



**REPUBLIC OF KENYA**

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

**HCCRA NO. 2 OF 2018**

**TENTERE SANKARE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**
2. The particulars of the offence were that on diverse dates between October 2016 and 27<sup>th</sup> August 2017 in Makueni County, the Appellant willfully and intentionally caused his penis to penetrate the vagina of MMM, a child aged 17 years.
3. There was 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.**
4. The particulars were that on the said period and at the same place, the Appellant intentionally and unlawfully touched the vagina of MMM, a child aged 17 years.
5. The Appellant was convicted on the main charge and sentenced to 15 years imprisonment.

**THE APPEAL**

6. Aggrieved by that decision, the Appellant filed this appeal and listed 7 grounds stating that the learned magistrate erred in law and fact by;
  - a) Convicting him against the weight of the evidence.*
  - b) Finding that the prosecution had established it's case beyond reasonable doubt when in fact there were glaring contradictions.*
  - c) Receiving the evidence of the minor without committing the same to compulsory test as required by the law.*
  - d) Arrogating himself the status of an expert in matters of conception and paternity contrary to the law.*
  - e) Finding that the necessary ingredients of the offence had been established when actually they were not.*
  - f) Failing to appreciate the reasons and consequences of the accused not adducing evidence.*
  - g) Failing to appreciate that the Appellant had a language barrier problem and failing to provide an interpreter thus making him not participate in the proceedings.*
7. Directions were given that the appeal be canvassed by way of written submissions and when the matter came up for highlighting of the same on 21/05/2018, Mr. Mulei, Counsel for the Appellant made an oral application to have additional evidence taken.
8. The learned prosecution Counsel Mr. Orinda objected to the manner of making the application after which the Court directed that a formal

application be filed. The application was subsequently filed, canvassed and allowed *vide* a ruling of this Court delivered on 10/07/2018.

9. The additional evidence was taken by this Court on 30/07/2018 and the witness was Tom Mogire Mogaka (DW1), a deputy registrar at the Civil Registration office, Kibwezi Sub-County. He produced an application for birth certificate made by the complainant on 02/05/2011 as D. Exh 1 and a birth certificate issued on 25/10/2011 as D. Exh 2. He testified that according to the birth certificate, MMM was born on 07/03/1996.

10. Pursuant to the additional evidence, the Appellant sought leave to file further submissions and the matter was eventually slated for highlighting on 16/10/2018. On the said date, the prosecution Counsel indicated that she had just been served with the further submissions and needed time to respond.

11. The Court gave her 30 days to comply but when I retreated to write this judgement, 30 days had lapsed and there were still no submissions from the prosecution on record.

12. Counsel for the Appellant submitted that failure to prove the age of the victim in a defilement case is fatal and relied *inter alia* on **Criminal Appeal No. 97 of 2009; Gilbert Miriti Kanampius –Vs- Republic (2013) eKLR** where Gikonyo J noted that;

***“proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction.”***

13. Further, he submitted that from the birth certificate produced by DW1, the victim was 21 years at the time of the alleged offence and was therefore not a minor. He urged the Court to allow the appeal.

**DUTY OF COURT**

14. It is now settled that the duty of a first Appellate Court is to scrutinize the evidence on record, make it’s own findings and draw it’s own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

15. From the totality of the evidence on record, the only issue for determination is whether the victim was a minor at the time of commission of the alleged offence.

**THE VICTIM’S AGE**

16. In the Trial Court, the prosecution used a health card as proof of the victim’s age. It indicated that she was 17 years. DW1 testified that he was a stranger to that card as it was never presented to their office when an application for birth certificate in respect of the victim was made.

17. He produced a birth certificate and confirmed that, from their records, there was no doubt regarding the details of the victim’s date of birth. In the absence of evidence to the contrary, I would consider DW1 an authority in matters of registration of births and deaths.

18. A health card would ordinarily be used as proof of age but when mirrored against a birth certificate which is *prima facie* proof of age, the latter prevails.

19. According to the charge sheet, the offence occurred between October 2016 and 27/08/2017. Assuming the actual date was 01/10/2016 and the victim was born on 07/03/1996, the inevitable conclusion is that she was 20 years and 7 months at the time of commission of offence hence not a minor.

20. As rightly submitted by the Appellant’s Counsel and in line with the numerous judicial pronouncements, the victim’s age in a defilement matter is a critical ingredient as it informs the kind of sentence to be meted out upon conviction. In this case, it is clear that the ‘victim’ was not a minor and as such, the charge cannot stand.

21. In light of the foregoing and in the interest of saving precious judicial time, I find it unnecessary to delve into the other grounds of appeal. In any case, there were no submissions from the prosecution which in essence means that the appeal is not opposed.

**CONCLUSION**

22. The court therefore finds that the appeal has merit and makes the following orders;

- i. The appeal is allowed.**
- ii. Conviction is quashed and set aside and the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.**

**DATED, DELIVERED, SIGNED THIS 21<sup>ST</sup> DAY OF JANUARY 2019 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**