



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CRIMINAL APPEAL NO. 77 OF 2015**  
**JOHN OKETCH ERICK.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(In appeal from original conviction and sentence in  
Criminal Case No. 644 of 2014 (Migori) decision  
by L.K SINDANI (Resident Magistrate)*

**JUDGMENT**

**JOHN OKETCH ERICK alias OLUOCH DACHE ( the appellant)** was convicted on a charge of defilement contrary to section 8(1) (3) of the Sexual Offence Act, that on 29<sup>th</sup> August and 29<sup>th</sup> September 2014 at [particulars withheld] in Migori County he intentionally and unlawfully caused his genital organ to penetrate the genital organ of **SAO** a female child aged 13 years. He faced an alternative charge of committing a indecent act with a child Contrary to section 11(1) of Sexual Offence Act.

The appellant denied the charge, but after trial in which 4 prosecution witnesses testified, and the appellant was the only defence witness, he was sentenced to serve 20 years imprisonment . The appeal was heard by Mrima Judge who is indisposed and appellant after instructing his counsel agreed to the writing judgment.

The prosecution's case summarized by the trial magistrate was that the minor who was aged 13 years was lured into marriage and she lived with the appellant for one month, during which period they had sex everyday.

The evidence on record as stated by the girl's father **WOO (PW2)**, was that while at home with all his children, **SAO** left home at about 8:00 p.m. saying she was going for a short call but she never returned. He explained:-

***“The accused is my neighbour. The day my daughter disappeared is the day accused had come and she did not spend the night at his home.”***

He eventually traced her to [particulars withheld], and found her alone, saying the appellant had gone fishing. He returned home with her and left to go and heard his cattle. Upon his return – SAO was missing. The pair were eventually traced at [particulars withheld] where they had rented a house and ..... to PW2.

**“....we found the girl with her husband, they had rented a house at [particulars withheld].”**

PW2 did not know the age of SAO. SAO (PW1) told the court she was 13 years old and got married to the appellant in August. It was her evidence that:-

***“The boy lied to me so that I go with him to his place. I stayed at their home with his boy.... we were having sex almost everyday for three days. He lied to me and forced me to go with him.”***

MOHINDI JUSTUS MAGATI a clinical officer at Migori County Referral Hospital presented a P3 Form in respect of SAO, on behalf Dr. JOHN RUTO who had examined the girl. The findings were that her genitalia was normal with no bruises or laceration but the hymen was absent. There were numerous epithelial cells which was an indication of on – going friction.

On cross examination PW3 stated that the examination showed the girl was 17 years old although the history given by her indicated that she was 15 years old.

CPL JOE ONGOKI (PW4) who received a report from PW2 that the girl was preparing food in the kitchen and left as though she was going to the toilet but never returned. The girl's father did not have a birth certificate but he was given a letter indicating SAO was in standard five (5).

Upon arresting both SAO and the appellant, he questioned them and says

***“... the accused , said he did not know how old the girl was but the girl had told him that she was above 18 years.”***

According to this witness the girl was examined in hospital on 14/10/14 by DR. ALEX OTIENO, who assessed her age at 14 years and the age assessment report was produced in court as exhibit.

The appellant in his defence said he was arrested and accused of marrying a girl he had seen one year earlier.

The trial magistrate noted that there was a range of ages attributed to PW1 but concluded that the Doctor's report pointed that SAO was 14 years old, and in any event all the ages stated ranged between 13 – 17 years which still placed her within the bracket of a child capable of being defiled.

The trial Magistrate also held that there was sufficient evidence to show that SAO left home got married to the appellant, and was only rescued from such bondage by PW2.

The trial magistrate noted that the medical evidence was not clear on whether there was penetration but chose to believe what PW1 said about their daily trysts saying nothing shook her testimony regarding how she related with the appellant as husband and wife, and her demeanour (which was not described) portrayed her as a credible witness and provoked the provisions of Sex 124 of the Evidence Act to find that SAO had been defiled she stated:-

***“ this court is inclined to believe that the complainant was lured into marriage and during the period, she was away from home, she was engaging in sex with her partner.”***

The appellant's defence was considered but rejected on grounds that there was no mistake on the identity of the person SAO was consorting with.

These findings were challenged by the appellant on these summarized grounds that there were material

contradictions as to the exact date when the offence was committed, when the report was made, and when the P3 Form was filled.

Further, that the evidence presented did not establish defilement. In any event the trial magistrate did not specify which offence the appellant was convicted on as he had faced two counts.

The appellant also took issue with the age of **SAO** saying there was no evidence to ascertain her age and in light of the conflicting ages given it was necessary to call the Doctor to give evidence.

This appeal was heard by **Mrima (J)** and argued by **Mr. Nyageosa** on behalf of the appellant, and **Miss Owenga** represented the State. I took over the matter to write judgment after **Mrima (J)** fell ill and travelled out of the country for prolonged medical attention. The appellant in consultation with his advocate had no objection to me writing the judgment.

**Mr. Nyageosa** submitted that the first procedural defect as that of PW1 was considered a minor aged 13 years as stated by herself, then she ought to have been subjected to *voir dire* examination before testifying.

He also argued that there was very weak evidence to prove defilement as the same requires confirmation that there has been penetration. Counsel referred to the case of **MARK OIRURE MOSE vs R [2013] Eklr DOMINIC KIBET MWARENG [2013] e KLR** and **KIVEVELO MBOLOI [2013] Eklr**.

He also submitted that the language used by the court was not indicated except at plea.

In opposing the appeal, **Miss Owenga** submitted that the evidence was overwhelming and connected the appellant to the offence. She also argued that appellant had confirmed at plea that he understood Kiswhaili with that indication in mind. It was her contention that the decisions cited were not relevant to the appeal, and were distinguishable.

The appeal basically lingers on three main issues.

- (a) **Whether the girl's age was established.**
- (b) **Whether the evidence tendered proved the charge of defilement**
- (c) **Voire dire examination not indicated**

The trial magistrate correctly noted that there was discrepancy in the evidence concerning the age of **SAO** – with each witness giving a different figure – varying from 13 – 17, **SAO** said she was 13 years, her father said she was 15 years old, although he did not know when she was born, the Clinical Officer who gave evidence on behalf of **Doctor – Ruto** who had examined the girl said her age was assessed at 17 years. The investigating officer said the initial report gave her age as 16 years but upon examination by one **Doctor Alex**, her age was assessed at 14 years.

Whereas the age range would still put her in the bracket of a minor age is as very significant factor under the Sexual Offence Act as it has a direct bearing with the nature of custodial sentence to be meted out – which is on a reducing scale as the age increases. If she fell within the bracket of 12 – 15 years it attracts not less than 20 years imprisonment. If she was between 16 – 18 attracts a prison term of not less than 15 years imprisonment. It was important to establish the age appropriately.

Since there was such discrepancy in age even by the two Doctors, it was critical that Dr. Alex attend court and verify the age he attributed to PW1 in the light of Doctor Ruto's findings. The lumping of **SAO** into any age category by the trial magistrate was grossly unfair to the appellant.

As to whether there was proof of defilement – again the trial magistrate properly observed that the medical evidence did not prove that defilement had taken place as there was no finding on penetration.

She also rightly observed that although the complainant's hymen was broken, that could have been caused by a variety of factors and not limited to sexual intercourse.

The importance of establishing penetration in defilement cases was underscored by the Court of Appeal's decision in **KIVEVELO MBOLOI vs E [2013] eKLR** which stated that

***“ For defilement to be established there must be proof of penetration Section 2 of the Sexual Offences Act, 2006 defines penetration as “the portral or complete insertion of the genital organs of a person into the genital organs of another person”.***

The medical evidence could not establish such penetration, but the trial magistrate found that from SAO's description of their indulgence showed sexual intercourse may have taken place. She was persuaded that SAO was telling the truth because of her demeanour which was not described. With the greatest and respect to the trial magistrate, answering questions put to a witness does not necessarily translate to telling the truth. It would be helpful to record the actual expressions observed by the trial magistrate-example witness not being hesitant when asked a question, witness looked straight at the person asking the question; however to her credit, she did point out that SAO's evidence concerning her marriage to the appellant was unshaken during cross examination. The only question that was not taken into account by the trial magistrate is whether SAO's evidence regarding the alleged sexual was also unshaken especially in light of the Doctor's findings. It is in this regard that the trial magistrate shifted the burden of proof from the prosecution on to the appellant and this was clearly prejudicial to the appellant. I note that the medical report referred to evidence of friction in SAO's genitalia, but there was no proof as to the cause of friction.

It is also significant that also PW1 told the court that she was 13 years old, she was not subjected to *voire dire* examination is to enable the court establish whether she understood the duty and importance of telling the truth. I can do no better than to refer to the decision by **Korir J** in **Kivevelo Mboloi (supra)** citing Lord Justice Bridge in **R v LAL KHAN [1981] 73 Criminal Appeal 190**, that:-

***“The important consideration ... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath and above the duty to tell the truth which is an ordinary duty of normal social conduct.”***

The absence of *voire dire* examination was thus a miscarriage of justice to the appellant. Due to the foregoing observations, I find that the appeal has merit. Consequently the conviction is quashed and sentence is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated, signed and delivered at Migori this 7<sup>th</sup> day of November, 2016**

**H. OMONDI**

**JUDGE**