



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 1 OF 2019

REPUBLIC.....APPELLANT

VERSUS

PAUL WANJOHI KIRIGO.....RESPONDENT

(Appeal from the judgment of the Nyeri Chief Magistrate's Court delivered

by Hon.P. Mutua SPM on 20/12/2018 in S.O. Criminal Case No.24 of 2014)

JUDGMENT

1. The Appellant is the Director of Criminal Public Prosecutions; the respondent **Paul Wanjohi Kirigo** was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** the **Sexual Offences Act**; the particulars of the charge are that on the 25th of June, 2014 at [Particulars Withheld] Village in Nyeri County he unlawfully and intentionally caused his genital organ to penetrate into the genital organ of **LWK** a child aged 8 years.

2. On the 1/08/2014 an alternative charge was included of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**;

3. The facts of the case as recorded by the trial magistrate are that the prosecution called a total of five (5) witnesses whereas the respondent elected to give sworn evidence and called six (6) defence witnesses; the trial court found that the alternative charge as framed to be fatally defective; as for the main charge it found that the charges against the respondent were not proved to the desired threshold and acquitted him on all the charges on the 20/12/2018;

4. Being dissatisfied with the judgment, the appellant filed a Petition of Appeal on the 25th August, 2020 and raised the following grounds of appeal;

(i) That the trial court erred in acquitting the respondent yet the prosecution adduced evidence on age, penetration and identification and proved its case to the desired standard;

(ii) That the trial court erred in finding that the respondent had poked holes in the appellants' case;

(iii) That the trial court failed to consider the prosecution's overwhelming evidence and exhibits; and placed more weight on the defence evidence;

(iv) That the prosecution did not prove its case beyond reasonable doubt and;

(v) That the trial magistrate disregarded the appellants' defence.

5. At the hearing hereof the appellant was represented by Prosecuting Counsel for the State, Miss Gicheha where as the respondent was represented by learned counsel Ms.A.Thungu; the parties were directed to canvas the appeal by filing and exchanging written submissions; hereunder is a brief summation of their respective submissions.

APPELLANT'S SUBMISSIONS

6. Counsel submitted that the critical ingredients forming the offence of defilement are (i) positive identification of the assailant; (ii) age of

the complainant and (iii) proof of penetration; case law referred to **Charles Wamukoya Karani vs Republic Criminal Appeal No.72 of 2013**;

7. **On age**; The Birth Certificate of the complainant was produced as an exhibit and the mother **PW2** also testified and confirmed the age of the complainant as being 9 years; the age of the complainant was therefore proved to be under 11 years as stipulated under the provisions of Section 8(2) of the Sexual Offences Act;

8. **On penetration PW1** testified that the respondent removed her panties and inserted his thing; he then told her that if she was asked as to what had happened she was to say that she had been pierced by a stick and should she fail to do so he would beat up her father so that he would end up in hospital;

9. Penetration was also proved by the medical evidence of the doctor **PW5** Dr, Susan Njuguna who stated that the examination was carried out 4 hours from the time the incident took place; the minor was bleeding from the vagina and had a 'V' shaped tear which was caused by force; this was treated with stitching and toileting; she produced Post Rape Care Form (PRC) as '**PExh.2**'; this form suffices as the primary medical evidence in cases of sexual offences; case law referred to **TNM vs R (2017) eKLR**;

10. **The identification** of the perpetrator was by recognition; **PW1** knew the person who had defiled her as her uncle; that evidence of recognition was better than that of identification particularly when the victim had interacted with the perpetrator previously; refer to **Peter MusauMwanzia vs R [2008] eKLR**;

11. The appellant proved all the requisite ingredients of the offence beyond reasonable doubt;

12. On the second ground of appeal the appellant submitted that the respondent did not at any time poke holes in its case; the respondent kept alluding to an existing grudge between himself and the victims' family over issues of land; yet no documentary evidence was availed to the court to show that indeed such a dispute existed; all the trial court needed to determine were three issues whether **PW1** was defiled; who defiled her and the age bracket of **PW1** under the Sexual Offences Act;

13. **PW2** took **PW1** to hospital under the mistaken belief that she had been injured by a stick only to be informed by the hospital that the minor had been defiled; if there existed a grudge **PW2** would have mentioned the defilement at the first instance; she too was shocked when the doctor informed her on the defilement; and further shocked to learn that the respondent was the defiler;

14. **PW2** stated the **PW1** had never lied to her before and there was no reason to do so; that the minor withheld the truth initially was due to fear and intimidation meted upon a vulnerable child; she only openly spoke out after undergoing counselling at the hospital;

15. It was submitted that the trial court placed more weight on the defence evidence; the respondent raised an alibi defence during his defence hearing which was not at the earliest given opportunity; case law **Athuman Salim Athuman vs Republic (2016) eKLR**; and neither was this defence raised during cross-examination of the prosecution witnesses; the only issue raised was that of a grudge arising out of a land dispute;

16. The defence witnesses evidence was contradictory and not credible as they gave evidence as to the day of arrest being the date of the commission of the offence; **PW5** stated that the respondent sold vegetables at 3pm and under cross-examination admitted that she could not account for the respondents movements from 3pm to 5pm; that it was clear that the respondent had two hours in which to commit the offence which the minor had stated occurred between 4pm to 4.30pm during the time she had left school;

17. The trial courts finding that the complainant pointed out the respondent as the perpetrator to enable her to be released from hospital was baseless as it was not anchored by any evidence;

18. In conclusion counsel submitted that the prosecution had proved its case beyond reasonable doubt and prayed that the appeal be found to have merit and it be allowed; the judgment of the trial court be set aside and the acquittal be substituted with a conviction and a sentence.

RESPONDENT'S SUBMISSIONS

19. In response counsel submitted that in all criminal cases the prosecution had the task of proving each and every ingredient of the offence of defilement beyond reasonable doubt; the ingredients are age, positive identification and penetration; and the most important ingredient of the offence that needs to be proved is that penetration;

20. The respondent's contention was that penetration as defined under Section 2 of the Sexual Offences Act was not proved and that the doctor **PW5** stated in her testimony that she never examined **PW1**; the Post Rape Care Form had no conclusion; **PW5** was non-committal on the act of penetration which then raised doubts as whether the offence was committed; under cross-examination this witness stated that the 'V' shaped tear could have been caused by a stick; she further testified that victims of sexual violence are normally anxious and agitated but in this instance **PW1** was unusually calm;

21. The question posed was that could a hymen only be ruptured by sexual intercourse; courts have taken the view that a broken hymen was not proof of sexual intercourse and that vigorous physical activities like horse riding and gymnastics can also be the cause of the tearing of the hymen; therefore a court ought to take into account the evidence in totality and not in isolation of other factors surrounding the case; caselaw relied on **PKW vs Republic [2012]eKLR**;

22. The evidence of the defence witnesses corroborated the respondents statement of defence; the church caretaker gave evidence that she saw **PW1** fall from a tree near the church and was carried away by other children; **DW6** confirmed that his children reported this incident to

him yet the prosecution failed to call these children as witnesses to give an account on how **PW1** got injured; the court can then infer that these witnesses were deliberately not called as their evidence would have been adverse to the prosecution's;

23. There were material contradictions in the evidence of **PW1** and the other prosecution witnesses evidence; **PW1** had told the doctor **PW5** that she had fallen from a tree and later denied this in cross-examination; her initial report to **PW2** was she had been pricked by a stick but later changed it to the respondent had defiled her; **PW1** and **PW3** contradicted themselves as to where the alleged defilement took place; **PW1** said it was on a sofa yet **PW3** stated that it was on the floor; **PW1's** evidence was not water tight and was shaken during cross-examination creating doubts in the mind of the court; case law relied on **Jackson Mwanzia vs Republic (2017)eKLR**;

24. On appeal the appellant tried to introduce new evidence that the respondent had brain washed **PW1** into saying that she had been pricked by a stick; but there was no such evidence adduced at the trial to support this assertion; therefore, this evidence cannot be introduced at the appellate stage; the minor's first narration of the events to **PW2** and **PW5** was the truth;

25. The alibi defence raised by the respondent was not an afterthought as alleged by the appellant; the prosecution failed to adduce evidence in rebuttal; that it was wrong to assert that the trial court wrongly placed weight on the defence evidence as opposed to the prosecution's; the trial court correctly applied the law and correctly applied the gaps in the prosecution's case in favour of the appellant;

26. Counsel urged the court to dismiss the appeal as it had no merit and to uphold the lower courts judgment.

ISSUES FOR DETERMINATION

27. After taking into consideration the above submissions these are the issues framed for consideration;

- (i) Whether the prosecution proved its case to the desired threshold;

ANALYSIS

28. This being the first appellate court it has a duty to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32**.

Whether the prosecution proved its case to the desired threshold;

29. In cases of defilement the key ingredients are identification, age and penetration;

30. **On the issue of age** the Birth Certificate of the complainant was produced as an exhibit and the mother **PW2** also testified and confirmed the age of the complainant as being nine (9) years;

31. This court is alive to the fact that the age of the victim is a crucial component for purposes of sentencing and that it must be either assessed or proved by a medical document or other documentary evidence; in this instance this court is satisfied that the prosecution proved the age of the complainant by the production of documentary evidence in the form of a Birth Certificate; and is further satisfied that the prosecution proved the age bracket of **PW1** under the Sexual Offences Act;

32. **On identification** there was no doubt that this was by recognition; the perpetrator was a person well known to **PW1** and she referred to him as her uncle; the evidence of recognition is always better than that of identification particularly when the victim has interacted with the perpetrator previously; and the incident is said to have occurred between 4.00pm and 4.30 pm which was during the day and therefore there were no unfavourable circumstances or conditions obtaining so as to cloud positive identification of the appellant by **PW1**.

33. **On penetration**; from the evidence on record on the initial report made by **PW1** to her mother **PW2** was that she had been pricked by a stick but later changed her report to having been defiled by the respondent; **PW3** also gave the same narrative that when she initially spoke over the phone to **PW1** she was told by **PW1** that her private parts had been pricked while picking fruits; later when **PW3** visited **PW1** in hospital the minor told her that she had been defiled by the Respondent and that he had told her to say she had been pricked by a stick;

34. The medical evidence of Dr. Susan Njuguna (**PW5**) was based on the Post Rape Care Form which was produced in evidence as **PExh.2**; she stated under cross-examination that this form did not contain any lab findings; that she was not in a position to know why tests were not conducted; and it was therefore **"....impossible to find out if there were pus cells, semen etc. and semen and pus cells not expected if the injury is caused by a stick."**; the witness went on to state that the **"PRC form is a medical examination report as it files a summary of the examination. There was no conclusion in the Post Care Form."**

35. It is this courts considered view that the medical evidence does not provide sufficient corroboration on the act of penetration; the doctor **PW5** was non-committal on the act of penetration and stated in her testimony that the Post Rape Care Form had no conclusion; under cross-examination this witness stated that the 'V' shaped tear could have been caused by a stick; she further testified that victims of sexual violence are normally anxious and agitated but in this instance the PRC form stated that **PW1** was unusually calm;

36. The gaps in the PRC form and the evidence of **PW5** raise doubts as to whether the offence was committed; and as correctly stated by the trial court in its judgment;

"That there was no medical evidence to link the accused with the offence."

37. The trial court went on to state that the only evidence that linked the appellant to the commission of the offence was that of PW1; the court proceeded to invoke the proviso to Section 124 of the Evidence Act and made an observation that a conviction could be based on the sole evidence of the victim in sexual offences provided the court was satisfied that the victim was telling the truth; but after considering the evidence of **PW1** in totality the trial court noted that there were material contradictions on where the act of defilement was committed and inconsistencies in her testimony on who **PW1** had confided in and being not satisfied that she was a truthful witness concluded as follows;

“It is therefore clear that PW1 was not truthful when she told the court that she told PW2 that it was the accused who defiled her.”

38. The trial court did not stop there but also took into consideration other factors surrounding the case such as lack of proper or poor investigations carried out by the investigating officer that **‘led to insufficient evidence’**; the failure by the prosecution to call crucial witnesses like **PW3’s** child who is said to have been with **PW1** when the incident occurred; it is also noted that **DW6** confirmed that his children had reported this incident to him yet the investigating officer and the prosecution failed to also call these children as witnesses to give an account on how **PW1** got injured; lastly the appellant had raised an alibi defence which the prosecution failed to rebut;

39. Upon re-evaluating the evidence on record finds that the prosecution’s case on penetration was based on doubtful evidence of the prosecution witnesses; there were gaps in the prosecutions’ case which raised doubts and it is trite law that the appellant is entitled to benefit of doubt; there are also material contradictions and inconsistencies found in the evidence of **PW1** that goes to the root of the prosecutions’ case; for these reasons this court finds no good reason that warrants interference with the trial courts findings that the offence against the accused was not proved beyond reasonable doubt;

40. This court is satisfied that the prosecution failed to prove its case to the desired threshold; this ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

41. For those reasons this court makes the following findings and determinations;

- (i) This court finds that there are material inconsistencies and contradictions in the prosecution’s witnesses evidence that go to the root of the prosecutions’ case;
- (ii) The prosecution is found to have failed to have proved its case to the desired threshold;
- (iii) The appeal is found to be lacking in merit and it is hereby dismissed; the judgment of the lower court is hereby upheld.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 11th day of February, 2021.

HON. A. MSHILA

JUDGE