



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 25 OF 2019

JEREMIAH MUTISYA KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Criminal Case No. 50 of 2017 in the Senior Resident Magistrate's Court at Kilungu delivered by Hon. C.A. Mayamba (PM) on 20th March 2019)

JUDGMENT

1. The Appellant was charged with offence of defilement Contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006 as read with Section 8 (4) of the same Statute.
2. The particulars being that on 7th December 2016 within Makueni County intentionally caused his penis to penetrate the vagina of MM aged 16 years.
3. The alternative charge was committing an indecent act with a child Contrary to Section 11 (1) of Sexual Offences Act No. 3 of 2006.
4. The particulars being that on 7th December 2016, same place and time intentionally touched the vagina of MM a child aged 16 years.
5. The Appellant pleaded guilty to the offence and matter went into trial. He was found guilty and convicted and after mitigation he was sentenced to fifteen (15) years imprisonment.
6. The parties agreed to canvass appeal via written submission but only the Appellant filed the same. The Respondent relied on evidence on record in opposition to the appeal.
7. The grounds raised to be canvassed in appeal were set out in the Amended Petition namely:-

1. **THAT** the learned Magistrate erred in both law and fact by convicting the Appellant on insufficient evidence.
2. **THAT** the learned Magistrate erred in both law and fact by convicting the Appellant while shifting burden of proof from the prosecution to the Appellant.
3. **THAT** the trial Magistrate erred in both law and fact by convicting the Appellant yet the age of the complainant was not proved.
4. **THAT** the trial magistrate erred in both law and fact by making a finding that the complainant was defiled by the Appellant yet the Complainants pregnancy was not connected to the Appellant hence penetration was not proved.
5. **THAT** the learned Magistrate erred in both law and fact by dismissing the Appellant's plausible defence without sufficient reasons.
6. **THAT** the learned trial Magistrate erred in both law and fact by convicting the Appellant on uncorroborated contradictory evidence.
7. **THAT** the trial Magistrate erred in both law and fact by convicting the Appellant on framed up charges through bribery of Kshs. 30,000/=.

8. **THAT** the trial Magistrate erred in both law and fact by convicting the appellant relying on the experts evidence which was categorical and did not link the Appellant with the alleged offence.

Appellant's Submission:

8. The appellant submitted that, no document whatsoever was ever produced at the trial court as an exhibit to prove the age of the Complainant. PW 5 a Clinical officer from Kilungu Sub-County Hospital testified on the contents of the P3 Form and he did not testify on the issue of the age of the victim.

9. PW1 in the trial court refers to a birth certificate (on page 14 of the record), which was not produced anywhere as an exhibit nor did the learned trial magistrate refer to it in his judgment and hence we opine that the Age of the victim was not satisfactorily proved before the trial court. The appellant relies on **Justice J.A. Makau** in the case of *Eliud Ouma Agwara vs Republic [2016] eKLR* where he held:-

“This though sworn evidence can be admissible, I am of the view that sworn evidence alone cannot suffice nor can a P3 Form, unless the producer of the same testifies that he/she medically examined the Complainant at the time of completing the P3 form and assessed the victims age as indicated in the P3 form or to be contained in a separate note or age assessment report hence the age of the victim was not proved before the lower court.”

10. See also *Hilary Nyongesa vs Republic* (Eldoret Criminal Appeal No. 123 of 2009) quoted in the case of *Dominic Kibet Mwareng vs Republic [2013] eKLR*. And also **Justice Weldon Korir** in the case of *JKB vs Republic [2018] eKLR* held that:-

“Age is a necessary ingredient in an offence of defilement. For a conviction to ensue the Prosecution must establish that the victim was under 18 years of age at the time of the Prosecution. Although the Doctor stated that the Complainant was 16 years, the source to prove the information was not produced. There is no indication that the Doctor who treated the Complainant carried out an age assessment on her.”

11. The Appellant also relied on the case of *Omus Kiringi Chivatsi vs Republic [2017] eKLR* the court held that:-

“... My view is that the age indicated on the P3 Form is what the complainant informs the police to be the complainant's age. That information has to be supported by the production of supporting documents or information. Such documents include birth certificate, immunization or baptismal card, school records such as school identity card indicating date of birth as per the school records or school leaving certificate, passport, age assessment or any relevant information such as the number of children the victim's family has and the complainant's position of birth in the family. This information enables the court to verify the victim's age. Where the victim appears to the court that she/he is a child, the court can make such observations and the apparent age can be considered. In the current case the trial court saw the complainant. The trial court did not conduct *voire dire* on PW 1 as it is presumed that she was old enough to understand the meaning of telling the truth. The mere fact that PW 1 stated that she was sixteen years cannot be conclusive proof of age. Further, the fact that PW 1 was in class six in 2011 does not prove that she was below eighteen years.

12. On the ingredient of penetration it is submitted that the prosecution did not just have to prove that the Complainant was penetrated, but that the penetration was done by the Appellant. He relies on **Mulwa J** in the case of *MKM vs Republic [2018] eKLR* reiterated that:-

“...also escaped the trial magistrate's mind while analyzing the prosecution evidence that the twelve (12) year old brother at the time was sharing a bed with the victim. Is there a possibility that the act of incest/defilement may have been committed by other person other than the Appellant taking into account that no direct corroboration existed.”

13. The appellant contended that, nothing connects the Appellant to having penetrated the victim and nothing connects him to the pregnancy. No scientific evidence was ever produced and/or tendered before the trial court to connect the Appellant with the pregnancy.

14. Doubts exist on who penetrated the victim. Doubts exist on whether this is a genuine case brought up by the Complainant. Why did the OCS lock up the Complainant's mother when she went to report about the abortion? Why did she pay Kshs. 30,000/= to the OCS? Is it true that the Complainant's mother is the one who organized for the abortion?

15. The Complainant (PW 1) made it known to the trial court that indeed her grandmother was an illegal charcoal burner and she (her grandmother) has had several confrontations with the Appellant herein amongst other Forest Guard over her illegal activities.

16. Thus the Appellant brings to the attention of the court that the complainant identified the Appellant as her assailant should be looked from several perspectives.

17. It is urged that the trial court never made it its duty to try and figure out as to whichever perspective the Complainant identifies the Appellant but instead meted a sentence on the Appellant without giving some serious thoughts.

The Duty of First Appellant Court:

18. The duty of the Appellant court were clearly set out in the case of *Okeno vs Republic [1972] EA 32* where the court held that:-

“An Appellant on a first Appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive

examination *Pandya vs Republic [1957] EA 336* and the appellate courts own decision on the evidence.

The first Appellate court must itself weigh the conflicting evidence and draw its own conclusion. It is not the duty of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion; 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."

Prosecution's Evidence:

19. **PW1** stated that she was a student at [Particulars Withheld] High School. It was her testimony that in the year 2016, she met Jeremiah Kilonzo who was on a motor bike. He followed her while she was from school.
20. It was her testimony that appellant asked for her hand in a relationship of which she agreed to. They became friends from January 2016 up to December 2016. In the year 2017, she went to school but was tested and found to be pregnant. She stated that on the 9th January 2017, appellant gave her some tablets to take.
21. The following day her mother took her to the hospital where it was found that the pregnancy had been terminated. She stated that appellant used to give her money and whatever she would ask for he was agreeing to. It was her testimony that they slept together very many times.
22. She did not inform anyone about their relationship until her father took her for pregnancy check. She was taken to Kilome police station where she recorded her statement before being taken again to the hospital. She went home after visiting the hospital.
23. It was her testimony that it was the appellant who had given her drugs which the doctor confirmed. She stated that she was treated and issued with P3 form and treatment notes. It was her testimony that currently she is 17 years old having been born on the 8th August 2000.
24. **PW2** stated that she wanted to take her daughter to school. Her father took her to the hospital and it was revealed that she was pregnant. It was her testimony that her daughter was born on the 8th August 2000. She stated that the father had taken her for pregnancy test in Machakos. On the 10th January 2017, she went home and found her feeling pain in the stomach.
25. It was her testimony that the complainant informed her that appellant had given her some drugs to take. She took her to a hospital at Joyland where the doctor confirmed that the pregnancy had been terminated. She went to the police station but was locked up in the police cells instead. She stated that the complainant informed her that the pregnancy belonged to a forest officer by the name **Jeremiah Kilonzo**.
26. **PW3** stated that on the 9th January 2017, he had taken his daughter to school as she was to join [Particulars Withheld] Secondary School. He took her to Machakos clinic for tests prior to joining school. The child was found pregnant. He was instructed by the doctor to report the case as the complainant had mentioned an officer.
27. He went with the child to Kilome police station and was referred to **Kilungu Hospital** by the O.C.S. She was again confirmed to have been pregnant. He went back to the police station but did not find the O.C.S. He was going back to work and asked his wife to take up the issue.
28. The following day his wife came home and found their daughter not feeling very well. He was informed that the pregnancy had been terminated which made his wife to be locked up into the police cell. It was his testimony that he saw appellant in court.
29. **PW4** carried out investigations and preferred the current charges as against appellant person. It was her testimony that the complainant came with her father to report this case on the 9th January 2017. The report was to the effect that she was pregnant. She escorted the child to the hospital at Kilungu where she was tested and found pregnant.
30. They went back to the station and the father was asked to go back to the station the following day. On the 18th January 2017, the mother came to the station to report that the child was not now pregnant which made her to be locked up for further investigations.
31. On 23rd January 2017, they went to [particulars withheld] Secondary School where they took the child to Machakos Level 5 Hospital whereby she was examined and it was noted that she had aborted. The P3 Form was filled leading to the arrest and charging of the appellant herein.
32. **PW5** examined the complainant whom she found pregnant but the same had been terminated. It was his testimony that ultra sound was done with the doctor confirming that she had had a complete abortion. He confirmed that in her outpatient card, the complainant on the 9th January 2017 was pregnant. He tendered the P3 Form as PEX1 and treatment notes from Kilungu Hospital as PEX 2.

Defence Case:

33. **DW1** stated that he was working for Kenya Forest Service and denied defiling the complainant or touching her inappropriately. It was her testimony that on the 7th December 2017, he was at Kilome Station and it was a Sunday.
34. He stated that the complainant had stated that she was with her parents and was not at Kilome station. He also denied that there was a

forest known as Kilome Forest as it is called **Kilungu Forest Station**. He stated that he did not know the complainant prior to this case.

35. It was his testimony that he knew the grandmother to the complainant who was a charcoal burner. He arrested the grandmother but warned her against destroying the forest as it was not her first time. It was his testimony that his juniors were not involved in the arrest of the grandmother as they were helping her to destroy the forest.

36. He blamed his woes on **Gerald Mia** who was colluding with other members of the community and encouraging destruction of the forest. He stated that **Gerald Mia** tried to have him transferred or fired. It was his testimony that he later learnt that the complainant was known to Gerald Mia through a boda boda operator.

37. He denied taking the complainant for H.I.V test. It was his testimony that January 2016, he was still new in the area. It was his testimony that it was not true that the complainant could bleed in their last sexual encounter as she had got used to the same. He denied having taken the complainant to procure abortion.

38. He tendered her statement as DEX1. It was his testimony that it could not have been true that he was using their motor cycle registration number **KBU 563T** to pick the complainant as the work ticket as DEX2. He stated that he was not arrested but was summoned to the police station but saw **Gerald Mia** therein yet he had not been summoned.

39. On the **25th January 2017**, he was informed that he had defiled the complainant. It was his testimony that **Gerald Mia** had incited the community against him including the area MCA.

40. It was his testimony that the community wanted their own forest station and the incident was captured in the vernacular FM station. He further stated that Gerald Mia was transferred though he claimed that he finalized his dreams. It was his testimony that the father to the complainant did not lay any blame on him.

41. He further stated that the father to the complainant made a report as the complainant was pregnant. He further stated that the mother to the complainant was arrested and the father asked to pay Kshs 30,000/= through Gerald Mia to the O.C.S as a bribe.

42. He equipped that this was a case framed as a result of confusion of names. He asserted that the medical officer could not give accurate findings as he did not examine the complainant. He urged this court to discharge him and allow him continue with his work. It was his testimony that O.C.S was bribed. He stated the investigation officer was one Kariuki.

Issues:

43. After going through the evidence on record and tendered submissions, I find the issues are; ***whether the ingredients of offence charged were proved beyond reasonable doubt? And whether the appellant defence was considered?***

Analysis and Determination:

44. **That the girl was under the age of 18**

It is trite law that for an offence of defilement, age must be established for any action to come within the ambit of Section 8 (1) of the Sexual Offences Act. Under the Children's Act, Chapter 141 Laws of Kenya, a child is defined as any person below the age of 18. The same definition has been adopted in the Sexual Offences Act under the provisions as contained in Section 2.

45. In the case of *Kaingu Elias Kasomo vs Republic* Malindi Cr. App. No 504 of 2010 the Court of Appeal stated, **“that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth. See also the case of *Francis Omuron vs Uganda Criminal Appeal No. 2 of 2000* where the court held that “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.”**

46. Also in the case of *JWA vs Republic* Court of Appeal No. 100 of 2013 held that, **“it is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced by Dr. Kalumbe who examined the complainant indicates that she was born in 1999 and thus 10 years in the year 2009, when the offence was committed; the P3 Form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the findings of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years.”**

47. In the instant case, the complainant stated that she was born on the 8th August 2000. The incident is alleged to have happened from January 2016 with the last encounter being the 7th December 2016.

48. It was also revealed during the tendering of evidence that the complainant on the 9th January 2017 was found pregnant upon medical test

being carried out on her. It suffices therefore that as at the time of the alleged offence, the complainant was actually 16 years old.

49. She testified that, on the 1st August 2018 she was 17 years with 11 months old which still brought her within the definition of a child. It must also be noted that the age taken is that of the commission of the alleged offence and not when the victim testifies. Thus it was justified in finding that, the complainant was within the definition of a child under the age of 18.

On issue of penetration:

50. It was the prosecution's case that the minor had carnal knowledge of. In proof of their assertion they summoned oral and documentary evidence in support of that claim.

51. PW 1 stated that she was followed by the appellant while from school in January 2016, who asked her for a hand in a relationship. She obliged and ever since they had many sexual encounters. PW1 stated that appellant used to give her money in exchange of sexual encounters, a fact that the defence disputed on account of mistaken identity but not the content of that assertion.

52. PW1 described in minutes details their sexual encounters which left this court with no doubt as to her ability to give a description of what constitutes defilement. It must be noted that this child was aged 16 years old and was quite intelligent as per my observation.

53. PW3 also took the daughter to Machakos clinic for medical tests prior to joining Form [Particulars Withheld] Secondary School. It was revealed that she was pregnant. The trial court did not find any reason to doubt this witness testimony that her child was pregnant as no ill motive could be read from this act.

54. PW5 on his medical findings noted that the complainant was examined and medical tests carried out on her. It was revealed that she was pregnant on the 9th January 2017 as per the treatment notes tendered herein as PEX 2.

55. It was his revelation that upon ultra sound being carried out later on it was revealed that indeed the girl had had a complete abortion. The evidence and more so the medical finding that the complainant was pregnant as at the time of medical examination, presupposes that she had been penetrated.

56. The defence contended that the fact that pregnancy had been terminated ruled out penetration, which is laughable since pregnancy is a result of penetration. When one is pregnant it is a prima facie evidence on penetration and no other possible explanation can ensue.

57. Section 2 (1) of the Sexual Offences Act, that penetration;

“...means the partial or complete insertion of the genital organs of a person into the genital organs of another person”. The Court of Appeal, in the case of *Erick Onyango Ondeng vs Republic [2014] eKLR* held as such on the aspect of penetration:- “In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

58. Thus the prosecution succeeded in establishing the aspect of the complainant being had carnal knowledge of.

Who had carnal knowledge of the girl vis a vis the defence?

It was the Prosecution's case that it was the appellant who had carnal knowledge of the Complainant; suffice to note that the latter denied the offence.

59. PW1 in her testimony stated that one day while coming from school in January 2016, appellant herein followed her asking for her friendship in a relationship. It was her testimony that it formed the onset of their relationship which generated into sexual encounters.

60. In his defence, appellant contended that he was transferred to Kilungu Forest in December 2015 and so the time was not enough for him to start such a relationship.

61. It is logical that a relationship can be started even with strangers encountering each other on the first day. It is not lost that some relationships which have led to successful marriages were conceived in matatus and some in churches during praise and worship sessions.

62. The trial court observed that it could not fault the complainant as her recollection was quite stable as a matter of common customs. The claim by the defence was not both scientific and socially impossible.

63. PW1 stated that they met with the appellant after she became her friend and had many sexual encounters. It was revealed that indeed this child was pregnant which presupposes sexual encounter. The defence did not dispute that indeed this child had been engaged in sexual encounters save for his culpability. It sums up that the child was truthful.

64. PW1 stated that upon being found pregnant, her father left her as he was heading back to work. She met appellant along the way as she passed through the forest who gave her some tablets to take.

65. She stated that she bled after taking the drugs which led to her abortion. In his defence, appellant did not respond to this fact but concentrated on his alleged enmity with his fellow forest ranger whom he referred to as Gerald Mia.

66. The trial court observed her demeanor and had no doubt that she was telling the truth. She vividly recalled what happened. For the above court recorded reasons, for believing her and found that her evidence was truthful.

67. PW1 stated that it was Jeremiah Kilonzo who defiled her. It was an aspect that she repeated during her testimony which was after 1 year from the date of plea. In her statement marked as DEX 1, she also mentioned her perpetrator as **Jeremiah Kilonzo**.

68. At no time did she appear to suggest that she had been coached to mention the appellant herein as the defence wanted court to believe. Clearly, trial did not find any confusion as to the two names **Jeremia Kilonzo** and **Gerald Mia** as purported by the defence. She was truthful.

69. It is not lost that sexual encounters also happen between people in close proximity which aide identification by recognition. In this case, this child indicated that they had been having their relationship from January 2016 to 7th December 2016.

70. It was her testimony that appellant used to give her money, a fact that the defence did not challenge. It shows that this two were very comfortable with each other and so mistaken identity was ruled out. The complainant from trial court deduction did not portray on a witch-hunt but was cogent in her recollection.

71. The defence contended that the case was fabricated by one Gerald Mia against him. However no evidence was adduced to support the allegations.

72. The defence also alluded to the fact that the name of the forest is known as [Particulars Withheld] forest and not Kilome forest as per the charge sheet but clearly one cannot tell the prejudice. Yes, the forest may not be Kilome forest but clearly it was not illegal to confuse the names since even appellant admitted that the complainant's homestead was about 100 metres from his work station name notwithstanding and so the same ruled out prejudice.

73. The defence has alluded to the fact that he had arrested the complainant's grandmother who deals in charcoal burning in the forest. It was not clear how he wanted trial court to believe that he had arrested the complainant's grandmother without availing an occurrence book confirming such an event.

74. Public offices are run by records and one must be able to account of his time through records. It is important to add that the grandmother to the complainant was not a witness to this case, denying the defence the nexus between his arresting her and this case, which was hinged on true facts.

75. The defence has contended that this case was frame work against him by his colleague and the grandmother but clearly nothing was presented to show such a position.

76. This court finds that the defence was considered by the trial court and properly rejected. This court find no merit in the appeal and makes the following orders;

i) Appeal is dismissed, conviction is upheld and sentence confirmed.

DATED, DELIVERED AND SIGNED AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019

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C. KARIUKI

JUDGE