



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 22 of 2019**

**BETWEEN:**

**SHADRAC MIRIMU.....APPELLANT**

**And**

**REPUBLIC.....RESPONDENT**

*(Being and Appeal from the Judgment (Conviction and Sentence)*

*of Hon. D. Ogale RM delivered in Hamisi Senior Principal Magistrate's*

*Court Criminal Case No. 595 of 2017 delivered on the 16<sup>th</sup> day of July 2019)*

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

1. The matter comes before the Court for the Appeal by Shadrak Mirimu (“the Appellant”). The Appellant was convicted of the offence of defilement and sentenced to a life imprisonment. On 11<sup>th</sup> March 2019 the Appellant filed his Petition of Appeal which was dated 31<sup>st</sup> May 2018. In his Petition he states:

*“1. That I pleaded not guilty.*

*2. That the learned trial court erred in law and facts by convicting me without being given humble and sufficient time to prepare for cross-examination during the trial.*

*3. That the trial court erroneously relied on the medical report to convict me without considering that there was no proof of penetration hence the prosecution case not exhaustively established beyond reasonable doubts.*

*4. That the trial court erroneously relied on contradictory evidences to convict me without considering that the same were insufficient in law.*

*5. My defence statement was not given due consideration whereas the same was capable of awarding for an acquittal.*

*6. That I beg the Hon. Court to be served with trial court proceedings and wish to attend the hearing of this appeal.*

2. Subsequently, the Appellant filed Supplementary Grounds of Appeal where he said:

1. That the learned trial magistrate grossly erred both in law and facts by failing to appreciate that this case was investigated against me as there existed a game-trick (boiling grudge) between me and PW1's father as he was a co-worker at S-K

2. That the learned trial magistrate grossly misinterpreted section 8 (2) and the SOA No. 3 of 2006 and having considered my mitigation he failed to interfere with the severity of the sentence.

3. That the learned trial magistrate grossly erred in law and fact when he misdirected himself in believing that the prosecution has proved its case beyond any reasonable doubt without considering that penetration as an essential element of defilement was not proved beyond any reasonable doubt.

4. That the learned trial magistrate erroneously relied on the contradictory, inconsistency and doubtful evidence to convict the appellant without considering that the same was insufficient in law.

5. That my defence statement was not given due consideration whereas the same was capable of awarding me an acquittal.

**REASONS WHEREFORE;** I pray that my appeal be allowed, conviction quashed a life sentence imprisonment be set aside and I be at my most liberty. And in alternative the sentence be reviewed downwards for the interest of justice my lord.

6. When the matter came before the Court on 28<sup>th</sup> January 2021, the Parties were directed to file Written Submissions. The Appellant filed his in June 2020 alongside his Supplementary Grounds of Appeal and the Respondent's Submissions were filed on 9<sup>th</sup> June 2020.

7. In the original trial the Appellant was charged with defilement. The Charge Sheet reads;

**“CHARGE: DEFILEMENT CONTRARY TO SECTION 8 (1) AS READ WITH SECTION 8 (2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

**SHADRACK MIRIMU:** On the 29<sup>th</sup> day of September 2017 at [Particulars withheld] Village, Walodeiya Sub-Location, Chavakali Location in Vihiga County intentionally and unlawfully caused his general organ namely penis to penetrate the genital organ namely vagina of FA a girl child aged 7 years.**ALTERNATIVE COUNT: INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11 (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

**SHADRACK MIRIMU:** On the 29<sup>th</sup> day of September 2017 at [Particulars withheld] Village, Walodeiya Sub-Location, Chavakali Location in Vihiga County intentionally and unlawfully touched the genital organ namely vagina of FA a girl child aged 7 years.”.

8. The Trial Court heard the evidence of the Complainant, her Mother and the eye witness as well as the investigating officer. The Complainant was adjudged to be about 8 years old by the Learned Trial Magistrate. The Learned Trial Magistrate also held that she could understand the importance of telling the truth. The Complainant, PW-1 gave evidence that she was on her way back from school when the Appellant waylaid her and took her to the bushes where he undressed her and had sexual intercourse with her. She described the act, in her childish way as “he put his urinating thing in mine”. She also said it was painful but she did not cry out. She said that her assailant was known to her as B.

9. Given her age, the Trial Court would have needed to hear corroboration of her evidence before placing any reliance on it. In relation to her being taken by the Appellant to the bushes near the place where wood was being chopped, her evidence was corroborated by PW-3 the neighbour who rescued her. The particulars of the assault were corroborated by the medical evidence, in particular the P3 and the doctor's examination notes. The conclusion was clear, the Child had been defiled. The examination was done a few days later but the injuries were clear, there was bruising in the vaginal area and the hymen was torn. Also there was vaginal discharge. PW-3 also corroborated the fact that the Appellant had undressed the Complainant when he discovered him on top of her. The Child's Mother, PW-2 gave oral evidence and produced documentary evidence to prove her age.

10. In his Petition and Supplementary Grounds of Appeal, the Appellant attacks the prosecution evidence and seeks now to contradict it. He also states that his defence was not given adequate consideration, in particular, that there was a boiling grudge

between him and his alleged co-worker.

11. In his Defence the Appellant said firstly that there was nothing to connect him to the offence. That is answered by the eye-witness account of the Complainant and the neighbour. He said that the event never happened and was a fabrication by the Complainant's Father. However, the Complainant's Father did not feature in the events of the day. When she was discovered, the Child was taken to the Police to report the crime. She was accompanied on that and subsequent visits by her Mother and the neighbour. As to the tale about a debt which was either paid or outstanding or to be paid imminently depending on which version the Appellant puts forward, the allegation is not presented in a cogent way. Neither is it corroborated. In the circumstances, the Learned Trial Magistrate was justified in giving it little if any weight. It is not enough to give rise to a reasonable doubt.

12. The Appellant had ample opportunity to cross-examine the prosecution witnesses and even to call his own witnesses. He did not then make the attacks that he is making now. In relation to the medical report, he did not ask why her clothing did not show signs of the attack, notwithstanding that the report itself states that the Complainant had changed her clothing since then. Clearly, it is an afterthought by the Appellant.

13. In relation to sentence, the Appellant feels that his mitigation was not given adequate weight. His mitigation was that he supports his mother. Against that there are the aggravating features of the offence. Firstly, the Complainant was clearly a minor, that is clear from the evidence. It would also have been clear to the Appellant because she was dressed in her school uniform. He also knew her and knew her family. He was employed as a watchman and it is possible that the community looked up to him as a result. As to the length of the sentence, the statute provides for a mandatory term. That part of the Act has not been challenged nor declared unconstitutional at this point in time. That may change, in which case, the Appellant may be entitled to a review.

14. As is apparent from the above, the submissions put forward by the Parties have been carefully considered in coming to a decision. It is the view of this Court that the Appellant has not put forward any cogent grounds on which the Appeal can succeed. In the circumstances, the Appeal against conviction is dismissed and the Appeal against sentence is also dismissed.

15. This Judgment was scheduled for delivery earlier in the year, however due to lockdown associated with the protocols for the management of the Covid-19 pandemic, it was not possible to deliver it on the due date. Any inconvenience is regretted.

**Dated June 2021**

**Order accordingly,**

**Farah S. Amin**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS THE 24<sup>TH</sup> DAY OF NOVEMBER 2021 IN KAKAMEGA IN OPEN COURT**

**In the Presence of:**

Court Assistant: Dennis Wasilwa

Mr Mutua of ODPP

Appellant : Not produced although Notices were re-served again.



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