



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 91 OF 2015**

**JAMES MURUNGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.3479 of 2013 of the Chief Magistrate's Court at Nkubu by Hon. O.M Wanyaga – Resident Magistrate)*

**JUDGMENT**

The appellant, **JAMES MURUNGI**, was charged with an offence of defilement of a girl contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 4<sup>th</sup> October 2013 at [particulars withheld] in Imenti North District of Meru County, the appellant attempted to defile **R.M** a girl aged 10 years.

The appellant was convicted and sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That he was kept in police custody longer than the law allowed.
2. That the learned trial magistrate erred in law and fact by finding that the charge had been proved.
3. That the learned trial magistrate erred in law and facts by failing to factor the defence of the appellant.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case are briefly as follows:

The appellant visited the complainant's home in the evening. He had supper with the complainant's family. He then requested the complainant to accompany him to the church. She was allowed, and the two left together. On the way he defiled her.

In his defence the appellant contended he was framed up for there is a land dispute between his mother and that of the complainant.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

The first duty for the trial court is to ensure that the charge is correct in all aspects. This is mainly at the plea stage but it is equally important for such a court to satisfy itself before the calling of the first witness. In the instant case the charge was wrongly drafted for we do not have section 8(1) (2) of the Sexual Offences Act. The charge ought to have read:

**" ... contrary to section 8 (1) as read with section 8 (2) ...."**

Since the appellant understood the charge and fully participated in the trial, I find that he was not prejudiced. The flaw is curable under section 382 of the Criminal Procedure Code.

The court of appeal has conclusively addressed the issue of the breach of the rights of an accused person by the police. This was in the case of **Julius Kamau Mbugua v Republic [2010] eKLR** made the following observations:

**In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.**

The court went on to advise any aggrieved person to seek redress in a civil court. I have held this view very strongly for the complainant has gone to criminal court to seek redress on own rights. All rights being equal in law, the breach of the rights of an accused by the police can never be visited on the complainant. In the instant case the appellant now knows where to seek redress.

The ingredients of the offence of defilement that need to be proved are;

- (a) Penetration,
- (b) Proof the complainant's age; and
- (c) That the perpetrator is the accused person.

**R.M** gave her age as ten years. The clinical officer, Catherine Mankura (PW2) who examined her said she was aged 10 years. The issue of proof of age has now been settled. The same can be proved by other means other than by production of a birth certificate. In the case of **FAPPYTON MUTUKU NGUI V REPUBLIC [2012] eKLR** it was held:

**The Learned Magistrate who observed her, performed voir dire, and listened to her in court assessed her age to be less than 10 years. I am aware that our case law requires that the age of a child to be conclusively proved before any conviction can arise from an offence under the Sexual Offences Act. The Courts are strict about this requirement because the penalty once found guilty is dependent on the age of the victim. For this strict approach, see, for example, Hillary Nyongesa v Republic (Eldoret HC Crim. App. No. 129 of 2009 (Mwilu J.)). I would be prepared to clarify that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate.**

**Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.**

In her testimony the complainant said that after the appellant had knocked her down, he inserted his male member into her genitalia. she felt a lot of pain and she also bled. The findings of the clinical officer were that her vagina and both labium were hyperemic. Her hymen was broken. Her dress was stained with blood at the back. This corroborated the complainant's contention that she was defiled.

The narrative of the complainant is that she left her home for the church with the appellant. As they walked together, the appellant knocked her down and defiled her. The appellant contended that he was framed up due to his mother and that of the complainant's differences over a land dispute. This did not convince the learned trial magistrate and for good reasons. The complainant said before they left for the church, the appellant had a meal with her family. This evidence went unchallenged and the act of the appellant visiting her home contradicts his contention that their mothers had differences that could be exploited against him.

The learned trial magistrate weighed the defence of the appellant against the evidence on record and dismissed it as wanting. I fully concur with this finding. It was the appellant who defiled the complainant. His appeal on conviction is therefore dismissed.

Section 8 (2) of the Sexual Offences Act 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.**

The learned trial magistrate imposed the only available sentence. Any other sentence would be unlawful. The appeal against the sentence must also fail.

In a nutshell, the appellant's appeal is dismissed.

**DATED at Meru 20<sup>th</sup> day of December 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**



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