



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 43 OF 2015**

**KYALO KIOKO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the conviction and sentence of Hon. D.G.Karani PM delivered on 16<sup>th</sup> December 2014 in Sexual Offences Act Case No. 6 of 2014 in the Principal Magistrate's Court at Kithimani)**

**JUDGMENT**

On 19<sup>th</sup> December 2013 at around 4pm, E M M, who is the complainant herein and PW1, was going home from church, and at around 5 pm, she met the Appellant herein at a place called [particulars withheld]. The Appellant greeted her and asked her to board his motorcycle. She refused and continued walking, when she was suddenly grabbed from the back by the Appellant, who led her to a bush, tore her bikers, pushed her to the ground and had sexual intercourse with her three times. According to E, the Appellant threatened to kill her if she told anyone, threw Kshs 200 on the ground and left. As a result E did not tell anyone about the incident and continued going to School at [particulars withheld] School.

The headmistress at [particulars withheld] School, R N M, who was PW5, got a report from one of the teachers on 24<sup>th</sup> January 2014 that she suspected E was pregnant. Upon inquiry, E told the headmistress that she also suspected that she was pregnant, and this was as a result of being defiled by someone she knew, whom she named. The headmistress then asked E to come to school with her parents.

E's parents, M M who was PW2 and D M M (PW3), confirmed being sent for by the headmistress, and that M did go to the school on 5<sup>th</sup> February 2014, where she was informed that E was pregnant and had been defiled. After confirming that this was the position with E, M went with her daughter to the Masinga police station on 6<sup>th</sup> February 2012 and reported the defilement, which report was received and recorded by PC Mohammed Isoka (PW6), who also arrested the Appellant.

E was examined on the same day by Edwin Mutembei (PW4), a clinical officer at Masinga sub-County, who found that E was pregnant and who produced the filled P3 form. On 24<sup>th</sup> April 2014 E was also assessed for age by Benjamin Maingi who was PW7 and a Senior Clinical Officer based at Matuu Sub County hospital, who in his report found E to be 15 years of age.

It is on the basis of the above events as narrated by the named witnesses during their testimony in Court, that the Appellant was charged with the offence of defilement contrary to section 8 (1)(4) of the Sexual Offences Act, the particulars being that on 19<sup>th</sup> December 2014 at [particulars withheld] in Masinga sub-county within Machakos County, he unlawfully and intentionally caused his penis to penetrate the vagina of E M M, a child aged 15 years. He was also on the same particulars charged with the alternative offence of committing an indecent Act with a child.

The Appellant pleaded not guilty to the offences. After trial, the Appellant was found to have a case to answer and put on his defence. The Appellant chose to give unsworn testimony, and did not call any witnesses and he denied defiling the complainant, and claimed that he had been framed.

The Appellant was thereupon convicted and sentenced to serve 15 years imprisonment for the offence of defilement. The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition of Appeal filed in Court on 12<sup>th</sup> February 2015, and Amended/Supplementary Grounds of Appeal he availed the Court dated 8<sup>th</sup> June 2016. In summary, the Appellant alleges that the trial magistrate erred by relying on evidence that was insufficient, unreliable, uncorroborated and contradictory, and by shifting the burden of proof to the Appellant.

Further, that no DNA analysis was done, the complainant's age was not conclusively established, and that the Appellant was not accorded sufficient time to prepare his defence and legal representation contrary to Article 50 (c), (h) and (j) of the Constitution. Therefore, that there was a mistrial as the Appellant's right to a fair and administrative action in contravention of Article 25(c) of the Constitution was prejudiced.

The Appellant availed two sets of written submissions to the Court dated 8<sup>th</sup> June 2016 and 30<sup>th</sup> August 2016, wherein he argued that the prosecution ought to have carried out a DNA analysis to establish the biological father of E's child, and reliance was placed on the decision in **Simon Mungai Kibe vs Republic, High Court Cr. Appeal No. 567 of 2007** in this regard. Further, as regards age, the complainant was assessed on 24<sup>th</sup> April 2014 and found to be 15 years, and was therefore less than 15 years at the time of defilement on 19<sup>th</sup> December 2013. Lastly, that the record showed that on 31<sup>st</sup> March 2014 he was availed witness statements one hour before the trial after he had indicated he was unwell and did not have the witness statements. Further, that there was thus an imbalance and prejudice as he was not legally represented and was against an experienced prosecutor.

The Prosecution opposed the appeal by way of submissions dated 26<sup>th</sup> July 2016 filed in Court by Adera Imelda, the learned prosecution counsel. It was argued therein that the evidence by the complainant was proof of penetration which was corroborated by the testimony of PW4. Further, that the complainant confirmed she knew the Appellant from before. It was also urged that the age of the complainant was assessed at about 15 years, and that the law does not set a requirement for DNA tests to be carried out as proof for defilement, as stated in the decision in **James Mulang's Kisunza vs Republic, Machakos Criminal Appeal No. 118 of 2010**. In addition, that a DNA test could not be carried out on the child, because at the time the complainant testified in Court the child had not been born. Lastly, that the Appellant had reasonable access to the witness statements, and the Appellant did not raise any allegation as to his rights being violated during the trial.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the arguments by the Appellant and Prosecution, and find that the issues for determination by the court are firstly, whether the Appellant's conviction for the offence of defilement was based on satisfactory and sufficient evidence, and secondly, whether the Appellant's right to a fair trial was violated.

On the first issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

**“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”**

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.**

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

In the present appeal, the evidence that was adduced by the prosecution witnesses as regards penetration was by PW1 who testified that on 19<sup>th</sup> December 2013, the Appellant grabbed her, pushed her to the ground, tore her bikers and had sexual intercourse with her three times. Further, PW4 testified and produced a P3 form that showed that on 6<sup>th</sup> February 2014 when he examined PW1 he found that she was pregnant. This in my view is sufficient evidence of penetration which is also corroborated. Both PW1 and PW3 previously knew the Appellant before as he was a neighbour, with PW3 stating that the Appellant was his classmate, and the alleged defilement took place during the afternoon of the material day, during daylight.

The medical evidence by PW4 has been disputed by the Appellant as having not proved any penetration, on account of no DNA analysis having been done to determine the biological father of the complainant's child. It is noted by the Court that such an analysis would include testing DNA from the child who was not yet born at the time the Appellant was charged in the trial Court, and at the time of the complainant's testimony. In addition, the Court finds that the complainant was consistent in her evidence as to the identity person who defiled her, whom she was able to identify as the Appellant, and as the pregnancy was sufficient corroboration of penetration, I am satisfied that there is sufficient proof that the Appellant is the one who defiled PW1.

As regards the requirement of age, It is apparent and not contested that PW1 was a minor and that she was still in primary school in class 8 at the time of the alleged. Any conflict as to the age of PW1 can only be resolved in favour of the Appellant, and since the age of the victim is only relevant when it comes to the sentence meted out for the offence of defilement, this Court will adopt the age which attracts the lesser penalty for the Appellant, which is about 15 years which could be construed to be over 15 years. It is notable that if the complainant is found to be less than 15 years at the time of defilement as alleged by the Appellant, he is then liable to imprisonment for a minimum period of twenty years under section 8 (3) of the Sexual Offences Act.

On the second issue raised, this Court firstly notes that on 31<sup>st</sup> March 2014 when the Appellant alleges his rights were contravened, the Appellant does not dispute that he was availed the witness statements, and when the trial reconvened later at 12.30pm, the Appellant stated that he was ready to proceed. There is no other record of the Appellant seeking witness statements. It was argued by the Appellant that he ought to have been accorded legal representation under Article 50 (2) (h) of the Constitution which provides that an advocate ought to be assigned to an accused person at State expense if substantial injustice would otherwise result. The Appellant alleges that the legal issues were too complex for him, however the record of the trial Court does not show any such disclosure and application for legal advice or assistance made by the Appellant, who on the contrary indicated he was ready to proceed with the trial.

Article 50 (2) (h) of the Constitution was also the subject of the Court of Appeal's decision in the case of **David Macharia Njoroge vs**

**Republic [2011] eKLR** wherein after reviewing the past and current law stated that as follows:-

*“Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”*

In the present appeal, the charges the Appellant was facing did not carry a penalty of loss of life, and the Appellant did not suffer from any of disability that prevented him from understanding the proceedings. His allegation that his right to a fair trial was infringed on account of lack of legal representation is therefore found not to have merit.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (4) of the Sexual Offences Act, and the sentence imposed upon the Appellant of imprisonment of fifteen (15) years. This Appeal is accordingly dismissed.

It is so ordered.

**DATED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF NOVEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**