**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 26 OF 2019**

**BERNARD WAMBUA MAWEU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence by Hon. C.A Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case (S.O) No. 77 of 2018 delivered on 19th March 2019).*

**JUDGMENT**

1. **Bernard Wambua Maweu** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 16th day of December 2018 within Makueni county intentionally and unlawfully committed an act which caused penetration of genital organ of RMM a child aged 17 years.

He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 16th day of December 2018 within Makueni county intentionally and unlawfully committed an indecent act with RMM by touching her genital organ (*vagina*).

2. The Appellant denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave a sworn statement of defence. After the trial the court

found the Appellant guilty, convicted him and sentenced him to serve 15 years imprisonment.

3. Being aggrieved with the Judgment he filed this appeal raising the following grounds:

a. That the learned trial Magistrate erred in both law and facts by convicting him on insufficient evidence.

b. That the learned trial Magistrate erred in both law and facts by convicting him by not considering the existing grudge between him and the mother of the complainant.

c. That the learned trial Magistrate erred in both law and facts by dismissing his plausible defense without sufficient reasons.

d. That the trial Magistrate erred in both law and facts by convicting him on uncorroborated and contradictory evidence.

e. That the learned trial Magistrate erred in both law and facts by convicting him relying on expert's evidence which was categorical and did not link him with the alleged offence.

f. That the trial pundit Magistrate erred in both law and facts by convicting him while relying on single evidence.

g. That he has high chances of acquittal if this appeal is heard and determined in time.

h. That since he cannot recall all that was attested during the trial process, he prays to this Honourable court to furnish him with a copy of trial proceeding to enable him file on more grounds.

4. **Pw1 (RMM)** who was 17 years at the time of incident testified that on 16th December 2018 at 6:00 am she was viewing herself through her uncle's window panes when the Appellant who was their shamba boy grabbed her and held her mouth with one hand. He uplifted her dress and removed her pant. She did not realize how he had removed his clothes. He inserted his penis in her genitals and anus. Pw2 appeared and the Appellant left. She dressed up and went to

the house and was taken to hospital. She also said that was not the first time he was doing this to her in the farm. She denied being the Appellant's girlfriend.

5. **Pw2 (CWM)** said on this morning she woke up together with Pw1. She remained cleaning the main house whereas Pw1 was in the kitchen. When she finished her chores she went outside to call Pw1 so that they could go to church. She did not find her in the kitchen and so went out to search for her. She found Pw1 and the Appellant at a corner having sex. Pw1 did not have her pant on and the Appellant did not have his trousers on. Pw1 ran away. She reported the matte to her grandmother who reported to her grandfather.

6. **Pw3 No. 107610 P.C Mollent Achieng** received the report and confirmed that Pw1 was 17 years old. She took both Pw1 and Appellant for medical examination. It was confirmed that Pw1 had been defiled.

7. **Pw4 Erick Kasiamani** is the clinical officer who produced the P3 form filled by his colleague Hannignton Maso. The Appellant had no objection to its production. She was examined on 17th December 2018. The findings were:

· Broken hymen

· Foul smelling white discharge

· Urinalysis revealed pus cells

· She had been defiled.

8. The Appellant was also examined with no significant findings noted. He produced the P3 and PRC forms (EXB1 and 2), copy of birth certificate of Pw1 (EXB3), treatment notes for Pw1 and Appellant (EXB4 and 5).

9. The Appellant gave a sworn defence and called no witness. He testified that on the date of incident at 6:30 a.m. his boss called him and informed him that he had information that he was responsible

for RMM pregnancy. He was later arrested and taken to Kalongo A.P camp. RMM denied she was pregnant. He claimed that his boss asked them to fabricate this against him because he was going to sue them. He admitted working at the home of Ruth and being with her that day.

10. The appeal was canvassed by way of written submissions.

11. It is the Appellant's submission that RMM was not truthful in her evidence. She never screamed when this was being done to her. Further that it would not have been possible for him to do all those things to her. He wonders how he could do such things to her if she was not his girlfriend.

12. He also submits that the evidence of RMM and CWM was not adding up. He concludes they were lying and walking in the plans of the parents to send him to prison. He also dismisses Pw3 and Pw4 as untruthful witnesses.

13. A summary of the Respondent's submissions is that it proved its case beyond reasonable doubt. That age, penetration and identification were well established. Counsel submits that the issue of a grudge was never raised during the hearing. It was only brought up in the grounds of appeal and submissions.

**Analysis and determination**

14. This is a first appeal and the duty of this court is to re-consider and re-evaluate the evidence and arrive at its own conclusion while bearing in mind that it did not see nor hear the witnesses. In **Okeno –vs- Republic 1972) E.A 32** the Court of Appeal stated thus:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself***
>
> ***weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 Vs Sunday Post (1958) EA. 424."***

Later in **David Wairimu Njuguna (2010) eKLR** it stated thus:

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

15. I have considered the evidence on record, grounds of appeal and submissions by both parties. The critical issue is whether the prosecution proved its case against the Appellant.

16. **Section 8 of the Sexual Offences Act** provides as follows:

> 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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.
>
> (3) 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.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen an eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (5) 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.
>
> (6) 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.
>
> (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal institutions act and the Children's Act.
>
> (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

17. It is trite that for an accused person to be convicted of defilement, three ingredients must be proved. These are:

> i. Age of the complainant
>
> ii. Proof of penetration of the complainant's genitalia
>
> iii. Identification of the perpetrator

See **Charles Wamukoya Karani –vs- Republic Criminal appeal No. 72 of 2013.**

18. The age of the victim in a case of defilement is a key element, since the penal consequences in case of a conviction are pegged on it. In the case of **Alfayo Gombe Okello –vs- Republic ( 2010)eKLR** the court stated that:

> *"In its wisdom, Parliament chose to categorise 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) … proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."*

19. **Mr. Erick Kasiamani** who testified as Pw4 produced RMM's birth certificate as EXB3 It showed that she was born on 2nd January 2001. I find that besides the evidence of the other witnesses, EXB3, provided the best evidence as to the age of RMM which was 17 years, 11 months and 2 weeks at the material date and thus any unlawful sexual activity with her fell within the ambit of ***"Defilement"*** under section 8(1) and the punishment within section 8(4) of the Sexual Offences Act 2006. The Respondent was therefore able to sufficiently discharge this burden of proof on the issue of age. The Appellant was charged under section 8(1) as read with section 8(3) instead of

section 8(4) of the Sexual Offences Act by virtue of her age. This error is curable under section 382 of the Criminal Procedure Code.

20. Another ingredient necessary to prove the charge of defilement is the fact of penetration. The Sexual Offences Act 2006 defines **"penetration"** as

> ***"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

21. The court of appeal in the case of **Sahali Omar –vs- Republic (2017) eKLR** held that:

"*…Penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act.*

22. RMM testified that a man inserted his penis in her vagina after grabbing her and removing her clothes and his. CWM found RMM and a man having sex at the corner of their house. She reported to her grandmother who in turn reported to the grandfather.

23. The medical evidence by Pw4 was to the effect that upon examination of RMM's genital, the hymen was found to be broken. She had whitish discharge which was foul smelling. On her urinalysis, there were pus cells. The conclusion was that she had been defiled.

24. Having considered all the evidence adduced I have concluded that RMM's genital organ was penetrated.

25. The remaining issue for determination is whether the Appellant was identified as the perpetrator of this offence. There is no dispute that RMM and the Appellant were well known to each other. She said the Appellant was their shamba boy. In cross examination of the

Appellant by the prosecution he said he worked at the home of RMM and he was with her on the material day and he met them outside.

26. In his submissions the Appellant discredits the evidence of all the witnesses saying it was contradictory and inconsistent. I have evaluated the evidence of RMM and CWM and find no contradiction. The questions he is posing in his submissions are issues he should have taken up in cross examination of the witnesses.

27. He has submitted that Pw4 was not the maker of the P3 form (EXB1) yet he produced it. The record is clear that a basis was laid for the testimony of Pw4 on behalf of his colleague Hammington Maso.

28. The record of 20th February 2019 when Pw4 testified shows this:

**"Pw4: A male adult Christian, sworn and states in Kiswahili**

I am called Erick Kasiamani. I am a clinical officer based at Kilungu sub district hospital. I have a P3 form filled by my colleague Hannington Maso, whom I know his handwriting and signature. He is currently engaged in emergency operation.

**Accused:** No objection

**Court:** Pw4 is allowed to testify on behalf of his colleague.

**C.A Mayamba**

**Senior Resident Magistrate**

**20/02/2019"**

29. He did not object to the production and so he can't change his mind now. He also claims that there are crucial witnesses who were not called to testify yet the evidence adduced was not adequate. He does not mention who these witnesses are and what they were to come and testify on.

30. This incident took place in the morning. The evidence of RMM and CWM is sufficient. CWM found RMM and the Appellant in the act of having sex. On seeing her, RMM took off while the Appellant asked

her not to say anything. In his defence he said this case was fabricated on him by his boss and Pw3 the medical officer. The learned trial Magistrate addressed this very well in his judgment.

31. The Appellant never put this allegation to the witnesses in cross examination. He did not in any event state why his boss, (Pw3) and the medical doctor could fabricate such a case against him. He did not even say where he was on 16th December 2018 6:00 am when the incident is said to have occurred.

32. In his own evidence he admitted having been with RMM on that date of incident, outside. I have not found any reason that would have made RMM and CWM to lie against the Appellant over such a matter.

33. The Appellant was sentenced to 15 years imprisonment as provided for under section 8(4) Sexual Offences Act on 19th March 2019 which was after the case of **Francis Karioko Muruatetu & Another –vs- Republic (2017) eKLR.** The Appellant was said to be a 1st offender and he gave his mitigation. Further as per the birth certificate EXB3 RMM was below the age of 18 years by two weeks and the evidence on record is so revealing.

34. What I have noted is that this was not the first time the two were engaging in sex. Secondly this incident did occur at the corner of the house where RMM'S grandparents were sleeping. They were so daring. Though she knew CWM was awake, RMM never screamed nor raised any resistance. Had CWM not abruptly appeared on the scene, RMM and the Appellant would have continued with their business to completion.

35. Though the Appellant did not raise a defence under section 8(5) of the Sexual Offences Act 2006, I am convinced that was the scenario prevailing at the time. Even in cross examination of RMM he put it to

her that she was his girlfriend. Her conduct on this day betrayed her.

36. Had the learned trial Magistrate considered all what I have stated above he would not have given the Appellant the mandatory minimum sentence. The Appellant first appeared in court on 18/12/2018. He was not released on bond though bond was given. He has been in prison for about two years.

37. In the circumstances, I uphold the conviction. I will however have to tamper with the sentence owing to R.M.M's active participation in the act when she was just two weeks to the age of adulthood.

38. The appeal against sentence is allowed with the 15 years imprisonment sentence being set aside. He will instead serve three (3) years imprisonment from date of sentence i.e. 19th March 2019.

Orders accordingly.

**Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.**

**.....**

**H. I. Ong'udi**

**Judge**