



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 177 OF 2015

MOSES BARASA SAEKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Moses Barasa Saeko** the Appellant herein faced a charge of defilement contrary to **section 8(1)** as read with **subsection (3)** of the **Sexual Offences Act No. 3 of 2006**. The brief particulars were that on the 12th of February, 2015 and 2nd of March, 2015 at [particulars withheld] location in Cheptais District within Bungoma County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of Z.N.W a child aged 16 years. (Initials substituted to hide the identity of the minor)

2. A summary of the prosecution's case was that the complainant eloped with the Appellant from her older sister's house on 12th February, 2015 at 8.00 p.m. on the advice of her said older sister. She cohabited with the Appellant as husband and wife and engaged in sexual intercourse until 2nd March, 2015 when her father showed up with the police and arrested the Appellant. The Appellant was subsequently charged as set out above.

3. In rebuttal, the Appellant raised an alibi defence and testified without oath and without calling any witness. He denied the offence and stated that he was arrested for a different offence on the evening of 2nd March, 2015, only to be confronted with these charges at the Police Station. He testified that he was not in his home on the dates in issue. At the end of the trial, the Appellant was convicted and sentenced to 15 years imprisonment.

4. Ms. Njeru learned counsel for the Respondent opposed the Appeal and submitted that the elements of defilement were proved at the trial and the age of the complainant was confirmed through age assessment. She asserted that there was no contradiction in the evidence, which was assessed and analyzed properly. Counsel contended that the Appellant's defence was also analyzed but was found to lack merit. She urged the court to dismiss the appeal and uphold the conviction and the sentence.

5. The Appellant relied on his written submissions in which he states that he was married to the Complainant and that he is merely being framed. That it was the Complainant's sister, C, who was never called as a witness, who directed the Complainant to go and become a wife to the Appellant whom she described as a good boy.

6. Upon perusal of the evidence tendered before the trial court and the judgment therefrom, I am of the view that the issues for determination are whether the Appellant defiled the Complainant, and whether the question of her age was given proper consideration by the trial court.

7. This being the court of first appeal, I have considered and reevaluated the entire evidence afresh with a view of making my own findings and drawing my own conclusions as is my mandate. In so doing, I was careful to give due allowance for the fact that I did not have the advantage of seeing and hearing the witnesses testify as did the trial court. (See - **Okeno vs. Republic [1972] E.A Pg. 32**).

8. The ingredients of defilement were highlighted in **Charles Wamukoya Karani vs. Republic Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant.”

9. On the question of the identity of the person who defiled the Complainant, there is only the evidence of the Complainant herself. She told the court that she was aged 16 years and was in class seven (7) when she testified, two (2) months after the Appellant's arrest. From her testimony, she eloped with the Appellant at the behest of her older sister who had identified him as a good person. She agreed to the arrangement because of the problems she was facing at home from her step mother since her biological mother was dead.

10. PW2, the Complainant's father, confirmed that the Complainant was found in the house of the Appellant at [particulars withheld] after a long search when she went missing. He did not elucidate how he concluded that that was the Appellant's home since the Appellant was not present when the Complainant was found. He was arrested on the way to Mt. Elgon.

11. No swabs appear to have been taken from the Complainant to link any fluid found in her with the Appellant. There is however no reason to doubt the Complainant's evidence as to the identity of the person who had carnal knowledge of her.

12. The more irksome question is the one of the Complainant's age. The Complainant stated that she was aged 16 years at the time of the offence. Her father did not tell the court how old the Complainant was, nor when she was born. Neither of the two witnesses produced any documents from which the court could deduce her age such as her birth certificate or clinic (child progress) card. These would aid the court in ascertaining her age. The court therefore relied on the evidence of PW7, the Community Oral Health Officer, who fixed her age at 15 years in reliance of her dental formula at the time.

13. I observe that both the Appellant and the Complainant were mere youths. There is nothing on record to indicate what the Appellant's age is but from his appearance, he too is a mere youth. Because the Complainant was not aged below 14 years whose appearance would be obviously that of a minor, it was necessary for the prosecution to establish that in the circumstances of this case, she could not have been mistaken for an adult.

14. I say so because PW7, the Community Oral Health Officer testified that he examined her dental formula to estimate her age. In his undated report, he indicates that there were no IOPA and BBW available at the facility to aid in the age assessment. The witness did not elaborate what the letters above stood for, but it is obvious from the form that he was supposed to carry out three levels of examination to arrive at his conclusion. For the foregoing reason, PW7 only carried out the Intra Oral examination. The examination did not include the Extra-Oral examination and the Radiography report as required in the age assessment report.

15. In the case of **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal (Githinji, Koome & Okwengu, JJ.A) when deliberating on the significance of establishing the age of a victim of defilement stated thus:

“As to whether the Appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the Complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the Complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under Part C of the P3 form, the age required is estimated age and under the Children's Act, “age” where actual age is not known means apparent age. This means that in the Doctor's opinion, the apparent age of the Complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

16. Whereas PW7 stated that he had used the universally acceptable standard of tooth eruption sequence, to determine the Complainant's age, it is noteworthy that heredity and other factors may influence the approximate ages at which wisdom teeth erupt. According to the British Journal of General Practise, wisdom teeth erupt into the mouth between 17 and 25 years of age. PW7 only employed an intra-oral examination in estimating the Complainant's age. He however failed to employ the other two parameters namely the extra-oral exam and radiography exam because the instruments were not available to him as indicated in his report.

17. Where no documents are produced as proof of age, and the actual age is not known, the court can use the apparent age to determine that an accused person ought to have known that the Complainant was a minor. It is however not clear whether from the appearance, or from a cursory look the Appellant was able to tell that the Complainant was aged below 18 years. There is nothing on the record to show that the trial court did note or indicate in any way that from the Complainant's appearance, it was obvious that she was a minor. This is because the difference between a 16 year old girl and an 18 year old girl may not be apparent by way of appearance.

18. I am reminded of the case of **Kaingu Elias Kasomo vs. Republic Malindi Criminal Appeal No. 504 of 2014** in which the Court of Appeal stated that 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.

19. For the reasons set out above, I find that the evidence of the Complainant's age was not sufficient to prove that she was a minor. The appeal is therefore found to be meritorious and is consequently allowed. The conviction is quashed, the sentence set aside and the Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 21ST DAY OF NOVEMBER 2018.

S. N. RIECHI

HIGH COURT JUDGE
