



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 84 OF 2017**

*Arising from the judgment of Hon. P.M. Wechuli, RM in Tigania CCRC No. 139 of 2015 delivered on 24<sup>th</sup> May, 2016)*

**(CORAM: F. GIKONYO J)**

**JOHN MWONGERA.....APPELLANT**

**-VS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Defilement**

[1] The Appellant was charged 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 are that the Appellant on the 13<sup>th</sup> day of December 2014 at [Particulars withheld] Village Amwari Sub-Location Kimachia Location in Tigani West District within Meru County intentionally caused his penis to penetrate the vagina of F. M a girl child aged 10 years.

[2] The trial court convicted the Appellant and sentenced him to life imprisonment. The grounds of appeal are that the prosecution did not prove their case beyond reasonable doubt, the Complainant's age was not ascertained and that the prosecution rendered inconsistent and conflicting testimonies.

[3] The Appellant argued his appeal. He told the court that he relied entirely on his written submissions filed on 8<sup>th</sup> May 2018 and that the court should consider them in determining the appeal. From the submissions, it has been argued that the age of the Complainant was not well established for the immunization card does not state the age. He submitted that **PW5** stated that the Complainant is 13 years old while **PW1** stated she is 10 years old. Further; that the prosecution did not prove its case beyond reasonable doubt because, first; the Complainant's evidence is not credible for she did not vibrantly state when or where the alleged incident took place. Second, that the prosecution did not offer an explanation for the cause of the long lapse of time before the Complainant was taken for treatment and examination. But the mother stated that she took the Complainant to hospital the following day which creates discrepancies. Third, that on examination the Complainant's hymen was broken and the labia majora and labia minora were intact hence making the evidence not credible. In addition, the presence of epithelia cells could not suffice as prove that the Appellant had defiled the Complainant as alleged.

[4] Mr. Namiti, counsel for the prosecution, opposed the appeal. He stated that the age of the minor was proved through the immunization card which shows the date of birth to be 3<sup>rd</sup> November 2003. He urged further that penetration was proved for **PW1** narrated how it happened; and it was confirmed by the doctor as well as **PW5** who noted physical appearance of minor suggested penetration. On recognition, **PW1** identified the assailant to be the Appellant.

**Duty of court**

[5] I know my duty as first appellate court; to evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they gave evidence. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. However, what must be avoided is merely rehashing of evidence as was recorded. Instead, the court should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insist on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. I will then express my overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

**Offence of Defilement**

[6] Defilement is defined in Section 8 (1) of the Sexual Offences Act as follows: -

***“A person who commits an act which causes penetration with a child of an offence termed defilement.”***

Thus, for one to be found guilty of this offence three inextricable things must be established:

1. That the victim was a child and age;
2. That there was penetration; and
3. That the perpetrator was the accused person.

#### **Age of child**

[7] According to the charge sheet the complainant was a girl aged 10 years. **PW1** stated that she was 10 years while **PW5** said she was 13 years. The immunization card which was produced in court show that she was born on 3<sup>rd</sup> November 2003. Therefore, when the assault was committed the Complainant was aged 11 years. Accordingly, it was proved that she was a child aged 11 years at the time of the commission of the offence.

#### **Was there penetration?**

[8] Penetration is defined under Section 2 of the Sexual Offences Act to be: -

***“the partial or complete insertion of the genital organs of a person into the genital organs of another person;”***

The Court of Appeal gave a clear rendition on penetration in the case of **Mark Oiruri Mose v Republic [2013] eKLR** that:

***“Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”***

[9] **PW1** stated that the Appellant did *tabia mbaya* on her that made her feel pain and caused her to bleed. **PW5** C N mother to Complainant corroborated the evidence of **PW1**. She stated that on the material day, **PW1** narrated to her the ordeal she underwent and how she had been defiled. She also observed that **PW1** was bleeding from her private parts. The next morning she took the Complainant to the police and hospital. She said that the Complainant was not walking properly. She reported to the chief who also testified as **PW6**. More resounding proof of penetration was given by **PW4, Geoffrey Muthomi Murithi** clinical officer at [particulars withheld] Hospital who examined **PW1** three days after the incident, which is, on 16th December 2014. **PW4** filled the result of his examination in the P3 form. Upon examination of the Complainant he noticed that her major and minora were intact but her hymen was broken. He came to the conclusion that she had been defiled. Consequently, this is conclusive proof that indeed penetration occurred. Although the Appellant admitted the alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006 the facts of the case show this was not simple indecent act defined in Section 2(1) of the Sexual Offences Act:

***“Indecent act” means an unlawful intentional act which causes –***

***a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.”***

The facts and evidence I have evaluated in this case do not reveal merely or intentionally causing penis to touch the vagina of girl aged 9 years. It is penetration and therefore defilement of the child. I therefore find the Appellant to be guilty of the offence of defilement. But by whom?

#### **Perpetrator**

[10] **PW1** testified that the Appellant held her leg, dropped her to the ground, removed her clothes and did *tabia mbaya* that made her feel pain and blood to come out. She told the court that the Appellant pressed her neck so that she could not scream. She then ran to where her mother was and informed her. **PW1** identified the Appellant as the assailant and the person who caused penetration of her genitalia. According to Section 124 of the Evidence:

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

[11] In law, therefore, the evidence of **PW1** would suffice to convict the Appellant. I am however aware that the court should warn itself in

convicting on the evidence of a single identifying witness. But, nothing shows that PW1 was under any delusion as the accused was her neighbour and she knew him. In any case, her evidence was corroborated by her mother, the chief and the IO. PW5 told the court that PW1 said to her that it was Mwongera who defiled her. Mwongera was their neighbour and is the accused herein. **PW7 No. xxxx Corporal Peter Ekai** the IO arrested the accused after investigations of report of defilement of PW1. I find that the Appellant caused penetration with the genitals of the girl herein aged 11 years.

Sentence

[12] The sentence is prescribed in section 8(2) of the Sexual Offences Act as follows:-

**8. Defilement**

***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

[13] The trial magistrate sentenced the Appellant to life imprisonment in accordance with section 8(2) of the Sexual Offences Act. The trial magistrate noted that the sentence in section 8(2) of the Sexual Offences Act was in mandatory terms. There lies trouble. Following the decision of the Supreme Court on mandatory sentences, the court still has discretion under section 8(2) of the Sexual Offences Act in order to mete out appropriate sentence as a matter of justice. Taking into account his mitigation that; he has small children, is sole bread earner and he was remorseful for what he did, I sentence him to 15 years imprisonment. I therefore uphold his conviction but set aside the life imprisonment. It is so ordered.

Dated, signed and delivered in open court in Meru this 5<sup>th</sup> June, 2018.

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Namiti for Respondent

Appellant in person

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**F. GIKONYO**

**JUDGE**