



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 106 OF 2019**

**BENJAMIN THURANIRA BECHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being and appeal against the conviction and sentence by Hon. O.**

**Wanyaga SRM given in the Maua CM Cr. Case No. 66 of 2017 on 26/6/2019)**

**J U D G M E N T**

1. **Benjamin Thurania Bechi (“the appellant”)**, was on 23/10/2017 arraigned before the Maua Chief Magistrate’s Court with the offence of defilement contrary to **section 8(1) & (2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 14/10/2017 in Igembe South Sub-County within Meru County, the appellant intentionally caused his penis to penetrate the vagina of **GM** a girl aged 9 years.
2. The appellant pleaded not guilty but after trial, he was convicted and sentenced to 40 years imprisonment. He has now appealed to this Court against the said conviction and sentence.
3. In his petition of appeal, he raised 8 grounds which can be summarized into four as follows; **that the trial Court; failed to note that the prosecution witnesses gave inconsistent and contradictory evidence, failed to consider the appellant’s defence, failed to note that the incident occurred at night and he was not properly identified and, failed to note that the prosecution case was not proved beyond any reasonable doubt.**
4. As held in **Okeno v. Republic [1972] EA 32**, this Court as the first appellate Court must re-appraise the evidence afresh review the same and come up with its own findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses.
5. The evidence before the trial Court was that on the material day at about 6 pm, **GM**, the complainant had been sent to the compound of one Hassan to fetch water from a well. After she had fetched the water, she was accosted by the accused who fell her to the ground, removed her skirt and biker. He dropped his trousers and inner pants, laid on her and inserted his penis into her vagina and had sex with her. He covered her mouth to prevent her from screaming. He also threatened to cut her with a panga which he had.
6. She bled. The accused ran away. The complainant went and reported the incident to her grandmother (**PW2**) with whom she was living. They both went to the accused’s home and told the accused’s mother what had happened. She was later taken to hospital where she was admitted and her private parts stitched.
7. **PW2 BN** was the grandmother of **GM**. She testified that on the material day at about 7 pm, the complainant came home from fetching water and told her that the accused had defiled her. She checked her private parts and confirmed that fact. She accompanied the complainant to the accused’s home and showed the appellant’s mother her what had happened. They reported the matter to Kiamuringa AP Camp. They then went to Maua Police Station after which they took the complainant to Maua Methodist Hospital where the complainant was admitted for 1 ½ months.
8. **Dr. Kariuki Michael PW3** produced the P3 Form. It showed that the complainant was in pain and bleeding when she was reviewed at the hospital at 5 am of 15/10/2017. She collapsed on arrival in the ward due to loss of blood. There was lacerations of the vaginal walls including a second degree perineal tear. Defilement was concluded to be the cause of the injuries.
9. **PW4 PC Njiru Charity Muthoni** testified on behalf of the investigations officer. The investigations established that the complainant had been accosted by the accused while fetching water and defiled. After the incident, the police recovered blood stained lesso, skirt and two blouses. The appellant went into hiding but was arrested on 19/10/2017 at Mikinduri.

10. In his defence, the appellant denied committing the offence. He told the Court that on the alleged day, he was in Tigania and not Kirindine. That he was being framed because of a land dispute between his father and the mother of the complainant. That he saw the complainant the first time in Court.

11. The Court has carefully considered the submissions of the respective parties.

12. The first ground was that the trial Court erred in not considering that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies. The appellant submitted that the typed proceedings showed the complainant's name as 'GM', 'GM' and GM in the charge sheet. That the P3 form showed that the defilement took place on 19/1/2019. That **PW3** told the Court that the perpetrator was one Hassan and that the appellant was arrested on 19/10/2018. He relied on the cases of **Dankerai Ramkisham Pandya v R [1957] EACA 336** and **Phillip Muiruri Ndaruga v Republic [2016] Eklr** in support of those submissions.

13. The reference to the complainant by different names is but typo errors. They do not refer to different persons. It is one and the same complainant. Nothing turns on that complaint.

14. As regards the alleged different dates of 19/1/2019 and 14/10/2018, surely those are clearly errors that do not go to the heart of the matter. The charge was very specific, the offence was committed on 14/10/2017. The case was being tried in 2018. There is no way the incident would have occurred in January, 2019. I note that the said issues were never put to the witnesses for they would have clearly explained the mistakes.

15. As regards the testimony of **PW3, Dr. Kariuki** appeared and produced the P3 Form. It is in the P3 form that the examining doctor indicated that one Hassan forcefully defiled the complainant. From the evidence of the complainant herself and **PW4**, Hassan was the person from whose compound the complainant went to fetch water. The well was in Hassan's farm. The examining doctor may have confused the owner of the well with the defiler. To my mind, the inconsistency is not material and does not go to the heart of the matter.

16. In **Richard Munene v. Republic [2018] eKLR**, the Court of Appeal held: -

***“Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.***

***It is settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to the benefit of it.”***

17. In **Willis Ochieng Odero v. Republic [2006] eKLR**, the Court of Appeal held: -

***“As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code”.***

18. In my view, the inconsistencies and contradictions complained of were not material and could not create any doubt in the mind of the trial Court. I reject that ground.

19. The second ground was that the trial Court failed to consider the appellant's defence. The appellant's defence was that he was not at the scene or the general area of the incident. That he was being framed because of a land dispute between the mother of the complainant and the appellant's father.

20. The trial Court found that the defence was not plausible. That it was curious for the appellant to claim that he was being framed by people he did not know. The appellant had told the Court that he did not know the complainant and that he had first seen her in Court. The trial Court rightly wondered how then there could have been a grudge between the mother of the complainant and the appellant's father.

21. It should also be noted that the defence of alibi could not stand, leave alone the existence of a land dispute between the complainant's mother and the appellant's father. When the complainant testified, the appellant chose not to cross-examine her. He never put to any of the prosecution witnesses his alleged alibi or alleged land dispute. While it was not for him to prove his innocence, the moment he set up an alibi, it was upon him to prove it. He never called anyone to collaborate his allegation that he was anywhere else other than the scene of crime at the material time. That ground also fails.

22. The third and fourth grounds are intertwined. These were that; the appellant was not properly identified as the incident occurred at night and that the prosecution case was not proved beyond any reasonable doubt. These are intertwined in that, identification is one of the ingredients in the offence of defilement.

23. The first ingredient for the offence of defilement is the age of the complainant. In the present case, the charge was that the complainant was aged 9 years. The complainant stated that she was subjected to age assessment whereby **PW3** who examined her confirmed that her age was estimated at 10 years when he examined her on 9/11/2017. He produced the age assessment report of even date which showed that the complainant was aged 10 years. Accordingly, that ingredient was sufficiently proved to the required standard.

24. The second ingredient is that there must be penetration. The evidence of the complainant was that, when the appellant accosted her, he removed her skirt and biker. He lowered his trouser and inner wear. He then inserted his penis in her vagina. She felt extreme pain during the

ordeal. She bled as a result. That when she was admitted at the Maua Methodist Mission Hospital, she was stitched in her private parts.

25. The complainant's testimony was corroborated by **PW3 Dr. Kariuki**. He produced the P3 Form which showed that the complainant had suffered lacerations of the vaginal wall including a second degree perineal tear (the tear of the internal vaginal walls). That she was repaired (stitched) under anesthesia in theatre. Undoubtedly, penetration was proved to the required standard.

26. The last ingredient which is intertwined with the appellant's 3<sup>rd</sup> ground of appeal was that of identification. It must be established that the perpetrator of the penetration is the accused. In the present case, the appellant submitted that since the incident occurred at night, there was no evidence on the source of light by which he was identified.

27. The evidence on record was that the incident occurred at 6 pm. That time by any estimation is still day light and one uses the natural light to see physical objects. There was no allegation that it was raining or dark. The complainant stated that he saw and recognized the appellant very well. She knew him well because he was a neighbor. That is evidence that was not denied or challenged.

28. In **Wanjohi & 2 Others v. Republic [1989] KLR 415**, the Court of Appeal held that recognition is stronger than identification but an honest recognition may yet be mistaken. Further, in **R v. Turnbull [1976] 3 ALL ER 549**, the Court held:-

*“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistake in recognition of close relatives and friends are sometimes made”.*

29. In the present case, the incident occurred in broad day light, at about 6 pm. **PW1** stated that she knew the appellant well as she knew him before that day. She even stated that she went to his parent's home with her grandmother immediately after the ordeal and that they met the appellant's mother. That is not evidence of a person who did not know or recognize the person who had assailed her.

30. In my view, the circumstances under which the incident occurred were favorable to recognition and that the appellant was positively identified as the perpetrator. There was no room whatsoever for mistake.

31. Accordingly, those grounds are also without basis and are rejected.

32. The end result is that the appeal has no merit. The same is hereby dismissed and the conviction and sentence upheld.

**DATED AND DELIVERED AT MERU THIS 30TH DAY OF JANUARY, 2020.**

**A. MABEYA**

**JUDGE**