



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E005 OF 2021

EVANS OUMA OGALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J. Mitey (SRM) delivered at Winam in Senior

Principal Magistrate's Court in Criminal Case No 264 of 2016 on 13th March 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. He was tried and convicted by Hon J. Mitey, Senior Resident Magistrate and sentenced to serve fifteen (15) years imprisonment for the offence of defilement.
3. Being dissatisfied with the said Judgement, on 4th February, 2021 he lodged the Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of appeal challenging both conviction and sentence.
4. His undated Written Submissions were filed on 2nd November 2021 while those of the Respondent were dated 1st November 2021 and filed on even date.
5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that had been placed before it for determination were as follows:-
 - a. **Whether or not the Prosecution had proved its case beyond reasonable doubt.**
 - b. **Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful**

and or warranted.

9. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

10. Grounds of Appeal Nos (1) and (4) were dealt with together under this head as they were all related. The court considered the same under the following sub headings.

A. AGE

11. The Appellant submitted that the age of MMO (hereinafter referred to as "PW1") was not proven. He pointed out that the Post Rape Care (PRC) form only gave an estimate of her age as twenty two (22) years old. He argued that her age was an estimation which could be higher or lower than her real age and consequently, there was no proof that PW 1 was forcefully defiled.

12. On its part, the Respondent submitted that PW1's age of sixteen (16) years was proven by Birth Certificate which was produced as PExhibit 3 which indicated that she was born on 5th May 1999. It pointed out that the same was corroborated by the evidence of PW 1 and that of her mother, BNK (hereinafter referred to as "PW 3").

13. Notably, when the trial commenced on 6th March 2017, PW 1 told the Trial Court that she was aged seventeen (17) years. She testified that she was born on 5th May 1999. PW 3 tendered in evidence the said Certificate of Birth. Bearing in mind that the incident was said to have occurred on 28th March 2016, PW 1 was aged slightly shy of turning seventeen (17) years.

14. Having said so, this court noted the Appellant's submissions that the PRC had given PW 1's age as twenty two (22) years. The said PRC Form was completed on 29th March 2016, a day after the incident was said to have occurred. The P3 Form dated 28th March 2016 indicated PW 1's age as sixteen (16) years old while the Certificate of Birth that was issued on 14th February 2017 showed that PW 1 was about seventeen (17) years of age at the time of the alleged incident.

15. Whilst there was not much disparity between the age given in the P3 Form and the Certificate of Birth, this court was concerned that a day after the alleged incident, the medical officer approximated PW 1's age as twenty two (22) years. This was a difference of about five (5) to six (6) years.

16. It is important to note that the Prosecution did not explain the disparity when Dr Edith Odhiambo Awour (hereinafter referred to as "PW 4") working at Jaramogi Oginga Odinga Teaching and Referral Hospital (hereinafter referred to as "JOOTRH") tendered the PRC Form as evidence in court.

17. Notably, in the case of **Hudson Ali Mwachungo vs Republic Mombasa [2016] eKLR**, the Court of Appeal held that proof of age of a victim in defilement cases is critical as the sentence is dependent on the age of such victim. Whereas the contradictions in the age of a victim cannot assist an appellant in escaping liability as was held by Majanja J in the case of **Stephen Ouma Ogola [2015] eKLR**, the court must be convinced by the evidence that has been presented before it proves that the victim is a child to establish the offence of defilement.

18. The fact that the said Certificate of Birth was obtained about three (3) weeks to the date when PW 1 first testified caused a lot of uneasiness to this court in finding that the said Certificate of Birth was proof of PW 1's birth. There was doubt that was raised in its mind to a certain degree.

19. This court thus took a different view to that of the Learned Trial Magistrate who determined that PW 1 was aged sixteen (16) years and found and held that PW 1's age had not been proven to the required standard, which in criminal cases, was proof beyond reasonable doubt.

B. IDENTIFICATION

20. This court could have downed its tools once it found that PW 1's age had not been proven. However, it found that it was necessary to address the other ingredients constituting the offence of defilement in the event it was found to have erred on the issue of PW 1's age.

21. The Respondent pointed out that the Appellant was positively identified as the perpetrator as PW 1 stated in her testimony that the Appellant used to be an employee at her mother's hotel. It added that this evidence was further corroborated by the evidence of PW3 which meant that the Appellant was a person that PW 1 had seen before and could therefore positively identify him.

22. PW 1 had testified that she knew the Appellant since the year 2015 when PW 3 employed him to work in her hotel. Although the Appellant had argued that the Trial Court failed to consider the fact that there was only one identifying evidence thus arriving at a conclusion out of inconsistencies, it was clear from his Written Submissions that identification was not in issue.

23. This court did not find value in analysing the submissions relating to the Appellant's identity because he had admitted that he was found in PW 3's house with PW 1. The question as to whether he defiled PW 1, however, was a different issue that has been addressed hereinbelow.

C. PENETRATION

24. The Appellant submitted that the circumstances surrounding the veracity of the offence were in doubt in respect to witnesses' evidence. He was emphatic that if this court was to analyse the evidence afresh then it would come to an independent conclusion as was seen in **Okeno vs Republic** (eKLR citation not given).
25. He pointed out that the Prosecution case had a myriad of inconsistencies in terms of dates that were alleged the incident took place. He added that PW 1 testified that she did not tell the police that he had sexual intercourse with her on 28th March 2016. He argued that there was no nexus between him and her regarding the events that took place on the alleged date.
26. He placed reliance on the case of **Ndungu vs Republic** (eKLR citation not given) where the court held that a witness should be straight forward for the strength of balancing credibility of the evidence. He submitted that if there was no proof that he had penetrated PW 1 at that material time, nothing then linked him to the occurrence given that the Prosecution witnesses were not part and parcel of the offence. He stated that he was only prejudiced for past events that went unreported.
27. He argued that the Trial Court failed to consider that the matter had a single identifying evidence thus the contradictions in terms of dates. He explained that the alleged material date was 28th March 2016 yet PW 2 stated that the date was 26th December 2015 while the investigating officer, No 95518 PC Veronica Kamilla (hereinafter referred to as "PW 5"), alleged that the incident occurred on 28th April 2016.
28. He added that the evidence by PW 2 could not stand given that the degree and status of the hymen was not ascertained as to whether it was broken or freshly broken for reasons that there were no obvious injuries noted on both labias. He pointed out further that no laboratory test yielded spermatozoa and that the external and internal genitalia was normal.
29. It was his contention that the evidence adduced was not the evidence tendered and thus stood against the weight of the evidence. He argued that an appellant is the most favorite child of law and every benefit goes to him or her as a matter of right. He added that twenty (20) years was a long time to serve in prison when issues that point to the offence are unclear.
30. The Respondent averred that penetration was also proven by medical evidence and corroborated by the evidence of the PW 1 as highlighted in the case of **Charles Wamukoya vs Republic Criminal Appeal No 72 of 2013** (eKLR citation not given).
31. It submitted that PW 1 stated in her testimony that the Appellant had sexual intercourse with her severally and that Dr Eve Koile (hereinafter referred to as "PW 2") who worked at JOOTRH and PW4 examined her filled her P3 form and the PRC form, respectively at Jaramogi Oginga Odinga Teaching and Referral Hospital (hereinafter referred to as "JOOTRH") It argued that the medical examination revealed that PW 1's hymen was broken and that there was a foul smelly discharge from her vagina which evidence was proof that she had been defiled.
32. In her evidence, PW 1 stated that the Appellant did not defile her on the material date of 28th March 2016, the Appellant came to her home and told her that he had come from his grandmother's ceremony. He asked whether PW 3 was at home and she told him that she was not. He then asked her to spend the night there but she was uncomfortable with that.
33. She added that he entered the house and immediately, her sister, AA, came with a motor bike. Her sister left and informed Justus, PW 3's employer, that there was man in their house. Justus locked them in the house and went to call the police. They were all then taken to Kondele Police Station.
34. She further told the Trial Court that she informed the police that the Appellant had defiled her four (4) months before the said date. She added that whatever he did to her before was not good. She denied telling the police that he defiled her on that material date. She was emphatic that he was the only person she had had sexual intercourse with but on that material date, she did not have sex with him. She was emphatic that he did not force her to have sexual intercourse.
35. On cross-examination, she was emphatic that he had sexual intercourse with the Appellant at her mother's hotel in the year 2015 but could not point out the exact date.
36. PW 2 testified that she received a medical report from OCS Kondele Police Station signed on 31st March 2016 for examination of PW 1 aged sixteen (16) years. She put the approximate time of injury as three (3) days and the probable type of weapon was described as sexual assault.
37. Her testimony was that PW 1 was reportedly sick when the former workman came to their house and found the Appellant who was naked having sex with PW 1. After carrying out a physical examination, she found PW 1 was sick-looking and complained of lower abdominal pain. However, her head, neck, thorax, abdomen, upper and lower limbs were normal. Further, there were no tears in the genitalia and the anus was intact but the hymen was broken and that there was foul smelling bloody per-vaginal discharge.
38. The high vaginal swab findings showed that there were red blood cells but no yeast cells, no spermatozoa and no trachomona vaginal were detected. She added that blood specimen was taken for HIV and Hepatitis B which were found non-reactive.
39. She added that her further findings were to get more details from the PRC Form. She produced the P3 form dated 31st March 2016 as Prosecution Exhibit 1.
40. PW 4, produced PRC on behalf of Arnolda Owiti who was a Clinical Officer working at JOOTRH but was no longer working there as at October, 2017. She testified that the PRC form was compiled on 29th March 2016 in Kisumu at JOOTRH under Ref Op No XXXX/2016 and

the patient was PW 1 whose date of birth was indicated as 5th May 1999.

41. She stated further that PW1 had reported that the Appellant had had unprotected sex with her severally and incident had already been reported to the police. She further testified the findings of the PRC form which corroborated the findings of the P3 form.

42. No. 95518 PC Woman Veronica Kamilla's (hereinafter referred to as "PW5") evidence corroborated that of PW 1, PW 2, PW 3 and PW 4.

43. The court carefully analysed the evidence that was adduced in the Trial Court and noted that there appeared no penetration occurred on the material night. PW 2's evidence that the Appellant was found naked having sex with PW 1 threw this court off balance. It was not clear where she obtained this information as none of the other witnesses testified to this fact.

44. Be that as it may, from PW 1's evidence, her sister arrived at the house immediately the Appellant entered the house and she was emphatic that he did not have any sex with her that night. PW 3's employer locked PW 1, her sister and the Appellant in the house and went to call the police. The said sister was not called as a witness to testify whether during that short period she stayed locked in with PW 1 and the Appellant, he had sex with PW 1.

45. The PRC Form was more clear that there was no obvious injury and the external genitalia was normal and this corroborated PW 1's evidence that the Appellant did not have sex with her on the material night. The fact that there was a broken hymen or that there was a foul smelling discharge did not mean that the same was a result of sexual activity that night.

46. Whereas PW 1 had testified that she had had sexual relations with the Appellant previously, he had been specifically charged with having defiled her on a specific date, being 28th March 2016. He could not be found guilty of past incidents if not evidence had been adduced to enable him mount a defence in respect of those past incidences. Indeed, an accused person is innocent until being found guilty of the charge that he is facing at a particular time.

47. If the Prosecution had wanted to sustain the charge of previous incidences, then it ought to have amended the Charge Sheet to charge the Appellant for having defiled or committing indecent acts with PW 1 on diverse dates which ought to have been specifically spelt out. Proceeding in the manner the Prosecution did caused great miscarriage of justice to the Appellant as he was not given an opportunity to defend himself regarding alleged past incidents. In this regard, he was not accorded a fair trial.

48. As the Respondent had ably submitted, the ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim as was held in the case of **George Opondo Olunga vs Republic [2016] e KLR.**

49. In this case, although the Appellant's identification was not in contestation, it was the considered view of this court that the age and penetration of PW 1 was not proven to the required standard. If any one ingredient has not been proven, then the court must give the benefit of doubt to the alleged perpetrator. This court was thus persuaded that it should give the Appellant the benefit of doubt. His submissions regarding the inconsistencies on the date of the alleged incident were thus rendered moot.

50. This court found and held that the Learned Trial Magistrate erred in having found that the Prosecution had proved its case beyond reasonable doubt,

51. In the circumstances, this court found and held that Grounds of Appeal Nos (1) and (4) to have been merited and the same be and are hereby upheld.

II. SENTENCE

52. Grounds of Appeal Nos (2) and (3) were dealt with under this head as they were all related.

53. It was not necessary to analyse the submissions relating to sentence as this court had already found that the Prosecution had not proven its case. Be as it may, for completeness of record, Section 8(1) and (4) of the Sexual Offences Act provides that:-

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

54. If this court had found that the Appellant had been properly convicted, it would not have interfered with the sentence as the same was lawful and legal. This court would also have directed that any time he had spent in custody while his trial was being conducted be taken into account in the computation of his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

DISPOSITION

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal lodged on 4th February 2021 was merited and the same be and is hereby allowed. The effect of this decision is that the Appellant's conviction and sentence be and are hereby set aside and/or vacated as it was clearly unsafe.

56. It is hereby directed that the Appellant be released from custody forthwith unless he be held for any other lawful cause.

57. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF FEBRUARY 2022

J. KAMAU

JUDGE