



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HCCRA NO. 94 OF 2015**

**(FORMERLY NAKURU CRIMINAL APPEAL NO. 159 OF 13)**

**(Being an appeal against conviction and sentence in Naivasha Criminal Case No. 3734/2011- E. Boke P.M. )**

**REUBEN**

**LOKUILOPEI.....APPELLANT**

**NT**

**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

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

1. The Appellant was tried and convicted by the Boke PM for the offence of Defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The particulars stated that on 12<sup>th</sup> December, 2011 in Naivasha, he caused his genital organ, namely penis to penetrate the vagina of Z.W.M. a girl aged 12 years. In the alternative count the Appellant had been charged, with the offence of Indecent act with a child Contrary to Section (1) of the Sexual Offences Act. Following his conviction on the main count, the Appellant was sentenced to 30 years imprisonment.
2. He now appeals to this court against both the conviction and sentence. His initial grounds of appeal were aimed against the sentence. On the hearing date, the Appellant furnished new grounds of appeal which are more expansive but also primarily targeted at the sentence. The former and new grounds will be considered together in this appeal as constituting the Appellant’s petition of appeal.
3. The initial grounds sought clemency and reduction of the sentence, as do grounds 4,5 & 6 of the new grounds. In addition however the Appellant challenges the sentence in ground one of the new grounds for being excessive and in ground 2 as violating article 24 (1) & (2) of the Constitution. In ground 3 of the new grounds, the Appellant claims that he was not informed of his rights under article 50 (2) (g) & (h) of the Constitution.
4. Notwithstanding the above grounds, the Appellant is entitled on a first appeal to have the evidence of the trial re-evaluated by the Appellate court which must draw its own conclusions thereon. **(See Okeno -vs- Republic 1972 E. A. 32)**

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate**

**court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.”**

5. The prosecution evidence at the trial was as follows. The complainant was a minor aged 12 years in 2011. On 12<sup>th</sup> December, 2011 she was out with a younger brother herding her family herd consisting of goats and cows in a farm far from her home in Naivasha. At about 1.00 p.m. the Appellant who was known to the Complainant while pretending to make inquiries on a destination of a nearby path thereby led the complainant to a deserted area. He then grabbed the Complainant and tied her hands and gagged her mouth with a piece of cloth while threatening to stab her if she resisted. He undressed the Complainant and also undressed before having sexual intercourse with the complainant for about one hour.
6. He thereafter escaped leaving the complainant injured and bleeding from the vagina.

She was rescued by **Alice Wamaitha Maigwa (PW3)** who happened by and on noting her condition arranged for her to be taken to the AP Post at Karagita. Police summoned the Complainant's parents who accompanied her to Naivasha District Hospital. The complainant had sustained injuries in her private part including a perineal (membrane between vagina and anus) tear which was repaired. She was admitted in hospital for two days for the purpose. The complainant had already given the name of the Appellant to **PW3**, her mother **G.W.M.** and on 23/12/11 he was arrested and charged.

7. In his defence, the Appellant gave an unsworn defence statement. He stated that he resided at Karagita and that prior to the material date, he had been employed by the Complainant's father to work in the family's home but left after he disagreed with the Complainant's mother over compensation for a goat she claimed he had injured. That arising out of the incident the said mother of the Complainant developed a grudge against him, spitting contemptuously, and reminding him of the compensation whenever they met. He denied that he defiled the minor indicating that the charges against him had been trumped up.
8. With regard to the appeal, the Appellant submitted that he was under 20 years of age and uneducated when charged thus he ought to have been provided with the services of a lawyer at state expense, in view of the penalty attaching to the charges facing him. Although he admits that he could not have afforded an advocate, he maintains that he was not informed of his right to engage an Advocate. The remainder of his submissions address the sentence which he describes as **“too harsh for a first offender.”**
9. Mr. Koima for the **DPP** reiterated the prosecution evidence in opposing the appeal. He pointed out that the ingredients of the offence had been proved and stated that the Appellant's defence was not raised during cross-examination of the complainant or her mother.
10. I have considered all the arguments made and the evidence in the trial. The fact that the Appellant was well known to the Complainant and her family was not in dispute. The Complainant's evidence on the sexual assault and the identity of the assailant was confirmed in material detail through the evidence of the good Samaritan **PW3** and the medical records including the Discharge Summary (Exhibit 6) and the P3 form (Exhibit 4). The age of the Complainant as per the Discharge summary is given as 12 years, but as 14 years going by the Birth Certificate produced as Exhibit 8. An Immunization Card which had been earlier marked for identification as MF1-5 was not tendered as an exhibit
- 11.. Although the Appellant did not object to the production of the Birth Certificate which was obviously obtained in the course of the trial, I am of the view that the said document ought to have been produced after identification by the Complainant or her mother. However the mother had testified in court that the Appellant was born in 1997 on a date she could not recall. That turned out to be the same year indicated in the Birth Certificate later produced.

12. The Complainant was a Standard 7 pupil at the material period and it is quite believable that she was born in 1997. However, in light of the names in which the Birth Certificate was procured and produced, the trial court should have addressed its mind more closely to the anomaly. This is what the learned magistrate stated in her Judgment:

**“As for the victim’s age, Birth Certificate No. 927083 was produced as prosecution Exhibit one....and it confirms that the victim was born on 14/8/1997, therefore she was fourteen (14) years and almost four (4) months by 12/12/11 when the defilement took place. So her age falls within age group provided for under Section 8 (3).”**

13. It was irregular in my view for the court to allow the production of a document which had not been identified by the Complainant and her mother and to place reliance on it. I have observed that the Appellant did not object to the production.

14. In the recent case of **Mwalongo Chichoro Mwanjembe -vs- Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR)** the Court of Appeal considered at some length the vexed question of the age of a victim of defilement. The court held that:

**“.....the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof”** It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (*See Denis Kinywa -vs- Republic Criminal Appeal No. 19 of 2014*) and (*Omar Ucher -vs- Republic Criminal Appeal No. 11 of 2015*). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of *Uganda in Francis Omuroni -vs- Ugandas Criminal Appeal No. 2 of 2000*. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable.....”

15. Even if it was to be accepted in this case that the Appellant may have somewhat been prejudiced by the irregular production of the birth Certificate, on my own evaluation of the evidence of the Complainant, her mother and based on the Discharge summary, there was credible proof that the victim’s age lay in between the bracket age of 12 and 15 years contemplated by Section 8 (3) of the Sexual Offences Act.

16. Regarding the defilement itself, the evidence of the Complainant is supported by that of her mother (**PW2**) and the Good Samaritan (**PW3**) as well as medical evidence. The evidence is overwhelming. The Appellant’s defence was a denial that he had any role in the defilement evidence by the Complainant, **PW2** and **PW3** indicates that the offence occurred in day time and the victim had ample opportunity in the 1 hour she spent with him to identify her assailant. The offence occurred in the out doors in an open place. The Complainant told the first adult she met, **PW3** that Lokui, the Appellant had defiled her. She restated this to her mother (**PW3**) and to police. It is not clear to the court why the minor would choose to implicate the appellant on such a gross charged if he was not involved. There was no disagreement between the two.

17. As for the Complainant’s mother, she did not know about the assault until she was summoned by police on the fateful day. By that time the Complainant had already named the Appellant to **PW3** who met her earlier. The alleged grudge between the Appellant and the Complainant’s mother was not put to **PW3** during cross-examination. In light of the overwhelming evidence, that defence sounds tenuous and was correctly dismissed by the learned trial Magistrate.

18. With regard to submission that the Appellant should have been provided with legal counsel at state expense due to his age and lack of education, the right is qualified by the words **“if substantial injustice would otherwise result”**. There is no evidence that the present case falls within the anticipated category. It was a defilement case and on my perusal of the record, the

Appellant was robust in the conduct of his defence. He demanded to be served with witness statements and various exhibits prior to the trial. He also cross-examined the witnesses called by the prosecution and indeed had their statements to police read back to them in testing their veracity. This shows that the Appellant not only understood his rights in a trial but also that he was literate.

19. In my own evaluation of the trial, it can hardly be said that substantial injustice occurred out of the failure by the court to appoint counsel for the Appellant at state expense. Nothing therefore turns on this issue. In the final analysis, I am satisfied that the Appellant's trial was proper and he was correctly convicted. The appeal on conviction is dismissed.
20. As regards the sentence, the same was legal and Article 24 of the Constitution does not apply to this appeal. There is a minimum sentence imposed by Section 8 (3) of the Sexual Offences Act. As such there was no applicable "**less severe**" sentence that the court could have opted for in this case. As to the question whether the sentence of 30 years was excessive, the Appellant has highlighted his young age, positive antecedents and his remorse. He was treated as first offender but the court described his conduct as "**ruthless**".
21. Principles applicable in determining whether a sentence is excessive are settled. In **Republic -vs- Mohammadali Samal (1948) 15 EACA 126** the court of appeal stated:

**"It is well settled that an Appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or imposed a sentence which is either patently inadequate or manifestly excessive...."**

And in **Wanjema -vs- Republic (1971) EA 403** the court held that:

**" A sentence must in the end, however depend upon the facts of a particular case..... An Appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case...."**

22. Having described the Appellant's conduct as ruthless the court stated: "**It is like he was on a revenge mission but fact that he is a first offender considered.**" It is not clear what influenced the thinking behind the words "**revenge mission**". However in light of the injuries sustained by the Complainant, the court was possibly outraged, by the Appellant's conduct.

The court did not note that the Appellant was himself a young adult at the time of sentence. She gave the appellant an equivalent of two times the minimum sentence. I am persuaded in the circumstances of this case to interfere with the sentence, by reducing the same to 20 years imprisonment from the date of the sentence (19/7/13). The Appeal has succeeded to that extent.

23. Delivered and Signed at Naivasha this.....**13<sup>TH</sup>** .....day of.....**May**.....2016.

**C. Meoli**

**JUDGE**

Appellant	In person
For the DPP	Mr. Koima
Court Clerk	Mr. Barasa