



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 23 OF 2019

ZACHARIAH MWOMBOMBIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the judgement of Hon. E. M Ayuka (Mr) S.R.M in Nkubu PMC0 (SO) NO. 29 of 2018)

JUDGEMENT

1. **ZACHARIA MWOMBOMBIA KIRIGIA**, the appellant was charged with the offence of defilement contrary to section 8 (1) as read together with Section 8 (2) of the sexual offences Act No. 3 of 2006. The particulars of the offence were that on 13th August, 2018 at around 1700 hours in [particulars withheld] Village Gaturi Sub location in Imenti South within Meru County he intentionally and unlawfully caused his penis to penetrate the Vagina of FNM a child aged 6 1/2 years.
2. In the alternative the Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 2006
3. The Appellant was tried and convicted for the offence of defilement and he was sentenced to serve life imprisonment.
4. Having been dissatisfied with the conviction and sentence he files this appeal setting out the following grounds
 - a. *The trial magistrate erred in law when failed to note that there were contradiction and inconsistencies in this case*
 - b. *The trial magistrate erred in law and in fact by failing to note that the prosecution case was not proved beyond reasonable doubt*
 - c. *The trial magistrate erred in law and in fact by failing to note that the appellant was not supplied with witness statements*
 - d. *The trial magistrate erred in law and in fact by failing to note that the clinical examination report did not link the accused with the ordeal*
 - e. *The trial magistrate erred in law and in fact by rejecting the appellant defense without giving cogent reasons*
5. **PW1 FN** told the court that on 13/8/2018 she was with her brother **PW2** at the accused where the accused had told them they could pick guavas. The accused did “tabia mbaya” to her as she was laid on her back and the accused used his penis to her vagina. **PW2** was picking guavas and could not see what was happening. Later she told **PW2** what happened but they did not tell their father until later. Her father questioned her and they proceeded to the accused house. She was the taken to the police station then treated at Kanyakine District Hospital.
6. **PW2 WB** who gave an unsworn testimony told the court that he and **PW1** had gone to the accused home to pick guavas. However, the accused and **PW1** did tabia mbaya. That the accused undressed the complainant and lay on him. He saw as he was on a guava tree. He then told his father who then took the complainant to hospital.
7. **PW3 MOSES BAIYANE** a clinical officer at Kanyakine sub county hospital told the court that the complainant was brought to hospital with allegations of having been defiled. On examination they found that the hymen was absent, the vaginal canal was swollen, there was yellowish discharge and the degree of injuries was assessed as grievous harm. The test run revealed that there was pus cells, red blood cells but there was no spermatozoa. Urinalysis had luicocides and blood. She presented the P3 form filled by her colleague Sabrina Kaimetheri.
8. **PW4 FMM** the father to the complainant told the court that his daughter is 6 ½ years old and presented her birth certificate to corroborate. The accused is a neighbor and on 13/8/2018 at about 5 pm the accused came to his home and he told the complainant that she

could go and pick guavas from his farm. She was met by PW2 her brother and together they went to the accused farm and the children came back at around 6 pm. The next day PW2 woke him up and told him that the accused had done tabia mbaya to the complainant. He interrogated the complainant and she confessed to what had happened. They went to the accused home and when asked the accused denied what had taken place. They reported the matter at Murugune police station and then took the complainant to Kanyakine Sub County hospital.

9. PW5 JOSEPH GITONGA the assistant chief of Gatui sub location told the court that the accused is well known to him as he hails from the same village. On 16/8/2019 he was called by MM who is a brother to PW4 he told him that the complainant had been defiled and he advised them to report to the police station and then take the child to the hospital. He was later called by the area chef who told him that there was an arrest order on the accused. He managed to arrest him on 20/8/2018 as he had gone to hide in his brothers home. During cross examination it was revealed that the accused is notorious with defilement cases.

10. **PW6 P.C SIMON KIARA** of Murungurune Police station testified and told the court that on 16/8/2018 the complainant together with her father came to the police station and reported that she was defiled. He interrogated the child and recorded the witness statements. The report was made on 16/8/2018 at the police station and the incident took place on 13/8/2018.

11. **ZACHARIA MWOBODIA** the accused told the court that on 25/8/2018 he went to the farm and came back on Wednesday. He further claimed that he is being framed as he did not commit the offence.

12. This Appeal was canvassed by way of written submissions.

13. This being a first appeal, it is up to this court to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusion and findings **Okeno v. Republic [1972] EA 32**. The prosecution called six witnesses in support their case.

14. I have considered the grounds of appeal, submissions, evidence in the trial court, the judgments of the trial magistrate and the issue for determination is whether the Appellant was found guilty and convicted on sound evidence.

15. 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.”

16. 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.”

17. On the issue of the age of the of the complainant PW4 the father of the complainant provided the birth certificate of the complainant which confirmed that his daughter was 6 years old at the time of the incident.

18. On the second issue of proof of penetration PW3 a clinical officer testified that on examination of the complainant they found that the hymen was absent, the vaginal canal was swollen and assessed that there was grievous harm. Even though there was no presence of spermatozoa the evidence provide proved that indeed there was penetration

19. This then leads to the final issue of positive identification of the assailant. The complainant positively identified the accused as the individual that attacked her. He was familiar to her because he was their neighbor and additionally PW4 who was present at the scene was able to identify the accused person because he was on a guava tree and witnessed the act. In my view therefore I find that the prosecution was able to prove their case beyond reasonable doubt. The Appellant has not shown that there were any material contradictions that were fatal to the prosecutions case and therefore his ground 1 and 2 or the appeal cannot stand.

20. On the ground that the accused was not provided with witnesses statements I have examined the record and found that on 17th September 2018, the Appellant confirmed to the court that he was ready to proceed with the matter and he did not complain that he did not have statements. Therefore I find that this ground of appeal does not have merit.

21. On the ground that the Clinical examination report did not link the Appellant to the ordeal this court’s take is that the medical examination reports are meant to establish whether the complainant was sexually abused and not who abused them. In any case the complainant and her brother identified the Appellant positively as the one who defiled the complainant and they took their father to the Appellant’s place and identified him to as well as the scene where he defiled the complainant. That ground therefore fails as well. The trial court was convinced by the evidence of the 2 minors and he said that there was no room of mistaken identification of the perpetrator as the offence took place in broad daylight.

22. On the claim that the trial court rejected the Appellants defence without giving cogent reasons, page 7 of the trial magistrates judgment has analysed the Appellants defence. The trial magistrate rejected the defence as a mere denial and afterthought. The Appellant raised an alibi which he did not raise with the complainants father who was categorical that the Appellant was present at home and he collected the children to go and pick guavas in his farm on the material day. The trial magistrate also said that there was nothing to suggest that there existed bad blood between the complainants parents and the Appellant that could make them frame him with the offence. The trial

magistrate also said that the conduct of the Appellant also pointed to his guilty mind as he went into hiding and he was flushed out at his hideout at his brothers home. That he even attempted to flee on seeing the arresting officers. The trial magistrate therefore gave good reasons why he did not believe the Appellants defense and he cannot be faulted on this finding.

23. Consequently, I find the appeal herein lacks merit and is therefore dismiss it.

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

Respondent: Ms Mbithe for state.

HON A. ONG'INJO

JUDGE