



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 36 OF 2016**

**BETWEEN**

**JAMES MUNDIA MAKOKHA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in Criminal Case Number 633 of 2015 in the Chief Magistrate's Court at Bungoma by Hon. L.O.Olel (RM) on 1st February, 2016)*

**JUDGMENT**

**The Trial**

1. The Appellant herein **JAMES MUNDIA MAKOKHA** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of **the Act**. The particulars of the main count are that

***On 31st January, 2015 at [Particulars withheld] sub-location within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of ENP a girl aged 10 years***

**Prosecution case**

2. The prosecution called a total of five (5) witnesses in support of its case. PW3, the complainant stated on the material date, one Eva sent her to collect a phone from their house and not finding it remained there. It was her evidence that appellant, whom he knew because he was their neighbour found her there and after she confirmed she was alone at home, he took her to a bed, gave her Kshs. 10/- and defiled her. PW1 DK and PW2 JK, the complainant's parents stated that complainant was 10 years old. They told court that on 31.1.15 at about noon, they returned home to find the door to their house closed. That when PW2 pushed the door open, the appellant emerged from the bedroom with his trousers at his knees and their efforts to arrest him failed after he escaped leaving his trousers behind. That they went to the bedroom where they found complainant who was bleeding from her private parts. The witnesses stated that they escorted complainant to hospital where the doctor confirmed she had been defiled and they later reported the matter to police. PW4 Elias Adoka, a clinical officer examined complainant on 5.2.15 and found she had no hymen and had a hyperemic orifice which according to him was evidence of friction which he concluded was evidence of defilement. He produced complainant's treatment book and P3 form as **PEXH. 1** and **PEXH. 2** respectively and age assessment report showing that complainant was 10 years old as **PEXH. 3**. PW5, CPL Kasili Wafula, the investigating officer received complainant's report on 31.1.15, arrested the appellant on 12.3.16 him charged. He produced appellant's trousers and sandals as **PEXH. 4** and **PEXH. 5** and a 10/- coin that appellant had allegedly given to the complainant as **PEXH. 6**

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant gave a sworn defence in which he denied the charges but conceded that he was a neighbor of the complainant and that their homes were about 500 metres apart. He also conceded that the trousers and sandals as **PEXH. 4** and **PEXH. 5** were his but stated that they were taken away by complainant's parents who beat him up when he went to demand for wages for work he had done for them.

4. *In a judgment delivered on 1st January, 2016, appellant was convicted and sentenced to life imprisonment.*

**The appeal**

5. Aggrieved by this decision, the appellant lodged the instant appeal on 5th February, 2016. From the 7 grounds of appeal and written submissions filed on 16th October, 2018, I have deduced three grounds of appeal as follows:-

1. ***That appellant was not supplied with witness statements***
2. ***That the doctors report had glaring mistakes***
3. ***That the age of the complainant was not proved***
4. ***That it was not proved that appellant committed the offence for which he was convicted***

6. When the appeal came up for hearing on 5.11.18, appellant chose to wholly rely on the grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

7. Mr. Oimbo, Learned Counsel for the state opposed the appeal and submitted that PW1's evidence that complainant was 10 years was corroborated by an age assessment report produced by PW4. Counsel also submitted that penetration was proved by way of a P3 form also produced by PW4. Counsel for the state submitted that statements had been supplied to the appellant as shown on page 15 of the record of appeal, line 7 to 10 where the court directed that statements that had been supplied to the appellant be handed over to his counsel that had come on record.

#### **Analysis and determination**

8. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

***“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”***

9. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant.

11. In dealing with this appeal, I will separately address the 4 grounds summarized above

#### **1. Was the appellant supplied with witness statements?**

12. Article 50 of the Constitution provides that: -

***(2) every accused person has the right to a fair trial, which includes the right—***

***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

13. I have considered the case of ***Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR*** where the court held as follows:

***The right to be provided with” material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.***

14. I have perused the record of the trial court and the appellant did not raise the issue of non-availability of statements during the trial. On the contrary, page 15 of the record of appeal, line 7 to 10 confirms that the statements had been provided to the appellant long before 17th August, 2015 when the court directed that the statements that had been supplied to the appellant be handed over to his counsel that had come on record. Indeed, the case proceeded to its conclusion without any complaint regarding the supply of statements confirming that they had without a doubt been supplied.

#### **2. Did the doctors report have any mistakes**

15. Penetration on the other hand is defined in section 2 of ***the Act*** as follows-

***“Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.***

16. Complainant testified that the appellant inserted his genital organ in hers. This was corroborated by her parents who told court that complainant was bleeding from her private parts. Further corroboration of penetration is to be found in the P3 form **PEXH. 1** dated 5.2.15 which shows that at the time of her examination, complainant had no hymen and had a hyperemic orifice. The Appellant did not demonstrate that the doctor's report had any mistake. From the record, I am satisfied that the doctor's report did without a doubt proved that complainant was defiled.

### **3. Was complainant's age proved**

17. Age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. (See **Stephen Nguli Mulili V Republic 2014 eKLR**).

18. Evidence by complainant's parents, PW1 DK and PW2 JK, that complainant was 10 years old was corroborated by an age assessment report which was produced as **PEXH. 3** which assessed complainant's age at 10 years.

### **4. Identification and/or recognition of appellant**

19. The appellant stated that his home and that of complainant's parents are 500 metres apart thereby confirming that they are neighbours and that he was well known to complainant and her parents by the name MUNDIA. This was therefore a case of recognition and the conditions were favourable since the offence was committed about noon.

20. Further to the foregoing, PW1 DK and PW2 JK, the complainant's parents stated that they found the appellant in their house where complainant was defiled and he escaped leaving his trousers behind.

21. The appellant indeed conceded that the trousers and sandals produced in court as **PEXH. 4** and **PEXH. 5** were his but stated that they were taken away by complainant's parents who beat him up when he went to demand for wages for work he had done for them.

22. Of interest to note however that is the appellant did not raise the issue of how his trousers and sandals were recovered when the complainant's parents testified thereby denying them a chance to either refute his line of defence or agree with it. This defence was in my considered view raised too late in the day and it must be an afterthought.

23. The recovery of the trousers and sandals confirms that the appellant was in the house of complainant's parents on the material date and time when complainant was defiled and corroborates complainant's evidence that he was the one that defiled her.

### **Decision**

24. The appellant is charged under section 8(1) as read with 8 (2) of the Sexual Offences Act under which the appellant was charged states:-

*(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.*

25. From the foregoing analysis, I find that the conviction and sentence of life imprisonment are safe since complainant's age was assessed to be 10 years and find no basis to interfere with them. The appeal is thus disallowed, the conviction is affirmed and the sentence upheld. It is so ordered.

**DELIVERED AND SIGNED AT BUNGOMA THIS..9<sup>th</sup> ...DAY OF....November.....2018**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistants** - Ribba & Diannah

**Appellant** -

**For the Appellant** -

**For the State** - Mr Oimbo