



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CRIMINAL APPEAL NO. 77 OF 2014**

*(Being appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Narok Criminal Case No. 971 of 2013 by Temba A. Sitati - Ag. SRM)*

**RICHARD WALLEY.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was charged in the lower court with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars stated that between 24<sup>th</sup> and 31<sup>st</sup> July 2013 in Narok South, he caused his penis to penetrate the vagina of a SC a girl aged 17 years. He denied the charge. Following a full a trial, he was convicted and sentenced to serve 15 years imprisonment.
2. He has now lodged an appeal to this court citing 14 grounds of appeal. Apart from grounds 6, 7 and 14 which raise issues relating to defects in charge sheet, harsh sentence and the flouting of procedure at trial, respectively, the remaining grounds attack the quality of evidence upon which the conviction was founded.
3. The brief facts of the case in the lower court was that SC (PW2) was a girl aged 17 years and a form 3 student in 2013. She was the Appellant's lover. The Appellant persuaded her to escape from school and elope with him as he wanted her for a wife.
4. Thus on 24/7/2013 the complainant left school and went to live with the Appellant at his home where they commenced "cohabitation" and engaged in sex on several occasions. When her father P.K. (PW1) learned of this development, he went to the Appellant's home on 30/7/2013 demanding that the daughter be released to him. The matter was reported to police and the accused was arrested. The complainant was treated at Longisa District Hospital.
5. In his sworn defence the Appellant raised an alibi defence – that in the material period he was in Kapsabet. He denied defiling the complainant.
6. The duty of the first appellate court as stated in **Okeno –Vs- Republic [1972] EA 32** is to:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) 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 (Shantilal M. Ruwala –**

**Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's 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, see Peters –Vs- Sunday Post [1958] EA 424."**

7. The state conceded this appeal on the question of proof of the age of the complainant. Having reviewed the respective submissions and the evidence, I am persuaded that indeed that sole issue disposes of this appeal.
8. PW1 stated that PW2 was born in 1995 and was therefore aged 17 years in 2013, the time of the offence. PW2 also said she was born in 1995. The P3 form produced by the investigating officer **PC Tarus** (PW3) states that the complainant was 17 years old. I agree with the Appellant's submissions that the prosecution evidence raises doubts as to the actual age of the Complainant..
9. The Complainant's age being a borderline case should have been proved through an age assessment report or through the production of a baptism card or other such records. If indeed as PW1 and PW2 asserted, the latter was born in 1995, she was 18 years old or thereabouts in 2013 and not 17 years old. And because the medical officer who examined her did not testify on this aspect, there is uncertainty as to the actual age of the complainant at the time of offence. She could have been 17 or 18 years old.
10. I have considered the submissions and authorities cited by the Appellant regarding the production of the P3 form by a police officer. With respect, I think that Section 77 of the Evidence Act must be considered separately from section 33 of the Evidence Act. Conflating the two in my humble view appears to place a more onerous burden on the prosecution than intended by Section 77 for purposes of this case. Section 33 is contained as in **Chapter I Part IV** of the Evidence Act entitled: "**Statements by persons who cannot be called as witnesses.**" These include statements made by deceased persons, or in the course of business.
11. Section 77 falls under **Chapter III** entitled – "**Proof**" and is in **part III** thereof, entitled: "**Documentary Evidence.**" Section 77 specifically provides for "Reports by Government analysts and Geologists." It reads:-
  - "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
  - (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
  - (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."**
12. It is clear from a reading of the above section that the government analyst's or medical report is treated in a special manner. The court may even presume the genuineness of the document and professional qualification of the person who signed it. While under subsection 3 the court may "if it thinks fit", summon the analyst or expert in question, there is no requirement to lay the sort of basis required by Section 33 of the Act where a witness other than the author tenders such report. Section 33 is concerned with the admission of proper hearsay evidence.

13.As matter of common sense, trial courts have routinely required that such documents as anticipated in section 77 are tendered by persons who are at least familiar with the signatures of the author and who are professionally qualified to answer any questions that may arise in respect of the document.

14.In the case before us, there was in my view a riddle before the court as to whether, having been born in 1995 the complainant was 17 or 18 years old in 2013. Hence, this was a fitting case to receive an explanation on the question of age. The prosecution informed the court that the clinical officer was unwell. The court should have given another opportunity and summoned him to attend the trial. The trial magistrate in his judgment did not address the uncertainty regarding the complainant's age that was introduced through the prosecution evidence.

15.The Court of Appeal has severally pronounced itself on the question of proof of age in defilement cases. In **Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo –Vs- Republic** it was stated:

**“Age of the victim of 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 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.”**

16.In the case before me, if SC was an adult at the time of the offence, the charge of defilement cannot be sustained. It behoved the prosecution to prove her age in a manner that left no doubt in the court's mind. In the circumstances of this case therefore, it cannot be said that the prosecution evidence proved the charge beyond reasonable doubt. I do therefore allow this appeal, quash the conviction and order that the Appellant be set at liberty unless otherwise lawfully held.

Delivered and signed at Naivasha, this **7th** day of **October 2015**.

In the presence of:-

State Counsel : Miss Waweru

For the Appellant : Mr. Kamwaro

C/C : Steven

Appellant : Present

**C. MEOLI**

**JUDGE**