



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 112 OF 2015**

**JOSEPHAT KIPLIMO TOT.....APPELLANT**

**-versus-**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. S. N. Telewa, Resident Magistrate in Eldoret Chief Magistrate's Court Criminal Case No. 4375 of 2013 delivered on 14/08/2015)***

**JUDGMENT**

1. The main issue for consideration in this appeal is whether the defence contemplated under **Section 8(5)** and **(6)** of the **Sexual Offences Act** No. 3 of 2006 is available to the Appellant in the circumstances of this case. The Appellant herein, **Josephat Kiplimo Tot** 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 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. The Appellant denied both counts.
2. The particulars of the offence of defilement were that *'between 28<sup>th</sup> day of August 2013 and 23<sup>rd</sup> day of September 2013 in Eldoret West District within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of M. J. a girl aged 16 years'*.
3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.
4. The prosecution called four witnesses in support of its case. The complainant testified as **PW2** whereas the complainant's mother one **R K**, testified as **PW1**. **PW3** was **Dr. Joseph Imbenzi** from MTRH and **PW4** was **PC (W) Jacinta Atieno** attached at Baharini Police Post was the investigating officer. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for **PW2** whom I will refer to as **'the complainant'**.
5. The evidence of the prosecution witnesses was recorded before **Hon. B. J. Bartoo**, Resident Magistrate before the learned Magistrate was transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya the matter proceeded for defence hearing before **Hon. S. N. Telewa**, Resident Magistrate. On being placed on his defence the Appellant opted to and gave sworn defence without calling any witness. Thereafter the court rendered its judgment where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.
6. Being dissatisfied with the conviction and sentence, the Appellant timeously lodged an appeal challenging both the conviction and sentence on the main ground that he had a holding defence in the case. At the hearing of the appeal the Appellant reiterated his position of innocence and prayed that the appeal be allowed. He cited the persuasive decision of **Martin Charo vs. Rep. (2016) eKLR** among others in support of his submissions. The State opposed the appeal.
7. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.
9. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. As the Appellant strenuously submitted that he ought to benefit from the defence contemplated

under **Section 8(5)** and **(6)** of the **Sexual Offences Act**, I will hence dwell on that defence.

10. I had an occasion and dealt with the said defence in **Migori High Court Criminal Appeal No. 59 of 2015 Sammy Chacha Chacha vs. Republic** (unreported) and since I have not changed my legal mind on the issue I will reiterate what I stated therein as follows: -

*'19. The other cardinal issue of consideration relates to the defence raised by the appellant. As earlier on stated, if successfully proved the same amounts to a complete defence in law and the appellant will be entitled to an automatic discharge. That is the defence provided for under Sections 8(5) and (6) of the Sexual Offences Act. The said sub-sections provides as under: -*

***"8(5) It is a defence to a charge under this section if:***

***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***

***(b)the accused reasonably believed that child was over the age of eighteen years***

***(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."*** (emphasis added).

*20. From the above provisions it can be seen that whenever an accused person opts to rely on the said defence then the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that: -*

***(a) That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;***

***(b) That the accused person reasonably believed that the child was over the age of eighteen years; and***

***(c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.***

*21. The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child. In this case, the appellant stated that the deception was by way of words given that it was PW1 herself who told him that she was 19 years old.*

*22. The other condition relates to how the accused person handled the alleged the deception. **Section 8(6)** requires the accused person to further demonstrate how he/she reasonably believed the deception including the steps taken by that accused person to ascertain the age of the complainant.*

*23. In discharging that onus, it must be remembered that the actions of the accused person must be weighed against what a reasonable person would have been expected to do in such circumstances.'*

11. The Appellant stated that he had befriended the complainant for a long period and between August and September 2013 he lived with the complainant and even introduced her to her parents as his wife. That, he initially did not know the age of the complainant but he later knew that she was around 15 years old. The complainant stated that she knew the Appellant well as she used to see him within the neighbourhood as she went to school and that despite the Appellant knowing that quite well he nevertheless forced her to be his wife.

12. With the knowledge that the complainant was 15 years old, the Appellant cannot take refuge in the contemplated defence since he knew that the complainant was a minor in law. The ground therefore fails.

13. As to whether the Appellant engaged in sex with the complainant during the period they lived together, the complainant stated that they used to have sex every night. That penile penetration was supported by the medical evidence tendered by PW3. It is further unrealistic that the Appellant even went ahead and introduced the complainant to his parents as his wife in the absence of consummation, albeit illegally. Afortiori, by placing the evidence of the Appellant and that of the prosecution on that issue side by side the scales turn in favour of the complainant. I therefore find that the Appellant had sex with the complainant during the period they stayed together.

14. On sentence, the Appellant contended that the sentence of 20 years' imprisonment meted on him was unlawful since the sentence provided for under **Section 8(3)** of the **Sexual Offences Act** is instead a term of imprisonment of 15 years. I do not find that argument holding since the said term of imprisonment of 15 years is the minimum. The sentencing court was within its rights to sentence the Appellant to a term of 20 years' in prison. The appeal on sentence must fail.

15. The upshot is that none of the grounds of appeal succeeds and the appeal is hereby dismissed.

16. Orders accordingly.

**SIGNED BY:**

**A. C. MRIMA**

**JUDGE**

**DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1<sup>st</sup> day of November, 2018.**

**H. A. OMONDI**

**JUDGE**