



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CRA NO.11 OF 2015**

*(Appeal from the conviction and sentence of by Mr. A. M. Obura in Kilifi Cr. Case No.32 of 2013)*

**MUGANGA CHILEJO SAHA.....APPELLANT**

**VRS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence were that, the appellant on 19/1/2013 at Muarari in Kilifi Township, Kilifi County intentionally and unlawfully caused his penis to penetrate into the vagina of the complainant, a girl child aged 8 years.

The appellant was convicted of the offence and sentenced to serve life imprisonment. The grounds of appeal are that, the complainant was a witness of doubtful integrity, that some vital witnesses were not called to testify, that the trial court failed to comply with section 36 of the Sexual Offences Act, that the complainant's age was not well established and therefore the charge of defilement was inadmissible, that the case was not proved beyond reasonable doubt and that the trial court failed to consider the appellant's defence which raised doubt on the prosecution case.

The appellant contends in his submission that, the complainant informed the court that she did not undress. She had her clothes on when the appellant allegedly did bad manners to her. It is submitted that, how could the defilement occur while the complainant had her clothes on? The appellant further submits that the complainant talked to neighbours and was irritated, however, the neighbours were not called to testify yet they are the ones who started the defilement story. The trial court ought to have utilized section 150 of the Criminal Procedure Code and summon the neighbours.

It is further submitted that, there were some blood stained garments that were not produced. Further, there was no evidence that the hymen was ruptured, whether it was freshly torn or it was a previous perforation. Therefore, penetration was not proved beyond reasonable doubt. The complainant's age was not proved. Apart from the doctor alleging that, the complainant was eight years old, there was no other document to prove that. The appellant's defence was reliable but it was rejected.

The State opposed the appeal. Mr. Nyongesa, prosecution counsel, submitted that, the trial court believed the evidence of the complainant. PW3 was a neighbour and all crucial witnesses testified. Further, section 36 of the sexual Offences Act is not mandatory. The blood stained clothes had been washed. The appellant's defence was considered.

The record of the trial court shows that six witnesses testified for the prosecution. PW1 was the complainant. She told the court that she was eight years old and a class one pupil. On 19/1/2013 during the day, they were playing near the road when the appellant called her. He told her that he wanted to send her to buy cigarettes and asked her to get the money from his house. The appellant was her neighbour. It is her evidence that while inside, the appellant held her mouth and nose and defiled her. The appellant did not undress her. He threatened to kill her if she were to tell anyone. Her clothes had blood stains and her mother did not initially suspect her. She was told to wash her clothes. The next day, her aunt talked to her and she revealed what had happened. The matter was reported to the police and she was taken to Kilifi Hospital. Her colleagues she was playing with were called to go and eat.

**PW2, S N** is PW1's mother. On 19/1/2013 she went home and found PW1 at about 5.00 p.m. PW1 was irritated and started vomiting. It is her evidence that, PW1 was 8 years old. PW1 informed their neighbour that the appellant had defiled her. They examined PW1 and noted that she had been sexually abused. PW2 had told PW1 to wash her blood stained clothes not knowing that she had been defiled. The appellant was their neighbour for two months. The matter was reported to the police. **PW3, Hadija Hamisi** is a neighbour. On 19/1/2013 another neighbour told her that, PW1 was withdrawn and had a problem. She talked to PW1 who revealed to her that, the appellant had defiled her. He had called her to buy cigarettes for him and in then defiled her. PW3 informed PW1's mother.

**PW4, Dr. Agnes Kalu** was based at the Kilifi District Hospital. She was stood down and was never recalled. **PW5, Cpl Dorcas Kaguwira** was stationed at Kilifi Police Station. She investigated the case. PW1 narrated to her what had happened. The incident was brought to her attention on 21/1/2013. She referred PW1 to Kilifi District Hospital and caused the appellant to be charged.

**PW6, Dr. Busra Ahmed** is a medical officer who was based at Kilifi District Hospital. He filled the P3 form for PW1 on 24/1/2013. He estimated PW1's age to be 8 years. PW1 had foul smelling discharge. Her hymen was not intact with bruised labia minora. He concluded that PW1 had been defiled. According to him the foul smell was a sign of infection through sexual intercourse.

In his sworn defence, the appellant testified that he is a mason. On 19/1/2013, he went to his work as usual. He returned in the evening. Shortly, PW1's mother and neighbours went to his house and claimed that he had defiled PW1. He denied the offence. He was beaten and taken to the police station. It is his evidence that the complainant must have mistaken him. He had no grudge with the complainant.

From the evidence of the prosecution, it is well established that, PW1 was defiled. The evidence of PW6 does indicate that, PW1's hymen was broken. She had a foul smelling discharge and her labia minora was bruised. PW6 concluded that PW1 was defiled. The main issue is who defiled PW1? PW1 herself mentioned the appellant who was known to her. The incident occurred during the day at about lunch time. The trial court evaluated the evidence and concluded that, PW1 was truthful. Although there was no other eye witness to the act, it is quite obvious that no one would want to defile a child in the open. In very rare occasions, the defiler would be caught red handed. All what the court has to do is to weigh the evidence on record and make a conclusion.

From the evidence on record, it is established that, it is the appellant who defiled PW1. There was no grudge between the two. PW1 knew the appellant and even his house. The incident occurred during the day. It was not a case of mistaken identity as alleged by the appellant. PW1 saw the appellant when he called her and asked her to go and buy him cigarettes. There is no evidence that it was someone else who defiled PW1 other than the appellant.

The appellant contends that PW1's age was not established. PW1 testified that, she was eight years old and in class one. PW2, the mother informed the court that, PW1 was eight years old. PW6 estimated PW1's age to be eight years. PW6, is a medical Doctor. There is no rule that one's age can only be proved through production of birth certificate, age assessment form or baptismal cards. The trial court saw the child and conducted *voire dire* even before she testified. The child was in class one. A doctor saw the child and estimated her age to be eight years. My view is that, although section 8 of the Sexual Offences Act classifies the punishment for defilement according to the victim's age, the said section does

not state that where age is not proved, then the accused should be acquitted. No-one is ageless. The worst case scenario would be to convict the accused for the offence of rape under section 3 (1) of the Sexual Offences Act. Once it is proved that the accused has committed an unlawful sexual act, he cannot ride on the issue of uncertainty of the victim's age and walk out of prison. Can it be said that whenever the age of the victim is not established then no unlawful act occurred? Are we saying that it is lawful to have sexual intercourse with a child whose age cannot be ascertained. Why is it unlawful to have sexual intercourse with an adult who does not give his/her consent? The bottom line is that an unlawful act cannot be made lawful by the uncertainty of the victim's age. It is erroneous to acquit children molesters on the ground that the child's age was not established. The trial court also see the victims and are able to assess the age of the victims. As for the current case, I do find that PW1's age was assessed by PW6 to be eight years. PW6 testified and gave evidence on the age of PW1.

On the issue of PW1 having been defiled while her clothes were on, this cannot be a good ground of appeal. The appellant took advantage of an innocent child and it is possible to have sexual intercourse without fully undressing. The defence evidence did not raise any doubt on the prosecution case. It does confirm that, indeed the appellant is a neighbour to PW1. There was no need for blood sample testing in this case. It was confirmed that PW1 had been defiled. The only issue was to know who the defiler was.

In the end, I do find that the conviction is proper. The trial magistrate elaborated all the evidence and legal issues relating to a defilement case. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 4<sup>th</sup> day of November, 2015.

**SAID J. CHITEMBWE**

**JUDGE**