



**REPUBLIC OF KENYA**

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

**HCCRA NO. 51 OF 2019**

**TEDDY JUMA NYABOLA.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***[Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu***

***\_(Hon. W. K. Onkunya SRM) dated the 5<sup>th</sup> September 2019 in Kisumu CMCCRC SEXUAL OFFENCE No. 21 of 2018]***

**JUDGMENT**

**TEDDY JUMA NYABOLA** was convicted for the offence of **Defilement** and was then sentenced to 10 Years Imprisonment.

1. In his appeal he has challenged both the conviction and the sentence.
2. The first issue he raised was about the Charge Sheets. He pointed out that there were 2 charge sheets at the trial court. The first charge sheet cited the age of the Complainant as 16 years, while the second charge sheet indicated that the Complainant was 13 years old.
3. The Appellant submitted that it was not possible for the mother of the Complainant to forget the age of her daughter. Therefore, the Appellant was convinced that the case was simply created, so that he could be convicted.
4. Secondly, he submitted that his Constitutional rights were violated, because he was taken to court about six (6) days after he had been arrested.
5. When canvassing the appeal, the Appellant pointed out that the Complainant made it clear to the trial court, that when she went to visit the Appellant, he sent her away, saying that he did not want to have any problems with her parents.
6. The Appellant further pointed out that it was the Complainant who laced his soft drink with alcohol. After he had had the said drink, the Complainant followed him to the house.
7. The picture that was painted by the Appellant was that he was a victim of the Complainant's tricks, and that he never wanted to have an affair with her.
8. On the one hand, the Appellant described the evidence of the Complainant as evidence of

***“a good gesture from the appellant”;***

whilst on the other hand, the Appellant submitted that;

***“... all the testimony and evidence of PW1 are lies and afterthoughts, and that she might have been defiled at the friend's place and decided to come to my place so that she could fix me at the expense of the defiler where she was taking liquor.”***

9. The Appellant reinforced his submissions by pointing out that the Complainant did concede having told lies at the police station.
10. On account of the concession made by the Complainant, about the untruths which she told at the police station, the Appellant urged the court to dismiss her evidence.

11. It was the Appellant's further submission that there was inconsistency in the evidence about the identity of the person who informed the mother of the Complainant, about what had transpired. The Appellant drew the court's attention to evidence which showed that the mother was given information by a neighbour called Jackline Ochieng; yet there was other evidence which said that it was an Aunt named RO who provided the information.

12. Other examples which the Appellant pointed out, to show that the evidence was contradictory are as follows;

(i) *PW3 talked about the door being opened, after the witness had knocked upon it, with decorum; whilst PW1 and PW2 said that the door was broken down.*

(ii) *PW3 said that the distance between the police station and the scene was 1 kilometer. Yet, PW4 testified that it took 2 – 3 hours to cover that distance.*

(iii) *PW5 testified that the complainant suffered grievous harm, yet there was no evidence that the complainant's vagina, (which was described as not fully developed), had been ruptured and required stitching.*

(iv) *PW6 said that the complainant told her that the appellant had used protection during the sexual intercourse.*

13. As that information was given at the police station, the Appellant submitted that that was part of the lies which the Complainant conceded when testifying. Therefore, he expressed the view that the arrest and charges were based upon false information.

14. The Appellant faulted the trial court for concluding that he did not make attempts to avoid the Complainant. He submitted that the evidence on record shows that he made serious efforts to avoid the Complainant.

15. Finally, the Appellant informed the court that he had contracted "*epidemics Kaposi Saroma*", while in custody.

16. In response to the appeal, the learned State Counsel,

Ms M. Odumba submitted that all the ingredients of the offence of defilement were proved beyond any reasonable doubt.

17. On the issue of the age of the Complainant, the Respondent submitted that it was proved to be 13 years, through the Birth Certificate.

18. As regards the identity of the offender, the Respondent submitted that this was a case in which the victim and the offender were neighbours. They had known each other even before the incident. Therefore, the Respondent submitted that there was no room for mistaken identity.

19. The Respondent submitted that the Appellant's defence was a mere denial, which did not shake the prosecution's case.

20. Whilst conceding that the Complainant had spiked the Appellant's drink, the Respondent submitted that the Appellant failed to demonstrate to the Court, the efforts he made to avoid the Complainant's advances.

21. On the question of the sentence, the Respondent pointed out that the statute set the Minimum Prison Term of Imprisonment for the offence of **Defilement** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**, at 20 Years.

22. Therefore, as the trial court had jailed the Appellant to 10 years, the Respondent described the said sentence as lenient.

23. As is required of the first appellate court, I will re-evaluate the evidence on record.

24. **PW1, "LWO"**, is the Complainant. She testified that she was 13 years old. Her evidence was that she visited the Appellant at his house on the night of 20<sup>th</sup> November 2018, but he sent her away.

25. On the next day, **PW1** met the Appellant when she had gone to visit his friend. She spiked her soda with some alcohol, and then gave it to the Appellant.

26. **PW1** followed the Appellant to his house, where she

*"forced him to have sex with me."*

27. She then spent the whole night in the Appellant's house.

28. Early the next morning, before **PW1** woke up, her aunt, named RO arrived and started screaming loudly, saying that Teddy had turned **PW1** into his wife.

29. According to **PW1**, she asked her aunt to stop shouting, because **PW1** had voluntarily gone to the home of Teddy, the Appellant.

30. **PW1** testified that aunt Rose phoned her mother (**PW2**) and told her that Teddy had turned **PW1** into his wife.

31. On the next night, **PW1** went to the Appellant's house at 7p.m, but he told her go away. He said that he did not want to have problems with the mother of **PW1**.
32. On the night of 24<sup>th</sup> November 2018, **PW1** was arrested at the Appellant's house.
33. When they got to the police station, **PW1** said that the Appellant had forced her to sleep with him, three times.
34. However, **PW1** testified that the information she gave to the police was untrue, because she had had sex with the Appellant only once, on 21<sup>st</sup> November 2018.
35. During cross-examination **PW1** explained that she told lies at the police station because she did not want to be detained at the station.
36. **PW2, "LAO"** is the mother of the Complainant.
37. She testified that at the material time, she was attending a funeral at Maseno. It is during that period when the daughter used to leave from their home, to go and visit the Appellant's house.
38. The person who told **PW2** about the happenings was her neighbour, Jackline Ochieng.
39. On the night of 24<sup>th</sup> November 2018 **PW2** was accompanied with police officers, when they went to the Appellant's house.
40. At the said house, the police found both the Appellant and the Complainant.
41. It is then that the Appellant was arrested.
42. **PW2** produced the original Birth Certificate for the Complainant, which shows that the Complainant was born on 4<sup>th</sup> April 2005.
43. **PW3, CPL ERICK NYAKAKO** was one of the police officers who accompanied **PW2** to the Appellant's house on the night of 24<sup>th</sup> November 2018.
44. He said that when the police knocked on the door, it was opened by the Appellant.
45. Inside the house, they found the Appellant with the Complainant, and they arrested the Appellant because he was with the minor, in bed.
46. **PW4, APC MARY AWUOR** was in the company of **PW3** when they arrested the Appellant at his house.
47. **PW5, DR. MACRINE ODHIAMBO OLWALA** was a Senior Medical Officer at the **JARAMOGI OGINGA ODINGA TEACCHING & REFERRAL HOSPITAL**.
48. She examined **PW1** on 29<sup>th</sup> November 2018. **PW1** told her that she had been sexually assaulted by somebody she knew.
49. **PW5** found the External Genitalia to be normal: the Anus was intact; there was no discharge; but the hymen was absent.
50. The laboratory examinations revealed Epithelial cells; no pus cells, and no spermatozoa.
51. The doctor testified that;

***"There was penetration. The hymen was absent. Presence of Epithelial cells.***

***Epithelial are the superficial layer of any surface in the body. Under normal circumstances it is usually intact. HVS are nil for Epithelial.***

***When there is activity, as in the case, sexual penetration, the epithelial cells will be many in the swab."***

52. During cross-examination the doctor explained that the injury sustained by the Complainant was classified by the doctor as being "Grievous Harm".
53. When asked for the meaning of that classification, the doctor said;

***"Grievous harm ..... is harm that permanently disfigures and causes permanent –***

***The victim was 13 years old and her sexual organs are not fully formed.***

*(Still very weak). They are not supposed to handle the stress that comes after sexual intercourse.*

*Anatomic injury might happen and might lead to long life issues, and if the anatomic injuries are absent then the risk of permanent psychological trauma, as in this case.*

*Anatomically, there was no permanent injury.”*

54. **PW6, SGT AMINA MOHAMED**, was the Investigating Officer. Her investigations revealed that the Complainant visited the Appellant's house during the period of time when her mother was away from home, attending a funeral.
55. **PW6** testified that the Appellant was arrested at the house, when he was in the company of the Complainant.
56. After **PW6** testified the prosecution closed its case.
57. When the Appellant was put to his Defence, he gave sworn evidence.
58. He told the court that on 24<sup>th</sup> November 2018 he went to work, as is his normal practice. After work, he went to “H Club” at the Fanana area, where he stayed until 10p.m.
59. Whilst he was on his way home, police officers arrested him, but they did not disclose to him the reason for his arrest.
60. On the next day, **PW2** went to the cell where the Appellant was being held and told him that the money which he was bragging about would not help him.
61. The Appellant said that he had had a sexual relationship with the Complainant's mother; but he denied having defiled the Complainant.
62. Having given due consideration to all the evidence on record, I find that the evidence tendered by the Complainant and her mother, proved beyond any reasonable doubt that the Complainant was 13 years old.
63. When cross-examining the Complainant, the Appellant did not challenge the facts provided by her, about the sexual relationship they had had.
64. And, similarly, when he was cross-examining **PW2**, he did not suggest to her that she was the person who he had had a sexual relationship with.
65. Thirdly, the Defence did not answer to any of the evidence tendered about what had taken place on the night of 21<sup>st</sup> November 2018. He only made reference to what happened on the date of his arrest, on 24<sup>th</sup> November 2018.
66. The medical evidence proved beyond any reasonable doubt that the Complainant was a victim of sexual assault.
67. The identity of the person who perpetrated the offence was definitely ascertained. This was a case of recognition.
68. I find nothing in the record of the proceedings to suggest that the mother of the Complainant had forgotten the age of her daughter who is the Complainant.
69. As regards the alleged violation of the Appellant's constitutional rights, I hold the considered view that if the Appellant prosecutes a case against those who might have violated his said rights, the court would make an appropriate determination.
70. At the moment, no issue arises from the judgment which is the subject matter of this appeal, regarding the alleged violation of the Appellant's rights. I cannot therefore determine a new issue when called upon to determine an appeal arising from the judgment of the trial court.
71. It is correct that the Complainant owned-up to the untruth which she told at the police station. She had told the police that the Appellant forced her to sleep with him 3 times. However, she told the court that he only had sex with her on one occasion.
72. Her explanation was that she told the lie because she did not want to be remanded at the police station; whilst she believed that the Appellant had the ability to stay in the cell.
73. In the light of that piece of evidence, it was open to the Appellant to further cross-examine the Complainant, so as to enable the court ascertain whether or not the Complainant had told other lies.
74. The fact that a witness admits telling one untruth does not necessarily imply that everything else that the witness said was untrue. That is amplified by the Appellant, when he acknowledges that the Complainant told the court that he had sent away the Complainant, in order to avoid problems with her parents.
75. The Appellant described that aspect of the Complainant's testimony as constituting evidence of a good gesture on his part.

76. Through that invitation, the Appellant is acknowledging that there were aspects of the evidence tendered by the Complainant, which were acceptable even to him.

77. As regards the alleged contradictions in the evidence of the prosecution witnesses, I find as follows;

*(a) PW1 did not say that the police brokedown the door to the Appellant's house.*

*She said that the Appellant opened the door when they felt that it was being broken.*

*PW2 also said that the appellant opened the door.*

78. In effect, those 2 witnesses gave evidence that is consistent with PW3.

*(b) PW4 said that it took the police officers 2 to 3 hours to reach the house of the accused. As PW3 had said that from the scene to the police station was a distance of one kilometer, it is not clear why it took the officers that long to cover the distance.*

79. However, I find that nothing turns on the said evidence, because no clarification was sought from the witnesses, during trial.

*(c) The issue of "Grievous Harm" was explained in great detail by the doctor. The doctor said that anatomically, the complainant had no permanent injury; but the complainant had the risk of permanent psychological trauma, which is classified as "grievous harm."*

*(d) Was protection used?*

80. The Complainant did not specify whether or not the offender used protection, whilst the Investigating Officer said that protection was used on 21<sup>st</sup> November 2018. The Investigating Officer said that on the next day, protection was not used.

81. As none of the other witnesses gave evidence on the issue concerning the use, or otherwise, of protection, this court is unable to determine if there is any reason to doubt the testimony of the Investigating Officer.

82. But, in any event, when penetration has been proved, as in this case, the offence has been committed, regardless of whether or not the offender has used protection.

83. In this case, penetration was conclusively proved.

84. However, one aspect of this case has caused me a lot of anxiety. The issue stems from the testimony by the Complainant, that she had spiked the soda with alcohol, before giving it to the Appellant. She said that the Appellant was drunk, when she caused him to have sex with her.

85. Bearing in mind the fact that prior to 21<sup>st</sup> November 2018 the Appellant sent away the Complainant, in order to avoid problems; and also that on the following day, he refused to have sex with the Complainant, it does appear that when he had sex with her, he did so without his own free will or intention.

86. In **Barton Muruthi Mureithi V Republic, Criminal Appeal No. 135 of 2017**, Kimaru J. quashed the Appellant's conviction because the trial court had failed to take into account the provisions of **Section 13 (4)** of the **Penal Code**. The said Section states as follows;

*"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."*

87. In construing that provision, it is imperative to bear in mind **Section 13 (1)**, which explicitly stipulates thus;

*"Save as provided in this section, intoxication shall not constitute a defence to any criminal offence."*

88. In this case, the Appellant never raised the defence of intoxication. He just denied committing the offence. And he did not want the court to believe the evidence tendered by the Complainant.

89. Nevertheless, the conduct of the Appellant on two separate occasions, when he was not under the influence of any intoxicant, lead me to find that it was more probable than not that the Appellant committed the act of penetration when he was under the influence of an intoxicant which was given to him by the Complainant.

90. It is not easy to imagine that the Appellant took the soda laced with alcohol, without any idea that it had alcohol.

91. But none other than the Complainant told the court that the Appellant was drunk, and was *"not in his normal senses."*

92. In those circumstances, I find that the Appellant did not knowingly or intentionally commit the offence. I therefore give to him the benefit of doubt, concerning his state of mind.

93. In the event, the appeal is allowed, the conviction is quashed and the sentence set aside.

94. I order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

95. I conclude this judgment by offering a piece of advice to persons who may think that if they commit offences whilst intoxicated, the courts will not convict them. **Section 13 (1) of the Penal Code** is very clear **about the scope of the application of the defence of intoxication.**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF MARCH 2021**

**FRED A. OCHIENG**

**JUDGE**