



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 54 OF 2018**

**JOHN KARURU RUKWARO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(Appeal from the original conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 29 of 2015 Hon. Wendy Kagendo Chief Magistrate, delivered on 27 November 2018)

**RULING**

The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act, No. 3 of 2006. According to the particulars of the charge, on the 21<sup>st</sup> day of May 2015 in Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AM a child aged five.

He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act the particulars being that on the 21<sup>st</sup> day of May 2015 in Nyeri County, he intentionally and unlawfully touched the vagina of AM a child aged five with his penis.

He was convicted of the offence of defilement contrary to section 8(1)(2) the learned magistrate having found that owing to the victim's age section 8(1)(3) was in appropriate in the circumstances. Nothing was said of the alternative count supposedly because the appellant had been convicted on the principal count.

Being dissatisfied with the decision of the court, the appellant appealed against both the conviction and sentence; in the petition of appeal filed on 4 December 2018, the appellant raised the following grounds of appeal:

1. The learned chief magistrate erred in law and in fact in convicting the appellant under section 186 of the Criminal Procedure Code, cap. 75 without any legal basis particularly after the trial court held the principal charge to be faulty and not making any finding on the alternative charge.
2. The learned chief magistrate erred in law and in fact in convicting the appellant on insufficient, inconsistent and contradictory evidence and without giving adequate attention to the appellant's defence.
3. The learned chief magistrate erred in law and in fact in considering extraneous matters hence arriving at a wrong decision.
4. The learned chief magistrate erred in law and in fact by misconstruing section 124 of the Evidence Act, cap. 80 considering that the complainant testified before a different trial magistrate.
5. The learned chief magistrate erred in law and in fact in failing to appreciate that vital witnesses in this case were not called.

On 22 January 2019, the appellant filed an application seeking to be admitted to bail pending the hearing of his appeal. It is this application that is the subject of this ruling.

The applicant's application was supported by the affidavit of his learned counsel and all that he deposed was that based on the grounds of appeal, his appeal has overwhelming chances of success.

At the hearing counsel submitted that the lesser offence for which the appellant was convicted was not disclosed and the learned magistrate only spoke of section 186 of the Criminal Procedure Code. On her part, Ms. Ndungu, the learned counsel for the state did not oppose the

application though she did not offer any reasons why she thought, like the learned counsel for the appellant, that the appeal has overwhelming chances of success. I will restrict myself to this ground only.

It is apparent from the brief submissions by the appellant's learned counsel that he picked only on the first ground of appeal for his position that the appeal has overwhelming chances of success.

While dismissing the appellant's defence and holding him culpable the learned trial magistrate said of section 186 in the following terms:

**I did not believe his defence and accordingly the court finds all the elements of defilement contrary to section 8(2) of the Sexual Offences Act. He is accordingly convicted under section 186 of the Criminal Procedure Code since the charge sheet talks of Section 8(1)(3) of the Sexual Offences Act which is faulty.**

As to whether the appellant was prejudiced by the 'faulty' charge sheet the learned magistrate held as follows:

**The court however finds that the defence was not prejudiced as the accused person was all along well represented by a very competent advocate Mr. Kimani Njuguna.**

Section 186 of Criminal Code which is in issue reads as follows:

**186. Charge of defilement of a girl under 14 years of age**

**When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.**

As far as I understand the learned magistrate the evidence before court was sufficient to convict the appellant on a charge of defilement contrary to section 8(2) of the Sexual Offences Act and not section 8(1) (3) under which he was charged. It is in this regard that she invoked section 186 of the Criminal Procedure Code to convict the appellant of the offence of defilement under section 8(2) though the appellant was not charged with it.

The reason the learned magistrate came to this conclusion is that subsection (3) of section 8 deals with victims who are twelve to fifteen years old yet the evidence before court showed that the complainant was only five years old at the time she was defiled. It followed that in view of the complainant's age, the appropriate section under which the appellant ought to have been charged was section 8(2) of course as read with subsection (1) which defines the offence of defilement, generally. Subsection (2) reads as follows:

**(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.**

Subject to the hearing of the appellant's appeal, I see no plausible reason why the learned magistrate should be faulted for holding that the appellant was culpable under section 8(2) and convicting him accordingly rather than under section 8(3) under which he was charged. The cause she adopted is properly covered by section 186 of the Criminal Procedure Code.

The upshot is that no material has been presented before court to demonstrate that the appellant's appeal has such overwhelming chances of success that the appellant should be admitted to bail pending the determination of his appeal. His application is hereby dismissed. It is so ordered.

**Dated, signed and delivered in open court this 20<sup>th</sup> day of September 2019**

**Ngaah Jairus**

**JUDGE**