



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 126 OF 2019**

**(Appeal arising out of conviction and sentence of Hon. D.K. Mtai (Senior Resident Magistrate)**

**in Kitale Chief Magistrate's Court Criminal Case No. 158 of 2018**

**delivered on 22<sup>nd</sup> November 2019)**

**HARRISON WAFULA KHISA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Harrison Wafula Khisa, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (4)** of the **Sexual Offences Act** before the trial court. The particulars of the offence were that on the 15<sup>th</sup> day of September 2018 at [Particulars Withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SNW, a child aged sixteen (16) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars were that on the 15<sup>th</sup> day of September 2018 at [Particulars Withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely the penis and the genital organ namely the vagina of SNW, a child aged sixteen (16) years. On arraignment, the Appellant pleaded not guilty to the two counts. After full trial, the Appellant was convicted of the main count and sentenced to serve **fifteen (15) years imprisonment**.

The Appellant is aggrieved by the conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that the trial court relied on fabricated evidence, no documentary evidence ascertained the age of the complainant, the Appellant was placed in police custody for more than 24 hours, the charge was pegged on an acrimonious relationship between the families of the Appellant and the complainant, his defence was disregarded and that there was insufficient evidence to prove the charge. Consequently, the Appellant urged this Court to allow the Appeal, quash the conviction and set aside the custodial sentence that was imposed and set him at liberty.

During the hearing of the appeal, the parties informed the court that they would rely on their written submissions. The Appellant submitted that the complainant was examined by Dr. Kekode and not Dr. Koima. She could not have been possibly seen by more than one doctor. The doctor should have tendered evidence as maker of the document. There was no conclusive opinion on whether the torn hymen was fresh or old looking. There were no DNA samples to conclude that the semen belonged to the Appellant; similarly, no fingerprints were taken from the complainant's clothing. The absence of a birth certificate, notification card or evidence of the complainant's parents vitiating the probative value of the age assessment report. As such, the court erred in assessing the complainant's age from the report alone. PW2 falsified evidence by stating that the complainant's mouth was covered when she was defiled. They failed to produce before court dirty clothes to justify evidence that the complainant had been defiled. Witnesses contradicted in their *viva voce* evidence on the age of the complainant. He submitted that the complainant was not psychologically well and should have been subjected to a mental assessment test before she adduced evidence.

Mr. Omooria for the State opposed the appeal. He stated that the prosecution proved that the complainant was a minor relying on the age assessment report showing that the complainant was sixteen (16) years old at the time hence below the age of majority. Further the court was satisfied as to her age having seen her at the trial. On penetration, the prosecution submitted that bearing in mind the principle of absolute penetration, it had proven that indeed there same was answered in the affirmative. This is because the complainant confirmed that the Appellant put his penis into the "thing she uses to urinate". PW4 from a psychological assessment found that the complainant was not doing well and told her on the ordeal. PW4 observed a broken hymen with injuries on the labia. On identification, the prosecution relied on the complainant's testimony that she has known the Appellant as their neighbour and employed by *Mwalimu* and identified him in court.

Turning to the Appellant's defences learned Prosecutor submitted that they were a sham and weak and were not corroborated. Citing the case

of **Amber May –vs- the Republic [1999] KLR 38**, the prosecution contended that the Appellant’s unsworn testimony has no probative value. Allegations of fabricated evidence were an afterthought. On being held in custody for more than 24 hours, it submitted that this issue was never raised at trial. Be that as it may, the Appellant’s recourse is to seek compensatory damages in a civil court. He was of the view that the sentence meted on the Appellant was proper and urged the court to dismiss the appeal and uphold the conviction and sentence.

This being a first appeal, it’s the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial magistrate’s court before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge Vs Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charges brought against the Appellant to the required standards of proof beyond any reasonable doubt.

The prosecution called 5 witnesses in a bid to establish its case. Dr. John Koima PW1, a clinical officer attached to Kitale County Referral Hospital produced the P3 form and treatment notes. On 15<sup>th</sup> September 2018, the complainant testified that she was collecting firewood when a person known to her called Harrison caught her, dragged her to his house and defiled her while covering her mouth. On examination of her genitalia, she was found to have a broken hymen with injuries on the labia. She was seen on 17<sup>th</sup> September 2018 and 18<sup>th</sup> September 2018. Both doctors (Koima and Kegode) noted the presence of vaginal discharge and the presence of pus cells. She was put on treatment. They also found trichomonas vaginosis, a sexually transmitted infection. She was advised to go for a review at a later date. PW1 concluded that there was evidence of penetration. The P3 form was marked PExh 1(a) and treatment notes PExh 1 (b).

PW2, CPL Paul Karanja, the investigating officer, stated that on 18<sup>th</sup> September 2018, he was assigned this case. He interviewed the complainant who stated that on 15<sup>th</sup> September 2018, while collecting firewood in the neighbourhood a man called Harrison accosted her following her refusal to accept his advances. He dragged her home and forced her to have sex with him. He covered her and succeeded in preventing her from screaming. He tore her biker in the course of struggle. She was wearing the following; orange top with black and white stripes, the biker and a black polka dot skirt. They were marked PExh 2(a), 2(b) and 2(c) respectively. She was threatened with death if she disclosed to anyone. Once done, the Appellant told her to leave. Her uncle noticed something was wrong when he found that her orange top was next to the firewood. He saw the complainant emerging from the Appellant’s house. The complainant was escorted to hospital and treated. The P3 form was filled on 18<sup>th</sup> September 2018. She indicated that she was twelve (12) years. Since there was no documentation to that effect, an age assessment was undertaken by Dr. Oyieke who was of the opinion that she was sixteen (16) years old. It was established that the Appellant and complainant are neighbours. PW2 preferred the present charges against him. The Appellant had chased away his wife prior to the incident.

PW3, the complainant, testified that she was in class five (5) studying at [Particulars Withheld] Primary School. She is aged thirteen (13) years. On 15<sup>th</sup> September 2018 at 10.00 a.m., she went to fetch firewood at the trees. She was called by the Appellant, Harrison who is her neighbour. She declined his advances. He then pulled her and took her to his house, removed her clothes and sexually assaulted her by “using his thing that he uses to urinate to insert it in her thing that she uses to urinate”. They were alone at his rented house where *Mwalimu* is the landlord. She had worn a black skirt, striped blouse and a biker. After he was done, he told her to leave as her uncle Ben came. She then went home with the firewood and took the cows for grazing. When her grandmother came home, she found her sleeping and told her to take the cows home. She asked her why she wasn’t walking properly. She told her grandmother what had happened. The matter was then reported to the police. She was treated in hospital and had since healed. She was transferred to her present school since her school peers knew about her incident.

PW4, SNN, the grandmother to the complainant, found her crying when she came back home. She found her sleeping with the cows. She is an orphan. She stated that Harrison accosted her when she went to collect firewood and did bad manners to her on 15<sup>th</sup> September 2018. She was released after the incident. She examined her and found blood on her thighs and pants and her vagina was not in good condition. There were blood stains on her clothes too. She identified the perpetrator in court. The matter was reported to the police the following day. She was taken to hospital. The doctor found that she had been defiled. She was taken for an age assessment test as she has no documents attesting to her age. She was counselled in hospital. She was transferred to another school. The incident occurred at Harrison’s rented house. *Mwalimu* is the landlord.

PW5, Dr. Mercy Oyieke, a Senior Dental Officer, did a clinical examination on the complainant and found that she had permanent dentition but 3<sup>rd</sup> molars had not erupted and was hence below the age of seventeen (17) years. A radiographic examination revealed that all permanent teeth were present and completely formed except the 3<sup>rd</sup> molars which crown formation was complete and root formation had just commenced. She conclusively estimated the age of the complainant to be sixteen (16) years old. The age assessment report was marked PExh 3.

The Appellant was placed on his defence. In his unsworn testimony, he stated that a boy named Manue entered his *shamba* on 08<sup>th</sup> September 2018 at 8.30 a.m. with cattle. He found him and gave him four (4) strokes of the cane as punishment and asked him to remove the cattle. He said he would report him to his mother. On 28<sup>th</sup> September 2018, while working at the farm, the Appellant indicated that two people accompanied him to the local trading center. He was accused of assault but retorted that he only beat Manue. He was then taken to Kitale Police Station. He was held for 2 days. He was later arraigned in court and charged.

For the prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the complainant
2. Penetration
3. Identification of the perpetrator

This court has aptly summarized the evidence of the trial court. On the complainant's age, PW3, the complainant testified that she was a class five pupil. She was aged thirteen (13) years. PW2 and PW5 on the other hand testified that the complainant was sixteen (16) years after undertaking an age assessment. The age assessment report was produced. The trial court in its findings, while acknowledging the critical nature of a birth certificate, found that its absence, did not render any other evidence incredible. This findings is sound in law. This court therefore disagrees with the Appellant's assertions that no conclusive proof in the form of a birth certificate was tendered in court to establish the age of the complainant. This court agrees with the holding cited in the trial magistrate's finding where the Court of Appeal in Uganda asserted that apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation common sense. [**Francis Omuroni –vs- Uganda Court of Appeal; Criminal Appeal No. 2 of 2000**]. Similarly, in **Fappyton Mutuku Ngui vs. Republic [2012] eKLR**, this Court held:

**“... that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”**

The next ingredient is penetration. Section 2 (1) of the Sexual Offences, defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

PW1's testimony gave an account of the sexual encounter with the Appellant. She testified that she had sexual intercourse with the Appellant on 15<sup>th</sup> September 2018. She was accosted by the Appellant after she refused his advances. He then sexually assaulted her. After the encounter, she was walking gait. That attracted the attention of her grandmother. She observed that she was walking with discomfort. Furthermore, she had blood stains on her clothes. A closer examination of her vagina revealed that she had indeed been sexually assaulted. Medical examination revealed that her hymen was broken. She had injuries to her labia. There was blood. She had vaginal discharge and was infected with trichomonas vaginosis, an infection consistent with sexual intercourse. In his expert opinion, there was evidence of penetration. This court finds that there was evidence of penetration on account of the two witnesses. The Appellant challenged PW4's evidence. He stated that no semen samples were collected. This vitiated the prosecution's testimony. This Court is not persuaded by the Appellant's challenge. There was overwhelming evidence based on the testimony of the witnesses that there was indeed penetration.

The third element is the identification of the perpetrator. PW3 testified that she knew the perpetrator long before the incident occurred as his neighbour. He was the tenant of one *Mwalimu*. The trial court was satisfied as to the veracity of the complainant's testimony. It was the trial court's findings the complainant was so truthful that she did not glitch or bring any iota of doubt in her testimony in court, to the investigation officer and to her grandmother. The evidence was repetitively the same. It was consistent. The trial court noted the demeanour of the complainant and concluded that she was indeed telling the truth. The trial court further considered the evidence of the Appellant which was found to be incredible. It was the Appellant's position that the charges levelled against him were for the purpose of settling old scores because he beat one Manue during the relevant period. He did not however establish the nexus between that incident and the charge laid against him before the trial court. This court finds no reason to disturb the trial court's sound findings.

On the defences raised, the trial court evaluated the Appellant's defence and found it to be baseless. This court has re-evaluated the said defence in light of the grounds of appeal put forward in the Appellant's petition of Appeal and articulated in his submissions. The Appellant by and large has introduced several facets that were not raised at trial. This court holds the same to be an afterthought. Furthermore, his submissions did not illuminate the inconsistencies and contradictions that he alleged in his petition of appeal. To the court's mind, the trial court considered the evidence of the Appellant and arrived at a just conclusion. The ingredients to establish the charge of defilement were proved. The prosecution proved his case beyond any reasonable doubt. Having re-evaluated the evidence adduced before the trial court, this court for the above reasons holds that the Appellant's appeal against conviction in respect of the above charge lacks merit and is hereby dismissed.

As regards sentence, the Appellant was under **the Sexual Offences Act No. 3 of 2006** sentenced to serve a term of fifteen (15) years. **Section 8 (4)** of the said Act provides as follows:

**“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”**

In the present appeal, it was clear to the court that the trial court committed no error in principle or applied the wrong considerations in meting out at the said sentence. The trial court took into account the nature of the offence, the evidence adduced and the mitigating factors raised by the Appellant at the trial. This court takes further account of the fact that the sentence imposed was the minimum sentence imposed by statute. The Appellant did not show remorse for the offence that he committed. The sentence was legal. The Appeal against the sentence is similarly dismissed as it does not have merit.

It is so ordered.

**DATED AT KITALE THIS 26<sup>TH</sup> DAY OF JULY 2021.**

**L KIMARU**

**JUDGE**