



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MURANG'A**  
**CRIMINAL APPEAL NO. 83 OF 2017**

**BETWEEN**

**JMW.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Murang'a*

*S.O. Case No. 3 of 2017 delivered by Hon. M.W.Wachira, CM on 22<sup>nd</sup> November, 2017).*

1. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the sexual offences Act No.3 of 2006. It was alleged that on the 30<sup>th</sup> day of December, 2016 at about 6.a.m. within Murang'a County intentionally and unlawfully caused his penis to penetrate the vagina of AK a child aged 6 years. In the alternative he was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offence act 2006 in that he intentionally touched the vagina of AK a child aged six years with his penis.

2. The Appellant was convicted of the main charge and sentenced to life imprisonment. Aggrieved by both the sentence and conviction he preferred the instant appeal. He set out eight grounds of appeal in a Memorandum of Appeal filed on 15<sup>th</sup> August, 2019. I summarize the grounds as under:

3. He was aggrieved that he was charged and convicted when he was a minor but sentenced as an adult. He was further aggrieved that the minor victim did not complain to her mother that she had been defiled. In that respect, he complained that the mother who reported the matter to the police neither recorded a statement nor testified as a prosecution witness. He took issue with the fact that the medical evidence adduced was not sufficient to establish the offence of defilement. He complained that the medical treatment notes from the hospital that first treated the victim were never adduced in Court. He also complained that it was never established that he was responsible for the penetration. He faulted the learned trial magistrate for believing in the evidence of the minor which itself was doubtful. Finally, he was aggrieved that the prosecution evidence on which the Court relied was inconsistent and contradictory.

4. This is a case in which the Appellant raised one paramount legal issue which this Court must first determine before it reevaluates the evidence on record because if it is determined in favour of the Appellant, other grounds of appeal will be rendered moot. The submission was that at the time he was arrested, tried and convicted he was a minor yet he was sentenced as an adult contrary to the provisions of the Children's Act. In his oral submission, he informed this Court that he brought it to the attention of the trial Court that he was a minor yet no action was taken by the Court to ascertain the fact. He argued therefore, that sentencing him to life imprisonment did not only violate his constitutional right to a fair trial but denied him his right to education.

**Determination**

5. I have thoroughly appraised myself with the record of proceedings in the trial Court. The issue that the Appellant was a minor during the trial only arose at the time he adduced his defence. He informed the Court that he was a student in Form III at [particulars withheld] Secondary School. In his oral submission, he informed the Court that he was at the time of sentencing aged 17 years. However, nothing bears witness to this assertion as no documentary evidence or age assessment was adduced to support the assertion.

6. In my view, as soon as the Appellant informed the Court that he was a Form III student, it was a signal sufficient to arouse the Court's attention to make an inquiry of his age. The Court ought to have immediately ordered a medical assessment or requested for documentary

evidence so as to ascertain his age. Unfortunately, the Court remained mum consequent which an injustice may have been occasioned to the Appellant.

7. I therefore concur with the Appellant that the trial was rendered defective by the mistake of the Court in failing to treating him as a child both in the trial and sentencing. This error rendered the trial a nullity. The defect can be cured by ordering a retrial.

8. In the case of *Fatehali Manji vs Republic [1966]EA 343*, the then East African Court of Appeal held as follows while giving guideline on the criteria to be followed before a retrial is ordered:

***“In general, a retrial be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial .....each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.”***

9. Further, in the case of *Opicho V. Republic [2009] KLR 369* similar words were echoed by the Court of Appeal which held as follows:

***“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it”.***

10. Having ruled that the defect was occasioned by the trial Court it is important to address the question of whether if a retrial is ordered would likely result in a conviction. The prosecution called a total of four witnesses. PW1 who was the complainant in her brief unsworn testimony narrated how the Appellant took her to his house after which he defiled her. He thereafter informed her grandmother who in turn reported the matter to the police and was referred to hospital. Both the complainant and the Appellant occupied one plot and were known to each other. The issue of a mistaken identity on the part of the Appellant could not arise in the circumstances.

11. As regards the issue of penetration, there was sufficient evidence to establish the same as evidenced by PW3 who reexamined PW1 and filled the P3 Form. From the record, PW1 was treated in a private clinic by the name Kimkan as public hospitals were on strike. Nevertheless, it was clear that PW3 referred to the medical treatment notes when he prepared the medical reports.

12. Without delving deep into the evidence it is important to highlight that although PW3 stated that he was unable to conclusively rule that there was evidence of defilement, his finding was clearly premised on the absence of spermatozoa in PW1's genitalia. He was however quick to note that there was absence of hymen and that spermatozoa was missing because examination was done many days after the incident. On this note the law is clear that a key element constituting the offence of defilement is not the presence of spermatozoa but penetration. Respectively, the prosecution established one of the key ingredients of the offence.

13. As regards the age of PW1, the same was established by the production of a Birth Certificate by PW2, the grandmother to the minor placing her age as six years as at the time of the incident. In my view therefore, this is a case which is likely to result in a conviction if a retrial is ordered.

14. I have further appraised myself with the fact that no prejudice shall be occasioned to the Appellant if a retrial is ordered. This is in view of the fact that the trial begun on 31<sup>st</sup> January, 2017 and as at date, the Appellant has been in custody for about one year and about eight months. The offence of defilement being serious and more so, having regard to the age of the complainant, the interests of justice tilts towards ordering a retrial.

15. In the upshot, I quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Murang'a Police Station not later than 11<sup>th</sup> September, 2019 so that he is prepared for presentation to take plea before the Chief Magistrate's Court in Murang'a not later than 12<sup>th</sup> September, 2019. The magistrate conducting the trial must be satisfied as to the age of Appellant before commencing the trial. Accordingly, this judgment must be served upon the Magistrate's Court for reference. The trial must also be conducted on a priority basis. The Deputy Registrar should remit the original trial Court record to the Magistrate's Court for purposes of the retrial.

It is so ordered.

**DATED AND DELIVERED AT MURANG'A THIS 5<sup>TH</sup> DAY OF SEPTEMBER 2019.**

**G.W. NYENYE – MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant in person.
2. Mr. Mutinda for the Respondent.