



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. E008 OF 2021

JOSEPH WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. G. Adhiambo, PM, dated 3rd February, 2021 in the SPM's

Court at Kimilili, in Sexual Offence Criminal Case No.56 of 2019, Republic vs Joseph Wafula)

JUDGEMENT

The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offences of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006

In this court the appellant has raised seven grounds of appeal in his petition of appeal.

I will consider grounds 2, 4 and 6 together. In a coalesced form in relation to those grounds, counsel for the appellant (Messrs Robert Wamalwa), has faulted the trial court for convicting the appellant when the offence was not proved beyond reasonable doubt. Based on *Joo v Republic (2015) e-KLR*, counsel submitted that the prosecution failed to prove their case beyond reasonable doubt. Counsel also cited *Miller v Minister of Pensions (1947) 2 All ER 372*, in which Lord Denning defined what is meant by the phrase 'proof beyond reasonable doubt' in stating in part that the said proof need not reach certainty.

Counsel submitted that the trial court casually believed the evidence of the complainant by invoking the provisions of section 124 of the Evidence Act (Cap 80) Laws of Kenya. The complainant (M.W. initials of her name) testified on oath after undergoing a voire dire examination. She testified as Pw 1. Her evidence was that the appellant was her Kiswahili language teacher at H Academy. She further testified that the appellant called her to his office. She went there and the appellant told her to lie on a table that he uses for marking books. He made her lie on top of his desk. He then lifted her dress and inserted his penis into her vagina. She cried because she felt pain. After this was done, he told her to go back to school.

Furthermore, she testified that the appellant repeated the same sexual intercourse in another morning. Pw 1 thereafter told her aunt namely CWW (Pw 2) who then took her to hospital.

The complainant was examined at Kimilili Sub-county hospital by Catherine Akiru (Pw 3); who was the clinical officer. Pw 3 made the following findings. The complainant was aged 7 years. There was mucus stained substance on the pant and around her private parts. There was a bruise on the labias but the hymen was intact. She had pus vaginal discharge which was creamish in nature. A laboratory a VDPL (sic) was done and it was negative urinalysis revealed protein ++, pus +++ and the vaginal swab had blood cells.

The complainant was put on medication for sexually transmitted infection that is metronidazole similar to erythromycin and paracetamol. She was also given post exposure prophylaxis to avoid contracting HIV and was advised to go for repeat of HIV test after 3 months. Pw 3 produced the P3 form as exhibit P exhibit 2.

In cross examination Pw 3 testified that the red blood cells came from the trauma the complainant had on the genitalia because the complainant had bruises on the labias. This was evidence that the complainant was partially penetrated. Pw 3 testified that the stains were mucoid stains and they were evidently sperms from a person who was well known to her. Pw 3 finally testified that the trauma to the complainant was caused by a sexual act not as an intercourse.

In addition to the clinical officer (Pw 3), the prosecution called Peter Wanjala Sausi (Pw 4), a dentist who examined the complainant in respect of her age at Kimilili sub-county hospital. Pw 4 holds a diploma from Mt. Kenya University. Pw 4 testified that in assessing age he looks at the eruption of teeth; which erupt at different stages. He conducted the examination upon the complainant. He checked her teeth. Normally the first molar will erupt at around 6 to 7 years. He found that the complainant was aged between 6 to 7 years. He produced his

report as exhibit Pexhibit 4.

CWW (Pw 2) was the aunt and guardian of the complainant. She testified that she used to work as a bar attendant but left working as such. As at the time of testifying she was selling chips and she used to go to gospel power church. Pw 2 produced as exhibit Pexh 1 the baptismal card of the complainant; which shows that the complainant was born on 2/12/2011.

Pw 2 further testified that on 29/5/2019 she realized that the complainant was not okay. After the complainant went to school, Pw 2 embarked in cleaning the house. She then came across the inner pants of the complainant. She noted that the inner pants had some things that looked liked mucus and blood. She kept it. She later showed the complainant the inner pants. In response the complainant told her that she had a wound in the buttocks. Pw 2 then told her to remove her inner pants. She complied. She then checked her. She did not see any wound. She then made the complainant to lie down. She noted that the pants the complainant was wearing had mucus and blood.

Pw 2 upon looking at her vagina saw that it was bruised and had things that looked like mucus. Pw 2 wept. The complainant told Pw 2 that the appellant called her to his office. When she went to his office the appellant made her to lie on the table, removed her inner pants and had sexual intercourse with her.

The prosecution also called No. 53599 PC Jane Wanjala of Kimilili police station; who testified that the complainant and her aunt went and lodged a complaint at the police station. She then took the complainant to Kimilili sub-hospital for treatment. She also recorded statements from witnesses. The appellant was arrested by members of the public and taken to the police station. She later charged the appellant with the offence of defilement. Pw 5 took the appellant to hospital. In cross examination Pw 5 testified that the P3 form of the appellant was not filled because he had taken a bath and nothing positive was found on him.

The appellant testified on oath denying the offence and called no witnesses in his defence.

It was his further evidence that he used to pay school fees for the son of CWW (Pw 2). It was his evidence that Pw 2 was her lover. At one time the appellant went to relax at Santora bar. He was shocked when he saw Pw 2 lying on a man's lap and kissing him. Pw 2 was disrespectful. The appellant was hurt. He then left the bar. The following day he met Pw 2 and asked her as to whom she was with. Pw 2 told the appellant that he had found a man with money since the appellant was not able to manage her.

After two weeks the son of Pw 2 was chased for failing to pay school fees. The appellant met Pw 2. Pw 2 then insulted the appellant "and threatened to step on me till I die as I was nothing to her."

The appellant left her and went home. In the evening police went to his home and arrested and charged him with this offence.

In cross examination, the appellant testified that he did not have receipts to show that he paid school fees for the son of Pw 2. The appellant also testified that he did not report the threats of Pw 2 to any place. He also testified that he did not raise the issue of his relations with Pw 2 when Pw 2 was testifying.

This is a first appeal. I have re-evaluated the entire evidence. And I have also considered the submissions of both counsel for the parties. I find that the complainant is not a credible witness. She blatantly lied to her aunt and guardian (Pw 2) that she had a wound in her buttocks; when the latter noted that the inner pants of the complainant which was wearing had mucus and blood. Furthermore, I find that the complainant is not a reliable witness as she failed to report the first defilement either to the police or to her aunt and guardian. In the circumstances, I find as persuasive the decision of the Court of Appeal in *Ndungu Kimani v Republic (1979) e-KLR*, in which that court observed that:

"...The witness in a criminal case upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raises a suspicion about trustworthiness, or do (or any) something which indicates that he is a person of doubtful integrity and therefore unreliable inordinate witness which makes it unsafe to accept the evidence."

The conviction of the appellant is based upon the sole evidence of the complainant and since I have found her to be an unreliable witness it is unsafe to uphold the conviction. Additionally, it is important to point out that the evidence of the complainant lacks corroboration. The medical evidence of Pw 3 cannot in law qualify as corroboration.

Furthermore, I find as persuasive the definition of what is meant by the phrase proof beyond reasonable doubt as set out in *Miller v Minister of Pensions (1947) 2 All ER 372*, in which Lord Denning defined what is meant by the phrase 'beyond reasonable doubt' in stating that:

"...That degree is well settled. It need not reach certainty, but it must carry a degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect community if it admitted fancily possibilities to deflect the course of justice. If the evidence is so strong against a man as 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 if proved beyond reasonable doubt but nothing short of that will suffice..."

I also find in view of the above authority that the prosecution has not proved their case beyond reasonable doubt with the result that the conviction and sentence are hereby quashed.

In view of the foregoing, I find that it is moot or academic to consider the remaining grounds of appeal and the submissions and I decline to do so. See *Attorney General v Ally Kleist Sykes (1957) EA 257*

The appellant is hereby ordered released unless he is held on other lawful warrants.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE THIS 25TH DAY OF JANUARY 2022.

J M BWONWONG'A

JUDGE

In the presence of:-

Mr. Kinyua: Court Assistant

The appellant in person

Ms. Mukangu for the Respondent