



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 48 OF 2019

WALTER KEPHA GIKONYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment of P. Kiama, Senior Principal Magistrate,

in S.O. No. 31 of 2018 at Kangema dated 18th October 2019]

JUDGMENT

1. The appellant was convicted for *defilement* contrary to section 8 (1) as read with section 8 (2) of the **Sexual Offences Act**. He was sentenced to *life imprisonment*.
2. The particulars were that on diverse dates in January 2018 and September 2018 at W. *[particulars withheld]* within Murang'a County, he intentionally caused his penis to penetrate the vagina of J.N.M. *[particulars withheld]* a girl aged *nine years*.
3. The petition of appeal raises four grounds. I will compress them into two: Firstly, that on the totality of the evidence, the conviction was unsafe; and, secondly that the sentence handed down was manifestly excessive.
4. At the hearing of this appeal, the appellant's learned counsel chose to rely wholly on his client's home-made submissions filed on 1st September 2020. The substance of the submissions is two-fold: that the conviction was pegged on circumstantial evidence from a single identifying witness; and, that the trial court failed to consider the grudge between the appellant and the victim's mother.
5. The learned Prosecution Counsel, *Mr. Mutinda*, opposed the appeal through written submissions filed on 4th September 2020. He submitted that all the elements of the offence were proved beyond reasonable doubt. He conceded however that the mandatory life sentence imposed by the lower court may be reviewed. He cited *Ochieng v Republic*, Kisumu, Court of Appeal, Criminal Appeal 93 of 2014 [2018] eKLR.
6. This is a first appeal to the High Court. I have re-evaluated the evidence on record and drawn independent conclusions. There is a caution because I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
7. I will now turn to the material evidence. The complainant was a minor. After a detailed *voir dire* examination, the court was satisfied that she understood the nature of an oath. I am satisfied that the trial court complied with the procedure of taking the evidence. *Johnson Muiruri v Republic* [1983] KLR 445.
8. The complainant alleged that she was defiled on at least four occasions by the appellant. She knew the appellant well as he used to live with her mother. Her mother and the appellant were lovers but they later separated. I have absolutely no doubt in my mind about *identification*.
9. Regarding the *age* of the child, I find that she was aged about 8 years at the time of the incident having been born on 6th February 2010 as per the Birth Notification (exhibit 3) and the age assessment report (exhibit 4(b)) produced by PW5.
10. The complainant was at the material time living with her mother and her grandfather, G.K. *[particulars withheld]* (PW2). When she was first defiled, she claimed that the appellant found her alone in the house washing dishes. He removed all her clothes, put her on her back and "*did bad things to me in between my legs. The accused used his dirt (uchafu yake)*".

11. I remain alive that a child of her age may not give graphic illustrations of the sexual encounter. But her explanation leaves no doubt about it. She said that her screams attracted the attention of her aunt, Chiru. She said that she also told her mother and grandfather about it. As I will discuss shortly, neither her mother nor aunt took to the stand.

12. The complainant testified that her grandfather informed the village elder. It would appear that on the same day, the appellant returned home and found the complainant alone. He defiled her a second time. This time round, she informed her mother and step-uncle. What is amiss is that her mother, step-uncle or aunt took no action at that stage. And like I have said, they were not called as witnesses.

13. The complainant said that the appellant defiled her on two other occasions: When she went alone to fetch some firewood in the middle of the forest; and, when she went to draw water one morning at 11:00 a.m. On the latter occasion, she was with her younger brother, C.K. [particulars withheld]. Her brother sought help from their uncle David. The complainant said her uncle found her at the scene and she narrated the incident to him. The dates are unclear but that would seem to be the time that she was taken to Wanjegi Health Centre. David did not also testify at the trial.

14. PW2 said that the complainant informed him about the matter for the first time on 23rd September 2018 at about 9:00 p.m. He informed the Assistant Chief (PW3) on 25th September 2018. The matter was reported to the police on 24th September 2018 and a P3 Form issued (exhibit 1). The appellant was arrested by PW3 on 25th September 2018 and detained at Kirogo Police Station.

15. PW2 said that at the time of the incident, the appellant and the complainant's mother (who was sickly) had parted ways; and, that PW2 was living with the mother and the complainant. He denied that he was motivated by any malice in pursuing the prosecution.

16. According to the clinical officer, Ann Muthoni (PW4), the complainant had "no injuries, swelling or wounds" to her vagina. There was also no bleeding or discharge. But her hymen was broken. She testified in cross-examination as follows-

The fact that the offence was done earlier, we only wanted to confirm. I would say the defilement had been done against the child. I found that the hymen was broken but it had taken time

17. Regarding the examination on the *appellant*, it turned out negative for venereal diseases or HIV. I note that the examination on the *complainant* took place on 24th September 2018, a day after one episode of the defilement. Yet, PW4 found no injuries, swelling or wounds from that incident. From the charge sheet, the first incident of defilement had taken place way back in January 2018. From the sheer span between the episodes coupled with the evidence of the clinical officer, some doubt is created about the penetration by the appellant.

18. 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".

19. While it is true that the complainant's hymen was broken, the prosecution required to prove that it is the *appellant* who penetrated the complainant on the alleged dates.

A broken hymen or the absence of a hymen is *not* necessarily proof of *penile* penetration. See generally, **PKW v Republic**, Court of Appeal at Nyeri, Criminal Appeal 186 of 2010 [2012] eKLR, **Bernard Ndegwa Maina v Republic**, High Court, Kiambu, Criminal Appeal 17 of 2020 [2020] eKLR.

20. I am alive that under section 124 of the **Evidence Act**, the evidence of the victim is sufficient to sustain conviction. However, it had some gaps which were not fully corroborated by the medical evidence. Some additional weight would have been given by the testimony of the complainant's mother, her aunt (Chiru) or uncle (David). PW1 testified that the latter two were first responders on two separate occasions when she was sexually assaulted.

21. I have also considered the defence tendered by the appellant at his trial. The net effect of all this was to create some doubt in his favour. I have kept in mind that in our criminal justice system, the burden of proof rested squarely on the Republic. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

22. On the totality of the evidence I have reached the conclusion that the prosecution did *not* prove the charge of defilement beyond reasonable doubt. It must follow as a corollary that the conviction was *unsafe*.

23. The upshot is that the appeal is *allowed*. The conviction and sentence are *set aside*. The appellant shall be released *forthwith* unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 20th day of April 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. Maingi for the appellant.

Mr. Mutinda for the Republic.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.