



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.251 OF 2012**

**BETWEEN**

**GEOFREY KIBET SIELE.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against conviction and sentence of the PM's Court at Kilgoris in Criminal case No. 1621 of 2011 delivered on 12<sup>th</sup> October, 2012 – Hon. B.O. Ochieng, SRM)*

**JUDGMENT**

1. The appellant GEOFREY KIBET SIELE was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8 (3)** of the **Sexual Offences Act No.3 of 2006** the particulars of which were that on 16<sup>th</sup> day of July 2011 at 5 a.m at [particulars withheld] village in Transmara East District of the Narok County did cause his penis to penetrate the vagina of M.C.C. who was a child of 13 years old.
2. He faced an alternative charge of Indecent Act of a child contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006** the particulars of which were that on 16<sup>th</sup> day of July 2011 at 5 a.m at [particulars withheld] village in Transmara East District of Narok County did intentionally and unlawfully cause his penis to come into contact with the breast and vagina of a girl aged 13 years.
3. He pleaded not guilty, was tried, convicted and sentenced to 20 years imprisonment on the main charge. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:-
  - a. *The prosecution case was not proved beyond reasonable doubt.*
  - b. *The sentence of 20 years was disproportionate, inhuman, demeaning and degrading thereby violating his constitutional rights under **Article 50 (2) (b) (c) (g) and (h)**.*
  - c. *The sentence was too excessive in comparison to the offence committed.*
1. When the appeal came up for hearing before me, the appellant who was not represented filed written submissions which he relied upon, while Miss Boyon appeared for the state and opposed the appeal.

**SUBMISSIONS**

2. It was submitted by the appellant that the age of the complainant was in dispute. He submitted

- that according to the complainant, she was born in January 1995 thereby making her age 16 years as at the time of trial. It was submitted that the doctor did not confirm the age of the complainant.
3. It was further submitted that the prosecution case was full of contradiction. It was submitted that PW1 testified that she never had sex with the appellant which was confirmed by PW2 on the status of the hymen. It was submitted that the head teacher testified that the complainant only missed school on 28<sup>th</sup> - 30<sup>th</sup> of June 2011 which contradicted the evidence of the doctor that she was three months pregnant. He further submitted that as per the traditions of their tribe he became friends with the complainant awaiting her to attain the age of majority before uniting with her as husband and wife.
  4. On behalf of the state it was submitted that the prosecution had proved its case beyond reasonable doubt. According to the evidence of PW1, PW2, PW3 and PW7 the act of defilement and the age of the complainant were proved.
  5. This being a first appeal, the court is required to re-assess the evidence tendered before the trial court to come to its own conclusion while taking into account the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.
  6. PW1 M.C.C. testified that she was aged 16 years having been born in 1996. She stated that she was on 16<sup>th</sup> July 2011 arrested at the home of the appellant where she had gone to stay with him as he had taken her as a wife and that they had sex throughout. PW2 PATRICK ONGUTI examined the complainant and did a pregnancy test which confirmed that she was less than three months pregnant. He did an age assessment and confirmed that she was between 13 to 15 years old.
  7. PW3 KHATY RINGO CHERUIYOT testified that on 26<sup>th</sup> June 2011 the complainant came wearing clothes that were ill fitting and stated that the appellant had bought them for her with intention of marrying her. He stated that the girl was approximately 13 years old. PW4 RICHARD KIBET ROTICH confirmed that the complainant was in [particulars withheld] primary school in class five and that the complainant was missing from school and it was reported that she had ran away with the appellant and that the father of the girl said she was pregnant and was not willing to go back to school.
  8. When recalled PW1 stated that she was 18 years old and she denied knowing the appellant but stated that the appellant was her boyfriend and that they were arrested on the same day. PW3 stated that the complainant eloped with the appellant and that she was aged 13 years.
  9. PW7 NASORD RASHID the investigating officer confirmed that the appellant and the complainant were arrested together and that the complainant told him that the appellant wanted to marry her and that upon examination she was 16 years old.
  10. When put on her defence the appellant gave sworn statement and stated that he was arrested on 16<sup>th</sup> July 2011 and that the police came with PW1.
  11. Was therefore the age of the complainant proved? It must be noted that age is very fundamental in an offence under Sexual Offences Act since the same determines the sentence upon conviction. As regards the age of the complainant, medical report produced as Exhibit 1 gave her age as 16 years old. In her evidence in chief, the complainant also stated that she was born in 1995 and was therefore not 13 years old as stated by the prosecution.
  12. It is clear that under **Sexual Offences Act Section 8 (4)** a person who defiles a child who is between 16 years and 18 years is liable to imprisonment for a term of 15 years whereas between 13 years and 16 years the person is liable to imprisonment for 20 years.
  13. The issue therefore for determination is whether the trial court was right in holding that “the child and parents gave out that the subject was 13 years old. The doctor comprehended this fact. This then was that the 1<sup>st</sup> upper of age was proved beyond reasonable doubt.”
  14. From the proceedings and evidence as analysed the age was not proved beyond reasonable doubt and therefore the trial court fell into error. However there is evidence tendered to prove that the complainant was 16 years old and therefore the appeal on sentence has merit and is hereby allowed by quashing the sentence of 20 years imprisonment and substituting the same with 15 years.
  15. On the issue of proof of the prosecution case that the appellant did an act that caused penetration with the complainant, the evidence of the doctor that PW1 was pregnant and her evidence that she had been with the appellant as husband and wife during which period of time they had sex and the fact that they were arrested together which arrest was confirmed by the father of the appellant and

- the complainant proves beyond reasonable doubt that the appellant defiled the complainant.
16. I therefore find that his conviction though based on the wrong age of the complainant did not prejudice the appellant and therefore confirms the conviction of the appellant for defilement of a girl aged 16 years.
  17. The sentence meted to the appellant was unlawful having taken into account the age of the complainant and the same is therefore reduced to imprisonment for a period of 15 years from the date of the judgment of the lower court.
  18. In the final analysis, the appeal on conviction is hereby dismissed and must point out that the appellant should not be proud of tribal traditions or cultures which are not in line with modern society as stated in his submission and of which the constitution says that if they are repugnant to justice and morality then should not be enforced.

**Signed and dated on this 11<sup>th</sup> day of March, 2015.**

**J. WAKIAGA**

**JUDGE.**

In the presence of:

Mr. Boyon for the Respondent

In person for Appellant