



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 173 OF 2015**

**J R N.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence of 15 years imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006 by Hon. N.S. Lutta (SPM) at Mariakani Law Courts on 4.9.2015)*

**JUDGMENT**

1. The Appellant was sentenced to 15 years imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual offences Act No. 3 of 2006.
2. The particulars of the charge were that on diverse 19<sup>th</sup> day of April 2013 at 9am at [particulars withheld] Village in KINANGO District in Kwale County within eh Coastal Region, the appellant intentionally caused his penis to penetrate the vagina of MN a child aged 16 years.
3. The Appellant was charged with an alternative count of Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 in that on the same material particulars as in count 1 (above), the appellant intentionally touched the vagina of MN a child aged 16 years with his penis.
4. The prosecution evidence in summary was that on 19.4.2013 at 9a.m, PW 2 (the complainant) was at her home alone. Her mother and father were away. The Appellant went to the complainant's home and gave her 3 buns (kaimatis) and Kshs.200/= . He then took her to the forest spread her lesso on ground removed her inner garment and defiled her. The complainant screamed and G G (PW 3) went to her rescue. PW 3 said he caught the appellant red handed lying down defiling the complainant clothes lowered. PW 3 said the complainant's clothes were full of blood. He said the two are cousins.

The complainant was taken to MARIAKANI District Hospital for treatment and the matter was reported to the police.

The complainant said the appellant repeated the act the following day. When the mother of the complainant returned after 2 days, the complainant reported to her and she was taken to hospital and the matter was reported to the police.

5. The appellant said in his defence that on 19.4.2013 he left work at around 8.30am and found the complainant fighting with her younger brother and he separated them. On 20.4.2013 while he was in his

house he heard a knock at the door and upon going to open, he found the complainant's father and two police officers who arrested him and took him to Mariakani Police Station and later he was charged in court.

6. The trial magistrate found the Appellant guilty as charged and sentenced him to 15 years imprisonment. The Appellant has appeal to this Court against both conviction and sentence on the following grounds which I now reproduce here verbatim:-

#### **AMENDEND GROUND OF APPEAL**

**i) That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering that the Appellant was not awarded a fair trial due to infringement of his fundamental right.**

**ii) The Learned Trial Magistrate erred in law and fact by not considering that section 19 of oaths and statutory declaration act was not complied with hence the conviction and sentence cannot stand in law.**

**iii) That the Learned Trial Magistrate erred in law and fact by failing to notice that the appellant was not subjected to any examination so as to confirm whether he is the one responsible for the offence charged.**

**iv) The Learned Trial Magistrate erred in law and fact by not considering that essential witness were not called to testify.**

**v) The Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's defence.**

7. The Appellant filed written submissions in which he stated as follows:-

i) That no voire dire inquiry was conducted upon the Complainant to determine if she was capable of giving evidence.

ii) That no age assessment report or birth certificate was produced in respect of the complainant as provided by the Sexual Offences Act and the sentenced passed was illegal since the sentence was determined by the age of the complainant.

iii) That there was no evidence of penetration since the medical evidence did not reveal any injuries and yet the appellant was convicted and that was contrary to section 107 of the evidence Act.

iv) That the prosecution evidence was full of contradictions and variances and that the two key prosecution witnesses differed in their testimonies in that the complainant (PW1) said the Appellant left her and ran away while the complainant's uncle (PW2) said he saw the complainant running away.

v) That there were vital witnesses who were mentioned but they were not called to testify such as the younger sister to the complainant mentioned by the complainant known by name as Mwaka.

vi) Finally the Appellant submitted that his alibi defence was not considered by the court and that the same was not rebutted by the prosecution.

8. The Respondent opposed the Appeal and submitted as follows:-

- i. On the issue of voire dire, the Respondent submitted the same was conducted on page 11 and 12 of the proceedings.
- ii. On the issue of prove of age the respondent said the birth notification and age assessment report

- were produced as exhibits 1 and 3 and the age of the complainant was ascertained as 16 years.
- iii. On the issue of key witnesses who were not called, the Respondent submitted that it was the preserve of the prosecution to decide how many witnesses to call and further that there was no contradiction between the testimony of the two key witnesses as the complainant was the victim and she did not know where PW 2 come from.
  - iv. Finally in the issue of the alibi defence the Respondent submitted that the law requires that the Appellant gives notice if he wishes to raise an alibi in his defence which was not done in this case.

9. This being a first appeal, it is incumbent upon this court to re-analyze and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

***“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts 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”.***

10. I have carefully re-evaluated the evidence adduced at the trial court bearing in mind that the trial court had the opportunity to see the witnesses. My findings are as follows:-

- (i) To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. Penetration is defined under **Section 2 (1) (d)** of the **Sexual Offences Act** as:-

***“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.***

I find that the Complainant’s testimony was corroborated by medical evidence. There is prove of penetration as the clinical officer confirmed that the complainant hymen was missing. The complainant, a 16 years old girl who was experiencing her monthly period at the time of the incident testified that appellant defiled her for a long time. The Appellant was found red-handed defiling the complainant by their uncle (PW2).

- (ii) The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she knew the Appellant prior to the incident. The Appellant was well known to both the complainant and her uncle and the incident took place in broad day light at 9.00 am.

- (iii) The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2 (1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the age of the complainant was established by the age assessment form which confirmed that the Complainant was sixteen years old.

- (iv) On the issue that vital witnesses were not called, the I find that the testimony of the Complainant alone is sufficient to convict the Appellant under section 124 of the evidence Act and in this case the trial court gave reasons why the evidence of the minor was reliable. The court said she knew the Appellant very well.

- (v) On the issue that no voire dire was conducted on the Complainant, I find that the Complainant’s

in this case is not a child of tender years and it was not necessary to conduct voire dire evidence. The complainant was 16 years old at the time of the alleged incident.

(iv) From the foregoing, the prosecution proved its case against the Appellant on the charge of **defilement** contrary to **Section 8 (1) as read with section 8 (4)** of the **Sexual Offences Act** to the required standard( beyond reasonable doubt). The Appellant's appeal on conviction lacks merit and is hereby dismissed.

The conviction is safe and I accordingly uphold it and confirm the sentence.

**Dated and signed at Mombasa this 16<sup>th</sup> November 2016.**

**ASENATH ONGERI**

**JUDGE.**