**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. E004 OF 2021**

*(From Original Conviction and Sentence of Hon. E. Muleka in Criminal Case S.O. Number. 20 of 2018 by the Principal Magistrate's Court at Sotik on 31/12/2020)*

**ROBIN KOECH...........................................................APPELLANT**

**VERSUS**

**REPUBLIC..............................................................RESPONDENT**

**JUDGMENT**

1. The Appellant, Robin Koech was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006. The particulars of the offence were that on 31st day of July 2018 at Kiptunoi location in Konoin sub-county within Bomet County, intentionally caused his penis to penetrate the vagina of IC, a child aged 10 years old.

2. An alternative count of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act was also brought against him. Particulars are that on 31st day of July 2018 at Kiptunoi location in Konoin sub-county within Bomet County, intentionally touched the vagina of IC, a child aged 10 years old.

3. The substance of the charges were read to the Appellant in the language he understood. His response was, "Not true" to both the main and alternative charges. A plea of not guilty was entered and the matter proceeded to full trial.

4. The prosecution called four (4) witnesses including the victim herself. At the close of the prosecution's case, the court found that the Appellant had a case to answer and put him on his defense. Section 211 of the Criminal Procedure Code was read and explained to the Appellant in the language he understood. He opted to give unsworn statement and called no witnesses. By Judgment delivered on 31st December 2020, the Appellant was convicted on the main charge. The trial magistrate sentenced the Appellant to thirty (30) years imprisonment to run from the date of his arrest.

5. Being dissatisfied with the conviction and the sentence, the Appellant lodged an Appeal raising 5 grounds verbatim as follows:

> a) That he pleaded not guilty at the trial.
>
> b) That the learned trial magistrate erred in both law and fact by convicting the appellant by uncorroboratory evidence from the prosecution witness which was not watertight and can't prove a case beyond reasonable doubt.
>
> c) That the learned trial magistrate erred in both law and in fact by determining a case of defilement without considering the fact that I was not medically examined.
>
> d) That the learned trial magistrate erred in both law and fact by failing to analyze that the charges were framed, manipulated and fabricated.
>
> e) That it is his humble prayer as an appellant to be present during the hearing and determination of the appeal.

6. The Appellant later filed an amended Memorandum of Appeal and listed the following grounds:

> (a) That the learned trial magistrate erred in law and in fact by failing to note that the charge sheet was defective in relation to the difference in date of commission of the offence and the date on the charge sheet.
>
> (b) That the learned trial magistrate erred in law and in fact in failing to detect that the Appellant was not examined – No forensic

examination was conducted to link him to the offence despite the presence of blood stains on the pant and skirt of the victim.

(c) That the learned trial magistrate erred in law and in fact in that section 124 of the Evidence Act was not complied with.

(d) That the learned trial magistrate erred in law and in fact by failing to find that failure to call vital witnesses by the prosecution entitled the court to draw an adverse presumption against it based on the rule in Bukenya vs. Uganda (1972) E.A. 544.

(e) That the learned trial magistrate did not consider that there were contradictory, inconsistent and the witnesses were unbelievable on their adduced evidence *(sic)*.

7. The Appeal was urged through written submissions.

**Appellants Submissions:**

8. The Appellant submitted that the difference in the date on the charge sheet and the date mentioned by the witnesses as having been the date of the offence being committed was defective and incurable in law under section 382 and 214 of the Criminal Procedure Code. He cited the case of Peter Ngure Mwangi vs. Republic (2014) eKLR. He also submitted that the trial court ought to have ordered for forensic testing of the blood found on the victim's clothes to ascertain whether they matched her profile as per section 36 of the Sexual Offences Act.

9. The Appellant further submitted that the trial magistrate never recorded his reasons for believing that the victim was telling the truth as required by section 124 of the Evidence Act. He also submitted that the prosecution failed to call material witnesses and listed them down as M – the complainant's mother, Dennis Kiprono – the man who hosted the party and had recorded a statement initially, the parents of Dennis Kiprono who were also witnesses, N the owner of the cowshed where the ordeal took place and A the owner of the house where the victim first slept after the ordeal. It was his view that this ought to have created doubt in the mind of the court.

10. Lastly, the Appellant submitted that there were numerous inconsistencies and discrepancies in the evidence adduced by the various witnesses. He submitted that the trial magistrate lost sight of what was fact and what was speculation and that as a result, the evidence adduced was not cogent enough to sustain a conviction.

**Respondent's Submissions**

11. The Respondent submitted that the Appellant was well known to the victim before the incident. In terms of the inconsistencies, the Respondent asked the Court to take congnisance of the trauma suffered by the victim in that she had to tender her evidence afresh owing to the application of section 200 of the Criminal Procedure Code when the matter started *de novo*. The Respondent also submitted that the evidence of PW3 and PW4 proved the prosecution had established its case and the fact that the matter was heard by two judicial officers meant that it must have been thoroughly considered. Lastly, the Respondent that she was not only a minor but a child of tender age and that the Appellant was known for being a habitual alcoholic and sexual physical offender worth of a custodial sentence. They prayed for the Appeal to be dismissed for lack of merit and the conviction upheld while the sentence should be enhanced in light of the fact that the decision in Muruatetu was only in respect to murder cases.

**Issues for Consideration**

12. Having reviewed the trial Record the grounds of appeal and the parties' respective submissions, the only issue for determination is whether the appeal has merit.

13. It cannot be gainsaid that the duty of the first appellate court is to subject the evidence from a trial court to a fresh analysis and thoroughly scrutinize the same in order to arrive at its own conclusions. (see **Pandya vs. Republic (1957) EA 336**).

14. Thus, while I give deference to the observations of the trial magistrate who heard and finally determined this case, I shall consider the entire evidence afresh bearing in mind that I do not have the benefit of examining the witnesses first hand.

15. It is trite that for the offence of defilement to be proven, three main ingredients must be established. These ingredients are considered conjunctively and not disjunctively. The absence of one element is sufficient to fell a charge of defilement. The case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** aptly stated this as follows:-

"*The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.*"

16. Section 8(1) as read with section 8(2) provides as follows:-

***8. Defilement***

*(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*(2) 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.*

**Proof of age**

17. In the present Appeal, PW1 who is the victim, first testified that she was fourteen years old. At the same time, she stated that she could not remember when she was born but that according to her birth certificate (MFI P-1), she was born on 1st January 2008. This means she was ten (10) years old at the time of the alleged offence. It is noteworthy that the said offence occurred on 31st July 2018 according to the charge sheet and later recorded as 1st August in the subsequent testimonies.

18. The importance of proving age was stated by the Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** thus:-

> ***"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In <u>Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu).</u> This Court stated as follows;***
>
> ***'....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."***

19. It follows then that age must be proven by cogent evidence and in various ways as stated in the case of **Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000,** where the Court of Appeal of Uganda held thus:-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."***

*(*See also Aburili J's decision in **Martin Okello Alogo vs. Republic [2018] eKLR**)

20. In the present Appeal, the victims Birth Certificate (Exhibit1)which indicated the victim's age as 10 as at the time of the offence. Thus evidence was not controverted. As such, it remains that though the victim did not know when she was born and gave a different age in her testimony, the Court is bound by the documentation presented in the trial file. Thus, the exhibit adduced in respect of the victim's age indicated that she was a minor, and specifically, a child of tender years. Whether she was 14 or 10 years old at this stage remains irrelevant because it was established that she was under 18 years old. I therefore find the first ingredient proved.

**Proof of Penetration**

21. Penetration is defined under section 2 of the Sexual Offences Act No. 3 of 2006 as:-

> *"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;*

22. The victim (PW1) testified that the Appellant took her to the cow shed, removed her skirt and pant, slid her to the ground and turned her to face upwards then did '*tabia mbaya'* translated as bad manners to her. She also stated that no one saw them. When recalled under section 200 to adduce evidence afresh, she stated that the Appellant removed all her clothes which were the skirt, the sweater and her inner pants, put her down and did bad manners to her. She stated that, "He defiled me, he did sex, I did not do anything. He then wore his clothes and left..."

23. Her evidence that she was defiled is corroborated by PW3's evidence. Dr. Kelvin Kipken stated that he examined the victim and filled a P3 Form, PEXH-2 and PEXH1 which was the PRC Form that was filled under his instructions. The P3 form which was in line with the doctor's tetsimony in court outlined the following:

(1) Fair general condition with injuries to the genitalia and blood clots on the underwear.

(2) Tears on the labia at 6 o'clock and 9 o'clock.

(3) Hymen freshly broken,

(4) Vagina inflammed

(5) Blood clots on the underwear with whitish discharge from vagina which was collected for examination.

(6) Anal orifice intact

(7) High vaginal swab indicated the presence of spermatozoa while pregnancy test was negative

(8) Urine contained red blood cells and spermatozoa.

24. PW3 also testified that the injuries were approximately between 8-48 hours and confirmed that the victim was examined on 2nd August

2018 at 2.00 a.m. after referral from Mogogosiek dispensary. It was his conclusion that there was sufficient evidence of penetration.

25. From the above medical evidence and coupled with the victim's testimony, it is not in doubt that the victim had been penetrated on the material date. I am satisfied that the second ingredient was sufficiently proven.

**Whether the Appellant was adequately identified.**

26. The scene of the offence was the neighbours home where a birth day party was on – going. Both PW1 and PW2 stated that the Appellant came to the party later on at 8.00 p.m. PW1 stated that the Appellant was known to her before the date of the incident and that he was a friend of her brother's. PW1 also testified that there was a security light at the place where she was washing the utensils which means she could properly see her assailant. According to her, no one saw them or heard her when she screamed. She then stated that after the ordeal, she left to go home. In the same testimony, she also said that she told A about the incident and slept at A's place because their house was far. It is important to point out that earlier on, she had said that the proximity of her house to the party venue where she was defiled was about 100 metres. She concluded her testimony by stating that it was A who told her mother what had happened to her and then she later also told her mother while on the way to the hospital. She then testified that they went straight home after treatment and that they only went to the police station the following day.

27. When PW1 was called to give evidence afresh, her testimony seemed to be different. She testified that after the incident, she went and told her mother who was in the house at the party about her ordeal and made no mention of A or N who was the neighbour. She did not state that she slept at A's house. This time she also testified that the source of light was a scanty lamp. She further stated that they went to the police station to report the matter the same night after the ordeal.

28. PW2 on the other hand first testified that the Appellant was his neighbour and they were in good terms. He however did not ascertain that they were friends. He also testified that it was some kids who informed them that his sister had been dragged away by the Appellant. Later on when called to tender his evidence when the trial started *de novo*, he testified that it was his mother who told him that she found PW1 bleeding and crying outside A's house. In terms of his knowledge of the Appellant, this second time, he testified that they only hailed from the same village but the Appellant came from far.

29. Evidently, the Appellant is believed to be well known to the two witnesses. Both PW1 and PW2 place him at the party at around the same time and PW1 recognises him as her assailant.

30. Precedent is replete with decisions on how a court of law should consider evidence of recognition. While it is considered more reliable than that of identification, it is necessary that a victim is able to provide clear evidence that will demonstrate certainty when pointing out to an accused person as the doer of the crime. In **Turnbull and others (1979)3 AR ER 549**, it was stated thus:-

> "*……Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

31. Bearing the above in mind, it follows then that it is not always that evidence of recognition can be without fault. Mistakes may be made. In the present case, the evidence of light is inconsistent. PW1 testified that the source of light was a scanty lamp. Before the trial was commenced *de novo*, she had testified that there was a security light at the place she was washing dishes. This Court cannot ascertain the source of light on the material night and whether it was sufficient to enable PW1 to see who pulled her away and defiled her. Additionally, the discrepancies in the source of light work in favour of the Appellant and this Court must give him the benefit of doubt. I am guided by the case of **Nzaro versus Republic (1991) KAR 212** where the court held that identification or recognition at night must be absolutely watertight to justify conviction.

32. Secondly, the Appellant faulted the prosecution for not calling material witnesses. I am guided by the precedent in **Oloro and Daltanyi vs. Reginam [1956] 23, 23 EACA 49** where the court held thus:-

> "*Prosecution have a duty to call material witnesses. If they fail, the presumption is that if the evidence had been called that evidence would have been unfavourable to prosecution."*

33. There are quite a number of witnesses who were present on the material day. Witnesses whose testimonies would have robustly supported the case against the Appellant. In this case the victim's mother, A and perhaps N who was the neighbour. Dennis, the man who hosted the party would have also been important in placing the Appellant at the scene of the crime. His evidence would have confirmed to the Court whether he saw the Appellant in his house on the material day or not. A on the other hand could have confirmed the events narrated by PW1 and PW2 especially because she is believed to have housed the victim on the said night. It is also peculiar that the victim's mother was never called to testify yet her evidence with regard to the victim's age and how she found her daughter bleeding would have been paramount in settling some of the questions that still remain a mystery to me. PW2 clearly stated that the Appellant was not invited to the party but he later came. No one else is called by the prosecution to place the Appellant at the said party, something that should not have been a difficult task since many people were present.

34. In summary, it is only PW2 and PW1 who point a finger to the Appellant and speak of his presence in the party. No one else does.

35. It now remains for me to determine whether the evidence adduced in respect of identification is cogent enough to point towards the Appellant. I make reference to the Court of Appeal case of **Michael Kinuthia Muturi vs. R. CRA 51 of 2002 (NRI)** where the following was stated:

***"Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in the instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference."***

36. In this Case I am disinclined to find that there was indeed sufficient evidence to sustain a conviction. The fact that the prosecution failed to call other witnesses who would have corroborated the evidence of PW1 and PW2 in respect of identifying the Appellant and shed more light on the events of the fateful night casts doubt to this Court on whether the Appellant was even present at the party and thus was the one who defiled PW1.

37. I also note that the trial court did not outline its reasons for believing the evidence of the victim when she pointed to the Appellant as the person who defiled her, contrary to the requirements of section 124 of the Evidence Act. Though evident and factual that she was indeed defiled, the evidence of identification is not watertight.

38. There is a high possibility that the Appellant was present at the party, that he was the one who dragged PW1 away to the cow shed and subsequently defiled her. His subsequent action after the incident was reported at the police station demonstrates that he had a guilty mind set. PW4 testified that the Appellant could not be traced when the victim and her family reported the matter to the Police the following day. He had ran away from home and was said to be staying in a videp shop in Litein.

39. The Appellant's conduct coupled with the testimonies of PW1 and PW2 raise a strong suspicion that he could have been the one responsible for the heinous crime committed against the victim. In considering this however, the Court finds guidance in the case of **Sawe vs. Republic [2003] KLR 354** where it stated thus:-

*"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."*

40. It is axiomatic that the standard of proof in a criminal trial must be beyond reasonable doubt. Lord Denning explained this degree of proof in the case of **Miller vs. Minister of Pensions (1942) A.C**.:-

***"It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

41. Where there is doubt, it is deemed that the prosecution has not discharged its burden of proof and the benefit of such an event goes to an accused person. In the present case and as already discussed, it is difficult to establish beyond the shadow of doubt that the Appellant was the person who defiled the victim. It behoved the prosecution to adduce adequate and cogent evidence to nail down the Appellant and point only to him as the person who committed the crime. Unfortunately, the evidence on Record was neither watertight nor sufficient. I find that the last ingredient of indentification was not proved to the required legal standard. The Appellant shall benefit from the doubt lingering over his identification as the person who defiled the victim.

42. In the upshot, this Appeal has merit and is allowed. The conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY, 2022**

**..................................**

**R. LAGAT-KORIR**

**JUDGE**

**Judgement delivered in open court in the presence of the Appellant acting in person, Mr. Muriithi for the State Counsel and Kiprotich (Court Assistant).**