



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 74 OF 2019**

**KSO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal arising out of the conviction and sentence of Hon. V.W WANDERA CM*

*delivered on 4<sup>th</sup> July 2017 in KITALE CM Cr. Case (S/O) No.119 of 2017)*

**JUDGMENT**

The Appellant, KSO, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 29<sup>th</sup> September 2017, the Appellant intentionally caused his penis to penetrate the vagina of A.A.O, a child aged seventeen (17) years at [particulars withheld] within Trans Nzoia County. 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 of the offence were that **on 29<sup>th</sup> September 2017**, at [particulars withheld] within Trans Nzoia County, **the Appellant intentionally and unlawfully caused contact between his genital organ namely penis and the genital organ of the complainant namely vagina.**

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the trial court failed to note that the charge sheet was defective. He was aggrieved that the entire medical evidence presented did not meet the required standard to sustain a safe conviction. He was aggrieved that the important element of age remained unproved. He was aggrieved that the entire prosecution evidence fell far below the threshold required in criminal offences. He was further aggrieved that his defence had been disregarded. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

**During the hearing of the Appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Mr. Omooria** for the State opposed the appeal. He filed written submissions. He made submissions to the effect that the prosecution had established the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. He set out the elements required to be proved in a charge of defilement as age, penetration and the identity of the perpetrator. In that regard he cited the case of **Daniel Wambugu Maina vs. Republic [2018] eKLR.**

On the complainant's age, it was submitted that the charge sheet indicated that the complainant was seventeen (17) years. PW5 assessed the minor's age to be eighteen (18) years at the time of trial and seventeen (17) years when she was defiled.

Learned Prosecutor cited the case of **Mwalango Chichoro V. Republic Mombasa C. Appeal No. 24 of 2015(UR)** where the Court of Appeal held that:

**“The question of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or, medical evidence.**

In that regard, it was urged that the age of the complainant was well established.

As regards the element of penetration, it was submitted that PW1 testified that she was at a funeral with the Appellant. She accompanied him to their home where he tore her trouser and sexually assaulted her. She felt a lot of pain and screamed but nobody came to her rescue. PW2 corroborated her evidence that the Appellant indeed called the complainant. PW2's testimony placed the Appellant at the scene of the crime. The Appellant had also sent away PW2.

PW4 testified that the complainant's hymen was torn and old looking. There was some whitish discharge. The laboratory results revealed that there were some pus cells and epithelial cells. He concluded that the complainant had been sexually assaulted. He produced a P3 form as P Exh 1 and treatment notes as P Exh 2. It was submitted that penetration was sufficiently proved.

As regards identity of the perpetrator, it was submitted that the complainant testified that the Appellant was a brother to her mother's father. She knew the Appellant three days prior to the material date. PW2 testified that he identified the Appellant because there was electric light in the tent. PW3 testified that the Appellant was his younger brother. The Learned Prosecutor maintained that the complainant knew the Appellant and chances of mistaken identity were remote as the Appellant was sufficiently recognized and identified. He cited the case of **RORIA vs. REPUBLIC [1967] EA 583** and invited the court to find that the circumstances favouring positive identification were present to enable the complainant identify and recognize the Appellant.

On the ground that the charge sheet was defective, the Learned Prosecutor maintained that the charge sheet was not defective as it clearly specified the charge and the particulars thereof. He further submitted that the Appellant did not raise the issue of the defectiveness of the charge; Even if the same had, a minor defect was curable under **Section 382** of the **Criminal Procedure Code**. He maintained there was no evidence that there was a miscarriage of justice because of that defect and there was no risk of confusion as the Appellant understood the charge he faced and aptly defended himself.

On the ground that the prosecution's evidence was riddled with inconsistencies and discrepancies, it was submitted that the Appellant's conviction was sound as all the ingredients of the charge were proved. The Learned Prosecutor cited the case of **Twehangane Alfred V. Uganda Criminal Appeal No 139 of 2001** where the court noted that it is not every contradiction that invalidates the prosecution's evidence. The court will ignore minor contradictions unless the court is of the opinion that they point to deliberate untruthfulness or if the contradictions affect the main substance of the prosecution's case.

On the ground that **Section 260** of the **Criminal Act** was not complied with, it was submitted that the said section of the law does not exist and if the same exists, it was not raised during trial.

In the premises, the Learned Prosecutor urged the court to dismiss the Appellant's appeal on conviction and sentence. The sentence was merited as all the elements required to sustain a conviction on a charge of defilement had been established.

The facts of the case according to the prosecution are as follows: PW1, A.A.O testified that she was aged seventeen (17) years. She was born on 7<sup>th</sup> July 2000. She was a Form 2 student at [particulars withheld] Secondary School. She stated that on the material day, at around 11.00 p.m. the Appellant whom she calls her grandfather, went to call her from a neighbour's house where she had gone to attend a funeral. She accompanied the Appellant who told her that her grandmother wanted to see her home. On entering her grandmother's home, the Appellant held her by the hand and started pulling her towards the direction of the cattle shed. She resisted and shouted but due to the loud music emanating from the neighbouring home, nobody heard her scream for help. The Appellant pulled her to the fence of the cattle shed, tore the pair of trousers she was wearing and knocked her to the ground. She struggled with the Appellant but overpowered her. The Appellant removed the trouser she was wearing. He removed her panty before unfastening his belt and thereafter lay on top of her. He then sexually assaulted her. She felt pain. When the Appellant was through, he left her at the scene of the assault and went to the house to sleep.

On the following day, her grandmother PW3 took her to a private hospital in Kitale town where she was medically examined. A HIV and pregnancy test were done before the doctor treated her. The complainant testified that on 3<sup>rd</sup> October 2017, PW3 took her to Kipsaina Police Patrol Base where she was issued with a P3 form. The Police referred her to Kitale District Hospital for further medical examination. This was done. A HIV test and pregnancy test were done. The P3 form was fully filled. The complainant's age was assessed at Kitale District Hospital on 17<sup>th</sup> April 2018 and estimated to be eighteen (18) years.

PW2, AWM, testified that on 29<sup>th</sup> September 2017 at about 9.00 p.m. she was in the company of the complainant their neighbour's home where there were funeral arrangements ongoing. She stated that at about 11.00 p.m., the Appellant went to the venue of the funeral arrangements and told the complainant that she was being sought by her grandmother. She accompanied the complainant but when they reached the gate to the house of the complainant's grandmother, the Appellant told her that he did not require her there. The Appellant told her to leave. She left the complainant in the company of the Appellant as she returned to the venue of the funeral. At about 12:00 a.m., her mother collected her from the venue of the funeral and proceeded to the home of the complainant's grandmother. Her mother and the complainant's grandmother left her there and went to look for the complainant. At around 2.00 a.m. her mother and the complainant returned to the house in the company of the complainant. When she saw the complainant, her body and clothes were soiled with mud. She saw the complainant was shivering and was unable to talk. She was not wearing shoes and a sweater which she was wearing earlier the same night.

PW3, FO, recalled that on the 29<sup>th</sup> October 2017 at about 9.30 p.m., she was at PM home where they had gone to mourn his deceased wife. She stated that she was in the company of her granddaughter A.A.O, the complainant herein was in the company of her friend PW2. She was seated with fellow women where the deceased's body was lying in state. The complainant and PW2 were seated in the tent where young people were listening to gospel music.

PW3 testified that at 1.00 a.m., she left PM home to escort her visitors to go and sleep at her home. She left the complainant and her friend PW2 seated in the tent. At about 2.00 a.m., her friend and church member AW returned to her house and informed her that PW2 had told her the Appellant had collected the complainant from PM home claiming that PW3 had sent him to call her.

PW3 testified that she started looking for the complainant together with her friends AW and EW. They found the complainant inside the

house where she used to sleep. She was crying. She said that she will be killed if she reveals what had happened to her. She was wearing a skin tight trouser and t-shirt which were soiled with mud. PW3 testified that the complainant told her that the Appellant had raped her. PW3 and her two friends examined the complainant and found spermatozoa inside and outside her vagina. She stated that as at the time the complainant was not wearing pants. In the morning, EW took the complainants to hospital. They did not find the doctors on duty in the government hospital. They were referred to Crescent Private Hospital. She further testified that she later reported the incident at Kipsaina Police Post. She stated that the complainant was issued with a P3 form. The Appellant was arrested after the complainant returned the P3 form to Kipsaina Police Post. She stated that the Appellant is her younger brother. She had called him to help in fencing the farm her son had bought her. On cross examination, PW3 corrected the date the Appellant defiled the complainant. She stated that it was on the night of 29<sup>th</sup> and not 30<sup>th</sup> September 2017. She denied having implicated the Appellant with the offence of defilement as she had nothing to benefit from doing so.

PW4, Ligare Linus, the chief clinical officer at Kitale County Referral Hospital, testified that the complainant was taken to hospital on 3<sup>rd</sup> October 2017 by her grandmother with a history of defilement by a person known to the complainant on the night of 29<sup>th</sup> September 2017. He stated that his colleague Kirwa Labatt examined the complainant and found that she had pain in her lower abdomen, her hymen was torn and old looking. Some whitish vaginal discharge was observed. There were no bruises on her vulva. The laboratory tests revealed there was some pus and epithelial cells, fungal infection and an element of friction. There was no bleeding, trauma, lacerations or tears. A urinalysis revealed blood in the urine which could be caused by menstruation or sexual assault. He referred the complainant for further management and the filling of a P3 form. He produced the laboratory results and the request forms as PEXh No. 4. (a) (b) and (c) respectively.

PW5, Pharis Silali, working at Kitale County Referral Hospital as a community oral health officer, testified that on the 17<sup>th</sup> April 2018, the complainant was examined by Dr. Muyira who assessed her age to be eighteen (18) years. On behalf of Dr. Muyira, PW5 produced the complainant's age assessment report dated 17<sup>th</sup> April 2018 as PEXh No.2. He stated that in 2017, the complainant was aged seventeen (17) years.

PW6, Daniel Ojwang Muka, a registered clinical officer at Butere County Hospital, testified that the complainant saw him on 30<sup>th</sup> September 2017 at Crystal Cottage Hospital in Kitale with a history of having been sexually assaulted by a person known to her. On examination, he found a white discharge but there was no bleeding, trauma, lacerations or tears. He did a urinalysis which revealed blood in the urine that could have been caused by menstruation or sexual assault. He referred the complainant to Kitale District Hospital for further examination, management and filling of the P3 form.

PW7, Corporal Haron Ombaso, the Investigating Officer, testified that on 3<sup>rd</sup> October 2017 at around 8.00 a.m., he was on duty at Kipsaina Police Post when the complainant, accompanied by her grandmother, made a report of defilement. He booked the report in the OB and issued the complainant with a P3 form. After PW7 had received back the P3 form, he recorded the statements of the complainant and her witnesses. On 6<sup>th</sup> October 2017, PW7 arrested the Appellant after he was identified to him by the complainant's grandmother PW3 and charged him with the present offence.

When the Appellant was placed on his defence, he stated that he was arrested on 6<sup>th</sup> October 2017 by a Kenyan Police corporal after he had alighted from a vehicle at Kipsaina. He was escorted to Kipsaina Police Post then to Kachibora Police Station. He remained there until 9<sup>th</sup> October 2017 when he was arraigned in court and charged with the present offence. He denied committing the offence. He told the court that his sister F (PW3) implicated him with the offence due to a land dispute that existed between him and her since 2016. He denied committing the offence. He stated that the complainant had been coached on the evidence to adduce before the court by PW3.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comment regarding the demeanour of the witnesses (See Okeno vs. Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Section 8(1)** of the **Sexual Offences Act** provides that: -

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

For the prosecution to sustain the charge of defilement, there are three elements that the prosecution must establish. The first one is the age of the complainant. In the present appeal, the complainant stated that she was seventeen (17) years of age at the time of adducing evidence in court. She was born on 7<sup>th</sup> July 2000. PW5 the community oral health officer who produced the complainant's age assessment report told the court that in 2017, the complainant was aged seventeen (17) years old. He produced an age assessment report as PEXh No. 3. On cross examination, he stated that there was a possibility that the complainant was aged eighteen (18) years before the 29<sup>th</sup> September 2017. **The Appellant did not challenge the evidence adduced with regard to the complainant's age. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act** to the required standard of proof.

The second element is penetration. **Section 2(1)** of the **Sexual Offences Act** defines penetration as:

**“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”**

In the present appeal, it was the complainant's testimony that on the material day of 29<sup>th</sup> September 2017, she was attending a funeral in a neighbouring home with her friend (PW2) when the Appellant approached her informing her that her grandmother (PW3) required her to

return home. She followed after the Appellant and on reaching her grandmother's gate, the Appellant held her hand and pulled her towards the direction of the cattle shed. She resisted and shouted but due to the loud noise in the neighbour's home, no one heard her or came to her rescue. The Appellant pulled her to the fence of the cattle shed, knocked her to the ground and tore her trousers. He also removed her panty before he unfastened his belt, lowered his trouser and lay on top of her. The Appellant then sexually assaulted her. She experienced a lot of pain. The complainant's evidence was corroborated by that of PW3 and PW6. PW3, together with her friends AW and EW helped examine the complainant's vagina. They found spermatozoa. PW4 produced the complainant's P3 form and treatment notes on behalf of Dr. Labatt who had established that the complainant had pain in the lower abdomen, with her hymen torn and old looking. He concluded that the complainant had been sexually assaulted. PW6, a clinical officer examined the complainant and found that she had whitish discharge. He conducted a urinalysis which revealed blood in the urine. He produced the laboratory results forms, prescriptions and laboratory request forms as Pexh 4 (a), (b) and (c) which formed part of this court's record. The Appellant did not challenge the evidence adduced with regards to penetration. This court finds that the prosecution established the ingredient of penetration to the required standard of proof beyond reasonable doubt.

The third ingredient is whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He is her relative. The complainant's testimony was corroborated by that of PW2 who testified that the Appellant had approached the complainant at a funeral and told her that her grandmother required her to return home. She accompanied the complainant who followed the Appellant home only for the Appellant to dismiss her (PW2) when they reached the complainant's grandmother's gate. The evidence undoubtedly places the Appellant at the scene as the person who sexually assaulted the complainant. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. He was her relative. She easily recognized him. It is a well settled principle in criminal law that recognition is better than identification of a total stranger. The Appellant in his defence denied sexually assaulting the complainant. He did not give an account of his whereabouts on the material day of 29<sup>th</sup> September 2017.

He told the court that his sister PW3 had implicated him in the commissioning of the offence due to a land dispute that existed between them since 2016. He stated that the complainant had been coached on the evidence to adduce before the trial court by PW3. However, this court observed that the Appellant did not bring up the issue of the existence of a land dispute during cross examination of PW1 and PW3. This court is of the view that the Appellant's defence is an afterthought and did not deny the otherwise strong inculpatory evidence adduced by the prosecution witnesses which squarely connected him with the sexual assault occasioned on the complainant.

The Appellant in one of his grounds of appeal argued that the charge as drafted was fatally defective since the particulars of the charge failed to include the term "**unlawful**". This court holds that the omission of the term "**unlawful**" did not in any way prejudice the Appellant in defence of the charge laid against him. In the present appeal, the complainant was seventeen (17) years of age at the time of the sexual assault. Any sexual act perpetrated against a child of such an age would not be deemed lawful. Indeed, any sexual assault is unlawful whether it is specifically stated in the charge sheet or not. The fact that the age of the complainant was stated in the charge sheet clearly shows that the sexual act was unlawful whether or not the word "**unlawful**" appeared in the charge sheet. Defilement cases involve minors who are vulnerable and unable to consent unlike rape cases which involve adults who are able to give consent to a sexual act. Therefore, the issue of consent is irrelevant in the present appeal. This court holds that the omission of the term "**unlawful**" is curable under **Section 382** of the **Criminal Procedure Code**.

The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made in this appeal, cannot see any reasons to disagree with the findings reached by the trial court. In light of the foregoing, the appeal lodged by the Appellant against conviction lacks merit and is hereby dismissed. The prosecution established to the required standard of proof that indeed the Appellant sexually assaulted the complainant. The custodial sentence meted out on the Appellant is legal. Since there is no reason to disturb both the conviction and sentence the decision of the trial court is hereby affirmed and the appeal is dismissed accordingly.

**It is so ordered.**

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

**L. KIMARU**

**JUDGE**