



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**HIGH COURT CRIMINAL APPEAL NO. 23 OF 2017**

**ROPHAS FURAHA NGOMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the Judgment of Hon. L.N. Juma, Resident Magistrate,**

**delivered on 31<sup>st</sup> May, 2017 in Kilifi Senior Principal Magistrate's**

**Court Criminal Case No. 334 of 2014).**

**JUDGMENT**

1. The appellant Rophas Furaha Ngombo was on the 12th of August, 2014 charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that between 7<sup>th</sup> and 8<sup>th</sup> August, 2014 in Kilifi Township location within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of SM [name withheld] a child aged 16 years.

2. The appellant also faced the alternate charge of indecent act contrary to Section 6(b) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that between 7<sup>th</sup> and 8<sup>th</sup> August, 2014 in Kilifi Township location within Kilifi County, intentionally touched the genital organs of SM [name withheld] a child aged 16 years with his penis.

3. The Hon. Magistrate heard the evidence tendered before her and found the appellant guilty of the main charge of defilement. She convicted him and sentenced him to serve 15 years imprisonment.

4. The appellant being aggrieved by the said Judgment filed a petition of appeal on 11th October, 2017. He thereafter filed an amended petition of appeal on 21st March, 2018 which this court deemed to have been properly filed. His amended grounds of appeal are that:-

(i) The Trial Magistrate erred in law and fact by failing to consider that both the conviction and sentence is founded on a defective charge whose particulars are at variance with the evidence adduced;

(ii) The Trial Magistrate erred in law and fact by failing to consider that no birth certificate, no birth notification or age assessment report was prepared and produced as an exhibit to prove the exact age of the complainant at the time of the commission of the offence;

(iii) The Trial Magistrate erred in law and fact by failing to consider that medical treatment note (clinic card) being a professional medical document was produced as an exhibit by the Police (PW4- Investigating Officer) but not the Medical Officer;

(iv) The Trial Magistrate erred in law and fact by failing to consider that the appellant was a minor below the age of 18 years and his conviction was in breach of Article 53(1)(f) of the Constitution; and

(v) The Trial Magistrate erred in law and fact by failing to consider the appellant's defence which was not challenged by the prosecution.

5. In his written submissions filed on 21<sup>st</sup> March, 2018, the appellant stated that his conviction and sentence were founded on a defective charge which indicated that the complainant, PW1, was 16 years old yet in her voire dire examination she stated that she was 18 years old,

thus she was treated as an adult. The appellant relied on the case of **Yongo vs Republic**, CA No. 1 of 1993 to demonstrate what is considered to be a defective charge.

6. The appellant submitted that the age of PW1 was not established as no birth certificate, birth notification or age assessment report was produced for the purposes of the provisions of Section 8(4) of the Children Act. He further stated that the age of 15 years reflected on PW1's P3 form was an estimate and did not amount to conclusive proof of her age. The appellant cited **Alfayo Gombe Okello vs Republic** [2010] eKLR and **Gilbert Riti Kanampiu vs Republic** [2013] eKLR to show the importance of proof of a complainant's age in a case of defilement.

7. It was submitted by the appellant that PW1's clinic card should not have been produced by PW4, the Investigating Officer but by the Doctor, PW3. The appellant contended that he was denied an opportunity to cross-examine the maker of the report.

8. The appellant alleged to have been a minor at 16 years of age as at 12<sup>th</sup> August, 2014 as he was born on 22<sup>nd</sup> May, 1998. He argued that his Constitutional rights under the provisions of Article 53(1) of the Constitution of Kenya, 2010 were violated by being detained. He relied on Malindi Constitutional Petition No. 18 of 2015, **Katana Mangi vs DPP** to the effect that detention of a child offender in prison should be for the shortest appropriate time. He also relied on the case of **A.O.O. and 6 Others vs AG and Another** [2017] eKLR on the same issue.

9. The appellant also argued that his alibi defence was not considered and in the absence of other evidence to rebut the same, his defence remains unchallenged.

10. In opposing the appeal, Mr. Fedha for the Office of the Director of Public Prosecutions (ODPP) filed written submissions on 27th March, 2018. He stated that PW1 testified that the appellant called her to his house where she stayed for 3 days and they had sexual intercourse. Counsel submitted that the said evidence was not seriously challenged by the appellant during cross-examination. He indicated that PW1's evidence was corroborated by the Doctor's evidence and other prosecution witnesses.

11. It was also submitted that the Hon. Magistrate was satisfied that PW1 was 17 years old at the time the offence was committed and that she was defiled by the appellant.

12. In addition to the foregoing written submissions, Mr. Alela, Learned Counsel who represented the ODPP at the hearing of this appeal argued that the appellant's defence was considered by the Hon. Magistrate and the appellant did not deny having committed the offence. Counsel prayed for the appeal to be dismissed.

#### **THE EVIDENCE TENDERED BEFORE THE LOWER COURT**

The duty of the first appellate court is to analyze and re-evaluate the evidence tendered in the court below and reach its own independent decision. In **Okeno vs. Republic** [1972] EA 32 it was held that:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”***

13. The complainant, SM [name withheld] gave evidence as PW1. As at the time she testified she was 18 years old and in class 5 at [particulars withheld] Primary School. She recounted before the lower court that on 7th August, 2014 at 1:00 p.m., when she was in School, the appellant called her to his place. She went there with her friend. The appellant told her to go later. On returning to his house, the appellant told her to remove her clothes, she did so and he removed his. He inserted fingers in her vagina and asked her if it was sweet but she told him it was not.

14. It was her evidence that she spent 3 days in the appellant's house and they had sex on the said days. She stated that she left her book with photos in his house which he took and retained. She identified the photos as MFI 1a-1e. On returning home, her grandmother and mother asked her where she was coming from. She told them that she was at her girlfriend's house. Her mother however insisted on finding out where she had been. She took her mother to the appellant's house. They then went to the Police Station. She later went to hospital for examination. She was given a P3 form and post rape care form, which she identified as MFI-2 and MFI-3, respectively.

15. PW2, SM [name withheld] was PW1's mother. She testified that on closing day, PW1 went to School but she did not go back home in the evening. In the morning, PW2 asked about PW1 from her friends who said they left her at the gate. PW2 stated that she went to the Chief who gave her a letter to take to the Police Station, where she made her report. She narrated that PW1 went home the following day and on asking her where she had been, she said that she had gone to her female friend's place. PW2 insisted that they go to the place where she had been. PW1 took them to the appellant's house. PW2 stated that the appellant said that he knew PW1 as they were schoolmates and they had agreed that they would get married after she completed school. PW2 testified that they reported the matter to the Police. She further stated that after a Doctor examined PW1, he said that she had been defiled. PW2 stated that her daughter was 18 old years as at the time she testified in court and was 17 years old the year before that.

16. PW3 was Dr. Mohamed Yones of Kilifi District Hospital where he had worked for 2 years. He produced a P3 form that was filled by Dr. Hashim Suleiman on 14th April, 2014. PW3 stated that he had worked with Dr. Hashim and he was familiar with his handwriting. In making reference to the P3 form, he indicated that the victim (PW1) complained of being defiled. She was treated for a sexually transmitted infection (STI) and a urine infection. She had a broken hymen. He produced the P3 form as P. exhibit 2. He also produced the post care form filled by Justina Chome as P. exhibit 3.

17. No. 878433 Corporal Clara Bingo attached to Kilifi Police Station testified as PW4. She stated that she took over to the file from PC Koitaba who was transferred. She indicated that from the file, the complainant was 16 years old and had reported that the appellant had defiled her. PW4 further testified that PC Koitaba in the course of her investigations visited the appellant's house and found photographs belonging to PW1. She produced the photographs as P. exh. 1(a)-(d). She also produced a clinic card as P. exh .4 which shows that PW1 was born in the year 1997.

18. In his defence, the appellant stated that he was a resident of Kibarani where he worked as a Carpenter. He indicated that he was the first born and his father passed away. He prayed for time to call his witness but at a later date he informed the Trial Court that the witness had refused to go to court.

19. The Hon. Magistrate considered the evidence adduced and found it overwhelming and that the appellant did not expressly deny having committed the offence.

## **DETERMINATION**

20. The issues for determination are:-

- (i) If the charge was defective;
- (ii) If the age of the complainant was proved;
- (iii) If an Investigating Officer was a competent witness to produce PW1's clinic card; and
- (iv) If there was penetration of the complainant's genital organ; and
- (v) If the appellant was a minor.

21. On the issue of a defective charge, the appellant was charged with the offence of defiling PW1, a 16 year old girl. The Child Health Card that was produced as P. exh. 4 to prove her age shows that she was born on 7<sup>th</sup> November, 1997. The charge sheet shows that defilement occurred on 7<sup>th</sup> and 8<sup>th</sup> August, 2014. The foregoing therefore reveals that PW1 was 17 years old when the offence took place. This is further buttressed by the fact that when she testified in court on 22<sup>nd</sup> June, 2015, she informed the trial court that she was 18 years old. Her mother confirmed the said fact. The Hon. Magistrate therefore dispensed with the need for voire dire examination.

22. Due to PW1's age as per the charge sheet and the age reflected on the Child Health Card and at the time she testified, the appellant urged this court to find that the charge was defective. It is apparent from the evidence adduced that the offence was committed when PW1 was 17 years old and not 16 years old. As such, the charge in regard to PW1's age as at the time of the commission of the offence was at variance with the evidence tendered in court. The foregoing factor does not however render the charge fatally defective, as the appellant was charged with the offence of defilement contrary to the provisions of Section 8(1) as read with Section 8(4) of the Sexual Offences Act. Section 8(4) states as follows:-

***“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”***

23. It is clear from the above provisions that defilement of a child of either 16 or 17 years of age attracts the same sentence. The defect in the charge with regard to PW1's age can therefore not go to the aid of the appellant. This court invokes the provisions of Section 382 of the Criminal Procedure Code to cure the defect in the charge.

24. On the issue of failure to produce an age assessment report or birth certificate, PW1's Child Health Card was produced to prove her age. In the Ugandan Court of Appeal 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 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 .....***

25. In the present case, an age assessment report was unnecessary by virtue of the production of the Child Health Card and the fact that PW1's mother, PW2 testified to the fact that PW1 was 17 years old in the year 2014. This court takes judicial notice of the fact that a Child Health Card is issued after the birth of a child for purposes of immunization and the date reflected thereon as to the date of birth is admissible evidence. In addition to the foregoing, it was not necessary to have the said document produced by a Doctor as the appellant contended. PW4 being the Investigating Officer was a competent witness for purposes of production of the said document.

26. On the issue of whether the offence of defilement was committed, there was adequate evidence on record to the effect that PW1 did not go back home on the closing day of her school. She went home on the 3<sup>rd</sup> day. PW2 took her and the appellant to the Police Station. Upon medical examination, it was found that PW1's hymen was broken. She admitted having had sex with the appellant when she was at his house. The medical evidence proved that there was penetration of her vagina and that she had been infected with a sexually transmitted illness. The appellant in his defence did not deny having committed the offence but seemed to be mitigating.

27. On the issue of the age of the appellant, the Hon. Magistrate considered an age assessment report dated 15<sup>th</sup> August, 2014 which indicated that he was 18 years old as at the time he committed the offence. He was therefore an adult.

28. It is this court's finding the evidence against the appellant was overwhelming and the conviction was proper. The Hon. Magistrate imposed the only sentence provided by law. The same cannot be varied to the benefit of the appellant. The appeal is hereby dismissed in its entirety. The appellant has 14 days right of appeal, from the date of this Judgment.

**DELIVERED, DATED and SIGNED at MALINDI on this 3rd day of July, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present in person

.....for the respondent

.....Court Assistant