required by the rule of law.
  - c) **That**, the prosecution evidence was riddled with contradiction malice and inconsistencies, hence could not have been relied upon to base the conviction.
  - d) **That**, the learned trial Magistrate erred in both law and facts by rejecting his defence of alibi without giving any cogent reasons for doing so.
3. The prosecution case is premised on the evidence of six (6) witnesses. The complainant **CMM**, who testified as Pw1 said she was born on 03/04/2003. It was her evidence that on 10<sup>th</sup> December, 2017 at 6:00 pm while on her way to her grandfather's home at Syamatani, she met the Appellant who was riding a motorbike. He offered to take her to the place but instead took her to his home at Kalulini which is off the road to Syamatani. She asked him to stop but he refused.
4. The Appellant ushered her into his house and into the bedroom. She lay on the bed after abut of resistance and he joined her. It was about 8:00 pm by then. He removed her pant leaving her with her skirt. He then inserted his penis into her vagina. She told him she did not want to have forced sex. Later she heard a knock on the door. The Appellant opened the door and a police officer entered. The officer was accompanied by her mother, siblings and a community policing man.
5. The Appellant was arrested and handcuffed and both of them were taken to Mutha police station from where she was taken to hospital the next day. She identified the treatment notes, P3 form and age assessment report which were later produced as EXB1 – 3. She said she knew the Appellant as they attend Sunday school service at the same church. She said she suffered injuries on her genitals as a result of the sexual activity. She said she had told the police she was 18 years old but this was because she did not know her age.
6. In cross examination she confirmed that this was the first time she was having sex with the Appellant. It was forced sex. She said she admitted having told him she was 18 years old.
7. Pw2 **KM** who is Pw1's mother left church on 10/12/2017 at 6:00 pm for home. On arrival she did not find Pw1 and was informed by one

Kathuri that Pw1 remained at the posho mill. Pw2 went to look for her. The maize which was to be ground by Pw1 was brought home by K. Pw1 had not told her she would be going anywhere else. K had a phone and was in contact with Pw1. It was realized that Pw1 was in fact communicating using the Appellant's phone.

8. The search now turned from Pw1 to the Appellant. Assisting in the search was Pw1's elder sister P (Pw3). The police were alerted and they all moved to the Appellant's home from where he was arrested. The Appellant and Pw1 were taken to the police station. It was her evidence that Pw1's birth certificate got burnt, so she did not use it to register her for the Kenya Certificate of Primary Education (K.C.P.E). Pw3 gave similar evidence to that of Pw2.

9. Pw4 **David Kalumbeta Lendi** the area chairman of nyumba kumi received the report from Pw2 and took necessary action to report the incident. Later they traced Pw1 at the Appellant's home.

10. Pw5 **No. 91695 PC Samson Mindoti** is the investigating officer. He was part of the team that went to the Appellant's home to effect the arrest. He said the report they had received was that the Appellant had started living with a 14-year-old. However, when Pw1 came to the station she told them she was 18 years old.

11. She was taken for age assessment and the report showed she was 14 years old. She was invited to do a further statement but she did not heed the call. He also asked her to avail the clothes she wore on the material day but she did not bring them. He produced the age assessment report (EXB1).

12. Pw6 **Benjamin Mwanzia** is the clinical officer who examined Pw1. He found her to have:

- Bruises on the labia minora and majora
- Broken vaginal hymen
- Blood stained discharge from vagina
- High vaginal swab (HVS) revealed the presence of spermatozoa.

Conclusion was that defilement had taken place. He produced the treatment notes and P3 form (EXB2 and 3).

13. The Appellant gave an unsworn defence and called no witness. He stated that on 10/12/2017 at 6:00 pm, Pw1 followed him voluntarily and told him she was 18 years having been born in March 1999. At the AP camp she repeated the same thing. She denied that she was 14 years old and that her birth certificate was burnt. He said even the P3 form shows she is 18 years of age.

14. During the hearing of the appeal, the Appellant relied on his written submissions. He has submitted that all along he knew Pw1 was 18 years of age and that's what she told even the police.

She deceived him into believing she was 18 years old. He referred to the case of **Martin Charo –vs- R (2016) eKLR**.

15. He further submits that the medical evidence was not conclusive as it did not prove penetration. That a DNA test should have been conducted to connect him to the offence. Even the complainant's clothes he says were never retrieved for analysis.

16. The Appellant further submits that the prosecution evidence was riddled with inconsistencies and contraventions which he did not bring out clearly.

17. Mr. Mamba learned counsel for the Respondent opposed the appeal. He said age was proved to be 14 years, penetration was proved and the Appellant was identified.

### **Analysis and determination**

18. This is a first appeal and this court has a duty to re-analyse and reconsider the evidence to arrive at its own conclusion. It should also bear in mind that it did not see or hear the witnesses and give an allowance for that. **See Okeno –vs- R 1972 E.A 32; David Njuguna Wairimu –vs- R (2010) eKLR.**

19. Having considered the evidence on record, grounds of appeal, submissions by both parties and authorities cited, I find the main issue falling for determination to be whether the prosecution proved its case against the Appellant to the required standard. The sub issues I will therefore deal with are: -

- i. Proof of age of complainant.
- ii. Whether Pw1's genital organ was penetrated
- iii. Whether the Appellant was identified as the perpetrator
- iv. Whether his defence under section 8(5) Sexual Offences Act was adequately considered.

**Issue (i) Proof of age of complainant.**

20. On this, Pw1 – Pw3 claimed that they were not in possession of Pw1’s birth certificate as the same had been burnt. An age assessment was done at Kitui district hospital and she was found to be 14 years old by Doctor Mamdam who did the assessment. A report (EXB3) was produced. She was therefore proved to be 14 years of age.

**Issue (ii) Whether Pw1’s genital organ was penetrated**

21. Pw1 explained that she had sex with the Appellant in his house on his bed that night. She explained what happened and added that she suffered injuries in her genitalia. Pw6 who conducted the examination on her, is clear on his findings which I have set out hereinabove. It was not just about the broken hymen.

22. I find Pw1’s evidence to be safely corroborated by the medical evidence by Pw6. There was penetration of her genital organ.

**Issue (iii) Whether the Appellant was identified as the perpetrator**

23. Again the evidence of Pw1 is clear on this. Pw2, Pw3, Pw4, Pw5 who were present during the arrest confirmed that on the material night Pw1 was found in the Appellant’s house. This is a fact not denied by the Appellant. Infact the Appellant does not deny having had sex with Pw1. His defence is that he believed that she was 18 years old.

24. My finding is that it’s the Appellant who penetrated Pw1’s genital with his male organ.

**Issue (iv) Whether his defence under section 8(5) Sexual Offences Act was adequately considered.**

25. From his cross-examination of Pw1 he raised issue with Pw1’s age. He said Pw1 told him she was 18 years old and she had no birth certificate. In other words, the sex was consented. Pw1 admitted having told him that she was 18 years of age and she told the police the same thing. Page 3 of the P3 form filled by Benjamin Mwanzii (Pw6) on 11/12/2017 shows that Pw1’s age is 18 years. This means Pw1 also gave him that information.

26. Following the push and pull, Pw1 was taken for age assessment. The document (EXB3) which is one-page paper shows that Pw1 was 14 years as at 15/12/2017. It shows nothing more. It does not even show how the doctor came to conclude that she was 14 years old.

27. The learned trial Magistrate addressed this issue and concluded that the Appellant had failed to convince the court of his reasonableness in believing that Pw1 was 18 years.

**28. Section 8(5) Sexual Offences Act provides: -**

**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 eighteen 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 eighteen years.*

**Section 8(6) provides: -**

*“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.*

29. When an accused person raises such a defence the burden shifts to him to satisfy the court that the complainant either by word or actions deceived him into believing that she was an adult. There is no dispute that indeed Pw1 told the Appellant that she was 18 years old.

30. According to Pw2 the daughter (Pw1) had not told her she would be going anywhere that evening. It’s said she left her cousin with maize at the grinding mill pretending she was going to relieve herself. She was however busy chatting with her said cousin on phone using the Appellant’s phone since she did not have a phone. That is how the family knew she was with the Appellant and they started tracing her.

31. She has not been described as a person who was in distress, by the family members she talked to. I am also wondering under what circumstances they were (*i.e. Pw1 and Appellant*) talking about her age. Was it when she allegedly got the ride or when they were in the Appellant’s house? I find her story of going to her grandfather’s home to have been just a make up to fool the mother (Pw2). The Appellant and Pw1 are persons who were relating and this incident of 10/12/2017 was well planned.

32. Pw1 may have appeared small body wise as stated by the learned trial Magistrate but her friend (Appellant) believed her when she told him she was 18 years. It is obvious why she was telling him that at the time they were together. She conducted herself as an adult. She never resisted getting into the Appellant’s house upto the bedroom. The Appellant said he believed when she told him she was an adult.

33. She lied to the Appellant, the police and the clinical officer about her age. She lied to her mother and sister about heading to her grandfather’s. She also lied to her cousin K when she left her with the maize at the grinding mill pretending to go to relieve herself. All

things and circumstances placed together I find Pw1 not to have been a credible witness. I find some truth in the Appellant's defence, which was not considered by the trial court.

34. I find merit in the appeal which I allow. The conviction is quashed and the sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 8<sup>th</sup> day of May 2020, at Makueni High Court.**

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**H. I. Ong'udi**

**Judge**