



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 38 OF 2020

FRANCIS MUTURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.J. Wanganga RM in Maua S.O No. 61 of 2016 on 9/08/2018)

JUDGMENT

1. **Francis Mutura ('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**. It was alleged that on 27/09/2015 in Igembe North Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of **EM ("the complainant")** a child aged 14 years old. He also faced an alternative charge of causing an indecent act contrary to **Section 6(a) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same day and place, he intentionally and unlawfully touched the buttocks, breast and vagina against the will of EM which was indecent.

2. He denied the charges, faced the prosecution at a trial where 3 witnesses were paraded in support of the prosecution's case. In his defence he chose to give a sworn statement. All the evidence was considered by the court which the, convicted the appellant on the main charge of defilement and he was consequently sentenced to serve a 20 years' imprisonment term.

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 4 grounds of appeal which I have collapsed into 2 as follows;

a. The trial court erred in law and fact by failing to note that the prosecution witnesses' testimonies were inconsistent, contradictory and conflicting which then fell short of the legal standard on the prosecution's burden

b.The trial court erred in law and fact by rejecting the appellant's defence without giving cogent reasons, and went ahead to convict him based on the wrong medical report.

4. In order to appreciate the merits or lack thereof of the appellant's appeal, it is important to set out the evidence at the trial. **PW1 Barnice Mtile Maingi**, a Clinician at Nyambene District Hospital, examined the complainant whose clothes were blood stained. She had visible lacerations on genitalia and her hymen was broken. She had fresh bleeding from a tear on the perineum (part of the vagina). The lab report showed presence of blood on the urine and high vaginal swab had blood. The complainant was referred to Meru Teaching and Referral Hospital for specialized observation and treatment. Based on the above observation, PW1 concluded that the complainant had been defiled. She produced the P3 form, clinical notes and Post Rape Care form in respect of the complainant. During cross examination, she reiterated that the presence of blood and tear was evidence that had complainant had been identified.

5. **PW2 EM, the complainant**, testified that she was in 2015 aged 14 years and in primary school. On the material day, she was at J's place taking care of J's baby. As she was washing utensils near the door, where there is electricity, the appellant came and grabbed her, threw her into his bed, closed the door, removed all her clothes, removed his clothes, touched her vagina, inserted his penis into her vagina and forced her to have sex with him for 2 hours. She felt a lot of pain and bled. He then threw her outside while she was naked. He warned her not to tell anyone and threatened her. She went to Josephine's house while still bleeding. When Josephine came at 8.00 am, she told her that the appellant had done bad things to her. When Josephine asked her why she did not scream, she said she did, but the appellant increased the volume of his radio and neighbours were asleep. Josephine then took her to the police station then later to the hospital. She knew the appellant prior to the incident for about 3 to 4 months, because he was Josephine's neighbour. The appellant, who had run away was arrested 1¹/₂ months later. During cross examination, she maintained that the appellant had defiled her for 2 hours.

6. **PW4 Sergeant Hellen Tandui** from Lare Police Station, took over the matter from PC Zuleka Wario, the initial investigation officer and recorded the complainant's statement on 3/10/2018. On 26/6/2018, she visited the scene in the company of the complainant and observed that the house where the incident took place, was within the other rental houses. She produced the complainant's birth certificate, which indicated that she was born on 20/10/2001. During cross examination, she affirmed that she visited the scene later and established that there

were other neighbours.

7. In his defence, the appellant insisted that he had been framed by his employer, whom he was living with. He went on to state that he had been fighting with Josephine, who had employed the complainant. He claimed that he was framed by Josephine because he refused to live with her.

8. Following directions by the court on 9/2/2021 that the appeal be canvassed by way of written submissions, both parties filed on 1/3/2021 and 21/6/2021. The appellant submitted that not only was the evidence tendered by the prosecution witnesses inadequate to sustain a conviction, but also the sentence meted out to him was unconstitutional. He contended that broken hymen did not sufficiently prove the offence as was held in *P.K.W v R (2012) eKLR*. He blames the trial court for its failure to consider his defence, which contained some reasonable facts to support his acquittal. He urged the court to set aside his conviction and sentence and set him at liberty. He relied on *Denis Kinyua v R (2017)eKLR*, *Dankerai Ramkisham Pandya v R E.A.C.A(1957) 336*, *Philip Muiriri Ndaruga v R (2016) eKLR*, and *The Queen v Manuel Vincent Quintanilla (1999) AB QB 769* in support of his submissions.

9. On its part, the prosecution maintained that it had proved all the ingredients of the offence charged beyond reasonable doubt and cited to court the decision in *Chales Wamukoya Karani Vs Republic* on what constitutes defilement. The prosecution equally relied on the decision in *Richard Munene v R (2016) eKLR* and *Erick Onyango Ondeng' v R (2014) eKLR* to buttress its submissions that not every contradiction can upset a conviction unless it be the kind of contradiction or inconsistency that is substantial and go to the root of the main issues so as to create a reasonable doubt in the mind of the court.

10. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *David Njuguna Wairimu v R (2010) eKLR*.

11. I do isolate the only issue for determination to be whether the offence of defilement was proved beyond reasonable doubt to have been perpetrated by the appellant.

12. 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.

13. On age, the complainant's testimony was that in 2015, she was aged 14 years and in Primary School. Her birth certificate, which indicated that she was born on 20/10/2001, was produced in court as evidence. I am therefore satisfied that the complainant at the time of commission of the alleged offence was 14 years old. In coming to this conclusion, I have noted that the while the typed proceedings capture the complainant, PW2 to have said that the offence took place in 2018, the hand written notes capture the date as 26/9/15.

14. The next element is the question of 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"***.

15. The evidence on record, which the trial court relied on to convict the appellant, was the complainant's own testimony together with the corroborative evidence of PW1, along with the medical documents adduced therein, which I have critically analyzed. It is clear from the PRC form that the complainant, who was mentally disturbed, had bleeding lacerations, and her hymen was broken. The evidence of PW1 that PW2 had visible lacerations on the genitalia, broken hymen, blood on the urine and fresh bleeding from a tear on the perinilla(part of the vagina), was not meaningfully challenged. PW1 testified that PW2 was referred to Meru Teaching and Referral Hospital for specialized observation under anesthesia. PW2 narrated how the appellant had defiled her for 2 hours then, thereafter threw her outside whilst she was naked. She stated that she felt a lot of pain and was bleeding. Even when she was cross examined by the appellant, she categorically affirmed how the appellant had increased the volume of his radio to suppress her screams. Based on the evidence it is the court's considered finding that penetration was established beyond reasonable doubt.

16. The last limb ingredient the prosecution was bound to establish is whether the appellant was the perpetrator. PW2 stated; -

"I was washing utensils near the door. There was light outside. There was electricity mounted on top of the door. It was 1 bulb. Mutura (accused) then came to his house. He opened his house. He then came and grabbed me. He threw me to his house. He carried me high and threw me to his bed. He had closed the door. He removed all my clothes i.e vest, trouser, biker and pant. He removed his clothes. He forced me into sex. He touched my vagina. He inserted his manhood (penis) to my vagina. I felt a lot of pain. I bled. He stayed with me for 2 hours and then threw me outside. I was naked."

17. During cross examination, the complainant reiterated that she had known the appellant for two months prior to the incident. It was not disputed that the appellant and the complainant were neighbors. The appellant in his testimony stated, ***"I have been fighting with Josephine who had employed that girl."***

18. I have no doubt in my mind that the appellant was positively recognized as the perpetrator of the offence by the complainant. The circumstances of identification were also favourable as there was electricity light outside, leaving no room whatsoever for mistaken identity. In any event being neighbours, that the complainant was taken by the appellant to the house she knew to belong to the appellant leave no doubt that the evidence was much of recognition than identification as such.

19. Upon carefully looking at the appellant's defence, I find the allegation of being framed was purely a fabricated afterthought by the appellant. I say so because it was brought up for the first time during the appellant's defence. I therefore uphold the trial court's finding that the said defence was not plausible in light of the overwhelming evidence tendered by the prosecution. On that basis, therefore, I do find that the record bears it out that the court properly considered the evidence led on both sides of the case and came to the appropriate conclusion. For that reason, there is no justification that the defence evidence was not duly considered.

20. I do not agree with the appellant's contention that the prosecution witnesses' testimonies were marred with inconsistencies and contradictions. In deed there were some inconsistencies but the same were minor and merely trifling. Despite such inconsequential contradictions and contrary to the assertion by the appellant, I find the testimonies of prosecutions witnesses to have been forthright, cogent, reliable and corroborative and I do not find the highlighted consistencies to have been a deliberate design with a desire to tell falsehood.

21. From the foregoing analysis, I find and hold that the prosecution proved the commission of the charge of defilement to the requisite standard. Consequently, the appeal on conviction is hereby dismissed.

22. On the whole, the appeal is devoid of merit and the same is entirely dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF AUGUST 2021.

PATRICK J.O OTIENO

JUDGE

In presence of

MR. MAINA FOR THE PROSECUTOR/RESPONDENT

APPELLANT IN PERSON IN CUSTODY.

PATRICK J.O OTIENO

JUDGE