



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E001 OF 2021

(consolidated with Cr Appeal No E004 of 2021)

GITONGA ABDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by

Hon. R. ONGIRA RM in Tigania S.O No. 42 of 2019 on 22/12/2020)

JUDGMENT

1. GITONGA ABDI ('the appellant') was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3) of the Sexual Offences Act No. 3 of 2006** in which charge sheet it was alleged that on 16/9/2016 at [Particulars withheld] Village, Antuanduru Sub-location in Tigania East Sub-County within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of FK ('the complainant') a child aged 12 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same day and place, he intentionally touched the vagina of FK a child aged 12 years.

3. As expected, he denied the charges, he was subsequently tried, convicted on the main charge of defilement and sentenced to 45 years' imprisonment. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 7 grounds of appeal in which the trial court is said to have; erred in law and fact by failing to note that prosecution witnesses gave inconsistent, contradictory and conflicting testimonies which failed to meet the standard of proof beyond reasonable doubt; rejected the appellant's defence without giving cogent reasons and meting out to the appellant a harsh and excessive sentence, despite the fact that major exhibits and vital witnesses were not availed in court due to the shoddy investigation.

4. As directed by the court, the parties filed their respective submissions on 30/4/2021 and 21/6/2021. The appellant faulted the prosecution for its failure to produce the *leso* as an exhibit before court. He alluded to various inconsistencies in the testimonies by the prosecution witnesses. He faulted the investigating officer for failing to establish whether a grudge existed between the appellant and the complainant's mother. He termed the sentence meted upon him as unfair and unconstitutional. He faulted the trial court for ignoring his defence, which contained reasonable facts to support his acquittal. He urged the court to set aside the conviction and sentence and set him at liberty. He relied on **Bukenya v Uganda(1972)**, **Joginder Patbic Chama v R 1971 KLR**, **Dankera Ramkisham Pandya v R E.A.C.A (1957) 336**, **Philip Muiruri Ndaruga v R (2016) eKLR**, **Denis Kinyua v R(2017)eKLR** and **Evans Wanjala Wanyonyi v R (2019) eKLR** in support of his case against the conviction.

5. On its part, the prosecution submitted that it had proved all the elements of the offence beyond reasonable doubt. According to the prosecution, nothing on record supported the allegation that the complainant was mentally impaired. The prosecution conceded that the sentence meted out to the appellant was illegal, and therefore it should be set aside. The cases on **G.O.A v R (2018) eKLR** and **Nahayo Syprian v R (2016) eKLR** were relied on in support of those submissions in support of the conviction.

6. The prosecution in advancing its case against the appellant called 5 witnesses in support thereof. **PW1, the complainant** gave unsworn testimony after a *voire dire* exercise. She told the court that she was then a class 7 pupil at [particulars withheld] aged 14 years old. She was on the material day heading home in the company of **PW2**, when the appellant got hold of her, carried her up, took her to a bush, removed her dress and put it in her school bag, removed her tights, removed his trouser and slept on her. He then gave her money and threatened her that if she told anyone what had happened, he would kill her. She saw a lot of blood and felt a lot of pain in her vagina. She then put on her blouse only but Faith Kaberia covered her with a *leso*. When she arrived home, she informed her mother what had happened after which she was taken to the hospital. She knew the appellant prior to the incident because they come from the same area. Even when she was thoroughly cross examined by the appellant, she stood her ground that he was her defiler.

7. **PW2 FM**, a minor then aged 10 years, was with her friend and sister, the complainant on the material day. She recalled running away after the appellant grabbed the complainant and took her towards the river. After a while, the complainant, who was then crying, came and told her that the appellant had given her money. The complainant was in a lot of pain while walking and she saw blood on PW1's leg. When they reached home, PW1 was taken to the hospital by their mother, **PW3**. She affirmed that she knew the appellant prior to the incident and used to see him walking on the road. She confirmed that she and the complainant were sisters during cross examination.

8. **PW3 PK, the complainant's mother**, was at home on the material day, when Faith called her to see her daughter. Faith informed her that she found the complainant walking on the road without her dress, so she covered her with a lesa. PW1, who was then in a special school, was bleeding profusely and blood was oozing from her vagina. Even the lesa that had been tied around her waist was soiled with blood. PW1 was crying and in great shock that she could barely speak. After PW1 told her that the appellant had taken her by force, removed her clothes and his and slept on her, PW3 took her to Muthara Hospital then to Miathene Hospital. PW1 was subsequently referred to Meru General Hospital, where she was admitted. She knew the appellant very well prior to the incident, because his home is not far from hers. Nothing useful came from cross examination.

9. **PW4 Kenneth Kimathi**, a clinician at Muthara Hospital, produced the P3 form, Discharge summary from Meru Hospital, Treatment notes from both Muthara and Miathene Hospitals in respect to the complainant. The complainant was first seen at Muthara Hospital on 16/9/2016, then at Miathene Hospital on 17/9/2016. She was further seen at Meru Level 5 on 18/9/2016. On examination, he observed bruises on her labia majora and minora. There was a tear on the vagina extending to the perineum, the hymen was torn and there was a brown smelly discharge on her vagina. The complainant was taken to the theatre for repair of the tear, and received post exposure prophylaxis, antibiotics and analgesics. The high vaginal swab revealed presence of pus cells and red blood cells, although there was no spermatozoa identified. As per the child health card, the complainant was aged 12 years at that time, having been born on 28/7/2005. From the above revelation, he concluded that the child had been defiled. During cross examination, he stated the complainant stated that she had been defiled by someone known to her.

10. **PW5 CPL Antony Gikandi** attached at DCI Tigania East, testified on behalf of the initial investigation officer, who had since proceeded on transfer. He produced the clinical card of the complainant which indicated that she was born on 28/7/2005. During cross examination, he stated that the complainant identified the appellant as the person who had committed the offence.

11. In his defence, the appellant admitted that he comes from the same area as the complainant's mother. He stated that he had been framed because of an alleged boundary dispute between himself and the complainant's mother. During cross examination, he stated that he had never reported the issue of boundaries to the authorities.

12. In determining this appeal, this court being a first appellate court takes into account the principles laid down in the case of **Okeno v R (1972) EA 32** where the Court of Appeal for Eastern Africa 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 1975) E.A. 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] E.A. 570). It is not the junction 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 1978) E.A. 424.”**

13. In executing the legal mandate in this matter, the issues discern for determination are whether the offence of defilement was proved beyond reasonable doubt to have been committed by the appellant.

14. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence. See **George Opondo Olunga v Republic [2016] eKLR**.

15. On age, the complainant's evidence was that she was in class 2 at Mbaranga when the offence took place, which evidence was buttressed by PW3. That evidence was not subjected to any cross examination by the appellant. In addition, the child health card referred to by PW4 and produced by PW5 indicated that complainant was born on 28/7/2005. Based on such undoubted public document, I have no lingering doubt in my mind that, the complainant was aged 12 years at the time of the commission of the offence.

16. The next element is penetration which is defined under Section 2 of the Act to mean *'the partial or complete insertion of the genital organs of a person into the genital organs of another person'*. The evidence on record which the trial court relied on to convict the appellant was the complainant's own testimony together with the corroborative testimonies of PW2 and PW3, alongside the P3 form and treatment notes adduced therewith, which I have had a chance to reappraise and reexamine fully. The P3 form showed that there were bruises on labia majora and minora, torn vaginal tear extending to perineum and the broken hymen. The complainant was bleeding with a whitish discharge with foul smell. The complainant, who was in pain while walking, was admitted for 4 days at Meru Teaching and Referral Hospital to undergo surgery to repair the tear on her vagina extending to the perineum. PW4's testimony was consistent with the observations recorded in the P3 form and the treatment notes. I do find the evidence to be cogent and credible hence, it is my finding that penetration was conclusively, and beyond reasonable doubt, established.

17. On whether the appellant was the perpetrator, PW1 during her entire testimony referred to the appellant by his name. She gave a detailed account of how the appellant had grabbed her in broad day light, taken her to the bush and defiled her. She testified that

**“I know Gitonga Abdi he is there (pointing at the accused). I knew him even before he took me to the bush we come from the same area. He slept on me and I felt too much pain here (pointing at where the vagina is).”**

18. During cross examination she stated “**when you defiled me I was in M in class 2B.**” PW1 disclosed to both PW2 and PW3 that it was the appellant who had defiled her and in her testimony, PW2 told the court that she was present when the appellant grabbed the complainant and went with her into the bush where both stayed for a while. She also said that she saw the appellant clearly well since there was light. PW5 told court that the appellant was identified by the complainant as the defiler. I am convinced beyond any doubt that the appellant was the perpetrator. Having found that the three ingredients were proved to the requisite standards, I find no merit in the appeal against conviction. The same is dismissed and the conviction upheld.

19. The remaining question now is whether the sentence meted out to the appellant was harsh and excessive. Section 8(1) (3) of the Sexual Offences Act provides that, “**A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**”

20. In his statement of mitigation, the appellant sought leniency from the court on the basis that he is the father of children whose mother had fled and left in the custody of the appellant’s old mother. In the sentence, the court meted out a jail term of 45 years. While I am I am alive to the gravity of the offence and the debilitating pain the complainant had to undergo together with the possible life-long trauma consequent to the attack and the inevitable hospitalisation for corrective surgery, together with the trial court’s observation that the complainant was mentally challenged, I do find that the sentence was in deed harsh, excessive and disproportionate. In so finding, I equally appreciate that the trial court had the benefit of observing the appellant and complainant testify, a benefit I lack. Having so cautioned myself, and while I uphold the conviction, I do find that the sentence being harsh and excessive ought to be set aside. I do set it aside and substitute a sentence of 25 years’ imprisonment. The sentence shall be computed from 27/3/2017.

**DATED, SIGNED AND DELIVERED AT MERU THIS 4<sup>TH</sup> DAY OF AUGUST 2021.**

**Patrick J.O Otieno**

**Judge**

**In presence of**

Mr. Maina for state

Appellant in person

**Patrick J.O Otieno**

**Judge**