**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 105 OF 2015**

**PHILLOMEN CHERUIYOT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in* ***Molo Chief Magistrate's Court***

***Criminal Case No. 2535 of 2014*** *by* ***Hon. H. M. Nyaga C M*** *on* ***20/04/15).***

**J U D G M E N T**

1. **Phillomen Cheruiyot**, the Appellant, was charged with **Attempted Defilement** in violation of **Section 9(11)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th September, 2014** at [**particulars withheld], Kuresoi District** within **Nakuru County** intentionally and unlawfully attempted to commit an act which would cause penetration to **C C** a child aged **4 years.**

2. In the alternative he was charged with the offence of **Indecent Act with a Child** contrary to **Section 10(6)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on the **19th September, 2014** at [**particulars withheld], Kuresoi District** within **Nakuru County** intentionally and unlawfully did cause his penis to come into contact with the vagina of **C C** and touching her breast a girl aged **4 years** in violation of the said Act.

3. Facts of the case were that on the **19th** day of **September, 2014,** PW2 **W M** was outside the house when she heard her four (4) years old daughter, **C C** (PW1) crying. She entered the house to establish what was happening only to find the Appellant her brother-in-law lying on top of the child, having lifted one of her legs. The child had no panty. She hit the Appellant and pulled away the child leaving the Appellant on the bed. The Appellant was arrested and taken to **Kuresoi Administration Police Camp** where he was re-arrested by PW4 **No. 20002055736 APC Robert Aketch Otieno.** The child was taken to hospital and subjected to medical examination by PW5, **John Rono,** a Clinical Officer. Her hymen was broken, the vaginal entry was inflamed but no spermatozoa were noted. PW6 **No. 65754 P C Joakim Ndaiya** investigated the case and caused the Appellant to be charged.

4. When put on his defence the Appellant who opted to make an unsworn statement stated that the allegations were untrue as he was not at home at the alleged time.

5. The learned trial Magistrate considered evidence adduced and reached a finding that the Accused ought to have faced a charge of **Defilement** or even **Incest** as the act of penetration was proved. Nevertheless, he convicted him as charged and sentenced him to **life imprisonment.**

6. Aggrieved by the conviction and sentence the Appellant appeals on grounds that the Complainant's age was not conclusively proved and his rights to a fair trial were infringed. He canvassed the Appeal by way of written submissions. He urged that he was not furnished with crucial witness statements contrary to **Article 50(2)(j)** of the **Constitution.** In that regard he cited the case of **Thomas Patrick Gilbert Cholomondley (2008) eKLR** where the Court stated thus:

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our constitution, the prosecution is now under a duty to provide an accused with and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like terms. In arriving at this holding the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda, respectively R vs. Ward (1993) 2 All ER 557; R vs. Stinchcombe (1992) LRC (Crim) 68; Oliem and Another vs. Attorney General (2007) 2 EA 508)"***

7. That the age of the Complainant ought to have been proved as sentences under the **Sexual Offences Act** hinge on the victim's age. That the age should have been proved by documentary evidence.

8. In response, the State through **Mr. Kemo,** the Senior Assistant Director of Prosecution opposed the Appeal. He urged that there was evidence of penetration therefore the Appellant ought to have been charged with **Defilement,** but the Court was satisfied with evidence adduced and convicted him. He reiterated what was stated by each witness and noted that the Court considered and rejected the alibi defence. He was emphatic that the Court did not find any reason why the Complainant would frame the Appellant her uncle and prayed for the dismissal of the Appeal.

9. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. It is urged by the Appellant that his rights were infringed as he was not provided with Prosecution witness statements. **Article 50(2)(c)** and **(j)** of the **Constitution** provide thus:

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"***

The Prosecution has a duty of furnishing an Accused person with witness statements, this enables the Accused to adequately prepare for his defence. **(See Simon Githeka Malombe vs. Republic (2015) eKLR).** Courts ensure that statements are provided as envisaged in law prior to the matter proceeding to hearing. If this is not done, ordinarily an Accused person would bring it to the attention of the Court. This is a case where the Appellant did not raise the issue of Prosecution witnesses' statements having not been availed. After the charge was read to him upon arraignment in Court a date for mention was given. This was a time when he should have raised the issue. Having not stated anything in that respect and having participated in the hearing by cross-examining all witnesses appropriately, raising the issue at an appellate stage is an afterthought that must be disregarded which I hereby do.

11. Regarding the issue of age, indeed age is a critical ingredient in cases of defilement. This is a case where the Appellant was charged and convicted of the offence **Attempted Defilement** contrary to **Section 9(1)** of the **Sexual Offences Act** which provides thus:

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."***

12. The Prosecution was therefore duty bound to prove that the Complainant was a child as opposed to an adult. On being taken through *voire dire* examination the child stated that: she was 4 years old and in nursery school. PW2, her mother stated that she was four (4) years old and a pupil at **[particulars withheld] Primary School,** in nursery. PW5 the Clinical Officer stated that the girl was aged 4 years.

13. **Section 2** of the **Children Act** defines age as meaning "apparent age" in cases where actual age is not known. In the case of **Evans Wamalwa Simiyu vs. Repulic (2016) eKLR** the Court of Appeal stated thus:

> ***"….. 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 age required is estimated age and under the children's Act "age" where actual is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from observation was 12 years…."***

14. The Court of Appeal in the case of **Tumaini Maasai Mwonya vs. Republic, Msa Criminal Appeal No. 350 of 2010** had this to say:

> ***"….. 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."***

15. This is a case where the Complainant's mother gave her age as 4 years and the Clinical Officer who examined her observed that she was of an apparent age of 4 years. This was proof that the Complainant was a child.

16. Per evidence adduced the Complainant's mother found the Appellant on top of the child. What attracted her attention was the cry of the child. PW3 **G K** her neighbor who was chatting with her outside the house also heard the child crying. The child stated that the Appellant took her to the bedroom and did "bad manners" to her – she pointed at her crotch. Medical evidence adduced revealed that indeed penetration occurred such that the child's hymen was broken.

17. The Appellant was the child's paternal uncle. In his testimony he said he was arrested for no apparent reason as he was away from home at the time. However, he did not suggest or come up with any allegation as to why PW2 could come up with the allegation. In the circumstances the learned Magistrate did not fall into error in dismissing the alibi defence he put up.

18. I do note that indeed it should have been a case of defilement. It was an oversight on the part of the trial Court to have not guided the Prosecution to have the charge amended. That notwithstanding I affirm the conviction.

19. Regarding the sentence, **Section 9(2)** of the **Act** provides thus:

> ***"A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."***

It has been stated that in imposing a sentence when the Accused is a first offender the Court should consider not imposing a maximum sentence. **(See Arissol vs. Republic (1957) EA 447; Charo Ngumbao Gugudu vs. Republic Criminal Appeal No. 358/2008, MSA).**

I do note the seriousness of the offence committed but there is nothing to suggest that the Appellant is incapable of reforming. In the circumstances I do set aside the sentence imposed and substitute it with a sentence of **fifteen (15) years imprisonment,** effective from the date of conviction in the Lower Court.

20. It is so ordered.

**Dated, Signed** and **Delivered** at **Nakuru** this **13th** day of **December, 2018.**

**L.N. MUTENDE**

**JUDGE**