



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 152 OF 2015**

**BONIFACE KIANGI MUTUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the conviction and sentence by Hon. M.O.A Opanga SRM arising out of a judgment delivered on 7<sup>th</sup> July 2015 in Sexual Offences Case No. 4 of 2013 in the Principal Magistrate's Court at Kithimani)**

**JUDGMENT**

The Appellant was convicted of, and sentenced to serve fifteen (15) years imprisonment for the offence of defilement of a child, contrary to section 8(1) (4) of the Sexual Offences Act. The particulars of the offence were that between the month of September 2012 and 28<sup>th</sup> day of January 2013 in [particulars withheld] village within Machakos County, he intentionally and unlawfully did an act which caused penetration with his organ (penis) into the genital organ (vagina) of T W, a child of (16) sixteen years. He was also charged with the alternative of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The Appellant has appealed against his conviction and sentence, and the grounds of appeal as stated in his Petition of Appeal dated 29<sup>th</sup> October 2015 filed in Court on 30<sup>th</sup> October 2015 by his legal counsel, Kanyi Kiruchi & Co Associates, are as follows:

1. THAT the learned trial magistrate erred in law and fact by considering the frivolous, vexatious and unsupported evidence adduced by the prosecution witnesses and failed to sufficiently consider the accused person's evidence or defence thereby arriving at a wrong decision .
2. THAT the learned trial magistrate erred in law and fact by relying on uncorroborated and contradicted evidence by the complainant thereby arriving at a wrong decision.
3. THAT the learned trial magistrate erred in law and fact in basing his decision on the fact that out of the defilement allegedly by the accused an issue/child was born without calling for a paternity test to prove it was the accused child, thereby arriving at a wrong decision.
4. THAT the learned trial magistrate erred in law and fact by shifting the burden of proof to the accused person by holding that paternity to the issue allegedly by the accused was not contested thereby arriving at a wrong decision.
5. THAT the learned trial magistrate erred in law and fact by failing to consider the accused

defence and dismissed the same without giving any valid reasons as reasons at all hereby arriving at a wrong decision

The Appellant's legal counsel also filed submissions dated 24<sup>th</sup> August 2016, wherein it was contended that PW1 informed the Court that she was 19 years old and was born in 1994, and wanted the Court to believe that she was above the age of majority. Further, that she used to visit the Appellant and they would have sexual intercourse, and she therefore behaved like an adult and acted like one. Reliance was placed on section 8(5) of the Sexual Offences Act and the decision in **Maritim Charo vs Republic (2016) e KLR** in this regard. It was further submitted that the trial magistrate erred in concluding that the baby born to the complainant was the Appellant's, in the absence of a DNA paternity test.

Ms Mogoi Lillian, the learned prosecution counsel, filed written submissions in response dated 22<sup>nd</sup> November 2016, wherein she conceded that the PW1 did testify that she was 19 years but later changed her testimony in this regard, and stated that she was 17 years old. Further, that her birth certificate and age assessment report found her to be 16 years old. In addition, that the Appellant did not raise the defence of being deceived by PW1 as regards her age, and that the paternity of PW1's child was not contested by the Appellant neither was a DNA test mandatory.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the grounds of appeal and the arguments made thereon, I note that the two issues raised by the Appellant are firstly, whether he was convicted for the offence of defilement on the basis of sufficient, consistent and satisfactory evidence, and secondly, whether the defence in section 8(5) of the Sexual Offences Act is available to him.

On the first issue, 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; age of the complainant, proof of penetration and positive identification of the assailant.”**

The relevant evidence adduced in the trial Court as to defilement was that of the complainant, who was PW1, and whose testimony was given on two different dates. The proceedings during the hearing on 20<sup>th</sup> March 2013 when PW1 first testified were as follows:

**Court**

**Hearing to proceed in camera**

**P.W.1 FEMALE MINOR SWORN AND STATES IN KISWAHILI**

**My name is T W. I come from [particulars withheld] in Donyo Sabuk. I do not work neither do I go to school. I am 19 years I was born in February 1994. I am not 16 years**

**Prosecutor**

**I do request that the witness be stood down so that I seek direction on the way forward. Mention on 15.4.2013**

**Court**

**Witness stood down. Mention on 15.4.2013 She denies age.”**

On 25<sup>th</sup> March 2014 PW1 narrated the material events as follows in her testimony in the trial Court:

**P.W. 1 FEMALE MIINOR AGED 17 YEARS SWORN AND STATES IN KISWAHILI**

**“My name is T W N. I reside at [particulars withheld] I go to school at [particulars withheld] Secondary School. I am in form one. I was born in 1996 on 28<sup>th</sup> May. I have a birth certificate [...] serial numbered [...]. I recall September 2012 I was in Standard eight at [particulars withheld] Academy. I know Boniface Kiangi Mutuku. He is father to the child I have. I knew him in September 2012. I used to visit him at his home. One Sunday his wife and child were not at home. Boniface invited me to go to his house we made love and had sexual intercourse with him. It was not the first time we had sex. That was the fourth time. I did get my periods the following month. I told Boniface I was pregnant. He told me not to abort he will take care of my child. I told my mother in December my father reported to police. Accused was arrested. I gave birth in June 2013. I was sixteen years then now I am seventeen .”**

The evidence by PW1 was therefore inconsistent as to her age, which is key to a determination as to whether defilement occurred or not. Although this particular issue of age was corroborated by the production of her birth certificate by her mother, Loice Ngii Ngangu (who was PW2), and which showed that she was born on 28<sup>th</sup> May 1995; and the production of an age assessment report by PW5, a Dr. Gachwiri from Thika Level Five Hospital that showed that she was 16 years old; I find that PW1’S testimony affected her credibility as a witness, and her evidence as to the defilement therefore required to be corroborated under section 124 of the Evidence Act.

Section 124 of the Evidence Act in this regard provides as follows:

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

In this respect I find that the element of penetration was corroborated by the evidence of Joseph Mwaniki (PW4) a clinical officer at Donyo Sabuk dispensary who examined PW1 on 28<sup>th</sup> January 2013 and produced as an exhibit the P3 form he filled with the results. PW4 testified that he found that PW1’S hymen was broken, and that the pregnancy test was positive. None of the other five prosecution witnesses other than PW1 however put the Appellant at the alleged scene of the offence, and there was therefore no corroboration of the identity of the person who committed the defilement. The evidence given by PW1 that she had a child with the Appellant arising out of the defilement could also have benefited by a paternity test as corroboration linking the Appellant to the defilement. I therefore find that there were gaps in the evidence adduced by the prosecution and it was not sufficient to establish the offence of defilement beyond reasonable doubt by the prosecution.

While this finding is enough to dispense with this appeal, I will for the record also make a finding on the second issue as to whether the defence under section 8(5) of the Sexual Offences Act is available to the Appellant. I have perused the said section as read together with sub-section 6 which provides as follows:

**“(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 the 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.”**

This court is required to re-examine the evidence adduced and satisfy itself that the accused reasonably believed that the victim was over 18 years old. In the present appeal, the Appellant initially testified that she was 19 years old and not 16 years, leading to a reasonable doubt that she indeed may have been deceptive about her age with the Appellant as well. She also further testified that she met the Appellant several times and had sexual intercourse with him. I therefore find that the evidence adduced raised the possibility that the Appellant had reason believe that the victim was of age and had capacity to consent.

I accordingly allow the Appellant’s appeal and quash his conviction for the offence of defilement contrary to section 8(1)(4) of the Sexual Offences Act. I also set aside the sentence of fifteen years’ imprisonment imposed on the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED AT MACHAKOS THIS 13<sup>TH</sup> DAY OF FEBRUARY 2017.**

**P. NYAMWEYA**

**JUDGE**