



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 22 OF 2019

MMY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Wajir Principal Magistrate's Court Sexual Offence Case No. 7 of 2019 delivered by Hon. A. K. Mkorross (PM) on 14th day of June 2019)

JUDGEMENT

1. The appellant MMY was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars being that on the 10th day of March 2019 at [particulars withheld] village in Eldas Sub-County the appellant intentionally caused his penis to penetrate the vagina of KBM. (name withheld) a child aged 7 years old.
2. In the alternative the appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars being that on the 10th day of March 2019 at [particulars withheld] in Eldas Sub-County within Wajir County the appellant intentionally touched the vagina of KBM. a child aged 7 years with his penis.
3. The appellant also faced a second charge of incest contrary to section 20(1) of the Sexual Offences Act. The particulars being that on the 10th day of March 2019 at [particulars withheld] in Eldas Sub-County within Wajir County being a male person caused his penis to penetrate the vagina of KB a person who was to his knowledge his niece.
4. Appellant pleaded not guilty and after full trial he was convicted and sentenced to serve life imprisonment.
5. Being aggrieved by the trial court verdict he lodged appeal and set out the same which can be condensed as follow:

I. There was no prove of ingredients of defilement beyond reasonable doubt.

II. That crucial witnesses were not availed in court to prove the truth of the prosecution's allegations.

III. That there was an existing vendetta which led to fabrication of the case against the appellant.

IV. That the sentence of life imprisonment was very harsh and excessive to a man of prime age like him.

6. Parties were directed to file submission but only appellant filed.

APPELLANT'S SUBMISSIONS

7. The appellant submits that penetration was not proved as the hymen was intact. The doctor's findings were that the hymen was intact. Thus there was no penetration on where the hymen is intact.
8. He contends that the age assessment and p3 forms were invalid as it was done by the I O who is not an expert.
9. The victim's mother had vendetta with him.
10. In a nutshell, he submitted that, the sentence imposed upon him was very harsh and excessive to a young man of prime age like him. He thus he urges the court be lenient on sentence and allow his appeal.

EVIDENCE ADDUCED

11. **RM**, (the mother of the complainant) appeared as the first prosecution witness and testified that on 18/3/2019 while she was at home a lady called Mariam had reported to her that the complainant was not well. The said Mariam told her that the complainant had a wound in her vagina and felt pain when she passed urine.
12. She then called for the complainant who was in the pastoral areas and the complainant was brought after three days. She immediately checked the complainant's private parts and saw that the complainant's vagina had been torn leading her to conclude that the complainant had been defiled.
13. She then took the complainant to the Eldas Hospital but was informed that the wounds could not be sutured and they were referred to Wajir Referral Hospital where they were also informed that the wounds could not be sutured because they had healed badly.
14. She further testified that when she asked the complainant who had harmed her thus the complainant had told her that the appellant had defiled her whilst they were in the pasturelands and threatened to kill her with a knife if she told anyone.
15. They then reported the matter to the police and the appellant was arrested.
16. She testified that the appellant herein was a stepbrother to her husband and further stated that the complainant was 9 years at the time of the incident.
17. **BKM** (the complainant) was the second prosecution witness and testified that she had been injured on 10/3/2019 while herding goats afar from home at [particulars withheld]. She stated that the appellant who was also herding goats came and sat beside her and after pulling off her shorts, lay on top of her and had sex with her only running off when he saw she was bleeding. She described the ordeal in graphic detail and stated that when the appellant had put his thing into her vagina blood had oozed out and that is when she got injured.
18. She stated the time was approximately 4pm and that the appellant had threatened to slaughter her with a knife if she told anyone what had happened. She identified the appellant as MM and stated that she had known him for a long time as they were related. Her evidence remained firm in cross examination.
19. **AM (PW3)** testified that upon receiving news that the complainant, his niece, had been defiled by the appellant herein, he had organized for transportation and is the one who had took the complainant and the appellant to hospital for examination.
20. **Duncan Kinyua (PW4)** is the clinical officer who examined the complainant. He testified that the complainant had been presented to him on the 19th March 2019 and she reported that she had been sexually molested by a person known to her.
21. On general examination he found that the complainant was weak and there were blood stains on her clothes.
22. Genital examination revealed that the complainant's labia majora and minora were bruised and that there was a healing cut wound extending from the vaginal orifice to the urethra. The hymen was however intact and there was no discharge.
23. His examination of the appellant yielded no obvious bruises or injuries on the penis.
24. It was his further evidence that after the physical examination they had sent the complainant to the dental personnel for age assessment and the complainant's age had been assessed as 9. He produced the P3 form as Pexh 1 and the age assessment as Pexh 3.
25. **PC Moses Egode (PW5)** was the investigating officer in this matter and testified that after being instructed to investigate this matter by his OCS he had recorded the statements of the complainant and her witnesses after which he took the complainant and the appellant to the hospital for examination. The medical examination showed that penetration had occurred and he therefore charged the appellant herein with the present offence.
26. He also testified that he had taken custody of the clothes worn by the complainant on the material day and produced the same as Pexh 2a and 2b. He was the final prosecution witness.
27. When placed on his defence the appellant renewed his plea of innocence and stated that he had differed with his family members and was thus being framed. He further asserted that the complainant herein had been subjected to FGM and sent to the pastoral areas which explained her wounds.
28. In cross examination he stated that he had differed with his brothers over pasture.

ISSUES, ANALYSIS AND DETERMINATION

29. After going through the evidence on record and the tendered submissions I find the issues are; **whether the ingredients of defilement were proved beyond reasonable doubt? Whether the appellant defence was considered? and whether the sentence was excessive?**
30. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the

trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

31. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

32. That the complainant was a child at the material time was not really in contest. An age assessment was produced as Pexh 3 and even though it was not specific on the age, it shows that the complainant was aged 9 years or below. That finding tallied with the complainant's testimony that she was aged 9 years at the time and further tallied with the trial court's own observation that the complainant was a child of tender years.

33. All the other medical records pertaining to the complainant also gave her age as below 9 years and thus the finding and holding by trial court that it was demonstrated to the required standards that the complainant was a child within the meaning of the Sexual Offences Act at the material time was justified. The appellant allegations that assessment report and p3 forms were made by the I O has no substance.

34. On the issue of penetration: Section 2 of the **Sexual Offences Act** defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

35. This position was fortified in the case of *Mark Oiruri Mose vs Republic (2013) eKLR* when the Court of Appeal stated thus:

"...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...." (Emphasis added).

36. Later the Court of Appeal, then differently constituted, in the case of *Erick Onyango Ondeng vs Republic (2014) eKLR* held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

37. The combined medical and oral evidence also leave no doubts that the complainant had been a victim of an act causing penetration. The P3 form which was produced as Pexh 1 shows that at the time of examination the complainant had a bruised labia majora and minora and a healing cut wound extending from the vaginal entrance to the urethra which corroborates the complainant's testimony that she had been forcefully penetrated thus causing injury to her vagina.

38. The definition of penetration is given in the Sexual Offences Act, to wit, that:

"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

39. That definition fits in with the complainant's evidence that upon the appellant putting his thing (penis) into her vagina, and upon the appellant noticing that he had caused her to bleed he pulled out and ran.

40. In determining whether there was penetration, the trial court also considered the appellant's assertion and /or theory that the complainant's injuries were caused by female genital mutilation (FGM) but however the PW3 and the oral evidence of the clinical officer (PW3), tell a different narrative which do not subscribe to his way of thinking.

41. That is because FGM has very special elements and target very special parts of the female genital anatomy which in the area victim comes from entails the type, which involved the removal of the prepuce of the clitoris i.e. the **Clitoridectomy** see **Female Genital Mutilation: health related problems among the Somali Community in Garissa Town, Kenya. K.U institutional repository 2014.**

42. The clinical officer could not have missed it if the injuries had been caused by female genital mutilation (FGM). The appellant did not raise the issue during cross-examination.

43. Further to the above, it is noteworthy from the P3 that the complainant had a cut wound which was extending from the vaginal orifice to the urethra which is not in keeping with a wound caused by female genital mutilation.

44. Thus there was no doubt that the injuries complained of by the complainant were caused by penetration and therefore the trial court justified to find so.

45. On whether it is the appellant who committed the act causing penetration, it is notable that, it is only the complainant who placed the appellant at the scene. No other person came forward to say that he/she had seen the appellant committing the act causing penetration thus making the complainant the sole identifying witness.

46. The dangers of relying on a sole identifying witness have been dealt with severally by the superior courts with the common position

being that relying on such evidence poses some uncertainty and must be approached with caution.

47. In addressing the issue, the Court of Appeal in *Maitenyi vs Republic [1986] KLR 198* had this to say:

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before decision is made.”

48. That rule, as trial court understand it, is general and cuts across all criminal matters with the exception of Sexual Offences matters concerning children which seem to be insulated.

49. Thus the provisions of section 124 of the Evidence Act which provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act (Cap 15), where the evidence of an alleged victim is 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 crime 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.” (Emphasis added).

50. In this instance the complainant was emphatic that it is the appellant who penetrated her and averred that she knew him well because they were related. That relation is confirmed by her mother (PW1) who testified that the appellant is a stepbrother to her husband and thus to the complainant’s uncle.

51. It is further on record that the incident occurred at 4.0pm in the open fields meaning that the complainant had sufficient light and opportunity to see who her molester was and identified him. That opportunity for identification was further increased by the intimate setting required for a sexual act and the fact that the appellant made no attempt to conceal his identity.

52. The prosecution evidence is considerably well stacked against the defence evidence and trial court having observed the complainant as she testified she impressed court as straightforward and honest. The trial court therefore believed her and made a finding that all the three ingredients necessary to prove a charge of defilement were proved beyond reasonable doubt.

53. When placed on his defence the appellant insisted that he was innocent and stated that he had differed with his family members and was thus being framed. He further asserted that the complainant herein had been subjected to FGM and sent to the pastoral areas which explained her wounds.

54. He never raised these issues during cross-examination of witnesses. Same appeared to be an afterthought and did not supplant the prosecution consistent and cogent evidence.

55. Thus this court finds that the prosecution proved its case on the main charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act and accordingly conviction of the appellant for offence was justified.

56. The court finds that the appeal on conviction fails and is upheld. On sentence, the appellant complains that the life sentence meted to him is harsh and excessive thus seeks court to reduce the same.

57. The appellant was a first offender and young and taking to account the sentencing guidelines, he ought not to have been awarded the maximum sentence thus this court will temper with the sentence.

58. Thus the court makes the following orders;

i) The appeal on conviction is dismissed and same is upheld.

ii) The life sentence is set aside and substituted with a sentence of 15 years’ imprisonment to run from the date of arrest 20/3/19.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE