



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 50 OF 2019**

**KEVIN ANAMI MUSOGA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(from the original conviction and sentence in Kakamega CMC Sexual Offences Case No. 20 of 2017 by J. N. Maragia, SRM dated 7/5/2019)*

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. He was dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are that:-

- 1. The learned trial magistrate grossly erred in law and fact in presiding over a trial without considering that the appellant was not served with the statements of witnesses as envisaged under article 50 (2) of the Constitution.*
- 2. The learned trial magistrate grossly erred in law and fact in convicting the appellant without observing that the age of the complainant was not conclusively proved as required by law.*
- 3. The learned trial magistrate erred in law and fact in convicting the appellant over evidence that did not meet the threshold required especially the evidence regarding penetration as the critical ingredient of defilement.*
- 4. The learned trial magistrate grossly erred in law and fact in convicting and subsequently sentencing the appellant on evidence that was malicious, fabricated, farfetched and inconsistent.*
- 5. The learned trial magistrate erred in law and fact in convicting the appellant without observing that section 36 of the Sexual Offence was not complied with.*

2. The grounds of appeal were expounded by the written submissions of the appellant. The state did not make any submissions in the appeal.

3. The particulars of the charge against the appellant were that on diverse dates between the 24<sup>th</sup> day of February and 18<sup>th</sup> day of March, 2017 in Kakamega East District within Kakamega County, intentionally caused his penis to penetrate the vagina of SM, a child aged 12 years.

**Case for Prosecution –**

4. The case for the prosecution was that the complainant was in the months of February and March, 2017 employed as a house help by a woman called Carol. She was working at the food hotel of the said woman.

5. It was the evidence of the complainant (PW5) that the appellant used to visit the hotel of Carol. That one day she served him with food at the hotel. That when she requested him for payment he pulled her to a nearby bathroom. He removed her clothes and also removed his. He inserted his penis into her vagina. She started to cry. A watchman heard her cries and went and opened the door.

6. That on 18/3/2017 a community policing agent PW2 received a report from some women that there were suspicions that he complainant had been defiled. PW2 passed the report to a village elder PW1. PW1 went and made inquiries from the complainant. The complainant revealed to him that she had been defiled by the appellant. PW1 summoned the appellant. The appellant alleged that the complainant was his wife. The village elder reported to the Assistant Chief. The appellant was arrested by members of the public. An administration

policeman PW3 of Khayega AP Post went and re-arrested the appellant. He escorted him and the complainant to Shisasari Police Station. PC Hassan Dogo PW6 of Shisasari Police Station investigated the case. He escorted the complainant and the appellant to Shinyalu Health Centre. The complainant was examined by a clinical officer PW3 who found her with whitish foul smelling discharge from her vagina, bruised labia majora and bruised vagina. A laboratory examination revealed traces of spermatozoa in her urine. The hymen was absent. The clinical officer completed a P3 form and a Post Rape Care form for the complainant. The appellant was charged with the offence. During the hearing the clinical officer produced the complainant's treatment booklet, the Post Rape Care form and the P3 form as exhibits, PEx 1-3 respectively. The clinical officer also examined the appellant. He produced his treatment notes as exhibits, PEx 4.

#### **Defence Case –**

7. When placed to his defence, the appellant stated in a sworn statement that he was arrested over a traffic offence on the 19/2/2017. He was taken to Shisasari Police Station. He was unable to raise a bribe of Ksh. 1,500/=. The investigating officer then fabricated this case against him. That he had been in custody since the time of his arrest. He denied that he had committed the offence.

#### **Submissions –**

8. The appellant submitted that the trial magistrate started the case before supplying him with copies of witness statements which was a violation of his right to a fair trial as enshrined in Article 50 (2) (j) of the Constitution.

9. The appellant submitted that the age of the complainant was not proved. That the village elder PW1 said that the girl was aged approximately 9 years. That the investigating officer PW6 said that she was aged 12 years. That no document was produced to prove her age.

10. It was submitted that there was no conclusive evidence to prove penetration. That the case was not proved beyond all reasonable doubt.

#### **Analysis and Determination –**

11. This being a first appeal, the duty of the court is to analyse afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the lower court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) E.A 32** and **Kiilu & Another –Vs- Republic (2005) 1KLR 174**.

12. The ingredients of the offence of defilement are proof of the age of the victim of the offence, proof of penetration on the victim and proof of the identity of the perpetrator – See **Dominic Kibet Mwareng –Vs- Republic (2013) eKLR**.

13. The appellant contended that the age of the complainant was not proved. The investigating officer PW6 said that the complainant was aged 12 years. That she was orphaned and that he could get documents in respect to her date of birth. The complainant during her evidence did not adduce evidence as to her age.

14. The trial magistrate in her judgment relied on the evidence of the investigating officer that the girl was aged 12 years. She also relied on the evidence in the P3 form which showed that the girl was aged 12 years. She accordingly held that the age of the girl was proved at 12 years.

15. The importance of proving the age of a victim of defilement was emphasized by the Court of Appeal in the case of **Kaingu Elias –Vs- Republic (2010) eKLR** where it was held that:-

*“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim.”*

16. The age of a person can be proved in various ways. In **Mwolongo Chichoro Mwanjembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR)** (cited in the case of **Edwin Nyabaso Onsongo –Vs- Republic (2016) eKLR**) the Court of Appeal held that:-

*“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”*

17. In the case against the appellant there were no documents produced to prove the date of birth of the complainant. There was no age assessment report produced to prove her age. The complainant herself did not state how old she was. The age indicated in the P3 was only an estimated age as per the opinion of the clinical officer who completed the P3 form. The age noted therein therefore cannot be taken as the actual age of the complainant. In effect, it is my finding that the age of the complainant was not proved.

18. The conviction was further challenged on the ground that there was no proof of penetration. The complainant testified that the appellant pulled her to a bathroom at her employer's hotel and penetrated her into her vagina. The findings by the clinical officer was that there were injuries on the walls of the vagina and traces of spermatozoa in her urine. This evidence was not challenged. The trial magistrate accepted this evidence to have been sufficient to prove penetration. I have no reason to find otherwise. There was therefore sufficient medical evidence in proof of penetration.

19. Section 36 of the Sexual Offences Act grants powers to a court trying an accused person for the offence of defilement to order a DNA test to be conducted for the purposes of ascertaining whether or not the accused committed the offence. The section is however not couched in mandatory terms – See the Court of Appeal decision in **Hadson ali Mwachongo –Vs- Republic (2016)** while citing Robert **Mutungi Murumbi –Vs- Republic, Malindi Cr. App. No. 524 of 2014**. The fact that the said section was not complied with was not fatal to the prosecution case.

20. The appellant was a person well known to the complainant. The trial magistrate who saw her testify described her evidence as sincere. There was actually no reason as to why the complainant would have picked the appellant as the person who defiled her. Her evidence must have been true. It was therefore proved that the appellant is the person who defiled the complainant.

21. Article 50 (2) (j) of the Constitution of Kenya 2010 grants an accused person the right to be provided with the documents that the prosecution intends to rely on in the case. The appellant took plea on 22/3/2017. By 26/11/2017 five witnesses had testified in the case. On that day the appellant made an application for the trial magistrate to recuse herself from the case on grounds, inter alia, that when the case started he had not been supplied with copies of witness statements. In dismissing the application the magistrate stated that nowhere in the court record did the appellant say that he needed copies of witness statements and that the same were denied to him. On that day the appellant was supplied with copies of witness statements.

22. In **Simon Ndichu Kahoro –Vs- Republic, Nairobi Criminal Appeal No. 69 of 2015 (2016) eKLR**, the Court of Appeal held that:-

**“... it is not every breach of Article 50 of the Constitution 2010 that should automatically result in an acquittal. Each case must be considered in the light of its own special circumstances as consequences of breach of right to fair trial depend on all the surrounding circumstances of a case.”**

23. It would appear that the appellant was not supplied with copies of witness statements when 5 witnesses testified in the case. It is clear that he was supplied with the same on 26/11/2017 which was before the investigating officer PW6 testified in the case. At that point the appellant had the right to demand that any of the witnesses who had testified before he was supplied with copies of witness statements to be recalled for further cross-examination or for the case to start afresh. He did not do any of these. The assumption is that after going through the witness statements he did not see the need to have the witnesses recalled. There was therefore no denial of a fair trial in the conduct of the case.

24. Upon my own evaluation of the evidence adduced at the lower court I find that the prosecution did prove penetration on the complainant and that the appellant is the one who committed the penetration. The age of the complainant was however not proved. The village elder PW1 stated that the girl was aged 9 years. The investigating officer said she was aged 12 years. The appellant could not be convicted of defilement when there was no proof of the age of the complainant.

25. Section (5) (1) of the Sexual Offences Act creates the offence of sexual assault. The section provides that:-

**“Any person who unlawfully—**

**(a) penetrates the genital organs of another person with—**

**(i) any part of the body of another or that person; or**

**(ii) .....**

**(b) .....**

**is guilty of an offence termed sexual assault.”**

26. In a charge of sexual assault the prosecution only need to prove unlawful penetration into the genital organs of the victim with any part of the body of another person. In **John Irungu –Vs- Republic, Mombasa Criminal App. No. 20 of 2016** the Court of Appeal held that where an accused person is charged with defilement and an important ingredient of the offence such as proof of the age of the victim is not proved, an accused person can be convicted of the offence of sexual assault although not charged with it. In this case the age of the complainant was not proved but there was proof of penetration into the vagina of the complainant by use of the appellant's penis. The appellant can be convicted of the offence of sexual assault although not charged with it. I accordingly convict him of the offence of sexual assault.

27. In the premises I find the appellant guilty of the offence of sexual assault contrary to Section 5 (1) (a) (i) as read with Section 5 (2) of the Sexual Offences Act. The conviction on the offence of defilement is quashed and the sentence imposed by the lower court set aside.

28. The minimum sentence for the offence of sexual assault under Section 5 (2) of the Act is imprisonment for a term of not less than 10 years that may be enhanced to imprisonment for life. In **Evans Wanjala Wanyonyi –Vs- Republic (2009) eKLR** the Court of Appeal held that even in an offence where a minimum sentence is provided the court has discretion to impose a lesser sentence to the minimum sentence. I am of the considered view that a sentence of 10 years imprisonment is appropriate for the offence committed. The appellant is accordingly sentenced to serve 10 years imprisonment for the offence of sexual assault contrary to Section 5 (1) (a) (i) as read with Section 5 (2) of the Sexual Offences Act.

**Delivered, dated and signed in open court at Kakamega this 25<sup>th</sup> day of February, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Mutua for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.