



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.50 OF 2019

GILBERT KAHORO MWONYA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. E KELLY (SRM),

DATED 10TH JULY 2019 IN CRIMINAL CASE NO.117 OF 2017).

JUDGEMENT.

1. The appellant was charged with the Offence of Defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 4th day of June 2017 at [Particulars Withheld] area within Nakuru county intentionally and unlawfully committed an act by inserting a male genital organ namely penis to a female genital organ namely vagina of HWM a child aged 8 1/2 years old.

2. The alternative charge is Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 4th day of June 2017 at [Particulars Withheld] area within Nakuru county intentionally committed an indecent act by touching private part namely vagina of HWM a child aged 8 1/2 years old.

3. The appellant was convicted and sentenced to 25 years' imprisonment hence this appeal which has raised about four grounds of appeal. Before looking at the merit or otherwise of the same it shall be necessary to summarise the evidence as presented during trial.

4. **PW1**, the minor testified that she was almost 9 years' old and a class 4 pupil. That on 4th June 2017 she decided to go and play with her friend but she did not find her. On the way she met the appellant who was a neighbour and who volunteered to assist her in her maths homework. They went to his house where he began touching her thighs and thereafter closed her mouth, placed her on the seat and defiled her.

5. After she was through he warned her not to tell her mother or she was going to kill her. She went to school the following day and it was only on the third day that her mother noticed that she was not walking well. She informed her of what the appellant had done. Her mother then removed her clothes and found that she had injuries in her vagina and some fluids coming therefrom.

6. They then went with her mother to look for the appellant whom they found entering the toilet. He however denied and they went to the hospital where she was examined and treated. The appellant was as well examined. They as well went to the police station where the appellant was placed in custody.

7. She said that the appellant covered her mouth that is why she could not scream for help.

8. When cross examined by the appellant she said that that was the first time he had assisted her with her homework. She said that it was on a Sunday and that the appellant had threatened to kill her if she disclosed what had happened.

9. **PW2 BM**, the mother to the complainant testified that on the 7th June 2017 the complainant came from school late and said that she was unwell when she noticed that she was walking abnormally. She told her to remove her clothes and she saw some blood stains and semen on her clothes and panty. She told her that the appellant had defiled her and warned her not to tell anyone.

10. She said that she went and met the appellant who told her not to raise any alarm and that he was to take the child to the hospital. They

went to Nairobi Women hospital where she was examined and P3 and PRC forms were filled. The police then arrested the appellant.

11. When cross examined she said that the child refused to tell her what had happened as he had threatened her with death. She said that they walked together to the hospital and that he requested that she should not raise any alarm. She also said that she saw blood and mucus secretion on her clothes upon checking the child.

12. **PW3 PC EUNICE MUTHONI** from Kaptembwa police station was the investigating officer. She said that a report was made by PW2 on 8th June 2017 and she directed that the child be examined at Nairobi women hospital where PRC form was filled. Later the P3 form was filled.

13. She said that she recorded statements from the witnesses and preferred charges against the appellant. That the appellant was brought to the station by the members of public.

14. **PW4 DR. NJOROGE RUKU** from Nairobi women hospital examined the complainant on 8th June 2017 and filled the P3 and PRC forms. She found that she had broken hymen and whitish discharge from her vagina. The vagina was also swollen. She produced the two documents as pieces of evidence.

15. When cross examined he said that hymen can be broken by other means but in this case the minor explained to him what had happened.

16. When placed on his defence the appellant gave unsworn evidence denying the charge and stated that he worked at his jua kali business on the three mentioned days and when he returned home on Wednesday he was confronted by PW2 who informed him that the child had been defiled. He accompanied her to Mother Calvin hospital where she was examined.

17. He said that he did not know why PW2 told her about the incident. She then screamed for help and he sought refuge at the same doctor till the police arrived. He was taken to the police station and was later charged.

18. When the matter came up for hearing the court ordered the same to be heard by way of written submissions which the parties complied. The applicant in his submissions based on the grounds raised submitted that he was incarcerated for 4 days in police custody and therefore his constitutional rights were trampled upon **contrary to Article 49 of the Constitution**.

19. That the court failed to take into account that the dates for the said defilement varied from 4, 7 and 8th June which created a doubt which should have been construed in his favour. He also submitted that crucial exhibits to wit the child's clothes which were tainted with semen and blood should have been produced.

20. He also submitted that the issue of which hospital the minor was taken after the incident was not considered by the trial court. In other words, the complainant's mother talked of Mother Kelvin hospital instead of Nairobi women hospital which the court failed to distinguish.

21. He submitted as well that crucial witnesses were not called especially the friends to the complainant and this showed that the respondent had some hidden agenda. Essentially he submitted that the court failed to consider his defence and thus fell into error and in the premises prays that his appeal be allowed.

22. In her submissions the learned state counsel submitted that the court's findings cannot be faulted as the case had been proved against the appellant beyond any shadow of doubt. That the period which the appellant alleges to have been held unconstitutionally was not correct as it was on a weekend and the courts were not sitting and at any rate he would be free to seek damages in a civil claim.

23. She submitted that the period in which the incident occurred was not an issue as the child spoke of 4th June 2017 and matter reported three days later. There was no apparent contradiction at all.

24. As regards the alleged exhibits not produced the same were no longer available as PW2 had already washed the same and thus it was not going to help in the investigations.

25. She went on to dismiss the defence by the appellant as the same did not raise much to rebut the prosecution's line of evidence. In short she prayed for the appeal to be dismissed as all the ingredients of the offence had been established.

ANALYSIS AND DETERMINATION.

26. The court has carefully perused the proceedings, the exhibits produced as well as the submissions herein. The duty of the appellate court at this juncture was well captured in the case among others of **OKENO V. REP (1973) E.A. 32** where it 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 (Pandya v R [1957] EA 336) 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 (Shantilal M Ruwala v R [1957] EA 570). 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, see Peters v Sunday Post [1958] EA 424.”

27. The three ingredients that must be established under the offence at hand are the age of the victim, the identity of the perpetrator and prove of penetration.

28. As regards the first heading the age of pw1 was proved by the production of the clinic card which was produced as exhibit 1. She was born on 2nd August 2009 a fact which was not disputed.

29. As regards the identity of the perpetrator, the incident no doubt occurred during daytime as the minor was going to her friend's place. Both the appellant and the minor were living next to each other as neighbours and known to each other. There was nothing especially from the appellant to suggest that he did not know the complainant nor her mother.

30. Was there prove of penetration? The evidence from the minor was corroborated by the doctor and the produced exhibits namely the P3 and PRC forms. Her mother as well explained what she saw after seeing that the child was not walking properly and undressed her. The sum total is that she was defiled.

31. The evidence pointed clearly to the appellant as the perpetrator. The evidence of the minor though a single witness in my view and as found by the trial court was truthful and believable. Even under cross examination by the appellant she remained steadfast. The provision of **section 124 of the Evidence Act Cap 80 Laws of Kenya** would aid her. The same states that;

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, 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.”

32. The failure to report to her mother immediately was clearly explained, namely, the threats that she could be killed by the appellant. Given her age, the threat in my view was real and imminent given that the appellant was a neighbour living nearby.

33. The other issues raised by the appellant in his appeal were periphery in nature. The issue of being held for more than 24 hours in police custody was clearly explained in the rebuttal submissions by the state counsel. In any case it was the appellant's evidence that the members of public were paying for his blood hence the reason why he went back to the doctor to seek refuge. Had he been released immediately perhaps he would not have been here now.

34. The minor's clothes were washed by PW2 and they were not available to be produced as part of evidence. At any rate this court does not find their lack of their production insufficient to prove the case.

35. On the issue of witnesses who were not called to testify, it is apparent that **Section 143 of the Evidence Act** does not indicate the number of witnesses to be called to prove an offence. It goes on to state that;

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

36. In this regard, the four witnesses and the exhibits produced in my view fully proved the case against the appellant. Failure to call the minors friends was not fatal as they did not witness the incident.

37. The appellants defence was not of much probative value for the reason that it was unsworn and even then it did not challenge the evidence as presented by the respondent. It merely narrated what the appellant had done for the last three days.

38. On the issue of the hospital which the child was taken, although there was no evidence that the child was taken to Mother Kelvin hospital, the evidence from Nairobi women hospital was conclusive that the minor was defiled. In my view that was the most important. There was no evidence that the findings were insufficient or it prejudiced the appellant.

39. On the issue of sentencing, I find the same completely efficacious. Essentially the maximum sentence was life imprisonment, but since the advent of the now famous **Francis Muruatetu** case by the Supreme Court of Kenya, our courts have been given the liberty to make an appropriate sentence depending on each case as long as the same is within the legal permitted parameters. The punishment meted against the appeal of 25 years is appropriate taking into account the circumstances herein.

40. In the premises, the appeal is unmeritorious and the same is hereby dismissed.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF APRIL 2021.

H.K. CHEMITEI

JUDGE