**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 9 OF 2019.**

**SYLIVESTER KIMEI...............................................APPELLANT**

**VERSUS**

**REPUBLIC..........................................................RESPONDENT**

***(Being an Appeal from the conviction and sentence of the Resident Magistrate Hon. E. KELLY delivered on 14th of June 2018 in Nakuru Cr. Case No. 1231 of 2013.)***

## JUDGMENT

1. The appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between 15th day of April 2013 and 1st November 2013 at [particulars withheld] Village in Njoro within the Rift Valley Province, unlawful committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of **MC** a child aged 16 years which caused penetration.

2. The appellant 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 are that, on diverse dates between 15th of April 2013 and 1st November 2013 at [particulars withheld] Village in Njoro within the Rift Valley Province, the accused unlawfully and intentionally committed an indecent act to a child namely **MC** a child aged 16 years by touching her genital organs namely vagina with his male genital organs namely penis.

3. The appellant denied the main charges and the alternative charge. The case proceeded for hearing with the prosecution calling 4 witnesses in support of their case while the appellant gave sworn defence and called 2 witnesses. By the judgment delivered on 7th of June 2018 the trial magistrate convicted the appellant of the main charge of defilement. He was sentenced on 14th June 2018 to serve 15 years' imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal challenging the conviction and sentence on 7 grounds:-

> *i. The learned Trial Magistrate erred in law and in fact by convicting the Appellant based on offence of defilement that was not proved beyond doubt.*
>
> *ii. The learned Trial Magistrate erred in relying on the prosecution's evidence which was weak and incapable of sustaining a conviction.*
>
> *iii. The learned Trial Magistrate erred in law and in fact by convicting the appellant under **Section 8(1) of the Sexual Offences Act as read with Sub section 4** thereof, without sufficient evidence and without making a specific finding as to whether the Appellant in fact defiled the complainant on the date, time and place indicated in the charge sheet.*
>
> *iv. That the learned Trial Magistrate completely misunderstood the case that was before her, misconceived the issue and as a result came to a wrong decision.*
>
> *v. That the learned Trial Magistrate erred in fact and in law by disregarding the evidence of the defence witnesses.*
>
> *vi. That the learned Trial Magistrate erred in fact and law by disregarding the fact that PW 1 was never recalled for cross examination.*
>
> *vii. That the learned Trial Magistrate erred in law and in fact in convicting the Appellant without conducting an age assessment on PW 1.*

5. The State opposed the appeal on both conviction and sentence. Both parties agreed to dispose of the appeal through written submissions.

6. The appellant's advocate on 5th November 2019 intimated to the Court intention to withdraw appeal against conviction and retain appeal against sentence. He however indicated that he wished to consult before doing so. This was not done after. Parties agreed to proceed by way of written submissions and the appellant's Advocate submitted on both conviction and sentence. I will therefore consider appeal on both conviction and sentence.

**APPELLANT'S SUBMISSIONS**

7. In written submissions dated 26th June 2019 and filed on the same date, the appellant submitted that the age of the complainant was not proved beyond reasonable doubt and the birth certificate produced could not be relied upon to prove the age of the complainant as the same raised a lot of doubt and in the interest of justice and fairness, the complainant should have been taken for age assessment. He submitted that the age of the complainant is a crucial element that need to be strictly proved to the required standard as the consequences of the offence flows from age.

8. Counsel submitted that there were inconsistences in regard to the age of the complainant as PW2 the father of the complainant testified the complainant was 16 years having been born on 8th July 1997 and not on 6th July 1997 as indicated in the birth certificate. The P3 form produced did not indicate the age of the complainant; that the complainant testified that she was born on 26th June 1994 and 19 years as at 15th April 2013; that she later changed to June 1996. Further PW4 who produced the birth certificate testified the complainant was born on 6th July 1997 and the certificate was issued in 2001; that she gave conflicting information as to her age thus putting her credibility in question. The appellant cited the case of **Hadson Ali Mwachongo Vs Republic (2016) eKLR** and the case of **Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009 (Kisumu).**

9. The appellant further submitted that the trial magistrate extensively dealt with the evidence of identification as opposed to the evidence relating to the alleged sexual offence and the court failed to record the reasons why they believed the complainant's testimony.

10. The appellant submitted that the charge was preferred by PW2, the complainant's father, to settle the old scores between him and DW2 who is the accused's father as testified by the defence witnesses; that clearly shows there was bad blood between the PW2 and DW2; that the two are sworn enemies and the defence of bad blood was not rebutted by the prosecution.

11. The appellant further submitted the case lacked a complainant as the alleged complainant never reported to her parents or the police station that she had been defiled despite being 7 months pregnant; that report was made to the police by PW2 and both the complainant and the appellant were arrested; that there was clearly a broken father-daughter relationship because when the complainant was released from police station and custody given to his father PW2, she disappeared without a trace and could not be found to come to Court after the appellant requested that she be recalled for cross examination; that the complainant had lost interest in the case thus the trial magistrate erred in convicting the appellant in the absence of a complainant.

12. Further that there was doubt as to whether the complainant was ever examined in a health facility. The appellant concluded that the prosecution did not prove the ingredients of defilement, therefore the Court should find the appeal merited, quash the conviction and set aside the sentence.

**RESPONDENT'S SUBMISSIONS**

13. The state through state counsel **Rita Rotich** filed written submissions dated 9th May 2020. She submitted that the core elements to be proved in a case of defilement are as follows: -

i. Age of the Complainants

ii. Positive identification of the Accused.

iii. Penetration.

14. On age she submitted that PW2, the complainant's father stated his daughter was born in June 1997 and the birth certificate was produced by PW3 the investigation officer as exhibit 3. That this served as sufficient proof the complainant was a minor. She stated that age assessment was not carried out on the complainant but this did not extinguish the prosecution case as a birth certificate was substantive proof of age.

15. She cited **Criminal Appeal 182 of 2014 Republic V Wesley Kipngeno Chirchir [2015] eKLR** where the Court stated that while the age of a minor is a critical component the absence of an age assessment report does not render a case fatal and an age assessment is not the only conclusive way to prove age. Further the court stated that "**a birth certificate is an official"** document which provides credible and conclusive proof of the complainant's age.

16. On identification, she submitted that PW1 positively identified the accused in Court and described her relationship with the accused as one of husband and wife stating they had been neighbors for 2 years. The complainant admitted to cohabiting with the accused for 3 months. PW2 led the police to the house of the accused who was found with the complainant. PW3, the Investigating officer identified the accused on the dock as the person he had found with the minor in his house during the arrest.

17. She cited **Criminal Appeal 267 of 2013 Republic Vs Daniel Kipyegon Ng'eno** where **Justice M. Mativo** stated that "**the positive**

**identification of an accused is an essential element of any offence.** It **is a fundamental part of the criminal process, properly obtained, preserved and presented, eye witness testimony directly linking the accused to the commission of an offence, likely the most significant evidence of the prosecution**".

18. On penetration, the state counsel submitted that medical evidence was tabled before the Court by PW4, who examined the minor. The findings from examination were that the complainant had a perforated hymen and the presence of vaginal discharge. Laboratory tests revealed the complainant was 7 months pregnant. The complainant disclosed in Court that from the duration she had lived with the accused, she had engaged in sexual intercourse with him on several occasions.

19. In respect to defence evidence, she submitted that the appellant stated that there had been a grudge between the two families resulting in the fabrication of the case against him. The Appellant claimed there had differences between his father and the complainant's father. That the appellant however failed to provide any documentary evidence to prove this claim. Worth noting was that the same allegation was negated by DW2, the accused's father who stated he had a rosy relationship with the complainant's father and had not differed. The idea of a grudge was far-fetched and an afterthought. The accused denied defiling the minor but admitted he knew the minor well and indeed she had resided at their home.

20. In respect to failure to recall PW1, the state counsel submitted that the defence counsel had made an application for PW1 to be recalled for cross examination. The Court granted this prayer on the condition that the Complainant would appear in Court subject to her availability. PW3 the investigating officer disclosed to the Court that the complainant was reported missing after testifying in Court and up to the close of the prosecution case the complainant was never found and the complainant's father made a report at Njoro Police Station vide OB. No. xx/xx/11/13.

21. She submitted that the Court should take into consideration that the accused was given an opportunity to cross-examine the complainant and the application to re-call the complaint was made in bad faith. The same was made to defeat justice as the accused knew very well the complainant had gone missing and could not be traced. She urged Court to dismiss the Appeal.

**DETERMINATION AND ANALYSIS**

22. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of ***OKENO VS REPUBLIC [1972] EA 32*** where it was stated as follows: -

> **"The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

23. Further in the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336 the Court held as follows: -**

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

24. In view of the above, I have perused and considered evidence adduced before the trial court. I have also considered submissions

a. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt

b. Whether the appellant sentence was harsh and unreasonable.

**(i)Whether the ingredients of defilement were proved.**

25. Ingredients of defilement to be proved are three as captured in submissions being age, identification and penetration. What has been challenged by the appellant is prove of age of the complainant. I note from the complainant's evidence that she stated that she was 19 years and the accused was her husband. She stated that she was born in 1996. She said she voluntary had sex with accused. She stated that she had sex with the accused on several occasions in April 2012 and that her father chased her from home; that she later had sexual encounter with the accused after April 2013 and on 1st November 2013 police arrested her from accused's house. She confirmed that she was 7 months pregnant.

26. On the other hand, the complainant's father testified that the complainant was born on 8th July 1997 through the birth certificate indicate 6th July 1997. He stated that the minor was 16 years old at the time the offence was committed. He said he gave the birth certificate to police. The doctor said the P3 form did not contain the complainant's age but he confirmed that she was 7 months pregnant.

27. I note from the birth certificate produced that the complainant was born 8th July 1997. From the birth certificate her age was 17 years between 15th April 2013 and 1st November 2013 when the incident is alleged to have occurred. No issue of authenticity of the birth certificate was raised by defence. I also note that it was registered on 5th January 2011, this was 3 years before the incident. In my view, it could not therefore be made for this case. In the presence of birth certificate and in view of the fact that its authenticity was not challenged it was not necessary to subject the complaint to age assessment; in any event age assessed by doctors is an estimate. In the case of **Mangunyu Vs Republic, Hon. Justice W. Ouko,** quoting reference from **I.E. Collingwood's Criminal Law of East and Central Africa (London: Sweet and Maxwell) 1967 Edition of page 123 observed:-**

> **"Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at birth."**

28. The birth certificate being a government document, I have no reason to doubt its contents. The complainant was therefore 17 years at the time of the alleged defilement and was therefore a minor when she is alleged to have been defiled.

29. Identification is not an issue as evidence confirm that the appellant and complainant's family lived in the same neighbourhood. Penetration is not also an issue as the complainant was confirmed pregnant.

**(ii) Whether the appellants defence was considered.**

30. Though the complainant stated that the accused was her husband and that he was living with him and engaged in sex, the accused denied having had any relationship with the complainant. He denied having married her. He however said that the complainant moved to stay at his home after disagreeing with her stepmother. DW2 the accused father confirmed that the complainant's family were their neighbours but however denied any bad blood between them; he said being village elder he reported the complainant's father for stabbing his wife;

31. DW2 confirmed that the complainant moved to stay in his first wife's home after disagreeing with her stepmother, he however denied that she lived with the appellant; he said the appellant was living with his 7 brothers. He further said the complainant was 2 years old when he saw her with her father after the death of her mother. He said that the complainant's father had strained relationship with him after reporting him for assaulting his wife. He denied that the complainant was born in 1997. He stated that the complainant's mother died in 1995.

32. Defence however failed to produce any document to confirm that the complainant's mother died in 1995 neither did the appellant adduce any evidence to establish that the complainant was not 17 years contrary to what was indicated in the birth certificate. The appellant never adduced any evidence to the effect that he was misled to believe that the complainant was over 17 years contrary. From the foregoing I find that it is not true that the appellant's evidence in defence was not considered.

**(iii) Whether the appellant sentence was harsh and unreasonable.**

33. The appellant was charged for Defilement contrary to **Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006** which provides as follows:

> **Section 8. (1) of the Sexual Offences Act No. 3 of 2006** states;
>
> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

34. While **Section 8. (4) of the Sexual Offences Act No. 3 of 2006** states;

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

35. The Appellant was convicted for the offence of defilement and sentenced to a jail term of 15 years. The act under which he was charged proved for a minimum punishment of 15 years.

36. I have considered the age of the complainant. I have also considered the circumstances surrounding the commission of the offence. Though the appellant did not admit taking the complainant as a wife and he never raised any issue as to whether he was misled to believe the girl was over 18 years, it appeared the girl considered herself an adult, she even stated that she was 19 years old and was appellant's wife. This could have contributed to her disappearance after testifying. In my view she may have wanted to save the appellant from being jailed or she was misled to act that way.

37. In the case of **Eliud Waweru Wambui Vs Republic [2019] eKLR,** the Court of Appeal judges stated that:

> **"We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years."**

38. I note that the trial magistrate imposed the minimum sentence provided by statute. However, the Supreme Court in the case of **Muruatetu** found that mandatory nature of sentence is unconstitutional as it takes away the discretion of the judicial officer and renders mitigating factors superfluous. I do agree that the trial officers should have discretion to consider circumstances of each case and mitigating

circumstances while imposing sentence. In view of the above, I find that 15 years' imprisonment in this case is harsh. I hereby reduce the sentence to 5 years' imprisonment

39. **FINAL ORDERS**

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed.

3. I hereby reduce sentence to 5 years' imprisonment.

4. Sentence to run from the day appellant was sentenced in the lower court.

**Judgment dated, signed and delivered via zoom at Nakuru This 9th day of July, 2020**

**.....................................**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer - Court Assistant

Mr. Tanga holding brief for Getanda advocate for appellant

Rita for State