



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 217 OF 2015

JOHN MUMBA KARISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of R.K. Ondieki PM in Criminal [Case No. 116](#) of 2015 delivered on 30th November 2015 at the Principal Magistrate's Court at Kaloleni)

JUDGMENT

1. The Appellant has appealed against his conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. After conviction, he was sentenced to fifteen (15) years imprisonment by the trial Court.
2. The particulars of the offence were that on diverse dates between 18th March 2014 and 28th September 2014 in Kilifi County, he unlawfully and intentionally committed an act which caused penetration of a male genital organ namely penis, into a female genital organ, namely vagina of MZD, a child aged 16 years. The Appellant had also been charged with an alternative to this count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006.
3. The Appellant's initial grounds of appeal were filed in this Court on 17th December 2015. He later filed Amended Grounds of Appeal and submissions. He has raised three main grounds of appeal. The first is that he was 17 years old when the offence was committed and was thus convicted and sentenced in contravention of the Sexual Offences Act and Children Act. The second ground is that reliance was placed on the unsworn and uncorroborated evidence of PW1 and PW5. Lastly, that his defence was not given due consideration.
4. Ms. Ogweno, the learned counsel for the Prosecution, opposed the appeal on the grounds raised on conviction, but conceded the grounds on the sentence in oral submissions she made during the hearing of the appeal on 17th July 2017. She urged that the Appellant was properly convicted for the offence of defilement as the complainant was 16 years old, she knew the Appellant, and the P3 form proved there was penetration as the complainant was pregnant.
5. I have considered the grounds of appeal and submissions and evidence given in the trial court, and find that there are two issues for determination. These are firstly, whether the Appellant's conviction for the offence of defilement was based on consistent, sufficient and satisfactory evidence; and secondly if so, whether his sentence was lawful.
6. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence 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).

7. On the first issue as to whether the conviction of the Appellant was based on sufficient and satisfactory evidence, the Appellant questioned the evidence of PW1 and PW5, who he argued were not sworn or affirmed contrary to section 151 of the Criminal Procedure Code. The record of the trial Court shows that on 2nd July 2015 the trial magistrate after conducting a *voire dire* examination did find that PW1, who was the complainant, understood the nature of an oath and directed that she be affirmed. However, there is no record that PW5 was sworn or affirmed before giving evidence.

8. The Appellant also argued that PW1 did not immediately complain after the alleged incident of defilement, and was not aware that she was pregnant as testified by PW5. Therefore that the evidence did not support the conviction of the Appellant. I have examined the trial Court record and note that the two key witnesses as to the commission of the offence were the complainant who was PW1, and Patrick Bashishi (PW5) who was a clinical Officer at St Luke's Hospital and who produced the P3 form and treatment notes of the complainant's examination, and the age assessment report on the complainant's age, showing that the complainant was 16 years old.

9. This Court is in this regard mindful of the ingredients of defilement which 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.”

10. As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

11. PW1 in this regard testified that she knew the Appellant who was her friend and neighbour, and that he inserted his penis in her vagina and they used to play sex all the time. According to PW1, they first played sex on 18th March 2014 and continued until 28th September 2014 when she discovered she was pregnant. They also continued having sex until November 2014. Further, that the Appellant's grandfather took her to the Appellant's house on 22nd December 2014 where she stayed for three days and went back home, which is when the matter was reported to the police and the complainant was taken for medical examination.

12. PW5 testified that the complainant was brought for examination on 27th January 2015 and her hymen was found to be broken and she was four months pregnant. Pc Joseph Ndirangu who was PW6 testified that he received the report of the defilement on 25th January 2015 from the complainant and her mother at Kaloleni Police Station.

13. Given that the report of the defilement was made by the complainant after over ten months after the first incident of alleged defilement, it is my view that the credibility of PW1 was in question and her evidence ought to have been corroborated pursuant to section 124 of the Evidence Act. The evidence of PW5 in this respect only corroborated that there was penetration of the complainant but did not establish the person who caused the said penetration. Contrary to submissions by the prosecution counsel, there were also no DNA results produced of the father of the complainant's child.

14. In addition, PW2, PW3 and PW4 who were relatives of the complainant, only testified as to the reports they received from the complainant of her relationship with the Appellant and pregnancy, but did not give any evidence placing the Appellant with the complainant on the material dates. It is thus my

finding that the offence was not proved beyond reasonable doubt.

15. Lastly, this Court notes that the Appellant in his Petition of appeal also appealed against the sentence. The Appellant submitted that he did inform the trial Court that he was 17 years old at the time of commission of the offence. An age assessment was also done on the Appellant and report filed in the trial Court showed that on 30th November 2015 he was aged 18 years old. It was thus established that the Appellant was a minor on the material dates of the commission of the alleged offence, being between 18th March 2014 and 28th September 2014.

16. Section 8(7) of the Sexual Offences Act in this respect provides as follows:

“Where the person charged with an offence under this Act is below the age of eighteen years, the Court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.”

17. The Court of Appeal sitting in Kisumu considered this provision in Dennis Abuya vs Republic, [2010] eKLR and held as follows:

“We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under 18 years on 19th June, 2007 when the offence was alleged to have been committed. Section 8(7) of the Sexual Offences Act specifically provides that where the person charged with an offence under this Act is below the age of 18 years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institution’s Act and the Children Act. The question of imprisoning a minor does not, therefore, arise under the provision of the Sexual Offences Act”.

18. At the time of the Appellant’s conviction, the Borstal Institutions Act was inapplicable as he was already 18 years old and could not have been taken to a borstal institution. The Children Act was however applicable, and section 191 thereof provides for the ways through which a child offender should be dealt with including:

- a. discharging the offender under section 35 (1) of the Penal Code;
- b. discharging the offender on his entering into a recognisance, with or without sureties;
- c. making a probation order against the offender;
- d. committing the offender to the care of a fit person, or a charitable children’s institution
- e. ordering the offender to be sent to a rehabilitation school suitable to his needs and attainments if aged between 10 and 15 years;
- f. ordering the offender to pay a fine, compensation or costs;
- g. committing the child who has attained the age of sixteen years to a borstal institution;
- h. placing the offender under the care of a qualified counsellor;
- i. ordering the child to be placed in an educational institution or a vocational training program;
- j. ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;
- k. making a community service order.

19. In light of the above provisions, the sentence of imprisonment imposed on the Respondent was therefore also unlawful.

20. I accordingly quash the conviction of the Appellant for the charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act for the foregoing reasons. I also set aside the sentence of fifteen years imprisonment imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

21. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF JULY 2017.

P. NYAMWEYA

JUDGE