



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

HIGH COURT CRIMINAL APPEAL NO. 135 OF 2019

RAPHAEL BIZUMURENGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

(Being an appeal from the decision of Hon. F Mutuku (Senior Resident Magistrate) delivered on 10th May 2019, in Criminal Case; S. O. No. 75 of 2015, at the Chief Magistrate's Court at Kibera)

1. On 8th December 2015, the appellant was arraigned in court, charged with the offence of; defilement, contrary to; section 8(1) as read with; section 8(2) of the Sexual Offences Act No. 3 of 2006 (herein "the Act"), and an alternative charge of; indecent act with a child, contrary to section 11(1) of the Act. The particulars of each charge are as per the charge sheet.
2. The substance of both charges was read to the appellant and he pleaded not guilty. The prosecution's case proceeded to full hearing. The case in brief, as led by the evidence of the complainant (herein "GW"), is that, on 2nd December 2015, she was playing in the company of other children outside their residence at Kawangware, when the appellant, who was residing in the same plot, picked her up and took her to his house, which was behind her parents' house.
3. That, he removed her clothes, namely; a skirt, biker, and pant and put her on the bed. He then unzipped the short he was wearing and did to her "tabia mbaya", by inserting his penis into her vagina. He then released her to go home with a warning that, she should not tell anyone what had happened. She went home and kept quiet.
4. That, on 5th December 2015, as she was going to the toilet, the appellant pulled her to his house, removed her clothes and once again did to her "tabia mbaya" and released her. However, as she was leaving the appellant's house a neighbor by the name "Khoru" saw her leave the house and she informed her mother. Her mother inquired from her what had transpired and beat her up. She then told the mother that, the appellant had sexually assaulted her on two occasions. Her mother then took her to Nairobi Women's Hospital for treatment.
5. Pursuant to the aforesaid, a report of the incident was made to the Area Chief and subsequently, the appellant was arrested by an officer Police, No. 227901, Corporal Cyprian Savai, from Kawangware AP Camp and taken to Muthangari Police Station. Upon conclusion of the investigations, he was charged accordingly.
6. At the conclusion of the prosecution's case, the appellant was put on his defence, whereby he testified to the effect that, he is a Rwandese by nationality. That, he came to Kenya in the year 2015. He is a musician. That, on 1st December 2015, he was to travel to Rwanda. He reached the bus stage but missed transport. He found two Rwandese men who asked him to accompany them to Kawangware. He was residing at Kangemi. He spent a night at Kawangware. The following day, those two people who had concealed their faces searched him and got his identity card and Kshs. 10,000. That, they took the money, slapped him and forced a young girl to say that, he defiled her. He was then taken to Muthangari Police Station and charged.
7. At the conclusion of the entire case, the trial court rendered its decision, vide a judgment dated; 10th May 2019, whereupon, the appellant was found guilty as charged on the main count and convicted under; section 215 of the Criminal Procedure Code. Subsequently, he was sentenced to life imprisonment.
8. However, the appellant is aggrieved by both the conviction and the sentence and appeals against the same, vide a petition of appeal dated; 30th May 2019 and on the following grounds, as reproduced verbatim;

a) That, the learned trial judge erred in law when he held that the case for the prosecution was proved on the main charge whereas the complainant's hymen was penetrated on 2nd December 2015 as charged;

b) That, the learned trial judge erred in law and facts by failing to observe that the scene of crime was not visited yet it was necessary in view of the complainant's claim that she was defiled on a mattress and bed;

c) That, the learned trial magistrate erred in both law and facts by failing to observe that a DNA test was wholly wanting yet not done hence no conclusive link established;

d) That, the learned trial magistrate failed to apply the provisions of section 169 (1) in relation to the defence statement; and

e) That, the applicant be served with a copy of the court proceedings to enable him raise more reasonable grounds and be allowed to be present at the appeal.

9. However, the appeal was opposed by the Respondent vide grounds of opposition dated, 25th November 2021, which states as follows: -

a) The appeal lacks merit, is misconceived and unsubstantiated;

b) The appeal is an abuse of the court process since the applicant was properly convicted before the trial court and the prosecution did discharge its burden of proof beyond reasonable doubt; and

c) That the appeal lacks merit and the same should be dismissed in its entirety.

10. I have considered the aforesaid materials and find that, the role of 1st appellate court, is to evaluate the evidence afresh, and arrive at its own conclusion with precaution that, the court did not have the benefit of the demeanor of the witness. This role was well articulated by the Court of Appeal in the case of; Okeno v Republic [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] 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 function 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, [1958] E. A. 424.”

11. To revert back to the matter herein, I find that, the appellant was convicted of the offence of: defilement contrary to section 8(1) of the Act. The provisions thereof state as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

12. Pursuant to the aforesaid provisions, and the settled law on the same, the ingredients of the offence are as follows:

a) **Identification or recognition of the offender,**

b) **Penetration, and**

c) **The age of the victim.**

13. The issue for determination therefore is, whether the prosecution adduced adequate evidence to sustain a conviction. In that regard, I shall evaluate the evidence adduced on the various ingredients. The first issue to determine is whether; the complainant's (“GW”) age alleged to have been nine (9) years at the time of the offence, was proved. The evidence of the complainant was that; she was ten (10) years old, at the time she was testifying on 9th September 2016. That, she was a student in class four (4) at [Particulars Withheld] Primary.

14. (PW3), TW, the complainant's mother, testified that, “GW” was ten (10) years old as at the time she gave her evidence in court. That, she was born on 13th August 2006. The mother produced the complainant's birth certificate dated; 27th July 2016, in proof of her age. It therefore follows that, from 13th August 2006 to 5th December 2015, when the offence was allegedly committed, “GW” was just over nine (9) years old. I therefore find that, based on the evidence of the birth certificate produced, the age of the complainant is adequately proved.

15. The second issue to consider is; whether the complainant was defiled as alleged. In that regard, the first thing to establish is, probable penetration into her private parts. Penetration is defined under section 2 of the Act as follows:

“The partial or complete insertion of the genital organs of a person into the organs of another person.”

16. In the instant matter, (PW1) testified that, she was defiled on two different occasions on; 2nd August and 5th December 2015. Of course, the appellant has denied committing the offence. The question is; has the evidence of “GW” been corroborated? In that regard, I find that, (PW3), TW, testified that, her daughter was defiled twice, as reported to her. Similarly, the Investigating Officer; No 51937, Police

Constable, Veronica Thuo, also testified that, the complainant told her that, she had been defiled twice.

17. Be that as it may, I find that, the conclusive evidence of penetration has to be scientific. In that respect, (PW4), Dr. Kinuthia Mbugua, from Nairobi Women's Hospital, produced a PRC Form dated; 6th October 2015, filed by Dr. Dannis Ndolo, who examined "GW" on 6th December 2015. The examination revealed that, her private part had a healing broken hymen and fresh bruises (hypothermia). The hymen was torn with thinning tear. That, a vaginal swab was taken showing pus cells indicative of infection. Urine samples were taken for further analysis. However, the HIV test was negative.

18. In the same vein, Dr. Joseph Maundu testified that, he examined "GW" on 9th December 2015, and found that, she had bruises on the edge of the vaginal opening. The hymen was not intact. There was healing of fresh tears, which were red in colour. She had no discharge. The doctor concluded that, his findings and those in the aforesaid PRC Form, were consistent with sexual intercourse. He filed a P3 form and produced it as an exhibit. Dr Maundu further testified that, he also examined the appellant and found that, he had no physical injuries on his genitalia.

19. Pursuant to the evidence above, I find that, the issue of penetration of the complainant's private parts was established. The last and critical issue to determine is; whether it is the appellant who committed the offence. In that respect I note that, the complainant "GW" told the court that, while playing with other children, the accused picked her up and took her to his house. She thus stated;

"He took me to his house which was behind our house. He was staying with two (2) men. They were not there that day. He carried me to his house"

The complainant went on to state: -

"He did it again on 5th December 2015. I was going to the toilet outside the house in the evening. Raphael pulled my hand. He knew my name. he called me S. He took me to his house. He was alone"

In cross examination, the complainant stated that: -

"You were living with two other people. They never defiled me. It's only you who did it. You are the one"

20. Moreover, (PW5) MM, the complainant's brother testified that, when she disappeared, he did not know where she had gone to. He went on to state:

"I know the accused; he is called Raphael. He was selling doughnuts in the plot; he was staying in a house behind the plot. We were staying in the same plot."

He went on to testify;

"He used to call GW "S Wangu" while at the lot playing. He used to tell her "nitakukwera". I don't know what he meant.....He used to stay with three (3) boys"

21. It suffices to also note that, PW5, MM, confirmed that, on the two occasions, when the offence is alleged to have occurred, the complainant disappeared from where they were playing, and resurfaced later. It is also noteworthy that, although (PW2) "GW" and (PW5) MM are children of tender age, they were able to testify on oath and gave the appellant an opportunity to cross examine them and explain themselves.

22. Pursuant to the aforesaid, I find that, it is clear that, the complainant, did not only know the appellant by name as "Raphael" but knew him as a neighbour and that, he knew her name as "S". Therefore, he was not a stranger to her.

23. Similarly, her mother; TW told the court that, when she inquired from the complainant what had happened, the complainant stated that, the appellant had defiled her twice. That, the appellant usually called her by the name of; "S" and told her that, "nitakusweti". Further, (PW4) Dr. Kinuthia Mbugua testified that, when the complainant was asked what happened, she stated as follows;

"She was defiled on different dates, the latest being 5th December 2015. She was taken to the neighbour's house who inserted his penis to her vagina by force"

24. In the same vein, (PW5) No. 51937 PC Veronica Thuo, told the court that, when she interviewed the complainant on what transpired, she told her that;

"On 2nd December 2015, she was playing with other children at [Particulars Withheld] at around 5.00pm. The accused called the complainant, took her to his house and gave her doughnuts, he undressed her and defiled her.....on 5th December 2015, at (sic) around 3.00pm, the complainant was playing again with the other children, the accused picked her and took her to his house, he forced her to undress and defiled her on her vagina using his penis."

25. In addition, No. 227901, Corporal Cyprian Sarai told the court that, it is the complainant who identified the appellant as the suspect. He was arrested and charged. Finally, Nancy Wangui who was staying in the same plot with the complainant's parents, told the court that, she

saw the “accused playing with the complainant.” That, her house was number (2) and the accused’s house was behind the plot. Further, “the accused was staying with three (3) other men and they were selling mandazi.”

26. Pursuant, to the aforesaid testimonies of the witnesses, it is clear that; the appellant was staying at Kawangware, in the same plot with the complainant’s mother and/or the complainant. His house is said to have been behind that of the complainant’s mother. In that case, his defence that, he was staying at Kangemi and only visited other people at Kawangware is a total lie.

27. Furthermore, the witnesses have confirmed that, he was selling mandazi or doughnuts within the plot. That, he used to play with the complainant. He would call her “S” or “S”. He allegedly told her “*nitakusweti*”, which coded language was unknown to the witnesses.

28. It is therefore, obvious that, the complainant knew the appellant very well. As such, the issue of mistaken identity does not arise.

It is against the backdrop of this evidence, that I find that, the defence tendered does not hold water.

29. I concur with the findings of the learned trial Magistrate that, the defence is an afterthought. The appellant did not cross-examine any of the prosecution witnesses on any of the issues alluded to in the defence. He did not even cross-examine on the alleged men, who offered him accommodation or stole from him.

30. Be that as it were, he has not advanced any reasonable explanation why the complainant and/or indeed any of the witnesses who testified, would plant such serious and undignified the charges on him.

31. All in all, I find that, there is sufficient evidence that, the complainant was defiled by the appellant. I therefore find that, the conviction was safe and I accordingly sustain it.

32. As regards the sentence, I find that, the provisions of; section 8(2) of the Act, states that: -

“Anyone who commits an offence of defilement with a child aged eleven years or less, shall upon conviction be sentenced to imprisonment for life”.

33. In the instant matter, the appellant was sentenced to, life imprisonment, therefore, the sentence imposed by the learned trial Magistrate is lawful and/or legal. I decline to set it aside. The resultant of the aforesaid, is that, the appeal is dismissed in its entirety.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 24TH DAY OF JANUARY 2022.

GRACE L. NZIOKA

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR THE APPELLANT

MS CHEGE FOR THE RESPONDENT

APPELLANT PRESENT VIRTUALLY

EDWIN OMBUNA – COURT ASSISTANT