



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 10 OF 2018**

**MWALUKI KITEMANGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Resident Magistrate's Court Criminal Case (S.O.) No. 37 of 2014 by Hon. Zacharia Joseph Nyakundi (PM) on 12/07/16)*

**J U D G M E N T**

1. Upon arraignment, **Mwaluki Kitemange**, the Appellant was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between the year **2011** and the month of **August, 2014** in **Ikutha District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **PSK.**, a girl aged **15 years**.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between the year **2011** and the month of **August, 2014** in **Ikutha District** within **Kitui County**, intentionally touched the private parts namely vagina of **PSK.**, a girl aged **15 years**.

3. He was tried, convicted for defilement and sentenced to **21 years imprisonment**.

4. Aggrieved, he appeals on grounds that:

- The learned trial Magistrate erred in both law and fact in convicting the Appellant on overly contradictory, uncorroborated and unreliable evidence.
- The learned trial Magistrate erred in law and facts by admitting a copy of a Birth Certificate produced by the Prosecution and relying on it without following the law of evidence.
- The learned trial Magistrate misdirected himself in law and facts by finding that the Complainant was a minor at the time of the alleged crime contrary to evidence tendered and without a medical age assessment report.
- The learned trial Magistrate misdirected himself in law and facts by not following up on the request by the Prosecution for an age assessment report for the Complainant.
- The learned trial Magistrate misdirected himself in law when he shifted the burden of proving the Complainant's age to the Appellant.
- The learned trial Magistrate misdirected himself in law and facts by failing to find that the Appellant was misled into believing that the Complainant was an adult at the time of the alleged crime.
- The trial Magistrate erred in law and facts by dismissing the Appellant's defence testimony which was reasonable to cast doubts on the Prosecution's case.

5. Facts of the case were that the Complainant who was a pupil in standard 7 at **[particulars withheld] Primary School** fell in love with the Appellant. They continued to engage in sexual intercourse until she became pregnant. She divulged the information to her parents. They

informed her teacher who reported the case to the Chief and the police were notified. The Appellant was arrested and charged.

6. Upon being put on his defence, the Appellant stated that the police went to his home looking for **Mayeke Solo**. He told them that **Solo** was not at his home and they arrested him, took him to Mutomo Police Station and they came up with allegations that he had impregnated a girl. He was released to go home only to be arrested later. He concluded his testimony by alleging that he was in possession of Baptismal Card that showed the Complainant as having been born in **1994**.

7. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that evidence adduced by the Prosecution was overly contradictory, uncorroborated and unreliable. That the Complainant alleged that the Appellant was the father of her child yet the DNA test conducted excluded him as the biological father of the child. That there were serious gaps in the Prosecution's case such that the trial Magistrate should not have relied upon **Section 124** of the **Evidence Act** to convict.

8. Arguing that the Appellant had no duty to prove his case, he cited the case of **Republic vs. Gachanja (2001) KLR 425** where the Court held that:

***“It is a cardinal principle of law that the burden to prove the guilt of an accused person, lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability.”***

9. That there was no medical evidence to establish the age of the Complainant and failure to make a finding to that effect was erroneous on the part of the Court.

10. The Respondent opposed the Appeal. It was urged that it was not in doubt that the Complainant was pregnant and investigations were carried out.

11. Regarding the Birth Certificate that was adduced in evidence, it was argued that what was adduced was the primary document hence admissible in evidence therefore she could not have deceived the Appellant into believing that she was above 18 years.

12. This being a first Appellate Court, I am under a duty to subject evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. In doing so I must bear in mind the fact that I neither saw nor heard any of the witnesses therefore unable to comment on their demeanor (**See Kiilu & Another vs. Republic (2005) 1 KLR 174**).

13. As correctly pointed out, in a case of defilement the Prosecution was required to prove:

- (i) Age of the victim.
- (ii) The act of penetration.
- (iii) Positive identification of the perpetrator (**Also see Fappyton Mutuku Ngui vs. Republic (2014) eKLR**).

14. In the case of **Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000** it was 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...”***

But in the recent case of **Mwalango Chichoro Mwajembe vs. Republic (2016) eKLR** the Court of Appeal stated that:

***“... the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ...”***

15. The Complainant told the Court that she was born in **1995** and at the point of testifying she was 19 years old. However, the Prosecution adduced in evidence a Birth Certificate that was issued on **12<sup>th</sup> October, 2011** which indicates that the Complainant was born on **18<sup>th</sup> February, 1999**. The Appellant argued that to his knowledge the Complainant was born in **1994**. **Section 2** of the **Children Act** defines a child as:

***““child” means any human being under the age of eighteen years;”***

16. As a result of engaging in coitus the Complainant conceived and bore a child which was proof beyond any reasonable doubt that she engaged in penetrative sexual intercourse.

17. Looking at the particulars of the offence it is stated that the act of defilement took place on diverse dates between the year **2011** and the month of **August, 2014**. In her testimony PW1 stated thus:

***“In the year 2011, I was a pupil at Kaketi Primary, I was in class VII. In the month of November, 2013, I met the Accused and we discussed about love. We were discussing at the home of my father. After meeting we started having sex with the accused. I came to discover that I was not having periods... the pregnancy belongs to the accused. He is the father of this child that I delivered in 2014, the baby boy. I have not had my child. I am aged 19 years old. I was born in 1995 ...”***

On cross examination she stated thus:

***“I was born in 1999. I cannot remember when I joined school. I repeated class V, I have two (2) children. The 1<sup>st</sup> born was born in 2012, I was in class VII, I repeated class VII, stayed at home for one (1) year before going back in class VII. I got 2<sup>nd</sup> born in 2014. I conceived in November, 2013 and delivered in August, 2014. You came and we sat at my father’s homestead when we were discussing about our love affair ...”***

18. PW6 No. 83757 **Corporal Roselyn Nelima** received a report of a girl who was pregnant. Following investigations, she established that she had a 1<sup>st</sup> born child who was 2½ years old. They asked her to get a certificate which however indicated that she was 15 years old. A DNA test was done in respect of the Complainant’s two (2) children. Per the reports adduced in evidence, there were **99.9%** more chances that the Appellant was the biological father of **M. S.** while he was excluded from being the father of **A. K.**

19. This case was reported to the police by the Administration. PW2 **Job Kimwele** an Education Officer received a report from PW3 **Peter Kilonzo** the Headmaster of **[particulars withheld] Primary School** regarding the Complainant who was alleged to be pregnant. That is how the case was reported to the police and investigations were carried out.

20. DW2 **PKK** the father of the Complainant, who was called as a defence witness told the Court that she was 22 years old and denied having any knowledge of the Birth Certificate that was adduced in evidence by the Prosecution. He stated that the Appellant accepted being the father of the child. They had negotiations with his parents and he agreed to care for the child. As a result, he (DW2) took the Complainant back to school. When she became pregnant again, she alleged that the person responsible was the Appellant. The children, according to him were born on the **22<sup>nd</sup> August, 2012** and **16<sup>th</sup> August, 2014**, respectively. On cross examination he was not remembering the Complainant’s date of birth but stated that at the point of testifying the Complainant was married to somebody else. On re-examination he stated that he had a Baptismal Card which showed that the Complainant was born on **6<sup>th</sup> April, 1994**.

21. Contradictions in respect of the age of the Complainant were apparent. In **Twehangane Alfred vs. Uganda (2003) UG CA 6** the Court of Appeal stated that:

***“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***

22. In the case of **Nzaka vs. Republic (2016) eKLR** it was stated that:

***“... whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”***

23. Evidence of DW2 the parent of the Complainant suggested that she was an adult. It was not clear as to why the Prosecution did not find it necessary to call her parents as Prosecution witnesses to clear the doubt that was established right at the outset by the Complainant herself. The Birth Certificate that PW2 disowned was issued on **7<sup>th</sup> October, 2011** and the informant was alleged to be the father. It would have been necessary to have an age assessment of the Complainant.

24. In the case of **Erick Onyango Odeng vs. Republic (2014) eKLR** the Court of Appeal stated that:

***“The hearing before the trial Court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial Court is to carefully analyze contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”***

25. All along the Complainant was emphatic that she engaged in consensual sex. To establish if she had the capacity to consent to the act, the Prosecution had the duty of proving her age beyond reasonable doubt. Contradictions that were apparent in respect of her age went to the substance of the matter. Without the assessment of the age, there was no evidence to establish whether or not the Complainant was a minor at the time of the act.

26. In the premises, the Appeal is allowed. I do quash the conviction and set aside the sentence meted out. The Appellant shall be set at liberty unless otherwise lawfully held.

27. It is so ordered.

**Dated, Signed and Delivered at Kitui this 2<sup>nd</sup> day of December, 2019.**

**L. N. MUTENDE**

**JUDGE**