



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 97 OF 2015

SAMSON MAANZA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.51 of 2015 of the Senior Resident Magistrate's Court at Githongo by Hon. C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **SAMSON MAANZA**, was Charged with an Offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 13th day of January 2015 at **Mwitumura** sub location, in Imenti Central District of Meru County intentionally to caused his penis to penetrate the vagina of **N.K** a child aged 11 years. Alternatively, he unlawfully and intentionally touched the complainant's vagina.

The appellant was tried and was convicted in the substantive charge and sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Igweta, the learned counsel who raised seven grounds of appeal which can be compressed into two as follows:

1. That the prosecution did not prove the actual age of the complainant.
2. That the learned magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

The state opposed the appeal and was represented by Mr. Murage, the learned counsel.

The facts of the case are briefly as follows:

When the complainant went to fetch her siblings from the house of the appellant, the latter went and locked her in and defiled her.

The appellant denied the allegation and highlighted his arrest.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced

before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32**.

Before I address the grounds raised by the appellant, I wish to comment on the way the charges were drafted. It is incorrect to cite a nonexistent section in the substantive charge he was accused of offending section "...**8(1) (2)** " In the substantive charge ought to have been contrary to **section 8(2)**... and if the drafter wanted to include a definition section then it ought to have read "... **contrary to section 8(1) as read with section 8(2)**..." However no prejudice was occasioned to the appellant.

The age of a complainant can be proved in other ways apart from the production of a birth certificate. In the case of **Kaingu Elias Kasomo vs. Republic** in *Malindi* the Court of Appeal in **criminal appeal No. 504 of 2010** stated as follows:

“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

Credible evidence need not be restricted to a birth certificate. In the trial court there was no issue raised about the authenticity of the birth notification. It is common knowledge that after the birth of a child a notification that is hand written is issued. This document is serialized and it is very easy to establish whether it is authentic or not. The appellant cannot object to it at this stage. I therefore find that this document is credible prove of the complainant's age. JON CARDON WAGNER & OTHERS vs. REPUBLIC [2011] eKLR is no longer good law.

The complainant testified of how she pursued her younger siblings to the house of the appellant's wife (I presume it is her kitchen since she testified that some food was cooking). As she was asking her siblings to leave, the appellant went and closed them inside. However her siblings managed to escape. The appellant grabbed her and made her to lie down. When he started to defile her after undressing her, she screamed and a boy called Wycliffe asked the appellant what he was doing. This is when he opened the door and led her away.

Sebarina Kaimathiri (PW4) is the clinical officer who examined the complainant on the same day of the alleged incident. Her findings were as follows:

- 1.Her underpants had mucous fluid,
- 2.The vulva and vaginal orifice were reddish in colour,
- The hymen was broken,
- 3.She had a whitish discharge,
4. No spermatozoa were detected,
- 5.No viral infection was detected; and
6. She was not pregnant.

She concluded that the redness of the her genitalia and the absence of the hymen was indicative of sexual intercourse.

The medical evidence corroborates the contention of the complainant that she was defiled. I accordingly make a finding that the conviction was safe and the same was based on evidence. Section 8 (2) of the Sexual Offences Act provides:

2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life

The appellant was therefore sentenced to the only available legal sentence.

I therefore dismiss the appeal on both conviction and sentence.

DATED at Meru 11th day of May 2016

KIARIE WAWERU KIARIE

JUDGE