



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL NO. 174 OF 2010**  
**RAPHAEL LOKINI LOITIKO.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence in the judgment in Nanyuki Senior Principal Magistrate's Court Criminal Case No. 2565 of 2008 (Hon. E.N. Gichangi) delivered on 21<sup>st</sup> May, 2010)*

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. He is alleged to have penetrated one PK, a child of 11 years on the 12<sup>th</sup> day of October, 2008 in Laikipia North Division in Laikipia North District within the Rift Valley province.

The trial court convicted the appellant of the offence and sentenced him to life imprisonment. He has appealed in this court against the sentence and conviction; in his grounds of appeal, the appellant has faulted the learned magistrate as having erred in law and in fact in convicting him when:-

1. The prosecution evidence was inconsistent;
2. The charges against the appellant were not proved;
3. He did not consider the appellant's defence; and
4. The prosecution was conducted by unqualified prosecutor contrary to **section 85(2)** of the **Criminal Procedure Code**.

The appellant relied on written submissions and one of the arguments he raised in support of the appeal in those submissions, and which in my humble view this appeal turns, was that the complainant's age was not ascertained. Although the state opposed the appeal, there was no response from the counsel on this particular issue of ascertainment of age.

The evidence at the trial was that on 12<sup>th</sup> October, 2008 at 1.00 pm, the complainant was on her way to school when she was accosted by the appellant. According to the complainant's testimony, the appellant dragged her deep into the bush and defiled her; she bled as and was in serious pain during and after this sexual assault. The complainant was forced to go back home where she found her uncle, **LL (PW3)** and

told him what had happened to her. Accompanied with her uncle, the complainant went to her school the following day and reported the case to school's head teacher, one Kuraro, who took the complainant to hospital. After examination, the complainant went to the police and reported the assault. The complainant testified that she knew the appellant as their neighbour at home.

The clinical officer who examined the complainant was **Kigen Bowen (PW2)**; he testified that he attended to the complainant on 13<sup>th</sup> October, 2008. According to his testimony, the complainant had small wounds and bruises on the labia; she also had a foul smelling vaginal discharge. The entire area of the vagina was swollen and the hymen was broken. The injury was approximately 24 hours old. The complainant was given anti-biotic drugs and analgesics. The officer's findings were contained in the P3 form which he signed on the same day he attended to the complainant; this form was duly admitted in evidence.

**LL (PW3)** testified that the complainant is his sister's daughter. He testified that when he came back from the grazing fields he found the complainant at home and since she was expected to be in school he enquired from her why she was at home at that particular time. The complainant told him that she had been beaten by the appellant while on her way to school; he took her to the hospital the following day when she started complaining of pains in the waist joints.

It is at the hospital that it was discovered that the complainant had been defiled. The doctor referred this witness and his niece to the police. When they went to the police they were given the P3 form which was subsequently filled at the hospital. The appellant was later arrested.

The officer who arrested the appellant was police constable **Peter Mutua (PW4)**; the officer testified that he arrested the appellant with the help of the head teacher of [Particulars Withheld] primary school who happened to have known the appellant before. The investigating officer, police constable Muthoni testified that the report on the defilement of the appellant was made on 12<sup>th</sup> October, 2008 and proceeded with the complainant together with her two uncles to hospital where she was examined and treated.

The appellant himself gave a sworn statement in his defence; he said that he was arrested and charged with the offence he knew nothing about. He denied having ever defiled the complainant. The appellant further stated that there were existing differences between him and the complainant's uncles over payment of dowry for his sister. He dismissed the prosecution case as a frame up and that the police who arrested him were induced to arrest and charge him.

**Section 8(2)** of the Act under which the appellant was charged provides as follows:

**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.**

For the court to convict a person under this section, it must be proved beyond reasonable doubt that first, the victim was defiled and second, that the victim was at most eleven years old. From the evidence given by the prosecution witnesses, more particularly the complainant herself and the clinical officer who examined her, there is no doubt that the first element of this offence was proved to the required standard.

The complainant testified that she was defiled and her evidence was corroborated by the clinical officer **Mr Kigen Bowen (PW2)**, who examined her and established that indeed she had been sexually assaulted; the P3 form in which his findings were contained was admitted in evidence. This evidence was not displaced and therefore it was safe to conclude, as the learned magistrate concluded that, this particular element of the offence was proved beyond reasonable doubt.

Proof of the second aspect of the offence was not as clear; apart from the complainant's statement that she was aged eleven, there was no evidence of whatever nature produced by the prosecution to prove that the complainant was eleven years old. What was indicated in the P3 form as the "estimated age" of the complainant cannot be assumed to be a conclusive proof of her age for purposes of establishing whether an offence under **section 8(2) of the Sexual Offences Act** was indeed committed. The Court of Appeal

sitting at Kisumu in **Criminal Appeal No. 164 of 2009, Dennis Abuya versus Republic** held that an “**estimated age**” indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one’s age. The learned judges (R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

**There is a P3 form in the record before us and it shows that on 26<sup>th</sup> June, 2007, the appellant’s “Estimated age” was eighteen years. By “estimated age” we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.**

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court’s judgment an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant’s age.

The point here is that the age indicated in a P3 form as “the estimated” age of either the victim or the villain of a sexual offence is not a conclusive proof of that particular person’s age; there is need for evidence ascertaining *conclusively* a person’s age whenever the question of his or her age is an issue.

Ascertainment of age conclusively is certainly an issue where a person is charged under **section 8(1), (2), (3) and (4)** of the **Sexual Offences Act**. **Subsection (1)** of **section 8** merely defines the offence of defilement but **subsections (2), (3) and (4)** thereof define the respective sentences meted out against convicts of this offence depending on the age of the age of their victims. As noted earlier, under **subsection (2)** where the victim is aged eleven or below, as the complainant is alleged to have been in the trial against the appellant, the mandatory sentence provided for and which was meted out against the appellant is life imprisonment. It follows that while ascertainment of age is generally a requirement under **section 8 (2), (3) and (4)** of the **Act** the severity of the sentence of any person convicted under **subsection (2)** should have been a reason enough not to leave any room for doubt as to age of the complainant.

In **High Court Criminal Appeal No. 2 of 2012, Anthony Mwangi Kanyari versus Republic**, where a similar issue arose, I was of the view that:-

**It is important to note that the age of a complainant is a vital element in any offence under section 8 of the Sexual Offences Act and it is imperative that it must be proved beyond reasonable doubt. Under that provision, age is not only an important component in the definition of the offence of defilement itself but it also defines the punishment which the offender will be subjected to upon conviction. Without any sort of documentary proof either by way of a birth certificate, a clinical card or an age assessment report, it would not be possible to state with any certainty that the complainant was of a particular age at the time the offence was committed and conclude that the appellant was appropriately charged. The issue of age cannot be left to speculation and without proof a conviction under section 8 cannot be upheld.**

The importance of ascertainment of age in sexual offences was also alluded to by the **Court of Appeal in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic**. At page 7 and 8 of its decision, the Court of Appeal had this to say:-

**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.**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010)**

eKLR where again it commented on the age of the victim of a sexual assault; in that case it said:-

**In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)... In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother MA when she testified on 16<sup>th</sup> October, 2007 that... “This child in court is mine aged 14 years born in 1992...The other piece of evidence on age was an estimate made in the P3 form dated 20<sup>th</sup> August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.**

The court concluded that *“prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars”*.

I would follow my earlier decision on this issue and in any case I am bound by the foregoing decisions of the Court of Appeal and regrettably allow the appeal. It is unfortunate that this crime, which by any standards is heinous, should go unpunished simply because the investigating authorities missed this simple but an important and a necessary legal step in establishing this offence; worse still, this case is not the first of its kind where this Court has had to quash convictions because the ages of the victims of defilement cases have not been ascertained. It may be necessary, as one way of averting this unwarranted trend, for the police to consider amending their P3 forms so that a provision is made in those forms for a proper assessment of the age of victims of sexual violence particularly those among them considered to be minors, where for one reason or another it may not be possible to secure documentary proof, such as a birth certificate or a notification of birth or such other credible evidence ascertaining these victims' ages. As the law stands currently, there is no room left to convict under **section 8** of the Sexual Offences Act in circumstances where the age of the victim of defilement cannot be established. It is this law that now binds me to allow this appeal; the appellant is accordingly set at liberty unless he is lawfully held.

**Signed dated and delivered in open court this 6<sup>th</sup> day of February, 2015**

Ngaah Jairus

**JUDGE**