



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO 50 OF 2017

(From original conviction and sentence by Hon J Kasam in

S.O. Case No. 5 of 2017 of the Chief Magistrate at Kerugoya)

ERICK MURIMI MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged and convicted with defilement contrary to Section 8(1) (2) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. He was sentenced to life imprisonment on 14th July 2017

2. Dissatisfied, the appellant has appealed against both the conviction and sentence. The grounds of appeal are that the trial magistrate erred in fact and in law by:

1. Not considering that the evidence produced in court could not support then charges.

2. Not considering that the case was full of contradictions and inconsistencies.

3. Not considering that the language used during the trial was unfamiliar hence rendered to unfair trial.

4. Not considering that the case was not proved beyond reasonable doubt since no document was produced to ascertain the age of the child.

5. Relying on shoddy investigations to arrive at the judgement and did not consider his defense, mitigation and his mental state.

3. The role of this court on appeal is to re-evaluate the entire evidence adduced at the trial and on record, and to reach to its own conclusions thereon. It must take care to note that it did not have the benefit of hearing and seeing the witnesses testify nor to assess their demeanour See **Okeno v R (1972) EA 32.**

4. The brief facts of the case are that the appellant, known by the 7 year old complainant JWN, as “uncle”, did on 2nd April, 2017 at [Particulars Withheld] village within Kirinyaga County, defile JWN by intentionally and unlawfully causing his penis to penetrate the complainant’s vagina. From her testimony, he was her neighbour and lured her to his house when she was outside playing. He held her hand and took her to his bed where removed her panty and took his penis which he inserted into her vagina, defiling her repeatedly.

5. When JWN got home she told her aunt , PW2, with whom she lived. PW2 informed JWN’s mother of the incident and she advised that PW2 report to the police.

6. The parties filed written submissions as directed by the court. The appellant merged all his grounds. In essence, he argued that: the complainant delayed in by a full day in reporting the offence; and he was not proved to have been involved in committing the offence; that there was a family grudge between the appellant and the complainant’s aunt who had alleged that the appellant once assaulted her son, hence the complaint was a frame-up; that there were contradictions and inconsistencies in the evidence and that substantive witnesses were not called to testify.

7. The respondent submitted that, in a defilement case, the state was required to prove three issues: the age of the complainant; penetration; and the identification of the perpetrator. On these, the state relied heavily on the recognition testimony of JWN; the victim's birth certificate for age; and the evidence of JWN and the Clinical Officer PW4 regarding penetration.

8. The state relied on the following cases: **George Kioji v R Crim App No 270 of 2012** that medical evidence is not mandatory or the only evidence relevant for a defilement conviction; **Mark Oirori Moses v R [2013]eKLR** which held that there is no requirement that spermatozoa be present in proof of defilement so long as there is penetration; and **JWA v R 2014** on the point that corroboration is not necessary in light of the proviso to section 124 Evidence Act – so long as the trial court was satisfied that the complainant was being truthful following a voir dire examination; and that the evidence of a single witness is adequate.

The act of defilement and evidence of identification of the perpetrator

9. The evidence is as follows. JWN, the 7 year old complainant, gave unsworn testimony after a voir dire examination. The trial court noted that JWN:

“understands the nature of the proceedings and she is capable of speaking for herself”.

From the outset JWN identified the accused as “Jasa, her uncle. He did not deny this, nor question her indication of his involvement with her. Indeed, the record shows that when the prosecutor applied to add the alias “Jasa” to the charge sheet and he had no objection:

“...because I am also known as ‘Jasa’ ”

To this extent, JWN's evidence cannot be faulted as unreliable.

10. JWN went on to elaborate how Jasa summoned her, took her to his house, removed her panty, and inserted his penis into her vagina repeatedly, after which she cried. When he finished he directed her to leave his house and warned her not to tell anyone. She said she had never been defiled by anyone else. The panty was identified in court and had blood stains on it. She reported to PW2 with whom she lived.

11. Her cross examination yielded nothing new, other than reaffirmation that JWN also reported the incident to her mother. It is poignant to note that at no point in cross examination did the appellant challenge the evidence of JWN as to what she encountered in his hands. In his sworn testimony, the appellant admitted that JWN came to his house on the material day, 2/4/2017, saying she was hungry and he gave her some food, and that she then left the house. In cross examination, he denied that he defiled her. His denial does not obviate or counter JWN's story concerning what she suffered in his hands.

12. PW2, JWN's auntie, lived with JWN. She testified that on the material day, she noticed that JWN visited the toilet repeatedly. When she asked JWN what the problem was, she was hesitant, then broke into tears and spilt the beans. The accused was her brother-in-law. PW2 reported the incident to JWN's mother, and they agreed that PW2 should take JWN to hospital. There, JWN was examined and the doctor confirmed the defilement. They were told to report to the police and they did so.

13. In cross examination, the accused put it to PW2 that the accusations were framed, stemming from an incident in which the accused had assaulted PW2's son. She denied this as an event long ago resolved, and asserted that JWN pointed to him only – amongst many other men in the neighbourhood – as the sole culprit in a serious sexual offence. Since JWN had not been coached and lived with her, PW2 believed JWN's report.

14. On JWN's evidence the trial magistrate in her judgment stated:

“I have considered the evidence of the victim and evaluated the evidence tendered in court.This court also had the benefit of observing the witness' demeanour as they testified and believed them...”

And later the trial court stated:

“...The evidence of the minor /complainant was clear on what transpired from the time she was lured to the house of the accused to the time she was defiled...”

15. Based on the evidence on record which I have analysed above, I have no reason to hold a different view.

16. JWN's mother gave evidence as PW3. She confirmed JWN's age as 7 years, and affirmed she knew the accused as Jasa, a neighbour. She identified the laboratory request form and PCR form for the medical tests conducted on JWN in relation to the defilement.

17. The medical evidence was even more palpable. According to the record, PW4, the Clinical Officer who examined JWN the day after the incident (3/4/2017), observed that: JWN was walking with her legs wide apart; he found that she had bruises on her “valve”(vulva) which area was swollen, reddish and painful to touch; that the hymen was freshly broken; and that there was a reddish discharge from the vagina. He opined that the age of the injuries was consistent with 17 1/2 hours. The Clinical officer filled the P3 form which he produced in court together with Exhibit 2(a) (b) and (c) lab test results.

18. As submitted by the prosecution using the case of **George Kioji v R Cim App 270/2012**: it is indisputable that medical evidence linking the accused to the defilement would be welcome, but the court also added the caveat that:

“...such medical evidence is not mandatory or even the only evidence upon which an accused person can be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person” (emphasis added).

19. From all this evidence referred to, I do not see any reason to doubt the story of the complainant or the finding of the trial court as to the identity of the perpetrator in committing the act of defilement.

Penetration

20. All that is required to be proved as to penetration is that the accused penetrated or caused to be penetrated, partially or wholly, the complainant’s genitals. Penetration can be effected with genitals or any other object.

21. In this case, the evidence of the complainant which is on record and analysed above, together with that of the Clinical Officer is clear. The complainant was penetrated, as a result of which she suffered a freshly broken hymen at about the time she was lured into the accused’s house. The accused does not deny being with her but denies defiling her. The complainant clearly stated what happened to her and how she was defiled by the accused. Her evidence is believable, and was believed, by the trial court. I think the evidence of penetration by the accused was not misplaced in the circumstances. I find no reason to doubt it, and this ground fails.

Age of the Victim

22. This was not a seriously contested issue, but is always inevitably a relevant issue in the proof of defilement. In this case, the age of the victim was testified to by PW3 who said she was 7 years old. A birth certificate was also produced as Exhibit 5 showing she was born on 8-8-2010, confirming she was 7 years old. This is important for purposes of proof of defilement and sentencing.

23. I see no reason to question the trial court’s determination of the age of the victim, and as earlier stated, there was no complaint by the appellant concerning the age issue.

Contradiction and Inconsistency in Evidence and delay in reporting to police

24. With regard to the delay in reporting the offence, the appellant submits that the offence was allegedly committed on 2/4/2017 but only reported on 3/4/2017 without any explanation being given. JWN testified that she told her aunt, PW2 what had happened earlier in the day. PW2 testified that she noted that JWN was going to the toilet frequently. She asked JWN what the problem was, and the girl opened up and told her. PW2 then told JWN’s mother. No issue was made in the testimony of cross examination as to what times these events occurred. PW3, however stated that she was called on 3/4/2017, the following morning.

25. JWN was taken to hospital on 3/4/2017 when lab request forms were filled after the report to police had been made on the same day. A P3 form and PRC were filled by PW4 on 4/4/2017. It was he who examined JWN on 3/4/2017 and made the findings concerning her defilement already discussed above. I see nothing illogical, irrational or unusual in the fact of the report to police and the medical examination of the complainant occurring one day after the discovery of the defilement.

26. The appellant’s main complaint, however, was that the evidence tendered was inconsistent and contradictory. In his sharpest criticism of the trial court’s decision, he correctly submits that the P3 form and the PRC form indicate different names of the complainant: The P3 refers to her as J W Njogu whereas the PRC refers to her as J W Wanjohi.

27. He further complains that there were other contradictions in the evidence of PW5 and PW2: that whilst PW5 said the accused’s brother is the one who noticed the complainant’s long visits to the toilet, PW2 said she noticed the accused having difficulties walking. According to the appellant, all these contradictions and inconsistencies should have resulted in reasonable doubt, and led the trial court to dismiss the case against him.

28. It is true that the P3 and PRC forms disclose different names of the victim. That issue was not raised at the trial court, nor was it dealt with by the trial magistrate. However PW2 and the victim’s mother, PW3, both testified that they were with the victim at the hospital. PW2 said that she was dressed in a pant and trouser; that the pant was stained with blood. Both PW2 and PW3 identified the lab request forms and PRC form; and that the P3 form was issued to them. They further stated that the doctor showed them the examinations and made enquiries of the victim.

29. In cross examination of both PW2 and PW3, nothing came up about the different third names of the victim. Both witnesses confirmed that the victim pointed to the appellant as the aggressor.

30. PW4 the Clinical Officer confirmed in his testimony that he filled in both the P3 and PRC forms and lab results forms, which he produced as Exhibits 4, 3 and 2(a-c) respectively, in respect of the victim.

31. In cross examination, nothing was raised about the different third name of the victim appearing in the P3 and PRC forms. On this issue of errors and omissions in proceedings, **Section 382 CPC** provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

32. Applying this provision, the court held in **Willis Ochieng Odera v Republic (2006)** that whilst there may be contradictions in the prosecution evidence, that alone cannot be a ground for quashing the conviction unless it occasions an evident failure of justice. No failure of justice is shown against the accused, and this ground of appeal fails..

33. The applicant also complained that a mentioned witness was not called. He was referring to PW5's testimony that the victim's difficulties in walking were noticed by the appellant's brother. That brother was not called to testify, leading to allegedly to injustice to the appellant.

34. On this point, **Section 143 of the Evidence Act (Cap 80) Laws of Kenya** provides:-

“No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.”

35. Whilst the **prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent, and the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case (Bukonya & Others v Uganda [1972]EA 549)**; the court has also held in the case of **Keter v Republic [2007] 1 EA 135** that;

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

36. This ground of appeal also fails.

Whether the appellant's defence was considered

37. The appellant submitted that there was a family grudge between him and the complainant's relative. Consequently, he argued that PW2 sought revenge against the appellant for assaulting her son by framing the defilement charge against him.

38. The answer to this from the complaint's aunt, PW2, was that the appellant once assaulted her son but the matter was solved at home before the present incident.

39. The Hon. Magistrate did in fact consider the appellant's defence and other available evidence. Ultimately, she found, correctly in my view, that there was insufficient evidence of malice or grudge between him and the family of the complainant. This ground fails.

Disposition

40. For all the foregoing reasons, all the appellant's grounds of appeal fail, and I see no reason to interfere with the trial court's decision. Accordingly, the conviction and sentence are upheld.

41. Orders accordingly

DATED AT KERUGOYA THIS 26TH DAY OF JANUARY, 2022

RICHARD MWONGO

JUDGE

Delivered in Presence of:

1. Mamba for the state

2. Erick Murimi Muchiri

3. Court Assistant Winnie Wanjiru