



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NUMBER 32 OF 2016**

**GILBERT NGETICH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against both the conviction and the sentence of Chief Magistrate Hon. Kagendo W. delivered on the 7<sup>th</sup> of March 2016 in MOLO CM Criminal Case No. 3093 of 2014 in Republic v Gilbert Ngetich.)***

**JUDGMENT**

1. The Appellant was charged before the Molo Chief Magistrate's Court with the offence of **defilement** contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on the 27<sup>th</sup> of November 2014 at [particulars withheld] in Kuresoi District in Nakuru County intentionally caused his penis to penetrate the vagina of **DC**, a child aged 8 years.

2. In the alternative, the Appellant was charged with the offence of **indecent act** with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on the 27<sup>th</sup> of November 2014 at [particulars withheld] in Kuresoi District in Nakuru County intentionally touched the vagina of DC, a child aged 8 years with his penis.

3. After full hearing, the trial magistrate convicted the Appellant of the main charge and sentenced him to life Imprisonment. The Appellant being dissatisfied with the conviction and sentence filed this appeal on the following grounds:-

i. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant while relying on identification by recognition evidence of PW 1 and PW 2 (minors) which was inadmissible in law

ii. The Learned Trial Magistrate erred in law and fact in failing to resolve that Medical Officer called by the prosecution (PW 4) was neither a registered medical practitioner nor a clinical officer.

iii. The Learned Trial Magistrate erred in law and in fact in failing to consider that no documentary evidence produced in court to confirm PW 4's evidence

iv. The Learned Trial Magistrate erred in law and fact in convicting the Appellant whereas the Appellant's Constitutional right enshrined in Article 50 (2)(b)(c)(j)(k) and (m) of the Constitution were flouted and violated in that the language used in court during plea taking, trial, not understood. Hence no interpreter, no disclosure thus violating the clear provisions of the Constitution

v. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the Prosecution had failed to prove its case to the standard required by law, that is, to prove beyond reasonable doubt.

vi. The Learned Trial Magistrate erred in law and fat by sentencing the Appellant to serve life imprisonment over the alleged offence without appreciating the Appellant was below the age of 18 years at the time the offence was presumed to have been committed

vii. The Learned Trial Magistrate erred in law and fact in failing to consider that the parents and guardians of the Appellant and PW 1, both children were not present at the time of the Police interview which clearly flouts provision as under Rule 4 (2) of the Children's offence rules

viii. The Learned Trial Magistrate erred in law and fact in failing to appreciate that critical witness were never called thus the Prosecution case remained unproved.

ix. The Learned Trial Magistrate erred in law and fact in failing to resolve that the provisions of Section 211 of the CPC were not

complied with

x. The Learned Trial Magistrate erred in law and fact in failing to give the Appellant's plausible defence adequate consideration.

### **APPELLANT'S SUBMISSIONS**

4. The Appellant submitted that evidence tendered by PW 1 and PW 2 as eye witnesses were insufficient, unbelievable and incredible thus inadmissible in the law. He submitted that the trial magistrate did not conduct a *Voire dire* for PW2, a minor, aged 11 years as required by **Section 124** of the **Evidence Act Cap 80** of the **Laws of Kenya**. He further stated that he was not given a right to cross-examine the witness. He added that the PW 4 did not identify himself as a doctor or clinical officer registered by the Clinical Dental Board or registered by the Board of Practitioner.

5. Appellant further submitted that baptismal card, birth certificate or clinical medical card were not produced by the in court as an exhibit and Prosecution did not call the Complainant's mother or guardian to verify the age of the Complainant thus prosecution case fell far below the required standards of proof in criminal cases.

6. That the Appellant gave sworn evidence but what was recorded was that the defence was unsworn and the language used in court was Kiswahili, which the Appellant did not understand.

### **SUBMISSIONS BY RESPONDENT**

7. The Respondent submitted that the evidence of PW 1 and PW 2 shows that the Appellant committed the offence; evidence adduced in court was that he was found wearing his trousers after the incident and there was no need for the medical officer to write that on the P3 form; that the medical officer was required to prove penetration;

8. On Complainant's age, the state counsel confirmed that no document was produced to prove her age neither was age assessment done. He submitted that the Complainant indicated to the court her age and the court interrogated the Complainant and believed that the child was of 8 years.

9. On availability of the child's mother to adduce evidence, the state counsel submitted that it was not for the court to look for the witness.

### **ANALYSIS AND DETERMINATION**

10. This being the first appellate court my duty is to reevaluate evidence adduced in the trial court and make an independent determination. This I do with the knowledge that unlike the trial court, I never got the opportunity to take evidence first hand and observe the demeanor of witness and will therefore make allowance for that.

11. In the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

**“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

12. I wish to consider whether the ingredients of the offence of defilement as set out hereunder were proved:-

- a. Whether *voire dire* examination was conducted on the complainant
- b. Whether ingredients of the offence of defilement were proved
- c. Whether appellant was able to follow proceedings

13. **Whether *voire dire* examination was done and whether appellant cross examined PW2**

Page 4 of the proceedings show that *voire dire* examination was done. Questions put to the complainant and answers to the questions are recorded. From the answers given by the complainant, it comes out clearly that, the complainant understood the importance of speaking the truth. The court formed an impression that the girl was intelligent and understood why she was in court and was able to discern what is true and what is not. This is contrary to appellant's allegation that no *voire dire* examination was done.

14. As to whether the appellant was able to follow proceedings, after her examination in chief, the appellant cross-examined her in Kalenjin language. It is not therefore true that he never understood the language used by court and that he never got opportunity to cross-examine her.

15. I now wish to consider whether the ingredient of the offence of defilement were proved. Ingredients of the offence of defilement were laid down in the case of **Dominic Kibet Mwareng V Republic [2013] eKLR**, where the **Hon. Justice Linnet Ndolo** stated as follows:

**“The critical ingredients forming the offence of defilement are;**

**i. The age of the complainant,**

**ii. Proof of penetration**

**iii. Positive identification of the assailant. “**

16. On the issue of age, during *voire dire* examination, the complainant said she was 8 years. *Voire dire* examination confirmed the child was under 10 years. The medical officer further confirmed in his testimony that the child was 8 years. The trial magistrate noted after *voire dire* examination that the child was intelligent and understood why she was in court. She went further to say that on account of age she would not be sworn. This means the court made observation of the child's age and confirmed she was under 10 years. There was therefore no doubt in the mind of the court that she was under 10 years. In the case of **Francis Omuroni – versus- Uganda, Court of Appeal Criminal Appeal No.2 of 2000**. The court held as follows:-

**“...Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”**

17. On penetration, the doctor PW4 confirmed that the girl's vagina had lacerations; that she had sexually transmitted infection (STI), dry blood cells, pus cells and spermatozoa with whitish discharge around the vagina. From the injuries shown by the P3 form there is no doubt that there was penetration.

18. On the issue of positive identification of the assailant, PW2 testified that he found the appellant putting trousers on. This happened around noon. The appellant was known to PW2. She said the appellant was working as a herdsman in the complainant's home. Even though the appellant said he never cross examined PW2, re-examination is recorded in the proceedings meaning there was cross examination which was followed by re-examination; I also note that recording under re-examination is indicated as nil which I believe should have been cross examination as it came immediately after examination in chief; I also believe re-examination would not have been recorded if there was no cross examination. It cannot therefore be true that the appellant never got opportunity to cross-examine PW2.

19. Upon re-evaluation of evidence adduced in the trial court, I have no doubt that penetration has been proved, assailant identified and there is no doubt that the child was under 10 years and failure to produce documents to prove age would not cause any injustice to the appellant in the case of **Ahmedi Ali Dharamsi Sumar –versus- Republic [1964] E.A. 481** and re-stated in **Fatehali Manji –versus- Republic [1966] E.A. 343** where the Court of Appeal stated:-

**“...it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not be ordered where it is likely to cause an injustice to the accused”**

20. As observed above, ingredients of the offence of defilement were proved beyond reasonable doubt. I see no merit in appeal against conviction.

21. On the issue of sentence, I agree with the decision in Eldoret **criminal Appeal No. 313 of 2018 B.W vs Appellant where the court of appeal held as follows:-**

**“Guided by the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the life imprisonment meted upon the appellant was excessive and cannot stand given the circumstances of the case. We intervene and hereby set aside the life sentence meted upon the appellant. We have considered the circumstances of this case where both the complainant and the appellant stated that it was not the first time they were engaging in sexual intercourse. In light of this, we find that the life imprisonment meted on the appellant is excessive and harsh. We substitute the term of life imprisonment with an imprisonment for a term of 20 years with effect from the date of sentence by the trial court on 17<sup>th</sup> July 2015. Otherwise, we uphold the conviction of the appellant for the offence charged.”**

22. Guided by the above decisions of both the supreme court and court of the appeal, and taking into consideration no previous record were available to court in respect of the appellant, the life sentence imposed is excessive. I am minded to interfere with the sentence and as I do so, I take into account the fact that the child was 8 years and was infected with sexually transmitted disease. I find it fair and just to set aside life sentence and impose sentence of 25 years imprisonment.

### **23. FINAL ORDERS**

1. Appeal on conviction is dismissed.
2. Sentence of life imprisonment set aside and appellant sentenced to 25 years imprisonment.

**Judgment dated, signed and delivered at Nakuru this 9<sup>th</sup> day of October, 2019.**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/Jenifer - Court Assistant

Appellant in person

Chigiti for Respondent