



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 175 OF 2013**

**JOHN WAMBUA MUTEMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the conviction and sentence in Kyuso Principal Magistrates Criminal case No. 224 of 2013 B. M. Mararo PM )***

**JUDGEMENT**

The appellant was charged in the subordinate court with defilement contrary to section 8(1)(4) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on diverse dates between 14<sup>th</sup> June and 20<sup>th</sup> June 2013 at Siveta village Ngereni Sub location in Tseikuru District within Kitui County, intentionally caused his penis to penetrate the vagina of MM a child aged 17 years. In the alternative, he was charged with committing an illegal act with a child contrary to section 11(1) of the same Act. The particulars of offence were that on the same dates and place intentionally touched the buttocks, breasts and vagina of MM a child aged 17 years with his penis.

He was recorded as having pleaded guilty. He was thus convicted on the main count and sentenced to serve twenty (20) years imprisonment.

He has now appealed to this court. He initially filed a petition of appeal on 19<sup>th</sup> December 2013. Before the hearing of the appeal, however, he filed amended grounds of appeal on 12<sup>th</sup> June 2014, as well as written submissions. He relied upon the grounds of appeal filed on 12<sup>th</sup> June, 2014.

The grounds of appeal filed on 12<sup>th</sup> June 2014 are on sentence. They are in summary that the appellant pleaded guilty; is a first offender; he is remorseful; that he is the bread winner, that the sentence is harsh, excessive and severe; that he did not understand the seriousness of the case; that what happened was due to the passion of love; and that he be put on community service.

At the hearing of the appeal, the appellant relied on the written submissions filed. His submissions were that he was living with the complainant as husband and wife with the consent of the parents of the complainant. He further submitted that he had already agreed to pay bride price for the complainant. That he was aware that the complainant was pregnant. He also submitted that the sentence was harsh and excessive.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal and supported both the conviction and sentence. Counsel submitted that the plea of guilty recorded was unequivocal. That though Section 8(1)(4) of the Sexual Offences Act was wrongly cited in the charge sheet instead of Section 8(1)(3), such

a defect was minor and curable under section 382 of the Criminal Procedure Code (cap 75).

Counsel emphasized that the complainant was 17 years old as evidence by the entry in the P3 form. Counsel doubted that the appellant did not understand the seriousness of the charge as alleged. Counsel also doubted the allegation that the appellant was threatened by the police. Counsel emphasized that it was not a defence to say that the offence was committed as an act of passion.

Lastly, counsel submitted that the minimum sentence for the offence was 15 years imprisonment. Therefore, in counsel's view, the sentence of 20 years imprisonment could not be said to be harsh and excessive.

This is a first appeal. Though the appellant was recorded as having pleaded guilty to the charge, as a first appellate court, I have to re-examine the record to be satisfied that the plea of guilty was unequivocal.

Secondly, I have to be satisfied that the facts given by the prosecution disclose the offence for which the appellant was convicted. Thirdly, I have to consider whether the sentence imposed was lawful and appropriate. I am required to do so even though the appeal is merely on sentence, particularly in the present situation where the appellant is a layperson.

With regard to the plea, on 30<sup>th</sup> September 2013 the main charge was read to the appellant in Kamba language which he understood. He was recorded as having responded that "it was true". Thereafter a plea of guilty was entered.

In my view, the plea of guilty on the main count of defilement as properly taken. It was taken as required by law as well as procedure set out in the case of **Adan vs. Republic (1973) EA. 445**. After entering the plea of guilty, the facts had to be given by the prosecutor before a conviction could be properly recorded.

Did the facts given by the prosecution disclose the offence for which the appellant was convicted and sentenced? The charge is merely an allegation. The facts have to support the charge and establish the offence before a conviction can be properly entered and sustained.

From the facts given by the prosecutor it is clear that the appellant lived with the complainant between 14/06/2013 to 20<sup>th</sup> June, 2013. He had sexual intercourse with her each night. Even on appeal, he has admitted that he lived with the complainant and had sexual intercourse with her resulting in her pregnancy. The facts given do disclose sexual intercourse between the appellant and the complainant. Thus two important ingredients of the offence defilement were disclosed by the facts. That is the occurrence of sexual intercourse, and the fact that the appellant was the culprit.

The third important ingredient of an offence of defilement is proof of the age of the complainant. The complainant has to be below 18 years. Sexual intercourse per se by the culprit does not constitute defilement unless the victim is below 18 years of age.

In the present case, the complainant (victim) is said to be 17 years of age. The prosecutor gave the age of the complainant at 17. That is the age stated in the P3 form as was recorded by the police on the front page. The same age was endorsed by the unidentified medical official in section C of the P3 form.

I observe however, that the age of the complainant in the treatment notes dated 31/07/2013 is indicated to be 15 years, which is an overwriting on another figure. Both the P3 form and the treatment notes were produced to back the facts given by the prosecutor. The P3 form has an age of 17 years while the treatment notes have an overwritten age of 15 years.

It is clear to me that from the facts given by the prosecutor, the age of the complainant is in doubt. There is no record that the age of the complainant was scientifically assessed either at the treatment stage or at the P3 form stage. No birth certificate or any other documentary evidence on age was produced or relied upon.

In my view, in a case such as the present one where the age relied upon was 17 years, which is the borderline to 18 years, it was imperative for the age of the complainant to be unequivocally established, and not merely presumed the way it was done. There should never have been a contradiction on the age of the complainant in documents relied upon and produced in court. The situation herein leaves a reasonable doubt in my mind that the age of the complainant was not established by the facts given by the prosecution.

In my view the prosecution failed to establish the age of the complainant beyond any reasonable doubt. It failed to establish that she was below 18 years. Such doubt has to be given to the appellant. This is especially so as section 8(5) of the Sexual Offences Act creates a defence to an accused where he believes that the victim is above 18 years. The appellant herein has stated even on appeal that he considered the complainant to be his wife, which means that he took her to be an adult. It is quite possible that the complainant was above 18 years. I give the benefit of the doubt to the appellant. The result is that the conviction will have to be quashed, as the facts given by the prosecutor did not establish all the three constituent ingredients of the offence of defilement.

With regard to sentence, as the conviction is to be quashed, the sentence cannot stand. It will also be set aside.

In the result, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**SIGNED AND DELIVERED AT GARISSA THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2015**

**GEORGE DULU**

**JUDGE**

**In the presence of .....**