REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 22 OF 2019

FRANCIS IHUTHIA NYAWIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of ***Defilement contrary to Section 8(1) Sexual Offences Act as read with Section 8(4) Sexual Offences Act*** in that on the night of 14th and 15th April, 2018 [Particulars withheld] Village Nyandarua County caused his penis to penetrate the Vagina of MNW a child aged 16 years.

2. There was also alternative charge but was convicted on principle charge and sentenced to serve 15 years' imprisonment, thus lodging instant appeal where 6 grounds of appeal have been set:

> ***i. The learned trial Magistrate erred both in law and fact in finding that the Appellant is the person who committed the offence while the evidence did not prove this.***
>
> ***ii. The evidence on record from both the prosecution and defence does not meet the threshold of beyond reasonable doubt.***
>
> ***iii. The learned trial Magistrate completely failed to consider the sworn evidence in defence which clearly shows that the Appellant was not at the scene of the offence but elsewhere.***
>
> ***iv. Looked at in full the evidence has a lot of doubts and the doubt should be interpreted in favour of the Appellant.***
>
> ***v. The evidence on record is purely circumstantial and does not point to anything else but the guilt of the Appellant, as required by law.***
>
> ***vi. The analysis of the evidence and law does not point to prove of the offence beyond reasonable doubt.***

3. The court directed the appeal be canvassed via submissions but only Appellant's side filed same.

APPELLANT'S CASE AND SUBMISSIONS:

4. The prosecution called a total of 5 witnesses.

5. **PW1's** evidence was that on the 14th April, 2018, the Appellant called her while at her home at around 8.00pm and he informed her that he was around his home. She went to where the Appellant was. She greeted him and he told her they go to his home. She followed him. He opened the house and he asked her to get in and she refused and he held her hand and pulled her inside. He informed her that he wanted to sleep with her but she refused. He said he wanted them to have sex but she said no. He removed her clothes, skirt and panty, took her to his bed and he removed his trousers. He slept with her the whole night and she did not know what was going on.

6. That she only saw him removing his trouser and that it was dark and there was no light. The Appellant laid on the bed and she even did not know what happened and she gained consciousness at 5.00am. He laid on top of her they started having sex. They did bad manners. He put his penis in her vagina until 5.00am. She did not sleep but she gained consciousness at 5.00am.

7. They had sex until she lost consciousness. That she found herself outside at 5.00am on the grass outside the Appellant's house. That she woke up and headed towards another church – but not towards their home. She sat there and slept for a while woke up and walked again. Her grandmother was later called by some children and she took her to her house where her mother was called and she was taken to Gwa

Kungu dispensary. She was referred to Nyahururu Hospital where she was treated. She confirmed that all this time she had a phone with her and it is the phone she confirmed that she gained consciousness at 5.00am.

8. On cross – examination by the Appellant, she confirmed that the Appellant was her friend for one year and she did not have his number but he had hers. She confirmed that the Appellant's aunt and cousin had gone for a family gathering. She did not scream because she did not know what he wanted when he pulled her into the house and she thought he would hit her. She knew she was defiled because she was in his house and he removed her clothes. That her grandmother came to the road and she was taken to the hospital and the doctor said he had defiled her.

9. On being cross – examined by the trial court, she stated that she used to love the Appellant and she did not scream after sex for she had lost consciousness. That she knew that the Appellant removed his trouser as she heard him unbuckling the belt for it was dark.

10. **PW2 MWN** is the Complainant's mother. She testified that on getting home at 7.30pm on the 14th April, 2018, she found PW1 at home cooking food with her brothers. They ate and she asked her to warm her water to wash her legs and she washed her legs. PW1 left them in the kitchen to the main house and when she went to the main house, she called her and she was not there. She inquired on her whereabouts from her brother and he replied that she had left them in the kitchen. He checked her in the toilet and around the house and she was not there. She went to a neighbour's house and PW1 was not there. She called her mother PW3 who reported that she was not at her home. 6.00am the following day, PW1 had not returned home and she called her phone, it rung and it went off. She informed her son and she reported at Gwa Kung'u Police Station. She later received a call from her mother who requested her to go to her home for PW1 had been seen and was in a bad condition. She found PW1 standing, saliva coming from her mouth and her right hand was very weak. She was not talking. Her clothes were full of mud for it had rained and they rushed her to Gwa Kung'u private hospital where she was treated and referred to Gwa Kung'u Police Station. She informed the police that she had found her daughter and they referred her to Nyahururu General Hospital and she explained on what PW1 informed her and he identified the PRC form – P3 form and a birth certificate.

11. On cross – examination, she confirmed that she did not see PW1 with the Appellant and she confirmed there being a dispute between her son and the Appellant touching on a motor cycle and village elders resolved that she pays Kshs.9,000/- for the damage to the appellant and which she paid.

12. **PW3** is the Complainant's grandmother. Her evidence was that on the 15th April, 2018, she was called by children and they took her where she found PW1 sleeping near her home. She took her to her home and she called her mother and they left to the hospital. She confirmed that the complainant did not tell her what had happened to her. She did not state that the Complainant had saliva coming out of her mouth and that her right hand was weak as described by PW2.

13. **PW4 and PW5** were the Investigating officer and the doctor and their evidence is as captured by the trial court.

14. The Appellant gave sworn evidence and he called one witness who corroborated his defence that they slept in the same house whole night on 14th and 15th April, 2018 and that the Complainant was not there.

15. The evidence of the prosecution witnesses did not prove the offence. Although it was alleged that the Appellant called PW1 using a phone and took her to his house, no data from the mobile service provider either of the Appellant or the Complainant was produced to confirm that indeed such communication took place.

16. The Complainant did not state that she was forcefully dragged to the Appellant's house. She had her phone all the time a fact which was confirmed by her mother but she did not make a call to anyone calling for help. There was no evidence that the phone was not found with her the following day as she even testified that she knew that it was 5.00am from her phone.

17. The Complainant was not found at the Appellant's house or anywhere near his house. Apart from the evidence of PW1, no one else confirmed seeing the Complainant with the Appellant in the night of 14th and 15th April, 2018.

18. Her evidence on what transpired in the Appellant's house did not support the particulars of the charge that the Appellant used his penis to penetrate her vagina. She testified that it was dark and she only assumed that the Appellant had removed his trousers and used his penis because she heard him unbuckle his trouser. She did not see him removing or using his penis. Her evidence in court on what transpired is recorded in a manner to suggest that it is the court prosecutor who was forcing her or putting words in her mouth especially where the word penis is mentioned.

19. It was her evidence that she lost consciousness the whole night and only came around in the morning. The question that begs is, how did she knew that the Appellant inserted his penis in her vagina while it was dark and while she was unconscious?

20. The fact that the doctor's findings were that her hymen was freshly perforated does not in itself point to defilement using a penis noting that no spermatozoa were found. Anything including fingers or any object would have been used to perforate the hymen.

21. Although the offence was allegedly committed on the 14th and 15th April, 2018, the Appellant was arrested on the 23rd April, 2018 a period of 8 days. The explanation given by the investigating officer that it took time to arrest the Appellant as the police were waiting for the PRC form and the P3 form to be filled is untenable given that the said documents were filled on the 15th April, 2018 and the 17th April, 2018.

22. The Appellant and his witness confirmed that they were together in the night of 14th and 15th April, 2018 and the Complainant was not with them. The defence was not considered by the trial court and no reasons were given as to why the court believed the Complainant and proceeded to convict on uncorroborated evidence of the Complainant to the effect that she spent the night of 14th and 15th April, 2018 with the Appellant.

23. The issue of there being a grudge between the Appellant and the Complainant's mother was raised and confirmed by PW2 but the same was not considered by the trial court, given that the Appellant testified that he had been arrested because of the grudge.

24. It was said that the distance from the Complainant's home to the Appellant's house was 500 meters but the Complainant did not scream or call for help between her home to the Complainant's home. Her mother did not attempt to call her through her phone during the night.

25. Her clothing and underwear were not torn and there were no injuries in her genitalia including blood and this again contradicts her evidence of forceful sexual intercourse noting that she was examined on the 15th April, 2018 by a clinical officer who filled the PRC form. The Complainant did not testify of feeling pain and the PRC form and P3 form do not contain any complaints of pain from her private parts. How then was she forcefully defiled the whole night until she lost consciousness and she did not experience any pain?

26. In the case of ***Benjamin Mugo Mwangi & Another v Repubic [1984] eKLR,*** the court held that;

> ***"The law of East Africa on corroboration in sexual cases is as follows; the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the Complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."***

27. The trial court did not warn itself.

28. In the case of ***DWN v Republic [2019] eKLR,*** the court held as follows;

> ***"In the absence of corroboration by medical evidence the charge of defilement has not been proved. The evidence is wanting and is insufficient to establish penetration. The broken hymen was most probably not fresh as the presence of inflammation suggest that there was an infection. The broken hymen noted be the doctor cannot support evidence that she was defiled that day in the absence of tears and bruises. The court was denied the results of the laboratory tests which were done was indicated on the treatment notes. Could they have been to adverse prosecution case. The court cannot tell."***

29. The findings of a broken hymen alone is not sufficient to lead to a conclusion that it is indeed a penis that was used to break the hymen. The conclusion by the doctor who filled the P3 form that the victim had vaginal penetration is not conclusive that it is a penis that was used. The Complainant's evidence taken in totality was to the effect that she did not see or know what transpired in the night of 14th and 15th April, 2018 as it was dark and she was unconscious.

ISSUES, ANALYSIS AND DETERMINATION

30. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

31. After going through the evidence and submissions, I find issues are **whether the ingredients of the offence were proved beyond reasonable doubt?**

32. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of ***George Opondo Olunga v Republic [2016] eKLR,*** it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

33. Coming back to the evidence in the instant case, the Complainant testified that she was 17 years old having been born in the year 2002. However, her mother who testified as PW2 stated that she was 16 years old for she was born on 5th April 2002 as evidenced by her birth certificate Serial No. 8294721 which was produced as (**Exhibit 3**).

34. This then proved that the Complainant was indeed 16 years old at the time of the commission of the heinous act on her, therefore, the appellant person was correctly charged with the offence of defilement contrary to ***Section 8(1) as read with Section 8(4) of the Sexual Offences Act*** as the prosecution proved beyond reasonable doubt that the Complainant was 16 years old at the time of the offence.

On the issue of penetration of the Complainant's private parts:

35. ***Section 2 of the Sexual Offences Act*** defines penetration as:

> ***"The partial or complete insertion of the genital organs of a person into the genital organ of another person."***

36. This position was fortified in the case of ***Mark Oiruri Mose v Republic [2013] eKLR*** where the Court of Appeal stated that:

> ***"…..Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ….."***

37. In demonstrating this particular ingredient of the offence the Complainant had the following to say:

> ***"…..He opened his house and he told me to get in. I refused but he held my hand and pulled me inside….. He said he wanted to sleep with me but I refused. He said he wanted us to have sex but I said no. He removes my clothes i.e. my skirt and my panty. He took me to his bed and he removed his trouser. He slept with me the whole night and I didn't know what was going on…….***
>
> ***…….He laid me on the bed. I then don't know what happened and I gained consciousness at 5.00am. I slept with him. He laid on top of me. We started having sex. He did bad manners. He put his penis in my vagina till 5.00am. I didn't sleep but I gained consciousness at 5.00am. we had sex till I lost consciousness. I found myself outside at 5.00am on the grass…."***

38. PW5 was the doctor stated that the Complainant visited the hospital and alleged to have been defiled by force on the night of 14th April 2018 where she had been lured into the perpetrator's house and that her panty had blood stains though it had no tears.

39. She had no physical injuries and upon examination of her genitalia, she had a normal external genitalia and her hymen had been freshly broken. She had no par-vaginal discharge and although the pregnancy, hepatitis and HIV tests were negative, urinalysis showed blood and pus cells and the high vaginal swab did not show any spermatozoa.

40. He concluded that there was vaginal penetration and she was given emergency contraceptives and post exposure prophylaxes (PEP) and was also started on STI medication. He produced the P3 form that he had filled and the PRC form that had been filled by a clinical officer who he had worked with for 3 years thus acquainted with both his signature and handwriting.

41. On consideration of the evidence on this issue in totality, the trial court found that there was proof that the Complainant had engaged in a sexual intercourse as evidenced by the proof of pus and blood cells common in her and further her hymen was freshly broken, hence penetration was proved. The evidence on record justifies that findings.

42. As the appellant person has denied committing the alleged offence thus there was need for an in-depth examination of the circumstances so as to settle the issue as to whether the appellant person was rightly identified as the perpetrator of the offence.

43. The offence was allegedly committed on the night of 14th and 15th April, 2018 and he was identified by the Complainant as a friend though they loved each other.

44. The evidence adduced by both the Complainant and her mother was evidence of identification by recognition for they knew him prior to the alleged incident as their neighbor's nephew.

45. She added that he had come to that area as he had visited his aunt whom he was living with. This was corroborated by her mother and even the appellant person in his defence when he stated that he had visited his aunt for some time though alleged that on the material day, he was from work.

46. He alleged to have been framed up for the Complainant was his niece and his brother had stolen his uncle's motorbike and the two families sat down and recorded and agreement as to how the Complainant's family was going to pay for the damaged motorbike. He added that once he was released on bond, the Complainant's parents asked for Kshs.50,000/- but he refused as he wanted the case to proceed.

47. The trial court took judicial notice that the Complainant though a minor at the material time, she was not a child of tender age and was capable of understanding the importance of informing her parents or even others and this she did and the matter was immediately reported to the police for yet the report of her disappearance had already been reported as evidence by the investigating officer's evidence.

48. Thus trial court was justified in making a finding in terms of the proviso to ***Section 124 of the Evidence Act in believing the complainant.*** Thus court justified in holding that the prosecution proved legally that the appellant person was the perpetrator of the heinous act.

49. Thus the court the following orders;

> ***(i) The appeal is thus dismissed and conviction and sentence are upheld.***

DATED AND SIGNED AT NYAHURURU THIS 27TH DAY OF JANUARY, 2022.

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CHARLES KARIUKI

JUDGE