



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E008 OF 2020

MOHAMMED CHEBII OKOMBA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon H.M Nyaberi

(SPM) delivered at Winam in Senior Principal Magistrate's

Court in Criminal Case No 37 of 2019 on 2nd September 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 19th day of August 2019 at [Particulars Withheld] Kolwa East Location, Kisumu East District within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of NAA (hereinafter referred to as "the Complainant"), a child aged sixteen (16) years.

2. He had also been charged with an alternative 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 19th day of August, 2019 at [Particulars Withheld] Kolwa East Location, Kisumu East District within Kisumu County, he intentionally touched the Complainant's vagina, a child aged sixteen (16) years.

3. He was tried and convicted by Hon H. M. Nyaberi, Senior Principal Magistrate and sentenced to serve fifteen (15) years imprisonment for the offence of defilement.

4. Being dissatisfied with the said Judgement, on 22nd October, 2020 he lodged the Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of appeal challenging both conviction and sentence. His undated Written Submissions were filed on 30th June 2021. Notably, the State's Written Submissions were dated 21st July 2021 and filed on 22nd July 2021.

5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that had been placed before it

for determination were as follows:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.

9. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

10. Grounds of Appeal Nos (1), (2) and (3) were dealt with together under this head as they were all related.

11. The Appellant submitted that the age of the Complainant was not proven beyond reasonable doubt as the birth certificate was not produced in court, a fact that he stated was admitted by the Learned Trial Magistrate. In this regard, he relied on the case of **Arthur Mshila Manga vs Republic Criminal Appeal No 24 of 2014 at Mombasa** (eKLR citation not given) and the case of **Kasomo vs Republic Criminal Appeal No 504 of 2010** (eKLR citation not given) where the common thread was that the complainants' ages were not proven as no birth certificates were adduced in evidence.

12. He added that penetration was not proven as Keziah Tanui (hereinafter referred to as "PW 4") testified that the Complainant had indicated that she had a boyfriend with whom she had been having unprotected sex with the last incident having been in July 2019. It was his contention that there was then doubt as to who penetrated the Complainant.

13. In that respect he relied on the case of **Jacob Odhiambo Omumbo vs Republic Criminal No 80 of 2008 in Kisumu** (eKLR citation not given) where the court held that penetration is a key ingredient of the offence of defilement and must therefore be satisfactorily proven.

14. He further relied on the case of **Arthur Mshila Manga vs Republic** (Supra) where blood stains and discharge were not noted. He pointed out that the Prosecution did not also adduce any P3 Form to show the place of injury and what caused the injury making the matter defective and fabricated.

15. He also cast aspersions on the Complainant's integrity because the fact that she had testified that she had a registered phone line meant that her alleged age was doubtful. He questioned whether she was a student and in Form 2 because it was necessary for her to have had an ID before getting a telephone line. He therefore argued that this cast doubt regarding her age.

16. In this regard, he relied on the case of **Ndarugu vs Republic [2016] Cr Appeal No 76 of 2012** (eKLR Citation not given) where the court held that to give an accused person the benefit of doubt in a criminal case was a matter of right and not a matter of grace and concession.

17. He contended that failure to summon the two police officers purported to have arrested him was fatal to the prosecution case.

18. On its part, the State was categorical that the offence of defilement was proven to the required standard. It relied on the case of **George Opondo Olunga vs Republic [2016] eKLR** where it was held that the ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim.

19. It submitted that the Complainant testified that she was born on 22nd December 2002 and that she also identified a copy of birth certificate marked for identification which showed her date of birth as having been 22nd December 2002. It added that PW4 also confirmed that at the time of examining the Complainant she was sixteen (16) years old as exhibited by the Post Rape Care Form.

20. It invoked Rule 4 of the Sexual Offences Rules, 2014 which provides that:- **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."**

21. In that regard, it placed reliance on the case of **Francis Omuroni vs Uganda Court of Appeal Criminal Appeal No 2 of 2000** where the court held that:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

22. It further argued that the medical documents together with the oral evidence of the Complainant and PW4 proved that the Complainant was sixteen (16) years of age at the time the offense was committed. In this respect, it placed reliance on the case of **Stephen Nguli Mulili vs Republic [2014] eKLR** where the Court of Appeal held that the court should consider other evidence adduced to prove age and not only the birth certificate, baptismal card or school documents and proceeded to find that the age of the victim as indicated on the victim's treatment record issued at the hospital and the P3 form was sufficient proof of age.

23. It averred that penetration was also proven. It submitted that the Complainant testified that on 18th August 2019 she went to the Appellant's home at around 5:00p.m and that he defiled her all night despite her attempts to refuse. It stated that PW2 who lived with the

Complainant testified that she failed to return home on 18th August 2019 and the following day he went to the home of the Appellant in the company of police officers and found him and the Complainant who was naked at the time.

24. It added that PW 4 examined her and found bruises inside her vagina and confirmed she had been defiled. It pointed out that a Post Rape Care (PRC) Form was also adduced in evidence which confirmed that there was penetration of her vagina.

25. It was its submission that she identified the Appellant through recognition as she knew him since 2019 July and that he was her boyfriend. It further argued that his identification was confirmed by the Complainant's brother-in-law, JWO (hereinafter referred to as "PW 2") who testified that he found the Complainant inside the Appellant's house and that she was seated on a chair, naked with the Appellant also being present. It was the State's contention that the Appellant was identified beyond doubt and thus urged this court to dismiss the Appeal herein as the same lacked merit.

26. A perusal of the proceedings showed that the Complainant testified that she had known the Appellant since July 2019. She told the Trial Court that she had given him her name and telephone contacts at [Particulars Withheld] area when they met. It was her evidence that on 18th August 2019 she went to see him at around 5.00 pm and spent the night at his place. She further told the Trial Court that the Appellant had sex with her the whole night despite her resisting.

27. She added that when she woke up in the morning around 7.00a.m she found two police officers and her brother-in-law who arrested her together with the Appellant and were taken to Chiga Police Station and later she was taken to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) for examination. She adduced in evidence a birth certificate that was marked for identification.

28. JWO (hereinafter referred to as "PW 2") testified that the Complainant was his sister-in-law and that she lived with him. He stated that she was a Form 2 student at St [Particulars Withheld] Secondary School. It was his evidence that on 18th August 2019, the Complainant failed to return home in the evening and after his personal investigations he was told by some young children that she usually talked to a young man. It was then that he reported the matter to the Assistant Chief who in turn asked him to report to Chiga Police Station, which he did at 6.00am. He told the Trial Court that he was given two (2) police officers who accompanied him to the Appellant's home where they found the Appellant and the Complainant sitting on a chair while naked.

29. Berinda Nekesa Olando (hereinafter referred to as "PW 3") was a Clinical Officer at JOOTRH. She had attended court to testify on behalf of PW 4 who was attending to a personal issue at home. The Trial Court stood her down to allow PW 4 who had examined the Complainant testify.

30. Her evidence was that on examining the Complainant, she observed bruises inside the vagina. She added that High Vaginal swab showed epithelial cells, red blood cells and pus cells and produced the Post Rape Care form. She adduced in evidence the Post Rape Care (PRC) Form

31. The Appellant adduced sworn evidence. His testimony was that on 18th August 2019, PW2 borrowed his slasher but he refused to give him and that the following day at about 7.00 am, PW2 came with two (2) officers who arrested him. He stated that he was then arraigned in court and charged with the offence of defilement.

32. 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."

33. To prove an offence of defilement, the Prosecution must prove that there was an indecent act or an act which caused penetration, the victim must be a minor and that the offender must have been identified and/or recognised by the victim.

34. Having carefully scrutinised the evidence adduced on trial, it was evident that the Appellant and the Complainant were known to each other. His identification was by way of recognition. The Appellant did not deny this fact.

35. The court considered the Appellant's submissions regarding the Complainant's age against possession of an Identity Card to enable her own a telephone line and found the same to have been immaterial as securing a line was not dependent on the user providing his or her Identity Card. Indeed, it is not uncommon for minor children to have telephone lines registered in their parent's names using their Identity Cards.

36. However, this court found the marking of the Complainant's copy of the birth certificate showing that she was sixteen (16) years of age at the material time to have relevant and material to the Appellant's Appeal. Notably the same was just marked for identification and was never adduced in evidence.

37. **The** question of whether a document that was marked for identification formed part of the evidence that was adduced and the weight thereof to be attached was addressed in the case of **Kenneth Nyaga Mwise vs Austin Kiguta & 2 Others [2015] eKLR**. **The court therein held that** the mere marking of a document for identification did not dispense with the formal proof thereof. It further held that the marking of a document was only for purposes of identification and was not proof of the contents of the document and that a witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case.

38. Notably, admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value. This court thus wholly associated itself with the holding in the case of **Kenneth Nyaga Mwise v Austin Kiguta & 2 Others** (Supra).

39. Proof of a victim's age is a key ingredient to prove an offence of defilement. The penalty is heavily dependent on age and it is critical that a complainant's age be proven. It is trite law that the age of a complainant need not be proved by a birth certificate only as stipulated in Rule 4 of the Sexual Offences Rules, a fact that was correctly made by the State.

40. The focus in that Rule is that the age can only be proven through other documentary evidence in the absence of a birth certificate. It cannot be proven by oral evidence. If this were not so, there would be many allegations flying around which would make it difficult for courts to come to a just determination as they would have no documentary evidence to fall back on so as to make a decision.

41. Indeed, this court took the view that proof of a complainant's age by parents or guardian and by observation and common sense as was held in the case of **Musyoki Mwakavi vs Republic [2014] eKLR** would be most preferable in obvious cases such as where children are of tender years. It would be risky to observe and use common sense to guess the age of older children already in their teenage years as body size could be very misleading. Proof of children in the teenage years is best proved by way of documentary evidence.

42. The fact that the Complainant's age was shown in the PRC Form was not proof of her age. Indeed, the PRC merely addressed itself to the examination of her genitalia and it could not be deemed to have been a document that proved the Complainant's age in the absence of any other verifiable evidence. Indeed, the mere fact that the copy of the Complainant's Birth Certificate was only marked for identification remained irrelevant, inadmissible and consequently, the Trial Court ought not to have attached any weight to it.

43. Attaching weight to the said Birth Certificate deprived the Appellant herein an opportunity to test its veracity and authenticity for the reason that he could not cross-examine the Complainant on the same. The Trial Court thus erred in law and in fact in having evaluated the contents of the said inadmissible Birth Certificate against the already admitted PRC Form. Without belabouring the point, this court thus came to the firm conclusion that the Complainant's age was not proven.

44. Turning to the question of the Appellant's identification, it was immaterial that the Complainant and PW 2 testified that the Complainant and the Appellant were found at the Appellant's house. He may or he may not have been found at his house with the Complainant herein as both the Complainant and PW 2 testified. This court could not state with certainty that the Complainant identified the Appellant through recognition.

45. In her testimony, the Complainant came across as having been naïve as far as sexual matters were concerned. However, the fact that PW 4 testified that the Complainant told her that she had a boyfriend called Michael with whom she had had sex with several times as late as July 2019 and the said Michael's relationship with the Complainant was documented in the PRC Form caused this court discomfort.

46. The time and place of the Appellant's arrest and by whom he was arrested was pertinent as it could have proven the aspect of his recognition through identification by the Complainant. The failure by the Prosecution to call at least one arresting officer or investigating officer to corroborate the Complainant's and PW 2's evidence on how the Appellant was arrested dealt a fatal blow to the Prosecution's case. The fact that they were not called as witnesses during trial caused this court to draw a negative inference on why they were not called to testify.

47. In the absence of the arresting and investigating officers adducing evidence to corroborate her evidence and that of PW 2, this court was not completely certain that the Appellant penetrated the Complainant as she had contended and/or that the facts of the case were as she and PW 2 had narrated to the Trial Court.

48. In criminal cases, every material fact must be proven beyond reasonable doubt. If there is any slight doubt in the mind of the court or if all ingredients are not proven to the required standard, the court must set the accused person free. It is far a much lesser evil to acquit a guilty person whose case has not been proven to the required standard of proof, which in criminal cases is proof beyond reasonable doubt than to convict an innocent person on evidence that was not cogent and inconsistent.

49. Accordingly, after carefully evaluating the evidence that was adduced, this court formed the impression, correctly or otherwise that the prosecution of this case fell far below the expected standards. It was handled very casually despite the risk of long deprivation of the Appellant's freedom that was enshrined in the Constitution of Kenya. This court thus came to the firm conclusion that the Prosecution did not prove its case to the required standard which in criminal cases was proof beyond reasonable doubt.

50. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (3) were merited and the same be and are hereby allowed. As aforesaid three (3) grounds of appeal were merited, the Appellant's Ground of Appeal No (4) on the question of the sentence was thus rendered moot. Suffice it to state that had the Appellant been guilty and convicted of the offence of defilement under Section 8(4) of the Sexual Offences Act, the sentence of fifteen (15) years imprisonment would have been lawful.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 22nd October 2020 was merited. Accordingly, the conviction and sentence of the Appellant be and are hereby set aside and/or vacated as it was clearly unsafe.

52. Accordingly, it hereby directed that the Appellant herein be and is hereby released forthwith unless he be for any other lawful cause be held.

53. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE