



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NUMBER 50 OF 2016

FKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. **FKK**, the **Appellant/Applicant** herein was convicted of the offence of defilement *vide Mwingi Senior Resident Magistrate's Court Criminal Case No.135 of 2014*. The particulars of the charge for which he was charged and convicted are that on 11th December 2012 in [particulars withheld] within Kitui County he defiled (name withheld) a child aged 4 years 6 months.
2. The evidence tendered before the trial court included the evidence of the minor (**PW1**) who narrated to the trial court how she underwent the ordeal in the hands of the appellant when her mother was away in Nairobi for work.
3. The evidence of the minor was corroborated by **AN (PW3)** who was sleeping in the same house and room with the victim when she was defiled. She heard the commotion in the room at night and when she hit a torch she saw the appellant and that is why she raised an alarm. She also recognized the appellant as her brother in law and an uncle to the victim.
4. The evidence of **PW3** was corroborated by **SM (Pw4)** who is father in law to the appellant. He told the trial court that the appellant went to his homestead at night and when he asked him what had taken him there at night, he reportedly told him he had gone to "greet them" (referring to **PW3** and the victim) but after a short while as the old man was cooking his meal he heard noise from **PW3** and when he went to check what was going on he met the appellant at the door coming from the house where the victim & **Pw3** were sleeping. He told the trial court that the appellant knocked him down but held his leg as he fell down. He held on to him and left him free only after the appellant pleaded "in law!".
5. The victim's mother testified that she was not at home at the material time but was informed of what had happened to her daughter the following day whereupon she went back home and confirmed the incident before taking the action to report the incident to the police and taking her daughter for treatment she tendered an immunization card as **P.Ex4** that showed that the victim was born on 19th May 2010. She further testified that when she arrived home the following morning, she found her daughter in pain and that she complained of pain when passing urine. She also stated that when she checked her private parts she found it swollen and stretched.
6. The evidence of the victim and the other witnesses regarding defilement was further corroborated by **Dr. Ugas Mohammed Ibrahim** who testified on behalf of **Dr.Christopher Wahinya** who had filled and signed the **P3** form (**P.Ex.3**). The medical evidence tendered confirmed that penetration was positive and the child had been defiled. According to the doctor, the hymen was broken and there was reddening around the vagina.
7. When placed on his defence the appellant denied defiling the minor. He told the trial court that he did not touch her. He told the trial court that he went for work in the material day and that when he went back he went to his home and slept. He added that while he was sleeping he heard people talk to his grandmother and that he heard **PW4** talk and did not bother much because according to him **PW4** had mental problems. He further added that the victim's mother wanted a relationship with him but had he declined. He also stated that **Pw4** had issues with his brother, **PK**, married to the victim's aunt and a sister to victim's mother. According to him dowry has not been paid to **PW4** and blamed that for his arraignment. He also blamed the sister to victim's mother saying that she used to take their donkey to help her family and when it came to having it back, she would raise issues.
8. The **Appellant's** witness **KM (DW2)** told the trial court that the **Appellant** who is her grandson went home at around 8 pm on material day (11/12/2014) and did not speak to her but went straight to his house. She added that at around 10.00pm **PW4 (AN)** went to her house and reported to her that the Appellant had defiled his granddaughter and wanted to cut him with a panga she told the trial court that she pleaded with him and that the following day he went back with 2 girls one of whom was the victim. She added that she was not called to see if the child had been defiled.

9. The trial court assessed the evidence tendered and found that the evidence proved beyond reasonable doubt that the child had been defiled. The trial court further found that penetration and the age of the victim had been proved which are two critical elements in defilement. The Appellant was then sentenced to life's imprisonment as prescribed in law.

10. The Appellant felt aggrieved and filed this appeal raising the following grounds namely:-

- (i) *That the learned Magistrate erred by convincing him or corroborative evidence of witnesses who were from the same family.*
- (ii) *That the learned Magistrate erred in law and fact by convicting him on the doctor's evidence without considering that he was not examined to prove that he was the one who defiled the minor.*
- (iii) *That the learned trial Magistrate erred by relying on contradicting evidence.*
- (iv) *That the trial Magistrate erred by not considering his defence regarding PW4.*
- (v) *That the learned trial magistrate erred by not considering his alibi raised in his defence.*

11. In written submission headed "brief submissions of Appeal", the **Appellant** submits that the trial court did not rule out the possibility of mistaken identity. This court however finds seeking the **Appellant** raised this new ground in his submissions without first seeking for leave to rely on new additional grounds as provided under **Section 350** of the **Criminal Procedure Act**. The ground on identification as raised is incompetent for want of leave. In any event, the appellant was an immediate neighbour and a relative to the victim. This court finds that even if the question of identification had been raised properly and competently, I would have still found that the Appellant was positively identified by the victim Pw1 who referred to him as "kinaa" PW3 (AN) who at the material time slept with the victim and lit a torch before raising an alarm after she heard some commotion in bed also positively identified him. He was also positively identified by **PW4** (SM) who had earlier prior to the incident met the Appellant outside his home and even had a conversation with him asking him what had taken him at night to his homestead. The question of identification was beyond doubt. The Appellant was positively identified.

12. On the question of alibi, I am not persuaded that the defence of alibi could stand in the face of overwhelming evidence tendered by the prosecution. I am in agreement with the **Respondent's** contention that the evidence of **PW1, PW3** and **PW4** in that regard were consistent and corroborative of what the victim told the court.

13. The **Appellant** told the trial court that he went for his construction work on the material day and after work passed by a place called Thokoa to rest and that he was at that place until 10pm. However the evidence of his own witness, his grandmother differed because according to her the Appellant on that day arrived home at around 8 pm and went to his house without talking to her. Given the narrative given by **DW2 & PW4**, this court finds that it was possible for Appellant to have arrived at his house at 8pm and head to the homestead of **PW4**, the scene of crime and committed the offence which he did. His defence of alibi in my considered view was weakened by the evidence given by his own witness (**DW2**). The defence still could certainly not stand in the face of overwhelming evidence tendered by the prosecution through **PW1, Pw3** and **PW4**.

14. The **Appellant** further submits that his conviction was based on evidence of minor when no *voire dire* examination was conducted. This court finds that this ground was also not property raised because it was a new ground raised without leave of this court. Besides this, the record does not show that Pw3 was 13 years old when she testified. The evidence taken shows that the girl was in class 7. This court finds that even if the girl was 13 as submitted by the **Appellant** (which is not confirmed) a girl of that age is old enough to give evidence on oath. She was sworn before she testified. I also find that the evidence she tendered is candid and indicative of a person who had clarity of thought. This court finds that the issue of *voire dire* examination has been raised by the **Appellant** belatedly and as an afterthought. The same cannot be sustained in this appeal.

15. The **Appellant** has also submitted that the evidence of **PW4** should not have been found to be corroborative on account of his advanced age. While it is true that the record shows that **PW4** was advanced in age and infact mentioned that he was not sure about his age but guessed he was 140 years old (which of course may have been stated in chest). It is apparent from his testimony is that the old man was quite consistent in his evidence in chief and even during cross examination. He remembered in detail what transpired including what the **Appellant** did on his fence as he talked to him to find out what he was doing in his compound at night. The witness also held the **Appellant** after being knocked down as the Appellant tried to flee from the scene of crime fully aware of what he had done. He was after all a neighbour and certainly knew the homestead well and it's occupants.

16. This court finds that contrary to what the **Appellant** alleges, the evidence of **PW4** and **PW3**, the persons who were at the scene of crime at the material time, are corroborative and consistent. Their evidence in addition to the evidence of **PW1 PW2** and **PW5** proved beyond doubt that the **Appellant** had defiled the minor (**PW1**) I am not persuaded by the **Appellant's** arguments that there was need to establish through medical evidence (or medical tests carried out on him) that he was the culprit who had defiled the minor.

17. The **Appellant** has also raised an issue of some differences with **PW4** and has stated that the same may have led to the old man framing him. The same in my view holds no water for 2 reasons (i) in the first place the **Appellant's** own witness (**DW2**) stated in some part that **PW4** was angry after the incident and that he was going to do bad things. That anger is under stable given what the **Appellant** did to his grandchild and a minor aged 4 years. This court is not persuaded that **PW4** could have any reason to lie because of the perceived differences he could have had with the Appellant. His age and the evidence he tendered in my view vindicates him against such accusation. I find that the trial court properly evaluated the defence put forward and correctly found that the prosecution's case had been proved beyond doubt nevertheless,

(ii) Secondly during cross examination, the **Appellant** did not raise any issue with **PW4** regarding any bad blood or reason to frame him.

This court finds that the Appellant in his allegations failed to raise doubts in the mind of the trial court.

The **Appellant** also contends that the trial court should not have relied on the evidence of witnesses called because of the fact that they were from the same family. That contention however holds no water because of the following reasons.

This court finds that the evidence tendered by the prosecution against the **Appellant** was simply overwhelming. The conviction against the **Appellant** was well founded and save to found a conviction. The documentary evidence (PEX.3 P3 form, and PEX.4 – Chinese booklet) established and proved beyond doubt that the minor was 4 years old. The provision of **Section 8 (2)** of the Sexual Offence Act prescribes life imprisonment for anyone committed of defiling a minor aged 11 years or less. In this instance the victim was aged 4 years which really illustrates the extent of physical and psychological trauma the minor underwent during the ordeal. This perhaps explains why the Appellant herein never raised any issue in this appeal regarding the severity of the sentence. He is certainly aware of the seriousness of what he did.

In the premises this court finds no merit in this appeal. The same is disallowed. The conviction & sentence imposed are upheld.

Dated, Signed and Delivered at Kitui this 20th day of January, 2021.

R. K. LIMO

JUDGE