



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.221 OF 2016**

**JUSTUS WEKESA MASIKA.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. The appellant having been convicted and sentenced to life imprisonment and had his names entered in the register of dangerous sexual offenders, in PM's Criminal Case No.260 of 2016 Sirisia in a Case where he was charged with a main Count of the offence of defilement contrary to Section 8(1) as read with Sections 8(2) of the Sexual Offences Act has preferred this appeal having been dissatisfied with the conviction and sentence.

2. The Appellant initially filed a Petition of Appeal on 5<sup>th</sup> December 2016 and thereafter an amended Memorandum on 27<sup>th</sup> December 2016. The summary of the appellant's complaint is as follows;

- *The charge sheet was defective, names differed with evidence and the word 'unlawfully' was left out.*
- *The evidence of the victim was uncorroborated.*
- *The appellant was not examined for purpose of a forensic and scientific examination including that of DNA.*
- *Essential witnesses were left out.*
- *The evidence of Prosecution witnesses was contradictory.*
- *Evidence did not support the charge.*
- *The medical report was not produced by the maker.*
- *The defence and alibi raised were rejected though not rebutted by the Prosecution.*
- *The Case was not proved beyond reasonable doubt.*

3. In his submission Counsel for the Appellant Mr. Makokha did not submit on all grounds and I therefore take it that he dropped some grounds. I will confine the judgement to ground canvassed on appeal. Counsel submitted that the trial Court erred in forming an opinion that the alibi was brought late in the day as an alibi defence can be produced at any time during the trial, as the Prosecution may recall evidence in rebuttal. In this regard, he relied on **Section 309 of the Criminal Procedure Code**, the Case of **Victor Mwendwa Mulinge Vs R eKLR & Elias Kiamati Vs D.P.P. (2015) eKLR.**

4. Though not a ground of Appeal Counsel raised the issue of identification stating that when taken to the scene of Crime the Complainant was unable to identify the appellant, secondly still on identification the victim had stated that her defiler was her teacher yet there is evidence that the appellant teaches elsewhere and not the victim's school.

5. On medical examination, counsel urged that the evidence is contradictory as the victim alleged to have been treated at Chepkwabi dispensary on 22<sup>nd</sup> February 2011, yet her age was assessed at Kimilili district hospital, and the P3 form was filled at Kapkateny hospital,

6. Counsel took issue with the fact that on examination the Complainant was not found to have any lacerations. It was his submission that there is a presumption that at the age 10 children do not engage in sex and therefore if indeed sex occurred the victim would have had visible injuries that would have been obvious. He relied on **John Musere Opwaso Vs R Criminal Appeal No.27 of 2013.**

7. On the evidence of the Complainant Counsel urged that the same was not believable and he cited **Peter Kimanzi Criminal Appeal 120 of 2012.**

8. On age assessment Counsel contended that the same was taken casually without considering the necessary parameters yet the age is crucial in terms of sentencing in a defilement case. In this regard he relied on **Kelvin Kiprotich Amos alias Rotich Vs R Criminal Appeal No.89**

**of 2016 and Peter Kimanzi Vs R (Supra).**

9. The State opposed the appeal as lacking merit as there was sufficient evidence on record to support the offence of defilement and further that the Sentence meted out was lawful.

10. On the issue of identification State Counsel Mrs. Njeru argued that the Complainant and PW2 were categorical that the assailant was their neighbor, teacher Julius which evidence was corroborated by PW4.

11. On the allegation that the minor failed to identify the assailant, she submitted that this ground cannot stand against the strength of PW5's evidence. The Complainant took the Police Officers to the place where she was defiled which place happens to be the appellant's shop. Upon arrival at the scene they found a number of people and upon being asked to point at her assailant, the complainant did not speak. Further that the evidence pointing at the accused is that of recognition, the alleged offence took place in broad day light and both the victim and the assailant knew each other.

12. As to whether penetration took place or not Counsel submitted that penetration was supported by the medical report.

13. On the issue of alibi, counsel contended that the same lacked merit as the appellant in his testimony admitted to having opened his shop by 4p.m. The incident allegedly happened at 5p.m., and he was at the scene at the time it happened. The alibi was therefore rebutted by the Prosecution.

Further she argued that in his statement to the police the appellant admitted the fact. The alibi was a mere denial and did not dislodge the prosecution case.

14. Counsel further urged that all the necessary ingredients of the offence of defilement namely, age, identification and penetration were proved. The Complainant was 10 years at the time of the alleged offence, there was an age assessment and PW2 indeed confirmed the date and year of birth, coupled with the fact that the trial Court had the advantage of observing the minor's age.

On the issue of penetration, the P3 form was filed 9 days after and lacerations if any could not have been fresh, nonetheless, the report proved penetration.

15. Further it was submitted that apart from being at the scene of crime, the appellant's behavior after the commission of crime points to the element of guilt as the appellant fled when being sought for and was found upon a tip off after 7 days.

16. This is the first Appellate Court and it has a duty to reconsider the Evidence afresh, examine and analyze the same in order to arrive at an independent opinion See **Okeno Vs R 1972 E.A. 32**

17. The Prosecution Case in brief is that on the 21<sup>st</sup> day of February 2016, as E.O. a minor aged 10 years, was on her way home she was called by a teacher and neighbor, the appellant to his shop and as she entered he pulled her to his bedroom removed her clothes and defiled her. The victim failed to return home and her grandmother PW2 went to search for her in her school the following day, but did not find her at the school. The child was later found at the Chief's office in Chepkwabi and was taken to Chepkwabi dispensary as she did not look well. The diagnosis done at the said dispensary showed that she had been defiled and on interrogation, the victim named the appellant, a teacher and neighbor as the assailant. The police summoned the appellant who failed to cooperate, he was to disappear and was only arrested upon a tip off 7 days later

18. The onus of proving this Case as any other Criminal case squarely lies on the Prosecution and this being a defilement case the Prosecution has to prove the age of the victim, that the assailant was positively identified as the defiler and that penetration occurred.

19. The issues for determination as crafted by the trial Court are adopted herein with approval, that is the issue of age of the victim, whether or not there was penetration, whether the alibi dislodges the Prosecution Case and if not, whether there is sufficient proof to the required standard linking the accused to the offence.

20. Age is no doubt an important factor in Cases of defilement as the same determines the punishment that follows once there is a conviction as there are different set of punishment prescribed dependent on the age of the victim. In the Case of **Hilary Nyongesa Vs R (Eldoret) Criminal Appeal No.23 of 2009**, Mwilu J (as she then was) said the following;

*“Age is such a critical aspect in Sexual offences that it has to be conclusively proved...”*

*And this becomes important because punishment (sentence) under the Sexual Offences Act is determined by the Victim's age”*

21. The best way to prove age would be through a birth Certificate which is not always available especially in rural Kenya. Other methods have been used in different Cases with approval such as age assessment, baptismal cards and information from parents or guardian and in some instances, courts have made observation.

In **Francis Omuroni versus Uganda, Court of Appeal, Criminal Appeal No.2 of 2000** the Court stated;

*“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.*

22. In this Case the minor is said to have been ten years. The Appellant's Counsel doubts the age assessment. Whereas I do agree with the defence Counsel that a doctor and a clinical Officer's assessment if not done professionally would be misleading See my holding **in Kelvin Kiprotich Amos alias Rotich Vs R Criminal Appeal No.89 of 2016**, cited by Counsel for the appellant, every Case is decided within its own facts and circumstances.

23. In this Case, several parameters were applied in proving age and for the court to have arrived at the conclusion that the minor was 10 years, the same are; -

i). The victim testified to the fact herself

ii) PW2 the victim's guardian gave the date, month and year of birth to the doctor.

iii) Assessment of her age was done. It stated as follows;

“.....Date of birth reported to be 28/12/2005

*Giving age as 10 years 2 months*

*Medical assessment is in congruence with age given above.”*

iv) The P3 form on age assessment stated;

“Upper set of teeth -14

Lower set of teeth -14

Total                    28

*Conclusion minor is below 18 using the dental formula”*

v) The trial Court also made its own observation as follows;

*“On whether or not the Complainant was indeed a minor of 10 years when the alleged offence was committed, PW1, the Complainant herein testified that she is 10 years old. Her age assessment was done by a doctor, confirmed that she was 10 years and it was produced as P. Exhibit I. This was not an issue. I will not belabor much on it as from the Court's observation the victim was child of tender years.*

24. Several methods were applied by the trial court in proving the victim's age, including its own observation. This Court would have no basis in the circumstances to interfere with the finding of the trial Court. The best this court can do for now is to concur with the said finding. Indeed, this court is under an obligation to take cognizance of the fact that the trial court had the opportunity of seeing and hearing evidence first hand. **Okeno Vs R (supra)**

25. Furthermore, the appellant did not raise any issue at the trial as regards age of the victim. This therefore leads me to the conclusion that the age assessment was correct and the issue now being raised is an afterthought.

26. On the issue of penetration, in her evidence the minor said as follows;

*“...when I entered the shop, he held my hand then pulled me to his bedroom, he removed my clothes, he still had his clothes on. He removed his clothes then did bad manners to me. He slept on top of me. He put his thing which he uses to urinate into my 'vagina'. I tried to scream but I could not. It was painful...”*

27. On the 22<sup>nd</sup> of February, 2016 the minor was taken to Chepkwabi hospital and the following day to Kimilili hospital. The medical record indicate that she attended Chepkwabi Dispensary at 5.30p.m. and a lab test done which showed pus cells and few sperms. The victim was given medication and referred to Kimilili District hospital for further investigations.

On 23/2/2016 the victim was taken to Kimilili hospital, examination results indicated that there were no lacerations found, and there was no hymen. And with these findings the examiner concluded from the examination that the victim had been defiled.

The P3 form repeated the same information.

28. The appellant's Counsel doubts whether there was defilement as alleged as the minor had no lacerations three days after the alleged incident though there was conclusion that the minor had been defiled.

In a **Sexual Assault Handbook by Dr. Jean Edward**, she considers two important sexual assault questions as follows;

*“1. Why there are frequently no (or only minor) injuries resulting from the alleged assault.*

*2. Why children who have accurately described penetration frequently have no medical injuries that are consistent with penetration.”*

29. The second question quoted above is most relevant in the circumstances of this Case and Dr. Jean Edward states under the heading rapid healing

*“(15) Because the genital area of young children has an extremely good blood supply, it heals very rapidly, usually without scarring. Unless the child is examined within 24-48 hours of the event, it is very unlikely that an injury will be seen”.*

30. I found the testimony of the victim credible, intelligent, believable and sufficient to have the appellant convicted. See the Proviso to Section 124 of the Evidence Act.

31. However out of abundant caution I find the same evidence to have been corroborated by medical evidence on record. The victim here was treated the second day after the alleged defilement at Chepkwabi dispensary where pus cells and some sperms were detected. On the third day she was examined again at Kimilili sub district hospital this was more than 48 hours later. She was found to have no lacerations but with no hymen and the doctor got the impression that she had been defiled. It is my considered opinion that from the analysis above she may have healed from minor injuries 3 days later, if not the injuries were not easily detectable and that may explain lack of lacerations, there having been pus cells and sperms earlier seen and a missing hymen.

I therefore find as a matter of fact the she was defiled which takes me to the next issue.

32. Who defiled the minor and is the alibi credible.

The Appellant’s alibi is that the incident was on a Sunday and he was in church most of the day and only opened the shop at 4p.m.

According to the minor the incident happened at 5p.m. The victim placed the appellant at the scene of crime at the time the incident took place. She was able to give his name and describe him and take the police to the shop. Though she was not able to speak when taken to the scene of crime this was attributed to the fact that there were several people at the shop and the trauma she was undergoing at the time which is a reasonable explanation.

In his defence the Appellant confirmed having opened the shop at 4 p.m. The Alibi although brought at the defence was rebutted by the prosecution evidence and is certainly not believable.

33. The victim described the appellant as teacher Justus, their neighbor. She further said she attends xxxx school and is in class 5. This was confirmed in writing and in evidence by her head teacher PW5 who also confirmed in exhibit 4 and in evidence that the appellant is his colleague and head teacher at xxxx R.C Primary school. Further PW2 in her evidence said she knew the appellant who is a neighbor, a distant relative and who teaches at xxx PW5 confirmed also that the victim told him that she was defiled by a teacher from xxxxx. A document introduced by the appellant on appeal and not an exhibit in his defence at the trial confirmed that he is indeed the headteacher at xxxx. I see no major contradiction in the prosecution evidence that would water down the recognition and identification of “teacher Justus of xxxxx”. This therefore leads me to conclude that the appellant was known to the victim, and since the offence occurred at day time recognition was positive and there was no possibility of mistaken identity.

34. For the above reason, I find the appeal devoid of any merit and the is dismissed as I am in total concurrence with the

Conviction and sentence.

**Dated and Delivered in Bungoma** this 8<sup>th</sup> day of February 2018

**ALI-ARONI**

**JUDGE**