REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E119 OF 2024

HENRY NYAE GAMBO……..……APPELLANT

VERSUS

REPUBLIC……..…..……..…..RESPONDENT

(Appeal from original conviction and sentence by Hon. Ngii. Principal Magistrate, in Mariakani Principal Magistrate's Court Sexual Offence Case No. E043of 2020 delivered on 14/10/ 202)4

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 15 years imprisonment. The particulars of the offence were that on diverse dates between 1st August 2020 and 30th October 2020 at (name withheld) village in Samburu location within Kwale county he intentionally caused his penis to penetrate the vagina of N.N.M. (herein referred to as the complainant/victim), a child aged 15 years.

2. The Appellant was aggrieved by the conviction and the sentence and lodged the instant appeal on the following amended grounds of appeal:

> (1) That the trial magistrate erred in law and fact by convicting the Appellant of the charge of defilement yet the age of the victim was not proved.
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> (2) That the trial magistrate erred in law and fact by convicting the Appellant of defilement when the element of penetration was not proved.

(3) That the trial magistrate erred in law and fact by sentencing the Appellant to 15 years imprisonment for the offence of defilement without making a finding that the sentence was unconstitutional.

3. The prosecution called 5 witnesses in the case while the Appellant was the only witness in his case.

Case for prosecution

4. The case for the prosecution was that the complainant was at the material time aged 15 years and was living with her mother, PW2. The Appellant was a herdsman at the home of the Appellant.

5. That sometimes in the month of August 2020 the Appellant went to relief herself in the bush when she met the Appellant. He forced her to have sexual intercourse with him. Later she missed her menses. She was taken to Mariakani sub county hospital where she was examined by a clinical officer PW4 and found to be two months pregnant. She disclosed that it is the Appellant who had made her pregnant. On 3/11/2020 the Appellant was arrested by members of public. A police officer PW3 based at Kenya pipeline Samburu was sent to pick him up. He went and re-arrested the Appellant. He escorted the Appellant and the complainant to Samburu police post. Sgt Nzombo PW5 of the said police post investigated the case. A P3 form was issued to the complainant and filled. He charged the Appellant with the offence. During the hearing of the case in court the clinical officer PW 4 produced the complainant`s treatment notes, P3 form, laboratory request and results as exhibits, P.Exh. 1, 2, 4 and 5 respectively. The investigating officer PW5 produced the complainant`s copy of birth certificate as exhibit, P.Exh.3. The same indicated that the complainant was born on 11/10/2005.

6. It was the evidence of the complainant that she had sexual intercourse with the Appellant on 5 occasions. That the pregnancy terminated prematurely

though she did not give the circumstances of when or how it happened. It was however the evidence of her mother PW2 that the complainant had on the 2/11/2020 complained to her that she had stomach pains. That the complainant went for a long call and when she went back she had blood stains on her legs and clothes. That she told her that she had dejected pieces of flesh. She, PW2 went to check at the place she had gone for a long call and found a piece of flesh that looked like a foetus. She asked the complainant on whether she had had sexual intercourse with anyone and she answered that she had done so with the Appellant. PW2 called the village elder who called the police. Policemen went and arrested the Appellant. They took the complainant to hospital for examination.

Defence Case

7. In his defence the Appellant stated in a sworn statement that he was previously working as a herder for the father to the complainant. He then received a higher pay from his neighbour and moved to work for him. The complainant`s father refused to pay him his dues. That on a certain day the complainant`s father called him to his home. He went there and found him with other people. The village elder and the police were called. He was arrested. The complainant was taken to hospital and found to be two months pregnant. He was accused of defiling and impregnating her. The complainant told the police that it is her parents who had forced her to implicate him. The complainant`s father assaulted him and bribed the police to have him charged.

8. The appeal was canvassed by way of written submissions.

Appellant`s submissions

9. The appellant submitted that a photocopy of the birth certificate was produced in court as prove of the age of the complainant despite his demand for the original document to be produced. That a photocopy was not admissible in

evidence in court. That failure to produce the original birth certificate or explain its absence violated the requirement to produce primary evidence unless secondary evidence is admissible.

10. The Appellant submitted that penetration was not proved beyond reasonable doubt. That the clinical officer PW4 admitted in cross-examination that there was no evidence to link him, the Appellant, with the offence. More so that there was no evidence how the pregnancy terminated nor was a DNA conducted. That the benefit of doubt ought to have been resolved in his favour.

Respondent`s submissions

11. The Respondent submitted that the Appellant in his defence did not raise any issue on the age of the complainant. That a copy of the birth certificate of the complainant was produced that indicated that she was at the time aged 15 years. That the age of the complainant was proved to the required standard.

12. On the ground that a DNA report was not produced in the case, the Respondent submitted that the complainant testified that she lost the pregnancy which evidence was corroborated by her mother. That this took place before the matter was reported to the police which explains why DNA was not conducted. Nevertheless, it is trite that DNA tests are not necessary to prove a case of defilement and failure to conduct a DNA test does not negate a charge of defilement. Reliance in this respect was placed in the case of **Robert Mutungi Muumbi v Republic (2013)** KECA 584 (KLR) where the Court of Appeal held that:

> **Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the**

principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.

13. It was submitted that failure to conduct a DNA test did not prejudice the Appellant. That all the ingredients of the offence of defilement were proved in the case.

Analysis and determination

14. This being a first appeal, this court is mandated to analyze and re-evaluate afresh the evidence adduced before the trial court in line with the holding in the case of **Odhiambo v Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

15. The appeal is based on three grounds that: the age of the complainant was not proved; that penetration was not proved and that the sentence imposed on the Appellant was unconstitutional.

16. On the issue of age, the Appellant submitted that the same was not proved as the original birth certificate was not produced. That what was produced was a photocopy but its production did not comply with production of secondary evidence in court.

17. Section 67 of the Evidence Act requires documents to be proved by way of primary evidence except in the cases mentioned in sections 68 to 82 of the Evidence Act. Section 68 of the Evidence Act allows production of certified copies of documents such as when the original is lost or destroyed. However, in

this case no basis was laid for producing a photocopy of the document. The birth certificate was therefore not properly admitted in the case. The trial court was in error in relying on uncertified photocopy of the birth certificate to hold that the complainant was aged 15 years.

18. The above notwithstanding, it is trite that the age of a person can be proved by other ways and not necessarily by way of documentary evidence. In the case of **Edwin Nyambaso Onsongo Vs Republic (2016) eKLR,** the court cited the case of **Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR)** where the Court of Appeal held as follows as regards proof of age:-

> **"… the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "… we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."**

19. The complainant told the trial court that she was at the time aged 15 years. Her mother PW2 similarly said that the complainant was aged 15 years. I find that the complainant was old enough to know her age. The mother to the complainant being the person who gave birth to her cannot have failed to know her age. There is no reason to disbelief her evidence that the complainant was at the time aged 15 years.

20. The clinical officer PW4 who completed the complainant`s P3 form, estimated her age in part "C" of the P3 form at 14 years. The Court of Appeal in

the case **Safari Charo Koyo v Republic [2017] eKLR** stated that where actual age of a victim of defilement is not established, the court can go by the apparent age of the victim as established by the doctor who examined the victim. Said the court:

> **We cannot help but note that PK's actual age was not established. Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act. Faced with a similar situation, as in this case, this Court in *Evans Wamalwa Simiyu vs R [2016] eKLR*, observed that -**
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> > **"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age**

of the minor complainant was not established, the apparent age was established as 12 years."

21. The estimated age of the complainant according to the clinical officer who examined her was 14 years. However, that was just an estimate which was not far off from the evidence of the complainant`s mother that the age of the complainant was 15 years. In view of the above observations, I find that the age of the complainant was proved at 15 years.

22. On to the issue of penetration, the same is defined in section 2 of the Sexual Offences Act as the partial or complete insertion of genital organs of a person into the genital organs of another person. It may be proved by oral evidence of the victim or by way of circumstantial evidence see, **Kassim Ali v Republic Criminal, Appeal No. 84 of 2005.**

23. The trial court in its judgment held that the clinical officer who examined the complainant found evidence of penetration on her and that the complainant was two months pregnant. The court said that the defilement on the complainant was corroborated by medical evidence. Further that the Appellant did not cross-examine the prosecution witnesses on his defence that the case was fabricated by the complainant`s father over some differences.

24. Though the clinical officer PW4 found the complainant with a missing hymen and being two months pregnant, he admitted in cross-examination that there was no medical evidence linking the Appellant to the offence. The fact of mere pregnancy on the part of the complainant was not evidence of defilement by the Appellant. In view of this there was no medical evidence to connect the Appellant with defilement on the complainant. The trial court was wrong in holding that the defilement on the complainant was corroborated by medical evidence.

25. There being no medical evidence to connect the Appellant with the offence, that leaves the oral evidence of the complainant as the only evidence that the Appellant defiled her. Section 124 of the evidence Act allows a court in sexual offence cases involving children to convict on the sole evidence of the victim if the court believes that the child is telling the truth and gives reasons for believing the evidence. The trial court in its judgment found the complainant to have been telling the truth that she was defiled by the Appellant. The court said that there was nothing to suggest that she was lying against the Appellant.

26. I have on my part considered the evidence adduced against the Appellant in its entirety. The charge sheet indicated that the Appellant defiled the complainant on diverse dates between 1st August 2020 and 30th October 2020. The complainant in her evidence never mentioned the dates that she was defiled by the Appellant. It is not known where the dates stated in the charge sheet came from.

27. The complainant said that she had coitus with the Appellant on 5 occasions. That one of them took place in the bush in the month of August 2020 when she had gone to relief herself. She never mentioned where and when the other 4 incidents took place. It was not enough just for the complainant to say that she was defiled by the Appellant on 4 other occasions without giving details as to where and possibly when the incidents took place. The lack of details creates doubt whether the incidents took place.

28. The mother to the complainant stated that the complainant lost the pregnancy on 2/11/2020 before she was taken to hospital. The clinical officer PW4 on the other hand stated that a pregnancy test was conducted on the complainant at their hospital on 4/11/2020 that showed that she was pregnant. The trial court was unable to resolve the contradiction on the evidence about the pregnancy and instead said that pregnancy is not an element of defilement.

Whereas that may be the case, the issue went to the credibility of the prosecution witnesses. In view of the evidence of the complainant`s mother that the pregnancy was lost on 2/11/2020 before the complainant was taken to hospital, a pregnancy test may not have been sufficient to show whether the complainant was pregnant or not. It might have been necessary for the hospital to conduct a CT scan to ascertain whether the complainant was pregnant or not. In the absence of such there was no reliable medical evidence that the complainant was pregnant. On the other hand, if the complainant lost the pregnancy and dejected something that looked like a foetus, there was no evidence that the same was shown to the village elder who was said to have been called to the scene by the complainant`s mother PW2. Neither was there evidence that it shown to the police officer who went to re-arrest the Appellant, PW3.

29. Upon carefully considering the evidence placed before the trial court, I find that the evidence on defilement was only the word of the complainant on one hand that she was defiled by the Appellant against the denials by the Appellant on the other hand. In my view, there wasn't sufficient evidence that the complainant was defiled by the Appellant. The prosecution did not prove the charge against the Appellant beyond reasonable doubt. The Appellant was from the facts of the case entitled to the benefit of doubt.

30. In view of the foregoing, I find the appeal to be merited. Consequently, the conviction entered by the trial court on the Appellant is quashed and the sentence thereof set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at GARSEN this 8th day of May 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch holding brief for Miss Ngina Mutua for Respondent

Appellant – present virtually at GK Prison Malindi

Court Assistant - Nasra