



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 123 OF 2018

JOHN KAIRITHIA MURANGIRI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an Appeal from the Judgment of Honourable L.Ambasi (Mrs) CM in Chief Magistrate's Court at Meru CMC S.O No. 28 of 2016, delivered on 28th August 2018)

JUDGMENT

1. The Appellant was charged in Meru CMC Sexual offence case No. 28/2016 with the offence of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act NO. 3 of 2006.
2. The particulars of the offence in the 1st count were that John Kairithia Murangiri on the diverse dates between 22nd and 30th June 2016 in Imenti North Sub-County within Meru County intentionally caused his penis to penetrate the vagina of NM a child aged 10 years. He was also charged with an alternative count to the first count under Section 11(1) of the Sexual Offence Act No. 3 of 2006.
3. In the 2nd Count the particulars were that John Kairithia Murangiri on diverse dates between 22nd and 30th June 2016 in Imenti North Sub-County within Meru County intentionally caused his penis to penetrate the vagina of MM a child aged 11 years.
4. Similarly there was an alternative count under section 11(1) of the Sexual Offences Act No. 3 of 2006.
5. Upon taking the evidence of 8 prosecution witnesses and the Appellants defence as well as evidence of his 3 witnesses Honourable L. Ambasi (Mrs) Chief Magistrate found the Appellant guilty in the 2 principal counts and he was convicted on 28th August 2018 and sentenced to serve life imprisonment.
6. The Appellant was aggrieved by the finding of the Trial Magistrate and he preferred the Appeal herein based 7 grounds as follows:-
 - a) That the learned Trial Magistrate Misdirected herself in fact and in law by not appreciating that the prosecution witnesses evidence was not properly corroborated as required by the Evidence Act hence arriving to a wrong conviction.
 - b) That the Learned trial Magistrate misdirected herself in fact and law by not appreciating the Appellants alibi that on the alleged dates he was not near the complainants hence arriving at a wrong conviction.
 - c) That the Learned trial magistrate misdirected herself infact and law by putting weight or contradicting evidence of the prosecution hence arrives to a wrong conviction.
 - d) That the Learned Trial magistrate misdirected herself infact and law by not appreciating the period of the alleged crime and the time reported hence arriving to a wrong conviction.
 - e) That the Learned Trial Magistrate misdirected herself in fact and law by not appreciating that the evidence tendered mostly consisted of hearsay.
 - f) That the Learned trial magistrate misdirected herself in fact and law by not appreciating the Appellants Mitigation.
 - g) That the sentence was excessive in the circumstances.
7. The evidence on record in the trial court was that the accused who is an uncle to one of the minors started showing them pornographic

videos and newspapers and subsequently defiled them repeatedly on 3 different occasions. When PW4 CM the mother of PW1 found one such pornographic newspaper pinned at the back of the door in her house and asked about it PW1 told her mother what the accused person had been showing them on the phone. PW1 and PW2 narrated to the court how the Appellant defiled them consecutively on 3 occasions in the shamba and also in the house.

8. Both PW1 and PW2 said that 1st Incident was on 19th June 2016 when the Appellant went to the house of PW1 and chased out the boys and started showing them pornographic photos on his phone and that he warned them not to tell anyone as he will beat them. From the evidence of PW2 they did not scream when the appellant defiled them in the bush and near the forest because he told them that he would kill them and that he had a knife when he defiled them near the forest and when PW1 wanted to scream he threatened to kill her.

9. PW3 the brother to PW1 confirmed that the Appellant chased the boys out of the house and remained with PW1 and PW2.

10. PW5 the mother of PW2 also testified that she got the report about the defilement of the children from PW4 and she accompanied PW4 and the 2 children to the police station and to the hospital where they were treated and P3 forms were filled.

11. PW4 and PW5 produced birth certificates and baptism card for PW1 and PW2 respectively to confirm their ages.

12. PW6 PC Kariuki Mkundi arrested the Appellant in company of Patrick Mwenda. He said that although the defilements had taken place in June, the Appellant was only arrested in September because he used to evade arrest.

13. The pw7 Dr Winnie Mutunga produced P3 forms filled by Dr Bett who examined PW2 and PW1 and confirmed that they had been defiled.

14. The offence was investigated by PC Joseph Ndonga who preferred the charge against the Appellant.

15. The Appellant person was placed on defence and he denied having committed the offence, he said that he had accused PW1's father of having an affair with his wife. He also said that since May 2016 he was loading poles and he used to leave at 6.00 am and would come late.

16. The Appellant's 3 witnesses testified and said that they were cutting firewood for KTDA with the Appellant since May 2016 to October 2016. They however, did not have documents to show they were working with KTDA and they didn't show that they had signed in and out of work at 8.00 am and 8.00 pm. They confirmed that they were neighbours to the Appellant and PW1 and PW2 parents.

17. This appeal was canvassed by way of written submissions. The Respondent submitted that the prosecution had proved the 3 ingredients of the offence of defilement namely:-

- a) Age of the complainant
- b) The fact of penetration
- c) The identity of the assailant.

18. They relied on Meru H.C .H. hhhjCr Appeal no. 78 of 2008 FMN vs Republic to urge the court to uphold the conviction and sentence of the trial court.

19. The Appellants counsel M.G. Kaume submitted that the complainants were not sure and specific on the date when the alleged defilement was committed and that PW1 does not mention by name whom she was referring to as having grabbed her and that she may have been referring to other people. The Appellants counsel also contended that there was contradiction as to the exact age of PW2 who testified that she was 12 years and yet the charge showed she was 11 years. It was also argued that PW2 claimed they were shown the pornographic photos on 6th June 2016 and yet PW1 says it was on 19th June 2016, 22nd June 2016 and 30th June 2016. It was also contended that the evidence of PW3 who said that the incident was in January contradicted PW1 and PW2 who said that it was in June 2016.

20. It was argued that the evidence of PW4 was hearsay and further contradicted that of PW1 and PW2 as she said that it was on 31st July 2016 and yet PW1 and PW2 talks about 2016.

21. In regard to the medical evidence, it was argued that the P3 form which was filled on 9th August 2016 for PW1 indicated that her injuries were 24hrs old when the incident was said to have occurred in June 2016. It was also claimed that there were serious contradictions as regards to the injuries and suffered by PW1 in the P3 form.

22. The appellants counsel argued that the court relied on the evidence of PW1 and PW2 who are minors to convict the Appellant and yet there was no other prosecution witness who corroborated their evidence as the rest of the prosecution witnesses gave hearsay evidence.

23. This being a first appeal this courts duty is to revisit and re-evaluate the evidence before the trial court a fresh, assess it and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okemo vs. R [1977] EALR 32**

24. The issues for determination are whether the trial court established that the ingredients of the offence of defilement under section 8(1) of the Sexual Offence Act No. 3 of 2006 were proved by the prosecution in the trial court.

25. The ingredients of the offence of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

26. As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

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

“Penetration” under section 2 of the Act is defined to mean **“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

27. In exhibit P2 Dr Bett who examined PW1 found that her hymen was broken and the complainant gave the history of how the Appellant defiled her in the month of June 2016 as well as defiled PW2 and post rape care form was also produced as exhibit 3 in that regard. Exhibit 5, P3 form for MM- PW2 Dr Bett also found that the minors hymen was broken. As a result of this examinations it was concluded that the 2 minors were defiled.

28. Regarding the age of the complainants, the authority of Francis Omuroni vs Uganda Court of Appeal Cr. 2 of 2000, it was held as follows

“ 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 victims parents or guardian and by observation and common sense. “

29. PW4 and PW5 produced certificate of birth and baptism card respectively for PW1 and PW2 confirming that they were born on 23rd September 2005 for NM and 23rd April 2005 for MM. The 2 minors were therefore, 10 and 11 years by the time of the commission of the offence and the Appellant was properly charged under section 8(1) of the Sexual Offences Act.

30. The submission raised as to the ages of the minors cannot be used to fault the trial magistrate verdict.

31. Whether it was the Appellant who committed the Offence, the Appellants counsel claimed that PW1 and PW2 evidence was not corroborated.

32. According to **Section 124 of the Evidence Act** it stipulates that :

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

33. This court finds that the evidence of the minors corroborated each other and their evidence was also corroborated by the medical evidence produced in Exhibit 2, 3, 5 and 6.

34. The Appellant is the uncle of the minors PW1 and PW2 and they said that the offence was committed in broad daylight and they could not have been mistaken identity.

35. The Appellant raised the defence of alibi and his witnesses claimed that they were with the Appellant between May and October 2016, however, the Appellant did not raise this defence on his arrest, during investigations or prosecution by cross examining the witnesses on his whereabouts or even on alleged grudge between him and the father of PW1. The Appellants witnesses claim they were working for KTDA but they had nothing to show for it. The Appellant himself did not say where he was carrying the poles whether at KTDA or anywhere else.

36. The Appellant was arrested in September 2016, and the arresting officer said that it was because he had been evading arrest since he committed the offence. It cannot therefore, be true that DW2, DW3 and DW4 worked with the Appellant upto October 2016 when he was arrested in September 2016.

37. The Upshot of the above analysis is that the Appeal lacks Merit and it is dismissed. Appellant 14 days right of Appeal on points of law.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 23RD DAY OF JANUARY 2020.

In the presence of :

C/A: Kinoti

Appellant: Present in person. Mr Otieno C holding brief for Mrs Kaume.

Respondent: Ms Mbithe for state.

Mrs Koome Advocate for Appellant

HON A. ONG'INJO

JUDGE