



REPUBLIC OF KENYA



KENYA LAW
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**Samwel v Republic (Criminal Appeal E015 of 2020)
[2022] KEHC 14350 (KLR) (30 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 14350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E015 OF 2020
JN NJAGI, J
MARCH 30, 2022**

BETWEEN

BOAZ NYANOTI SAMWEL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. W.C. Waswa, RM, in Nyamira CMC Sexual Offence Case No. 16 Of 2020 delivered on 19/11/2020)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006 and sentenced to serve 10 years imprisonment. The particulars of the offence were that on the March 4, 2020 at Bosamaro Chache location within Nyamira county he intentionally and unlawfully caused his penis to penetrate the genital organs, namely vagina, of GKM, a child aged 13 years.
2. The appellant was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal were self-drawn by the appellant. They are generally to the effect that the trial court wrongly convicted him of the offence when there was no evidence to connect him with the offence. Further that he was not identified as the perpetrator of the offence.

Case For The Prosecution -

3. The case for the prosecution was that the complaint in the case was a 15-year-old school going girl. That some days before the material day, the complainant (PWI) and another girl, PW4, had escaped from home and were loitering at Keroka town and Mosobeti market. That on the evening of the material day at 8 pm they were at Mosobeti market when they met the appellant and another young man called Ongiri. The appellant was riding a motor cycle. He ferried them to his house near Keroka town. They-



found another young man in the house. They slept in the house. The complainant and the appellant slept on a bed in the house while PW4 slept with Ongiri on a mattress on the floor. The complainant and the appellant engaged themselves in sex. So did PW4 and her partner. In the morning they took tea. The girls left the house and went to Mosobeti market where they were to wait for the appellant. While at the market the area chief arrested them. He interrogated them and they revealed to him what had transpired.

4. The father to the complainant PW2 was contacted. He went to the chief's office. He said that the girl had escaped from home.
5. The chief managed to get the phone number of the appellant from another person. He called him and the appellant went to the chief's camp. The appellant and the girl were taken to Nyagacho Police Post and then to Nyamira Police Station.
6. The case was investigated by Sgt Jedidah PW 3 who on the March 6, 2020 took the girls to Keroka County Hospital. The complainant was examined by a clinical officer PW4 who found her with broken hymen and old bruises. The hymen was not freshly broken. There was whitish discharge and foul smell. No sperms were seen. He concluded that there was penetration due to the broken hymen and bruises albeit old. He completed a P3 form for the complainant.
7. The complainant's father PW2 said that the girl did not have a birth certificate. On the March 10, 2020 Sgt Jedidah escorted the girl to hospital for age assessment. She was examined by a dentist Dr Mandere. An x-ray of her dental formula was taken that indicated that her third molars had not fully formed and root formation had not started. The doctor concluded that she was aged 15 years. Sgt Jedidah charged the appellant with the offence. During the hearing the clinical officer PW6 produced the P3 form as exhibit, P exh1. Dr Emily Mutui PW5 produced the age assessment report as exhibit on behalf of Dr Mandere, Pexh 2.

Defence Case —

8. When placed to his defence the appellant gave a sworn statement and stated that he does not know the complainant and PW4. That on the March 5, 2020 he was called by the chief and informed that there was a complain that he had stolen somebody's phone. That he went to the chief and found him with the two girls and another young man. The chief did not tell him what the issue was. He tied him up and the other young man. They were all taken to the police station.
9. The appellant stated in his defence that he does not know Ongiri. That he lives at his home which is about 200m from Mosobeti market but has never rented a house at Mosobeti.

Submissions —

10. The appellant submitted that the age of the complainant was not proved. That she said that she was aged 13 years but at the same time said that she did not know her age and that she could be 16 or 17 years. That her father stated that she was 15 years which was the age stated by her friend PW4.
11. The appellant submitted that he was not examined to ascertain whether there was anything to connect him with the offence.
12. The appellant submitted that there were material contradictions in the case. That the complainant stated that she had escaped from home for 3 weeks yet her father said that it was 3 days. That Sgt Jedidah said that it was 2 weeks. That PW4 said that they were away from home for 2 weeks but on cross-examination changed that to one week. That the contradictions showed that the witnesses were not credible.



13. The appellant submitted that the complainant testified that after the chief talked to the appellant he did not arrest him and does not know when he was arrested. However, that her father said that the appellant was arrested on the same day he was interrogated by the chief.
14. The appellant urged the court to acquit him.
15. The learned principal prosecution counsel Mr Desmond Majale, submitted that the prosecution had proved its case beyond all reasonable doubt. That the ingredients of the offence of defilement are proof of the age of the victim, penetration and identity of the perpetrator of the offence. That the age of the complainant was proved by production of age assessment report that established that she was aged 15 years. That the report coupled with the evidence of her father proved that she was aged 15 years.
16. The prosecution counsel submitted that penetration may be proved by direct or circumstantial evidence. That the evidence of penetration was corroborated by the other girl, PW4 and by the evidence of the clinical officer.
17. It was submitted that the complainant and PW 4 spent enough time with the appellant to be able to identify him.
18. The prosecution counsel submitted that the appellant was convicted of defiling a child of 15 years whose sentence under section 8(3) of the *Sexual Offences Act* is a minimum sentence of 20 years imprisonment. That the sentence imposed by the trial court of 10 years imprisonment is illegal and should be substituted with 20 years.

Analysis and Determination —

19. This being a first appellate the court is alive to and takes into account the principles laid down in the case of *Okeno v Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination 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. 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.”
20. It is the duty of the prosecution to prove the charge against an accused person beyond reasonable doubt.
21. The ingredients of the offence of defilement that the prosecution is required to prove were stated in the case of *George Opondo Olunga v Republic* (2016) eKLR to be: proof of the age of the victim, proof of penetration and identification of the offender.
22. The appellant in this appeal attacked the conviction on the ground that there was no sufficient evidence to sustain the charge against him. The prosecution on the other hand maintained that the charge was proved beyond reasonable doubt. I will therefore consider whether the trial court reached the right conclusion that the three elements of the offence were proved.



Age Of The Complainant —

23. The appellant submitted that the age of the complainant was not proved as she gave different ages from 13 years to 16/17 years. The prosecution responded that the age was proved by the complainant's father who said that she was aged 15 years which corresponded with the findings in the age assessment report.
24. The trial court correctly directed itself that the age of a person can be proved by both medical and oral evidence. The court cited the case of *Joseph Kiet Seet v Republic* (2014) eKLR where it was held that:
- “It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni v Uganda*, Court of Appeal criminal appeal No 2 of 2000. It was held thus: In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
25. A similar holding was reached by the Kenyan Court of Appeal in the case of *Mwolongu Chichoro Mwanyembe v Republic*, Mombasa criminal appeal No 24 of 2015 (UR) (cited in *Edwin Nyambaso Onsongo v Republic* (2016) eKLR) where the court stated that: -
- “...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the of the parents or guardian or medical evidence, among other credible forms of proof.” “...we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
26. There is no better person to prove the age of a person than a parent. The complainant's father in this case gave evidence that the girl was born in 2005 thereby making her age at the time of the offence to be 15 years. This was corroborated by medical evidence whereby the dental formula of the girl was examined and her age assessed at 15 years. The opinion of the doctor on the age of the girl was not challenged by any other medical evidence. The examination of the dental formula of the girl was credible evidence in proof of her age. In my review of the evidence I, find that the complainant was aged 15 years. The trial magistrate made the right conclusion that the girl was aged was 15 years.

Penetration —

27. Section 2 of the *Sexual Offence Act*, defines penetration to mean:
- “the partial or complete insertion of the genital organs of a person into the genital organ of another person.”
28. The appellant submitted that there was no medical evidence placed before the court that tended to connect him with the offence. The prosecution counsel submitted that sexual intercourse can be proved by both oral and circumstantial evidence. That there was ample evidence of the complainant and PW4 to support the charge. That the trial court believed the evidence of the two witnesses that the offence had been committed.



29. There was actually no medical evidence to support the charge of defilement against the appellant. The clinical officer PW6 did not find any fresh evidence of defilement. The hymen was not freshly broken and the bruises that were seen were old. There was no presence of spermatozoa. The medical evidence therefore did not support defilement.
30. It is however settled law that medical evidence is not the only evidence that can be used in proof of defilement. In *AML v Republic* (2012) eKLR the Court of Appeal stated that: -
- “It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence.”
31. The same court in *Kassim Ali v Republic*, Mombasa criminal appeal No 84 of 2005 stated that:
- “(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”
32. In the absence of medical evidence to support the offence, the question was whether there was sufficient oral or circumstantial evidence to prove penetration on the complainant.
33. The trial magistrate considered the oral evidence of the complainant and PW4 on the issue and held as follows:
- “This court finds that the evidence of PW1 has been corroborated by PW4 to the extent the PW1 slept with the accused on the same bed and in the same house. This shows that PW1 was telling the truth when she said that she had sex with the accused person when they slept together on the same bed that night. In the circumstances therefore, this court finds that the prosecution has proved the ingredient of penetration beyond reasonable doubt.”
34. Section 124 of the *Evidence Act* provides that: -
- “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.”
35. The complainant herein was aged 15 years. She was therefore not a child of tender years for the purposes of section 124 of the *Evidence Act*. Her evidence did not require corroboration. That notwithstanding, her evidence was corroborated PW4. The trial magistrate had the advantage of seeing the two witnesses testify. He weighed their evidence against the evidence of the appellant and believed that they were telling the truth. There was indeed no reason of doubting their evidence. They met the appellant on the same day of the incident. They had no grudge against him that would have prompted them to lie against him. The finding by the trial court that the girls were telling the truth was firmly founded.



There was credible evidence that the appellant penetrated the genital organs of the complainant with his genital organ.

Identity Of The Perpetrator —

36. The question is whether the complainant and PW4 clearly identified the appellant as the person who defiled the complainant. The trial magistrate considered the issue and held that:

It follows therefore that PW1 spent enough time with the accused person. Further due to the light in the house, she could see him properly. They also slept on the same bed until morning and therefore she definitely saw him well enough to identify him as the culprit. This court does not believe that PW1 made a mistake in identifying the accused as the perpetrator.

Hence, this court finds that the prosecution has proved, beyond reasonable doubt, that the accused had sex with PW1 on March 4, 2020 at Mosebeti.

37. Indeed, the complainant and PW4 stayed with the appellant for a considerable period of time as a result of which they cannot mistake him for another person. Both witnesses said that there was electricity in the appellant's house and therefore they had ample opportunity to see him properly. The witnesses left on the following day when it was already day light and they could see him properly. The defence by the appellant that he never met the two girls before his arrest was a mere denial. There was sufficient evidence from the two witnesses that the appellant was the person who defiled the complainant.

Contradictions —

38. The appellant submitted that there were several contradictions in the evidence of the complainant and PW4 that showed that they were not credible witnesses. For instance, that the girls differed on the duration of the period they had been away from home with PW1 saying that it was 3 weeks while PW4 said it was one week.

39. The way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twabangane Alfred v Uganda* CR Appeal No 139 of 2002 (2003) UGCA,6 where it was held that:

“with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

40. It does not appear from the evidence that the girls deliberately wanted to lie on the duration of time they had been away from home. It could just have been a question of forgetfulness or not being very keen on time. The contradictions did not affect the substance of the prosecution case.

41. On my own independent review of the evidence, I am convinced that trial court came to the right conclusion that the prosecution had proved the charge against the appellant beyond all reasonable doubt. The appeal is therefore bereft of merit and is dismissed accordingly.



Sentence —

42. The guiding principles upon which a court may interfere with a sentence imposed by a lower court were stated in the case of *Ogalo S/O Owuora v Republic* 1954 24 EACA where it was held that:
- “An appellate court has the power to interfere with the sentence passed by the trial court if there is evidence that the learned magistrate or Judge acted on wrong principles, overlooked some relevant material or factors or that the sentence passed is illegal or manifestly excessive or punitive or too low as to occasion a miscarriage of justice.”
43. The appellant was charged under section 8 (3) of the *Sexual Offences Act* that provides that: -
- A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
44. The trial court sentenced the appellant to 10 years imprisonment. The provision of the law is that where the law imposes a minimum sentence, the court has no discretion to impose anything other than the minimum sentence. The complainant in this case fell under the age bracket of 12 to 15 years. The sentence for a person convicted of the offence of defiling a child of that age is imprisonment for a term of not less than 20 years. The sentence imposed in this case was therefore illegal. This court is duty bound to correct the error made by the trial court and impose the right sentence as provided by the law.
45. The upshot is that the appeal is bereft of merit and is hereby dismissed, but the sentence of 10 years imprisonment is substituted with one of 20 years imprisonment.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MARCH 2022.

J. N. NYAGI

JUDGE

In the presence of:

Mr. Majale for the Respondent

Appellant Present in person – GK Prison Kisii – Virtually

Court Assistant – Mwangi

14 days Right of Appeal

