



REPUBLIC OF KENYA
AT THE HIGH COURT OF KENYA
AT BUNGOMA
CRIMINAL APPEAL 71 OF 2014
JOSEPH SIMIYU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[An appeal from the judgment in original Webuye Cri. Case No. 243/2013 delivered on 26.6.2014 by Hon C.N. ORUO -RM]

JUDGMENT

The appellant JOSEPH SIMIYU was charged with the offence of defilement of a child contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the night of 19th day of April 2013 at [particulars withheld] sub-location Misikhu Location in Bungoma East District within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of MS a child aged 5 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the night of 19th day of April 2013 at [particulars withheld] sub-location Misikhu Location in Bungoma East District within Bungoma County the appellant intentionally and unlawfully touched the vagina of MS a child aged 5 years.

The prosecution evidence is that MKS the complainant a child of tender age testified that on 19/4/2013 she was at home. She stated that the accused came and took her to his house and slept with her. She testified that "he touched me here" pointing on her loin. She testified that he removed my pant and his pair of trousers and he released me later on. She testified that her father came and took her from accused house and took her to the hospital.

Pw2 RM, grandmother to complainant, testified that she recalled on 20/04/2013 she was at a funeral, and complainant was living at [particulars withheld] at the home of accused brother. She testified that she received a call at 3.00pm from C who told her to go home that complainant was at the hospital and she had been raped. She testified that she went to Lugulu Hospital and the doctor attended to complainant. They saw some semen on her vagina, clothes and pants. She produced treatment notes from Lugulu Mission Hospital-PMF(1) 1(a) (b) (c) dated 20/04/2013.

The evidence before the trial court was that on 19.4.2013 the complainant MK was at home when accused came and took her to his house. While in the house accused lay on her. He removed his trousers and then he pants. He then later released her. She testified that she felt paid. She later reported to her mother.

Pw3 RSN testified that on 19/04/2013 he went to his garden next to accused house. He testified that he was looking at the accused because he was with complainant and the door was locked from inside. He testified that accused came at 12.00pm and he had cakes and he later left the house without the cakes and locked the house from outside. He testified he went and looked into the house and he saw complainant and called her as she was lying on the bed. He testified that he went into the house and other neighbors witnessed too and they examined the child and she was taken to Lugulu Hospital.

Pw4 Antony Elvis Otieno a Clinical Officer at Webuye District Hospital testified that complainant was brought to the facility by a police officer alleging that she had been raped by a man on 19/04/2013 at night.

He testified that the patient was taken to Lugulu before he saw her. He testified that on examination the Labias were swollen, no hymen and no visible bleeding. He testified that he made an assessment of defilement and that the vagina had discharge and pus cells were seen. He produced P3 Form as MF1-3. He also testified that the dentist assessment found that she was 6 years and dental assessment was produced as MFI-4.

PW5 Constable Richard Rotich testified that he recalled on 20/04/2013 at 3.00pm there was a member of community policing called Fred Mumelo who came to the camp and reported that there was a minor who had been raped and she has been taken to Lugulu Hospital. He testified that the person who raped the minor was known and he was brought to the compound they arrested him. He testified that they went to the hospital and they were informed by the Doctor that the accused was HIV Positive and that he was later charged.

Pw6 PC Jacinta Chemengish Bungei testified that she is the investigating officer in the case. She testified that she received a report from community policing member called Fred Mumero, that the accused was seen in company of a child on 19/04/2013 and that on 20/04/2013 the neighbors did not see child come from the house and they got worried.

She testified that when they forced themselves into the house, they found a child on the bed and when asked what had happened, she informed them that she had been defiled by the father.

She testified that the accused was arrested and taken to AP camp Makhese and the child was taken to Lugulu Hospital. She testified that later the child was taken to Webuye Police Station and she issued P3 form from the Doctor filled it and confirmed the child had been defiled.

In his defence the appellant opted to give sworn evidence and did not call any. The appellant Joseph Simiyu testified that on April 2013, he had gone to collect firewood and when he came back home he found people at his home asking why he had locked the child in his house. He testified that they accosted him and took the child and was later arrested. He stated that he did not commit the offence. In cross-examination he confirmed the complainant was his step-daughter and that he slept in his house. After full hearing and upon the above evidence the trial court found the accused guilty of defilement and sentenced him to life imprisonment. Having been dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

i. That he pleaded not guilty to the charge

ii. That the learned magistrate erred in law and facts by making decision without basing on the evidence on record.

iii. That there was no circumstantial evidence to prove the offence

iv. That the trial magistrate erred in law and facts by considering P3 form of the complainant without any report that was made by the doctor.

v. That the trial magistrate erred in law and facts by relying on the evidence of Pw1 who is the complainant

vi. That the learned magistrate erred in law and fact by rejecting his defence.

The appellant filed his written submissions in which he submitted the clinical evidence was not conducted per the required provisions of law. He submitted that he was charged under a defective charge sheet and that sentence passed was unlawful.

The prosecution opposed the appeal. Prosecuting counsel M/s Nyakibia submitted that on age, the age assessment form was produced as Exh.4. He submitted on identification that the appellant was well known to the complainant. She submitted on penetration was confirmed by evidence of the clinical officer. She submitted that evidence of complainant and was corroborated. She submitted that sentence was proper and should be upheld.

This being the first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno Vs R 1972 EA** 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.

This Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in standard of beyond any reasonable doubt.

The 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 the age of the complainant, the prosecution produced age assessment form as exhibit 4 that confirmed the minor was 4 years old. The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as **“The Sexual Offence Act (Rules of Court) 2014** which came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that on the foregone evidence, the complainant was a minor at the alleged time of commission of the offence.

On the issue of penetration of the Complainant's private parts, 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.’

This position was fortified in the case of **Mark Oiruri Mose vs R (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 mine).

In demonstrating this particular ingredient of the offence, Pw1 testified that she was defiled and she able to pint on her loin using his hand on where the accused person penetrated her using his penis. PW4 a clinical officer testified and confirmed through examination that the Labias were swollen, no hymen and no visible bleeding. Going by the foregoing evidence it is clear that the act of penetration was effectively proved. Therefore, it is my finding that evidence of complainant was credible on penetration confirmed by the Medical examination evidence of Pw4. I am satisfied that the element of penetration was proved. On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

Complainant testified that on 19/4/2013 she was at home. She stated that the accused came and took her to his house and slept with her. She testified that “he touched me here” pointed on her loin. She testified that he removed my pant and his pair of trousers and he lay her. She testified that her father came and took her from accused house and took her to the hospital. From this evidence the appellant was well known to the complainant. I am of the considered view that the appellant was positively identified by the complainant. The identification was free from error.

On sentence the appellant has prayed for leniency. Sentencing is discretion of the court and the high court can only interfere if the sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor aged 4 years old. The law provides for a sentence of life imprisonment. There were aggravating factors. The complainant was a step-daughter; and the appellant knew he was HIV Positive and undergoing treatment when he committed the offence in view of these aggravating factors, I am satisfied that the sentence of life imprisonment imposed was appropriate.

This Appeal is hereby dismissed.

Dated at Bungoma this 11th day of March, 2020.

S.N. RIECHI

JUDGE