



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 41 OF 2019

STEPHANO NGIGI MAIGWA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. D Nyaboke Sure (SRM) delivered on 31st October, 2019 in Naivasha SO No 5 of 2018)

JUDGMENT

1. The appellant was charged and convicted for defilement contrary to section 8(1) as read with Sec 8(4) of the Sexual Offences Act. He was sentenced to fifteen years imprisonment.
2. Dissatisfied, he appealed on four grounds of appeal alleging that the conviction was based on uncorroborated evidence; that the medical evidence was unreliable; that there was a failure to conduct a DNA test and that the sentence was excessive. Subsequently, his counsel submitted on the following three issues:
 - a) That the prosecution did not prove the offence beyond reasonable doubt;
 - b) That there having been a complaint of pregnancy from the defilement, there should have been DNA proof of the same;
 - c) That the complainant's medical examination was of no value as it was done seven(7) months after the alleged incident.
3. The court is required to evaluate all the evidence adduced at the trial, and come to its own conclusions being careful to take into account that it did not hear the witnesses and see their demeanour. See **R v Okeno (1972) EA 32**.
4. The brief facts are that on diverse dates between 1st June and 30th June 2017, within Njabini Location, the appellant defiled the complainant, aged seventeen (17) years.
5. In her testimony, the complainant (PW1) stated that she was in form 3 student at [Particulars Withheld] Secondary School. That she was walking to school at 6.00am one day in June 2017, when the appellant called her to his hotel and told her to take a mandazi to someone. When she entered the hotel, the appellant shut the door behind her and lay her on the floor on her back, holding her by force. He then put a scarf in her mouth, and removed her biker and panty under her dress. He also partly removed his trouser, raped her. When he completed, he wiped her vagina with the scarf, gave her 50/- and told her not to disclose. She said did not report the incident
6. The complainant testified that after she went to school, she was sent home for fees and stayed home for a week. On her way back to school again at about 6.00am, she met the appellant at a bridge. He greeted her but she remained silent and continued walking. The appellant then pulled her by the hand into a bushy area, lay her on the ground, removed her panty and biker, and had sex with her. He then threatened to kill her if she told anyone. She dressed up and went to pay her fees at a Mtaani agent and went back home
7. After six months her mother noticed she was pregnant, and reported to the Principal, who reported to the DO. She was then directed to the police where a report was booked and she was sent to Njabini Hospital where she was examined and confirmed to be 6 months pregnant. She was referred to Engineer Hospital and later gave birth on 12/2/2018
8. PW2, Dr Julius Ntwiga, is a medical doctor and head of medical services at Engineer Hospital. He said he was standing in for Dr Rotich who had filled in the P3 form for the complainant on 8/1/2018, as Dr Rotich was currently held up in other duties. The P3 form was filled on the allegation by the complainant of a defilement 7 months prior by a person well known to her. The clothes had been changed; there were no physical injuries in the torso; and the probable weapon causing injury is indicated as penile vagina.

9. The examining doctor recommended a DNA test after birth to ascertain paternity. In my view, the fact of pregnancy, which was not claimed to be by miraculous virgin birth, is merely a sure indicator that the complainant had had sexual intercourse at some stage about nine months before her baby's birth. Where, as here, there is pregnancy the P3 medical report is of little value as it is based entirely on an allegation which is subject to proof. In circumstances such as these where there is a live birth and the only person accused of causing it is the accused, I think it is prudent for the prosecution to ensure that a DNA test is conducted.

10. PW3 ZWW is the complainant's mother. In her brief testimony, she confirmed the complainant's age stating she was born on 8/4/2000. She noted in December 2018 that her daughter was pregnant and she told her the culprit was the accused. ZWW testified that she did not know the alleged culprit. They then went to report to the police and took the complainant to the hospital.

11. PW3 stated that she saw the accused at the police station and again identified him in the dock. In cross examination, she stated that the accused was the father of her grandchild, meaning the father of the complainant's child.

12. PW4 Corp. Oscar Muthusa was the Investigating Officer. He stated that the victim reported that she was pregnant by the accused. Two officers were and arrested the accused, and wrote statements. After the victim was taken to hospital, the accused was charged. He produced the victim's birth certificate. In cross examination, he said they did not recover any clothes.

13. The accused gave sworn testimony. He said that he lived in Githabai and had been a hotelier for three years. He said he knew the complainant as he bought land from her uncle, and knew the complainant's family well as he bought land. He said he opens his hotel at 4.00am. He stated that if a person screamed in his hotel, it will attract people; that there are no bushes in Joma as both sides of the road have houses. He also said he knew the complainant's mother and that she too knew him.

14. In cross examination he said he hired girls who started work at 6.00am in his hotel; that there are trees near the hotel but they are far from each other, and it is difficult to do defilement there. He denied that the door of his hotel was locked; and that there were always employees at the hotel when it was open

Whether the offence was proved beyond reasonable doubt

15. What is required to be proved in a case of defilement is evidence that the elements of the offence are demonstrated. This was stated by the Court of Appeal in **CRA 32 OF 2017 G.O.A v Republic (2018)**, where the court held:

“The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.”

16. The appellant submitted that the trial court relied on the uncorroborated evidence of the complainant, PW1. He argues that her evidence created reasonable doubt in the prosecution's case. He cited the cases of **Mark Makoani Musyoka v R [2020]eKLR** – that there should be a clear narrative of what the accused did to her; and **Julius Kioko Kivuva v R [2015] eKLR** – that evidence of sensory details as to what a victim heard, saw, felt and even smelled, is highly relevant to prove the element of penetration.

17. In her judgment, the trial magistrate found and held:

“.....On the 2nd issue, PW2 examined PW1 and confirmed defilement since the hymen was completely broken, on further examination they established PW1 was pregnant though this was not an issue.

As to who defiled and caused her pregnancy, PW 1 pointed an accusing finger towards the accused and gave a vivid account of how she was defiled on two occasions while going to school.

Accused was well known to PW1. They were know to each other and neighbours. Further PW1 acknowledged accused was well known to her father. I therefore find PW1 is not mistaken as to who defiled her”

18. I do not think the evidence on record enables the trial court to come to the conclusion that the accused was the one who defiled the complainant and caused her pregnancy. She stated that the pregnancy was not an issue in dispute, implying, as I understand it, that it was not in question that the complainant had become pregnant. The medical doctor had recommended that a DNA test be done to tie up the accused with the defilement resulting in the pregnancy. Thus, it was improper for the trial court to tie up the pregnancy to the accused in order to make the finding she did.

19. As for the evidence of PW4, there is no nothing on record to show that the IO conducted any investigations whatsoever. There is no record that he visited the hotel, where the alleged offence was first committed to confirm details, of its entrance and whether the floor is tiled. Nor is there any indication that the IO visited the alleged bridge where the second incident allegedly occurred in a bushy area.

20. The fact that PW3, the victim's mother, said she did not know the culprit reported to her by her daughter also raises an alarm bell. She stated:

“I noted (PWN) was pregnant. I questioned her and she told me the culprit who I did not know.”

21. An accused person is innocent until proven guilty by the evidence adduced. The standard that must be met by the prosecution is proof beyond reasonable doubt. If there is reasonable doubt, the accused must be found not guilty. The least that was required was that the trial court ought to have taken into account all the evidence in its entirety.

22. The prosecution cited **Mohamed v Republic 2006 2KLR 138** that affirms that corroboration is not mandatory in sexual offences; **AML v Republic [2012]eKLR** which held that the fact of rape or defilement is not proved by way of a DNA test but by way of evidence; and **Kassim Ali v Republic [2006]eKLR** that the absence of medical evidence to support the fact of rape is not decisive as rape can be proved by oral evidence or by circumstantial evidence.

23. In **Kassim Ali**, however, the trial court found that the medical examination was conducted immediately after the offence was committed but the report filed in two months later. Here the evidence is that the report to police and the medical examination were made when the complainant was pregnant; when it was useless for purposes of determining whether the offender was the one who penetrated the complainant, and making the causal connection.

24. In addition, the state argued on the strength of the case of the Court of Appeal decision in **Benjamin Gitau v Republic [2011] eKLR** that there was no necessity of a DNA test as penetration which is the main element of the offence was proved through direct evidence. In **Gitau's case** the report of the defilement occurred immediately after the incident due to distress calls from the victim(s), there was no issue of pregnancy, and the accused were arrested following the distress calls. The evidence of penetration was shown by tears and bleeding in the vaginal opening and the inflamed labia. Here, there was nothing to connect the penetration by whoever was the perpetrator with the offence.

25. In her judgment, the trial magistrate noted that section 124 of the Evidence Act

“was amended to allow conviction on the uncorroborated evidence of a complainant with merited reasons”

26. The proviso to Section 124 Evidence Act is as follows:

“Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

27. This provision is not, in my view, a *carte blanche* for a trial court to ignore all aspects of the evidence to convict the accused, even if the other evidence is shaky. The trial court must set out the reasons for believing the accused, in light of all the testimony available. In so doing, the court must take all the circumstances together into account. The court must objectively weigh all the evidence, even if it tends to believe the uncorroborated witness.

28. Here, there was a child born of the alleged defilement but no DNA testing was done. The victim delayed in reporting the alleged defilement for six months, but at no point did she say why she did not report. Here there was a denial that the hotel floor was tiled; and there was no investigation to show whether that was so or not. There was no investigation to show if there were bushy areas as alleged.

29. Section 124 of the Evidence Act was not enacted to enable a sloppy approach to investigations, or to lower the standard of proof. The standard remains proof beyond reasonable doubt.

30. I further note that the trial magistrate stated in her judgment that the case had been assigned to Police Constable Antonine Adhiambo (PW4) who interrogated the witnesses and decided to charge the accused. The record does not bear this out as the person who testified as PW4 is Corp Muthusi, who testified that the Investigating Officer was Sgt Wefuafua who was transferred and Muthusi took over.

31. This is an untidy investigation situation which should have alarmed the trial court.

Medical evidence and DNA

32. The appellant submitted that the complainant being the only eye witness, it was necessary to have a DNA test of the appellant and the child born of the alleged defilement. Thus that the failure to order a DNA test was as failure in exercise of the court's discretion, particularly since the complainant was examined 7 months after the alleged incident. On this point he relies on the case of **Emmanuel Japala v R [2019]eKLR** where it was stated :

“ The charges facing the appellant were very serious in nature: they attracted a sentence of life imprisonment, thus the prosecution had a mandate to carry out the DNA testing to establish the truth.”

33. The appellant further submits that the complainant's evidence being the only testimony relied upon, and the DNA testing not having been done , the medical examination done on 16th July 2012 was too remote to connect the appellant to the defilement.

34. As earlier pointed out, the medical doctor had recommended that a DNA test be done to tie up the accused with the defilement resulting in the pregnancy. The trial court could not escape the DNA and proceed to tie up the pregnancy to the accused in order to make the finding it meant that the accused was guilty.

35. The analysis already done above on the cases concerning the fact that DNA testing is not essential, are helpful as shown where the connection between the commission of the offence and the medical report as to penetration can be readily made. In the present case, I do not

think there was a proper basis laid by clear evidence beyond reasonable doubt that the accused was the person who penetrated the complainant.

Disposition

36. From all the foregoing it is clear that the prosecution evidence did not set out a clear case of proof beyond reasonable doubt. For these reasons the appeal succeeds and the conviction and sentence are set aside.

37. The accused is set at liberty unless otherwise lawfully held.

38. The court notes that the appellant had also filed a second appeal along the same lines on 13th December 2019, in respect of which an Appeal file reference number 10 of 2020 was opened. The appellant's appeal having been determined herein, the Appeal File Number 10 of 2020 is spent and is hereby closed.

39. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA THIS 25TH DAY OF FEBRUARY, 2022.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State
2. Ojea holding brief for Mathea for Appellant
3. Appellant – Stephano Ngigi Maigwa - present Naivasha Maximum Prison
4. Court Assistant - Kamau