REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 134 OF 2016

EDWARD MUSYOKA MUTISO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal case Number 31 of 2016 in the Chief Magistrate's court at Mombasa – Hon. D. N. Ogoti (CM)

JUDGMENT

1. The appellant herein, Edward Musyoka Mutiso, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that between 2nd December 2015 and 18th March 2016 at [Particulars Withheld] area in Likoni District within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of RK(particulars withheld) a child aged 14 years. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The appellant pleaded not guilty to the charge after which the case was heard in trial in which the prosecution presented the evidence of 4 witnesses and at the end of the case, the trial court found that the prosecution had proved its case beyond reasonable doubt whereupon the appellant was convicted and sentenced to serve 15 years imprisonment thereby triggering the instant appeal in which the appellant has listed the following grounds of appeal:

> **1. That the learned trial magistrate erred in law and in fact arriving to his conclusion and sentenced me to 15 years imprisonment without considering that the charge of defilement were not properly established hence the sentence was harsh and excessive.**
>
> **2. That the trial magistrate erred in the rule of law by arriving to his conclusion without putting into consideration that the AGE of the complainant was not conclusive proved hence the conviction and sentence was unsafe.**
>
> **3. That the learned trial magistrate did not prove its case beyond any reasonable doubt, so the sentence of life imprisonment imposed upon me was unsafe.**
>
> **4. That the learned trial magistrate erred in law by failing to consider my reasonable defence statement.**

3. At the hearing of the appeal the appellant submitted that he was not accorded a fair trial because the language used during the trial was not indicated contrary to the provisions of Articles 25(c) and 50(2) of the Constitution.

4. The appellant also submitted that the age of the complainant was not proved beyond reasonable doubt as while the charge sheet indicated that she was 14 years the documents produced during the trial showed that she was 15 years.

5. The appellant further submitted that the medical evidence presented by the prosecution did not establish the case beyond reasonable doubt it was the appellants further submission that the trial court did not consider his defence in making the finding of guilty against him.

6. In a rejoinder, Mr Isaboke learned counsel for the state submitted that the issue of the language used by the court was not disputed or raised during the trial and that the appellant participated fully in the lower court's proceedings.

7. For this argument, counsel relied on the decision in the case of **Munyasia Mutisya v Republic 2015 eKLR** wherein the court stated:

"The subsequent hearing date do not have any indication of the language used wither by the court or by the witnesses.

That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however, note that the appellant participated fully in the trial by cross examining witnesses. He cross examined P.W. 1. He cross examined PW2. He cross examined PW4, 5, 7, 8 and 9. In my view therefore understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not allege an appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court."

8. Counsel submitted that the minority age of the complainant was proved through the Child Health Card which showed that the child was a minor aged 15 years at the time she was defiled.

9. On penetration, counsel submitted that the complainant and the appellant lived together for 3 months and that the hymen was broken and had scars estimated to be 3 months old.

10. On claim that the appellant's defence was not taken into account in the trial court's judgment, counsel submitted that the said defence was not only unsworn and therefore not tested through cross examination but also comprised merely of an explanation on the circumstances surrounding his arrest. According to the respondent's counsel, the said defence did not controvert the prosecutions case in any way so as to warrant any consideration.

11. As a first appellate court, this court is under a duty to re-consider and reanalyze the evidence tendered before the lower court afresh with a view to arriving at my own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify.

12. A summary of the evidence presented before the trial court was as follows:

> PW1, the complainant, testified that she ran away from home on 2nd December 2014 after disagreement with her mother who had caned her because she had refused to go to the shamba. She went to the bus stage in order to board a vehicle to Mombasa to look for a job, but while at the bus stage, she met the appellant, a matatu tout, who then hired her to his house where they stayed together for about 3 months. She further stated during their 3 months stay, the appellant repeatedly defiled her and that on the 3rd month, the appellant became violent and started mistreating her with death thereby prompting her to run away and look for a job at a hotel. She later learnt that the appellant had been arrested and that she was interrogated and taken to hospital.

13. PW2, was the complainant's mother. She testified that the complainant disappeared from home thereby prompting her to report the matter to the police who gave her some 2 telephone numbers to call and that on calling one of the numbers that belonged to PW1 it was answered by the appellant who denied that PW1 was his friend. She added the PW1 was later brought to station by one Mwanasiti. On cross examination, PW2 stated that the appellant had the mobile phone belonging to PW1 and that they were communicating.

14. PW3 Dr. Samira Osman produced the P3 form in respect to the examination on PW1 which revealed that PW1 and a broken hymen.

15. PW4 was Cpl. Martin Ojwang the police officer who investigated the case. He also produced the complainants birth certificate and child Clinic Health Card which showed that complainant was born on 24th November 2011.

16. When placed on his defence, the appellant gave an unsworn statement in which he denied committing the offence and explained how he was arrested by 2 policemen before being released after 2 days only to be arrested later on claims of defilement.

Analysis and determination

17. I have anxiously considered this appeal and the submissions by the appellant and learned counsel for the state. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.

18. The main ingredients of the offence of defilement are the minority age of the victim, penetration and the identification of the appellant as the perpetrates of the offence.

19. On the age of the complainant, I am satisfied that the same was proved to the required standards. I find that there was cogent and uncontested evidence from the complainants birth certificate and child Clinic Health Card which showed that the complainant was born on 24th November 2001. The offence in question was alleged to have been committed between December 2015 and March 2016, during which time, the complainant was 14 years old.

20. Turning to penetration, I similarly find that the same was satisfactorily established through the P3 form and the Post Rape Care (PRC) form which indicated that the complainant's hymen was broken with the age of the scars estimated to be 3 months old. I find that it was therefore not in dispute that the complainant was defiled.

21. The main bone of contention in this appeal however is whether it was proved, beyond reasonable doubt, that it is the appellant who defiled the complainant. It is to be noted that in respect to the issue of whether or not the appellant had sex or lived with the complainant, there was no other independent witness to attest to this apart from the complainant herself.

22. I find that in the circumstances of this case and bearing in mind the fact that the complainant was a troubled child who had even ran away from home, it was necessary that her evidence, especially the bit that she lived with the appellant for at least 3 months be corroborated other witnesses especially the neighbours one of whom was mentioned to be Mwanasiti, the lady who allegedly brought the complainant to the police station.

23. It is also curious to note that as at the time the appellant was arrested, the complainant was not living with him as, by her own admission, she had also run away from the appellants house and was reportedly working in a hotel.

24. My take is that the above circumstances couple with the complainants own admission that she had involved herself with another lover, lead me to conclude that penetration in this case, even if proved cannot be exclusively attributed to the appellant.

25. The complainant stated as follows during examination in chief:

"I had involved myself with another person. These were my fellow students. The head teacher knew and were punished."

26. Having regard to my above finding and observations I further find that in the circumstances of this case, it is unsafe to uphold the conviction. There was also the allegation that the appellant was found in possession of a phone and/or phone number that belonged to the complainant and that this showed that they had been together once again, this was an allegation that was not proved by any other tangible evidence of proof of ownership.

27. I reiterate my findings that this is one case that left so many questions unanswered and that the benefit of doubt should be given to the appellant.

28. Consequently, allow the appeal, quash the conviction and set aside the sentence. I direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and signed at Nairobi this 11th day of March 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 8TH day of April 2019

NJOKI MWANGI

JUDGE

In the presence of:

Appellant present

Ms Marindah for the Director of Public prosecution

Mr Oliver Musundi – Court Assistant