



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 238 OF 2013

JOSEPH NGUTU NGUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court, Criminal Case No.181 of 2013 by Hon. D.G. Karani, Principal Magistrate on 19th September, 2012)

J U D G M E N T

1. **JOSEPH NGUTU NGUI**, the appellant was charged with the offence of **benefiting from Child Prostitution** contrary to **Section 15 (f)** of the **Sexual Offences Act, No.3 of 2006**. Particulars of the offence being that on the **24th day of September, 2012**, at **[particulars withheld] Donyo Sabuk Market** within **Machakos County** knowingly had control of the said house that was used for the purpose of the commission of defilement against **E A** a child aged **16 years** Daniel Wainaina.

2. He was tried, convicted and sentenced to **ten (10) years** imprisonment.

3. Being dissatisfied with the judgment and sentence he appealed on grounds that:

- Particulars of the offence did not support the charge.
- Evidence adduced did not support the charge
- The charge was not proved to the required standard

4. Briefly, facts of the case were that **PW1, E N**, the complainant, was sent to collect some clothes from **[particulars withheld] Market**. She went to **[particulars withheld]** where she was grabbed from behind by a person. Later, she found herself inside a house. The person who forcefully took her to the house defiled her as the appellant stood at the door. On completion of the act the perpetrator pushed her outside and threw her clothes at her.

5. The complainant screamed as she left the house. She encountered **PW2 R M** whom she informed what had befallen her. PW2 saw one **Mauzo** whom the complainant identified as the person who defiled her. She lived on the same plot with the appellant. She saw him later in the evening. Thereafter, she learnt that he had been arrested. She escorted PW1 to hospital.

6. **PW3 No.79068 P.C. Gregory Gakenye** received a report from the complainant. He arrested **Daniel Wainaina alias Mauzo** whom he charged with the offence of defilement. His investigations revealed that the appellant was present when the complainant was being defiled.

7. **PW4 No.87314 P.C. Johanna Ngolya** arrested the accused and charged him.

8. When put on his defence the appellant stated that he went to visit his brother on the material date. While at the market he was approached by a lady who asked him for a certain mobile phone number. Daniel Wainaina came by with one **Otieno**. He heard them say the girl was hungry. They gave her **Ksh 1400/-**. He went into the video room. He came out but did not see Daniel or the girl. He headed to fourteen falls and while there he received a phone call and was informed that there were some people in the house and they had refused to open the door. He went to the house and found the girl he had earlier seen with Wainaina. The girl was crying and Wainaina was seated on the seat. He asked what Wainaina was doing but he did not answer him. He left the house and threw away the paper bag that he was carrying. His two (2) neighbours took the complainant to the police station.

9. This being a first appellate court, its duty is to subject the evidence on record to a fresh review and scrutiny and come up with its own conclusion bearing in mind, however, that it did not hear or see witnesses testify. (see **Okeno vs Republic (1972) EA 32**).

10. Submissions filed by both the defence and state counsels have been duly considered.

11. The appellant was charged with an offence contrary to section **15 (f) of the Sexual Offences Act** that provides thus:

“Any person who intentionally or knowingly owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this act with a child by any person commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.”

12. The prosecution had a duty of proving that:

1. **The appellant owned/managed/occupied/had control of or had leased the premises.**
2. **The premises was used for the purpose of commission of the offence.**
3. **The act consisting the offence was committed with a child.**

13. Evidence adduced by PW2 Established that the appellant was his neighbour on plot [particulars withheld] where the offence was alleged to have been committed. The defence did not dispute that fact. The appellant was therefore in occupation of the house.

14. It was stated by the prosecution that one **Daniel Wainaina alias Mauzo** defiled the complainant, he was arrested and charged. Other than the allegation, no evidence was adduced to establish that particular fact.

15. PW2's attention was attracted by PW1 who was crying. According to her testimony, PW1 told her that she had been defiled by Mauzo. Defilement occurs when a person commits an act which causes penetration with a child. (see **Section 8(1) of the Sexual Offences Act**). In her evidence PW1 told the court that the defiler completely messed up her private parts. However, she did not describe what the person did that amounted to defilement.

16. It was important to prove the age of the complainant to establish if indeed she was a child. PW1 told the court that she was 16 years old. In the case of **Francis Omuroni vs Uganda Criminal Appeal No. 2 of 2000**. It was held thus;

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. A part from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”.

17. In this case no medical evidence of the age of the complainant was adduced. No Birth Certificate was adduced in evidence. Her parents/guardians were not called as witnesses. The learned trial magistrate who had an opportunity of hearing her testify made no observation of the complainant's age.

18. Consequently, the age of the complainant was not proved beyond any reasonable doubt. Therefore, it could not be stated that the act, if committed was with a child.

18. From the foregoing there was no proof that the charge was proved beyond any reasonable doubt.

The appeal therefore succeeds. The conviction imposed is quashed and the sentence is set aside.

The appellant shall be released forthwith unless otherwise lawfully held.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 3rd day of February, 2016.

L. N. MUTENDE

JUDGE