**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 17 0F 2020**

**BENARD NDEGWA MAINA...........................................................APPELLANT**

**VERSUS**

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

**{Being an appeal against the judgement of Hon. A. Maina SPM Thika - dated and delivered on the 4th day of November, 2019 in the original Thika Chief Magistrate's Court Sexual Offence No. 46 of 2018}**

# JUDGMENT

The appellant was charged with Defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 27th May and 31st May 2018 at Section 9 in Thika West District within Kiambu County he intentionally and unlawfully caused his penis to penetrate the vagina of FM a child aged 14 years.

He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on diverse dates between 27th May and 31st May 2018 at Section 9 in Thika West District within Kiambu he County intentionally by use of his genital organ namely penis caused contact to the genital organ namely vagina of FM a child aged 14 years.

After the trial he was convicted on the main count and sentenced to twenty (20) years imprisonment. Being aggrieved with the conviction and sentence by the Trial Magistrate the appellant has lodged this appeal. It is premised on the following grounds: -

> **"1. That the learned trial magistrate erred in law and facts for failing to find that I was not properly identified as the perpetrator of the offence charged.**
>
> **2. That, the learned trial magistrate erred in law and facts for failing to find that the complainant was an incredible person whose testimony cannot safely be relied on to base a conviction.**
>
> **3. That, the learned trial magistrate erred in matters of law and fact for not finding that there was material variance between the evidence given to the police and that adduced in court.**
>
> **4. That, the learned trial magistrate erred in matters of law and fact for not finding that essential prosecution witnesses were not produced.**
>
> **5. That, the learned trial magistrate erred in matters of law and fact for not finding that the prosecution case was premised on hearsay evidence.**
>
> **6. That, the learned trial magistrate erred in matters of law and fact by failing to find that my mode and circumstances of arrest are justifiable under the circumstances of the case.**
>
> **7. That, the learned trial magistrate erred in matters of law and fact for failing to find that there existed a strong background of grudge sufficient to justify a frame up."**

The appellant canvased the appeal by way of written submissions in which he stated that Complainant is untrustworthy and the court should not rely on her testimony since she had a similar case at Makadara Law Courts in 2016; that the prosecution did not prove that he committed the alleged heinous act; that there is no evidence linking him to the offence as neither the Complainant nor her belongings were recovered from his house at the time he was being arrested and that the prosecution failed to call a crucial witness namely the boda boda rider who alleged to have notified PW2 that the Complainant was in his house. The appellant also challenged the medical evidence produced by PW4 and submitted that the broken hymen and whitish discharge do not prove penile penetration.

On her part, Learned Prosecution Counsel Ms. Muthoni urged this court to find that the charge against the appellant was proved beyond reasonable doubt as all the ingredients that constitute the offence of defilement had been established. She submitted that the element of age was proved through the production of the Complaint's birth certificate which indicated that the Complainant was born on 20th January, 2004 placing her at 14years of age at the time of the alleged defilement. On the issue of penetration, Counsel submitted that the complainant testified on oath that the appellant penetrated her vagina with his penis and he also testified that she had had sexual intercourse with the appellant for three days. Counsel stated that penetration was also corroborated by PW3 who testified that PW1's hymen was missing and there was whitish discharge and produced a P3 and Post Rape Care (PRC) forms to that effect.

On identification, Counsel stated that PW1 testified that she had stayed with the appellant in his house for a couple of days and this was corroborated by PW2's evidence when he testified that PW1 confirmed that the appellant had stayed with her for three days. Counsel contended that the victim cannot be dismissed for having two similar cases of defilement. Counsel urged this court to uphold the judgment of the lower court and dismiss the appeal.

This court sits in this matter as a first appellate court and guided by the case of ***David Njuguna Wairimu V Republic [2010] eKLR*** I am enjoined to reconsider and re-evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses. I have nevertheless carefully considered the submissions by both sides and the cases cited by the appellant.

> For the prosecution to secure a safe conviction for the offence of defilement it must establish that **the victim/complainant is a child, that there was penetration** and that **the person charged was positively identified as the perpetrator of the offence. Section 8(1) of the Sexual Offences Act** provides: -
>
> **"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**
>
> **Section 2 of the Sexual Offences Act** defines **"penetration"** to mean **"the partial or complete insertion of a genital organ of a person into the genital organ of another person."**

In this case there was inconsistency regarding the age of the Complainant in that whereas the complainant testified that she was 15years old at the time of the alleged defilement, the charge sheet, the birth certificate produced in evidence and the evidence of PW3 and PW4 placed her at 14 years old. However, whether the complainant was 14years or 15 years the fact is that she was a child hence incapable of consenting to any form of sexual intercourse. It is my finding that in this case the prosecution having proved that the complainant was a child by way of a birth certificate which is the best evidence of proof of age, the inconsistency in the evidence is not fatal. The victim's exact age only becomes material at the point of sentencing. ***(See Alfayo Gombe Okello Vs. Republic (2010) eKLR).***

The appellant contends that there was no proof of penetration. It was his submission that a broken hymen does not necessarily prove penile penetration. I agree with him. In the case of ***PKW v Republic [2012] eKLR*** the Court of Appeal held: -

> ***"16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769."***

A broken hymen perse is therefore not proof of penetration. However, I am satisfied that penetration was proved beyond reasonable doubt. The complainant described with precision that she had sexual intercourse with the appellant. She testified that the appellant inserted his penis into her vagina on three separate days. The fact that the medical examination conducted upon the complainant did not expressly disclose that the appellant was the one who defiled the complainant does not in my view rebut the evidence of the complainant as her evidence alone was sufficient to convict him (***see Section 124 of the Evidence Act)***. The complainant's evidence was consistent, credible and truthful and I believed her. She was a child hence incapable of consenting to sex and the appellant committed an offence by having sexual intercourse with her.

On the element of identification, there is no doubt at all that this was identification by recognition. The complainant testified that she stayed with the appellant in his house for almost five days. She knew the appellant well and there is no possibility of a mistaken identity. As provided under **Section 143 of the Evidence Act** the prosecution was not required to call any particular number of witnesses to prove the fact of penetration, age or identification. As I have stated **Section 124 of the Evidence Act** empowers this court to convict solely on the evidence of the complainant. I am also not persuaded that this is a case in which I should draw an adverse inference on the ground that the witnesses adverted to by the appellant were not called to testify ***(see the case of Benard Mutua Matheka v Republic [2012] eKLR*** where it was held that **such an inference may only be drawn where the evidence in support of the prosecution's case is barely sufficient to prove the case.** The unsworn evidence of the appellant did not do anything to challenge the prosecution's evidence which I find to be overwhelming though that should not be taken to mean that the appellant was required to disprove the evidence against him. I am therefore satisfied that all the elements of the offence of defilement which are age of the victim, penetration and identification of the perpetrator were proved beyond reasonable doubt and the appeal against conviction cannot stand.

The appellant made a fleeting mention of the sentence but there is nothing either in his petition or in his written submissions to challenge the sentence and accordingly I shall leave it undisturbed and dismiss the appeal in its entirety. It is so ordered.

**Signed and dated this 28th day of October 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.**

**MARY KASANGO**

**JUDGE**