REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 219 OF 2014

DANIEL KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.1 of 2012 of the Chief Magistrate's Court at Busia by Hon. J. Nthuku– Senior Resident Magistrate)

JUDGMENT

1. **Daniel Kamau,** the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars were that on the 28th December 2011 in [particulars withheld] District within **Rift Valley** Province, intentionally and unlawfully inserted his penis into the vagina of **LN**, a girl aged 11 years.

3. The appellant was sentenced life imprisonment. He now appeals against both conviction and sentence.

4. His grounds of appeal are as follows:

a) The learned trial magistrate erred in law and in fact by finding that the age of the complainant was proved.

b) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence of penetration.

c) The learned trial magistrate erred in law and in fact by disregarding the defence evidence.

5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted out was lawful.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. It is now settled law that before a conviction for the offence of defilement can be made, the prosecution has to prove beyond reasonable doubt that (a) there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were recapitulated in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.

8. The evidence of **LN**, the complainant was that she was 12 years on 18th June 2012 when she testified in court. Her evidence was that on the material day, she went to borrow a matchbox from the appellant but he had none. The appellant then stood at the door and asked her to "give" him. She enquired what she was to give him but he did not tell her but instead pushed her to a bed where he pulled down her skirt. Since she had no petticoat or a pair of panties, he proceeded to defile her. She felt pain and screamed but the volume of the radio was very high. She also bled.

9. The medical evidence adduced by **Dr. Mondi (PW3)** was that at the time the complainant was examined on 3rd January 2012 she was 11years old. A tear was seen on her vaginal wall and her hymen was broken. The medical officer who examined her was Dr. Sarah Karanja. She noted on the P3 form that her skirt was blood stained.

10. **RW (PW4)** the complainant's mother testified that when she saw blood on her daughter's skirt, she involved a neighbor to interrogate her. This is when it emerged that she had been defiled.

11. The oral evidence of the complainant and her mother, coupled with the medical evidence and the evidence of blood on the skirt the complainant was wearing on the material day prove beyond reasonable doubt that the complainant was defiled. There is therefore sufficient evidence of penetration.

12. The evidence of **LN** was categorical that the perpetrator of the offence against her was the appellant. This was a person well known to her and that was why she had gone to borrow a box of matches. While cross examining the complainant's mother, the appellant suggested that he was falsely implicated over a donkey issue. This was denied. In his defence testimony, he abandoned this issue and contended that he was arrested and charged with an offence he did not commit. I am satisfied that the appellant was properly identified as the perpetrator of the offence.

13. In the case of **Fappyton Mutuku Ngui vs. Republic** (supra) it was held:

> ... **that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases**.

I subscribe to this school of thought. This is informed by the fact that in some rural areas and informal settlements in urban areas the importance of birth certificates has not been appreciated and insistence on the same may result in untold injustice. In the instance case the oral evidence on the age of the complainant was contradicted by the child's immunization card that was produced. The name of the child on the card is **RW** and the mother's name is **JW**. The complainant in this case is not RW and her mother is not JW. One wonders where these names popped up from.

14. In the case of **John Otieno Obwar vs. Republic [2011] eKLR** Asike Makhandia J (as he then was) observed:

> **Defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of this case, the charge sheet talks of the complainant being aged 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed his age. It would have been easy for the prosecution to tender in evidence the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required.**

While in the case of **Hilary Nyongesa vs. Republic [2010] eKLR** where Mwilu J (as she then was) stated that:

> **On my part I have thoroughly perused the evidence at trial and I find that nowhere in it was the age of the victim established. All there is as concerns age is the victims word for it. The victim also told the doctor examining her that she was 15 years old. In my considered view those two statements by the victim in the absence of a birth certificate or medical age assessment reports do not suffice. Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim. In this case the age of the victim was not proved and hence any sentence passed and meted out to the accused would be a matter of conjecture which would not stand in criminal cases where the offence must be proved beyond any reasonable doubt.**

These two judgments emphasize the importance of the proof of age in defilement offences. This is rightly so for the sentence is pegged to the age of the victim as provided for in the Sexual Offences Act.

15. The two judgments tend to suggest that that failure to prove the age of the victim is fatal to the prosecution case. Is it in the interest of justice to set an accused person free just because the age of the victim has not been proved with mathematical accuracy? This would only add salt to a wound that the complainant has been inflicted.

16. My proposal is that a pragmatic approach ought to be adopted to the issue where age has not be established through evidence but the other ingredients of the offence have been proved. Where a child is of an apparent age of above about 11 years or above but apparently below the age of 18years, the accused be sentenced under section 8 (3) of the Sexual Offences Act. Where the child is apparently younger than 11 years, then an accused be sentenced under section 8(2) of the Sexual Offences Act and where it is not clear whether the complainant is 18 years and above or is about 17 years, the accused ought to be given the benefit of doubts. The sentence ought to be that of rape. In my view, this approach will be fair to both the victim and the accused person.

17. My opinion is guided by the decision the Ugandan Court of Appeal in the case of **Francis Omuroni vs. Uganda**, **Criminal Appeal No. 2 of 2000** where it was held thus:

> **In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. *Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…*** [Emphasis added]

18. In the instant case the opinion of the medical officer who examined **LN**, was of the opinion that her estimated age was 11 years. Since this was just an estimate and not an age assessment, I would give the appellant the benefit and set aside the conviction and substitute it with one for a lesser charge of defilement under section 8(3) of the Sexual Offences Act. The effect of this is to reduce the sentence.

19. I accordingly set aside the sentence by the trial magistrate and substitute with a sentence of 20 years imprisonment. The appeal succeeds to that extent.

DELIVERED and **SIGNED** at **Nakuru this 12th Day** of September**, 2019**

KIARIE WAWERU KIARIE

JUDGE