



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CRIMINAL APPEAL NO. 21 OF 2017**

**MARO SALIM GULU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from Original Conviction and Sentence in***

***Criminal Case No. 21 of 2016 of the Principal Magistrate's***

***Court at Hola Law Court-M. D Kiprono, SRM dated 3<sup>rd</sup> August, 2016)***

**CORAM: Hon. Justice R. Nyakundi**

**The appellant in person**

**Mwangi for the State**

**J U D G M E N T**

The Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. X of 2006. The particulars of the offence were that on diverse dates between 6<sup>th</sup> January, 2016 and 14<sup>th</sup> January 2016 at [particulars withheld] Village, Jamhuri location within Tan River Sub County within Tana River County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of GMA a child aged 15years.

He was charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, on diverse dates between 6<sup>th</sup> January, 2016 and 14<sup>th</sup> January, 2016 at [particulars withheld] village Sub location within Tana River Sub-County, Tana River County intentionally and unlawfully caused his penis to touch the vagina of GMA a girl aged 15 years old.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

- 1) That the learned trial magistrate erred in law and fact by relying on the evidence of a single witness which was insufficient to sustain a conviction.***
- 2) That the learned trial Magistrate erred in both law and fact by failing to consider that the conviction was against the merits of the entire case.***
- 3) That the learned trial Magistrate erred in law by failing to consider the contradictions between the evidence produced in the P3 Form, Treatment Notes and the age assessment form.***
- 4) That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence.***
- 5) That the learned trial Magistrate erred in law by giving a harsh and excessive sentence in the circumstances of this case.***

**BACKGROUND**

**PW1 GMA**, the victim was sworn in after *voire dire* examination. She told the court that she lives in Jamhuri with her mother and father. She confirmed to the court that she was 15 years of age and that the Appellant was well known to her. The victim recounted to the court that

on the 6<sup>th</sup> day of January, 2016 at around 10:00am she was at home fetching water when the Appellant came and called her. He informed her that he wanted them to talk and he asked her to accompany him home. The victim informed the court that on the 8<sup>th</sup> day of January, 2016 the Appellant and the victim had sexual intercourse at the Appellant's house. The victim also confirmed that she was at the Appellant's house until Thursday when the father came looking for her and it was until this day that she returned home.

The victim stated that her father asked her to accompany him to school in the company of the Appellant. They were later referred to the police who took them to Wenje and later brought to Hola Hospital for examination. The victim confirmed to court that they had sexual intercourse on several occasions, that he would undress and she would undress and the Appellant would proceed to insert his organ into her private parts.

In cross-examination by the Appellant, the victim stated that she spent the whole week at the Appellant's place.

**PW2 MB**, was the victim's mother. She informed the court she stays at Jamhuri. She told the court that on 6<sup>th</sup> of January, 2016 she was at home and on 7<sup>th</sup> of January, 2016 her daughter was missing. PW2 told the court that she informed her husband what had transpired. On the 6<sup>th</sup> of January, 2016, she went to hospital in the morning expecting that her daughter would be back since her husband had started looking for her. She informed court that she did not know when the victim was found.

**PW3** was JSA who stays at Cheriroti. He informed court that on 10<sup>th</sup> of January, 2016, he was at the farm of the victim's father when the father received a call from one Mzee Mohammed Amir who requested that we wait for him. When he came, he said that the victim was at his house and we should not search for her. He told court that the two agreed that he returns the girl home since she was still attending school. He confirmed to court that the victim had not been returned home when he left for home across the river.

**PW4 Dr. Aidham Mohamed Ali** based at Hola Hospital gave evidence on behalf of Dr. Mohamed Bilal. He confirmed to court that he had worked with the doctor for two years and he was familiar with his handwriting and signature. His evidence was that the P3 form was for one GA alleged to have been defiled by a person known to her. He produced the P3 form as P. Exhibit. 1, the Treatment Notes as p. Exhibit 2 and the Age Assessment form as P. Exhibit 3. He testified that PW1 was examined on 14<sup>th</sup> of January, 2016 and she tested Negative for both pregnancy and syphilis. He also told the court that Age Assessment was also done and the conclusion was that she was 15 years old.

**PW5 AMK**, was the head teacher at [particulars withheld] Primary School. He informed the court that, on the 11<sup>th</sup> day of January, 2016 when the school was opened, a parent came to report that hid daughter GAR had been married.it was his evidence that he advised the parents to report the matter to the police for further action. He told the court that when the parents did not report the matter to the police as advised, he summoned the father, the victim and her husband. His testimony was that they were later arrested. He informed court that he had the register and the victim had not reported to school. He told the court that the victim was later transferred to [particulars withheld] Primary.

On cross examination, he confirmed to court that he did not know how many days the Appellant was with the victim. He also confirmed that that he did not know of the relationship before the report was made by the parents. He told the court that the record showed that the victim was not in school and that he asked the victim's parents to bring the victim and the person involved to school and was the time he came.

**PW5** was later recalled on the 3<sup>rd</sup> day of May, 2016.he told the court that he had the register in court and it showed that the victim was in school from 4.1.2016 to 19.1. 2016.He produced the register as P. Exhibit 4.

**PW6 AGK**, was the victim's father who stays at Jamhuri Location and is a farmer. He confirmed to court that PW1 GMA was his daughter and at the time she was 16 years old and she goes to [particulars withheld] Primary School. He informed court that on 9<sup>th</sup> of January, 2016, he was at his shamba when his wife called him at around 7:00 pm informing him that the victim was missing. He told the court that he informed his wife that he would go home the following day. He said that the friends did not know her whereabouts and that he later heard that the victim was married. He told the court that when he went home on the 10<sup>th</sup> of January, 2016, the father of the Appellant came to inform him that his son had married the victim. He told the court that he informed him that the girl was a school girl and should be returned home. He confirmed to court that the Appellant's father did not do as he was told and it was at this point that he went to the head teacher at [particulars withheld] who advised him to come with the victim, the boy and his parents. He told the court that on 14<sup>th</sup> of January, 2016, the victim came with the accused and that he took them to the head teacher. He confirmed that he had known the Appellant from childhood. He told the court that the police were called and picked both the victim and the Appellant. He confirmed that he accompanied them to the police and recorded statements.

On cross examination, the witness confirmed that he went to the head teacher when his daughter went missing. He also confirmed that there existed no grudge between the two of them. He told court that he reported the matter to the head teacher, that he was the victim's parent and that he told the Appellant's father to bring the victim home.

**PW7 No. 70734 PC Geoffrey Thiaine** attached to Wenje Police Station performing general duties. He stated that on the 12<sup>th</sup> of January, 2016, he was on duty when he received a report from Bububu Head teacher that one of the parents had reported a missing daughter. He told the court that he recorded the complaint in the Occurrence Book and that he also recorded his statement on 13<sup>th</sup> January, 2016.he told the court that the head teacher called him and informed him that the parent would bring them to school the following day. He informed court that on the 14<sup>th</sup> of January, 2016 when the head teacher called him, they proceeded to the school and arrested the Appellant. He told court that they took the girl to hospital where she was examined and later charged with the present offence.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellant was placed on his defence and he elected to give a sworn statement.

The Appellant stated that he remembers the charges and that they are not true. That he was 17 years and on 14<sup>th</sup> January, 2016, he went to

buy food for his siblings and upon returning home, he met Baba Ali with his daughter. He recounted that Baba Ali told him to follow him in order to repay a debt he owed him. The Appellant later went to follow him to school where he worked. The Appellant told the court that as he waited for him, he saw people he did not know approach him and later arrested him. They introduced themselves as police. The Appellant enquired why he was being arrested but they informed him that he would be informed at the police station. He stated that they brought him to Hola and later to court.

## **Submissions**

### **Appellant's written Submissions**

The Appellant filed undated written Submissions in support of his appeal. It was the Appellant's submission that both penetration and age of the victim were not proved to the required standard. He stated that the evidence of PW4 could not be relied upon to prove the actual age and penetration.

Further, he submitted that the complainant's conduct played a fundamental role in the defilement case. He contended that the complainant was behaving like an adult and as such, she was mature enough to consent for marriage. The Appellant further contended that the victim's parents were to blame for their failure to ensure that the complainant was disciplined.

The Appellant submitted that the prosecution failed to produce certified formal primary documentary evidence to prove the actual age and penetration to the victim to justify the legality of the sentence awarded. He relied on *Moses Nato Raphael v Rep Cr. App No. 169 of 2014 (2015) eKLR*.

## **ANALYSIS AND DETERMINATION**

In criminal cases before a trial Court one of the fundamental duties of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence.

***In R v Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330 it was held that:***

***“When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person.”***

The general provisions on the legal and evidential burden are to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence. In *Woolmington v DPP {1935} AC 462 Lord Sankey stated* in the following terms:

***“But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty.”***

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See *Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR*.

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

In order for the offence of defilement to be proved, the prosecution must prove all the three elements of defilement being the age of the Complainant, proof of penetration and the positive identification of the perpetrator. See *Charles Wamukoya Karani v Republic Criminal Appeal No.72 of 2013*.

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See *Moses Nato Raphael v Republic (2015) eKLR*.

It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. In *Thomas Mwambu Wenyi v Republic (2017) e KLR* cited with approval *Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000* which held that:

***“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”***

In *Richard Wahome Chege v Republic (2014) e KLR* the Court of Appeal sitting in Nyeri pronounced itself thus:

***“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself.”***

In the instant case, proof of age of the complainant was given by PW4 who produced an Age assessment Form as P. Exh.3. On proof of age of the victim, the Sexual Offence Rules of Court 2014 Rule 4 provides that: -

***“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”***

In the case of *William Odhiambo Siara v Republic (2014) Muchelule J* held that: -

***“It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence.”***

In this case, the victim informed the court that she was 15 years old while PW4 told the court that the victim was 15 years. Having made the above analysis, I am satisfied that the age of the victim was satisfactorily proved to be 15 years old at the time of the offence.

On the element of penetration, Section 2 of the Sexual Offences Act defines penetration as:

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

The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant. In determining penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in *Dominic Kibet Mwareng v Republic (2013) eKLR* where the court stated that:

***“In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence...”***

In this case, the victim clearly recounted that they had sexual intercourse on the 8<sup>th</sup> day of January, 2016. It is also common place that penetration can be proved by the evidence of PW1 alone as provided by *Section 124 of the Evidence Act* which provides that:

***“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”***

This position was succinctly held by the Court of Appeal in *Williamson Sowa Mbwanga v Republic (2016) eKLR*, where it stated that:

***“The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in GEORGE KIOJI V REPUBLIC CR APP. NO.270 of 2012 (Nyeri): “where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and record the reason for such belief”***

The evidence of PW1 was corroborated by the medical evidence adduced by PW4 a clinical officer who examined the victim and filed the P3 Form. He found that the victim had a broken hymen. It is therefore clear that the evidence of the victim was corroborated by the medical evidence by PW4. To this end, it is the finding of this court that penetration was proved.

On identification, where identification is based on Recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The court of Appeal in *Francis Muchiri Joseph v Republic (2014) eKLR* held that:

***“In LESARAU v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name”.***

In the instant case, the victim informed the court that she knew where the Appellant lived and she also identified the Appellant. According to (PW1) evidence the period of observation of the Appellant was over long period of time to support recognition of the Appellant positively.

From the evidence of the Appellant, he did not disapprove that he did not engage in sexual intercourse with the complainant and in fact from the evidence on record, it is evident that the Appellant and his father seduced the victim into believing that it was okay for her to be with the

Appellant since the Appellant's father said he would talk to her father. Though the case on identification was solely that of the complainant, I find no danger for the trial court to have convicted the Appellant as such on a single identifying witness in the circumstances of this case.

Considering the facts outlined above, the circumstances of the case is that the Appellant seduced the victim to thinking that her father had agreed to have her married off to the Appellant and for the above reasons the appeal on conviction and sentence is dismissed. That is the order of the court.

**DATED, SIGNED AND DELIVERED AT GARSEN THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**