



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 20 OF 2020

DENIS NYONGA KIVUVA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J.O. Magori (SPM) in Makindu

Senior Principal Magistrate's Court Sexual Offence No. 108 of 2018

delivered on 15th January, 2018).

JUDGMENT

1. **Dennis Nyonga Kivuva** the Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act and sentenced to serve twenty (20) years imprisonment. The particulars of the offence were that the Appellant on the 4th day of December 2018 at Emali township in Nzau sub-county within Makueni county, intentionally and unlawfully caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of one **AM** a child aged 15 years.

2. The Appellant being aggrieved by the judgment, filed this appeal through the firm of Nzavi & Co advocates. He raised the following grounds:

a) **That** the Honourable learned trial Magistrate erred in law and in fact in convicting the Appellant on the basis of insufficient evidence that failed to prove the charges he (*the Appellant*) faced beyond any reasonable doubt as required by the law.

b) **That** the Honourable learned trial Magistrate erred in law and in fact by finding the Appellant guilty of the charge of defilement on the face of glaring evidence to the contrary that would warrant acquittal of the said charges.

c) **That** the Honourable learned trial Magistrate erred in law and in fact by misapplying the legal tenets governing oral evidence in such a case and failed to distinguish the same with lack of collaborative evidence produced in court which was speculative at best in terms of confirming that the Appellant was indeed the defiler warranting conviction.

d) **That** the Honourable learned trial Magistrate erred in law and in fact by failing to analyze and take into consideration the profound testimonial evidence issued in court in favour of the Appellant when making a finding on the charges that the Appellant faced.

e) **That** the Honourable learned trial Magistrate erred in law and in fact by failing to find that the legal principles governing the ingredients required to prove defilement which weren't established against the Appellant to warrant conviction and sentencing in such offences.

f) **That** the decision of the learned trial Magistrate is thus an impropriety.

3. The prosecution relied on the evidence of four (4) witnesses while the Appellant gave sworn evidence and called two witnesses. The complainant (AMN) who testified as Pw1 said she was aged 15 years having been born on 5th October 2003. She explained that on 4th December 2018 4:00 pm she was at home with her mother (Pw2) when a neighbor (*mama F*) who was unwell brought F to stay with them as she went to hospital. F was in standard six (6) then while Pw1 was in form one (1). At 5:00 pm Pw2 left for her grocery business.

4. F informed Pw1 that she wanted to go and play with S (Dw2) which she did leaving Pw1 alone at home. At 6:00 pm, Pw1 decided to go for F from where she had gone to play but did not find her as they had been sent by S's uncle, one Dennis Kivuva. When she called out F's name the Appellant responded and asked her to get into the house.

5. The Appellant who was alone asked her to put for him some drinking water. She told him to ask F to come home upon her return. The Appellant stood up held her hand and mouth which he covered with a seat cover. He removed her black checked skirt and purple pant and laid her on the sofa set. He then removed his trouser and shorts and inserted his penis into her vagina. She felt pain.

6. When he finished he gave her, her clothes and told her to tell no one. She wore her clothes and he pushed her outside. She went to their house and slept. It was about 7:00 pm. F came about ten (10) minutes later. She had supper, watched a movie and later came to sleep. Her mother (Pw2) came back at 5:00 am and went to sleep.

7. She later informed her mother she was having stomach-ache and was also bleeding. The bleeding was not for her monthly periods though she did not mention this to Pw2, who gave her money for sanitary pads. She reported to Pw2 what the Appellant had done to her at about 8:00 am as they had breakfast. They later reported the matter at Emali police station. She was taken to Sultan Hamud hospital and referred to Makindu sub-county hospital. She took her blood stained skirt and pant EXB 1 and 2 to the police station. It was her evidence that she had not known the accused before the incident.

8. In cross examination, she said she could not scream since her mouth had been covered/tied with a cloth. It was her first time to engage in sex. She confirmed that her skirt and pant had blood stains. She said when she went to Dw2's home she only found the Appellant there. M and F were not present. It was her evidence that it is Dw2 who gave her the Appellant's name.

9. Pw2 **DNK** is Pw1's mother. She gave similar evidence to that of Pw1 in respect to what transpired before the defilement and the report she was given by Pw1. She identified documents from the hospital and the P3 form as EXB5 – 7. She confirmed not having known the Appellant prior to the incident.

10. Pw3 **Anthony Gitonga** a clinical officer from Masimba health centre examined Pw1 on 10th December, 2018. He relied on the treatment notes (EXB4), PRC form, lab request, reports and examination to fill the P3 form (EXB6). His findings were that the complainant had the following:

- The genitalia had a tear at six o'clock.
- Minimal bleeding and hymen was broken
- Vaginal bleeding
- HVS showed numerous blood cells.
- Pregnancy test was negative
- Presence of spermatozoa cells.
- HIV and VDRL tests were negative.

He only examined Pw1 who was presented to him.

11. Pw4 **No. 118447 PC Daniel Mburu** is the investigating officer. He received the report on 5th December 2018 at around 1600hours from Pw1 and Pw2. The two explained what had happened to Pw1 the previous day. He confirmed taking Pw1 for treatment at Sultan Hamud sub-county hospital while the P3 form was filled at Masimba health centre on 10th December 2018. The Appellant was arrested on 17th December 2018. He recovered a black striped skirt and an under wear which he produced as EXB 1 and 2.

12. He said he was unable to visit the scene since the owners were never there. He produced Pw1's birth certificate (EXB3) showing she was born on 5th October 2003. He confirmed not having known the Appellant prior to the incident.

13. In cross examination he said the Appellant was arrested by his colleagues. Further that EXB 1 and 2 were brought later when Pw1 came to record her statement. The clothes were not taken for analysis to confirm the origin of the blood on them.

14. In his sworn statement of defence the Appellant denied the charge. He said he is a businessman and lives in Mbuvo of Makueni county. He travelled to Nairobi on 4th December 2018 to pick S (Dw2) who is his sister's child. At around 2:00 pm they left Nairobi for Emali arriving at about 5:00 pm. The house keys had been left with Jacinta Mwendu (Dw3) a neighbor to her sister. They found her outside her house and she opened the house for them and they entered together. Dw3 continued talking to Dw2. After a while two girls entered the house. He later learnt they were Antonio (Pw1) and M who were friends to Dw2 who took them outside saying her mother did not want children in the house.

15. When Dw2 returned they (Dw2, Dw3 and himself) continued watching television till 7:00 pm when her sister Dorcas Wavinye came. Dw3 then left for her house. They later had supper and slept. He left for his home in Mbuvo the next day at 11:00 am. On 10th December 2018 he came back to Emali to pick Dw2 whom he took to Mbuvo. He returned her to Emali on 17th December, 2018. It was while there that

he was arrested by police officers and taken to Emali police station from where he was informed of the present case. He denied committing the offence.

16. His witness is a minor (S) who testified as Dw2. She stated on oath that she lives in Emali with her mother and she knew the Appellant as her uncle. She is the one whom the Appellant had gone to pick from Nairobi on 4th December, 2018. She gave similar evidence to that of the Appellant on the happenings of that day. She denied having been sent to buy chips or even eating them. She said she ate ugali after seeing off her friends (*Pw1 and M*). It was her evidence that there was no time the Appellant was left alone. Further that Pw1 never returned after being escorted. She denied having seen F that day.

17. In cross examination she confirmed that Pw1 was her friend but she had never been to their house and neither had Pw1 been to their house. She confirmed that their house has a two seater sofa set, cupboard and television. She escorted her friends and returned to the house.

18. **Jacinta Muendi Kiilu** testified as Dw3. She said Dorcas who is her friend and plot mate is the Appellant's sister. Her evidence is similar to that of the Appellant and Dw2. She stated that when Dw2 escorted Pw1 and M the witness remained with the Appellant in the house of Dorcas. That Dw2 was away for just ten (10) minutes, and Pw1 never came back to the house.

19. The appeal was canvassed by way of written submissions. Mr. Nzavi has outlined the three ingredients which must be proved in a case of defilement. He submits that in this case the age of the victim and the fact of penetration were proved. His issue is with the identification of the Appellant as the perpetrator. He argues that the element of identification by Pw1 was not corroborated by any other evidence. The reason he insists on the corroboration is the fact that Pw1 had not known the Appellant prior to the incident. Further that the Appellant and his two witnesses led cogent evidence showing that the Appellant did not commit the offence.

20. Counsel further submits that the blood stains on Pw1's panty and skirt (EXB 1 and 2) plus spermatozoa ought to have been subjected to DNA testing as provided for under section 36(1) of the Sexual Offences Act. He admits that DNA testing is not compulsory but for this case the testing should have been done to either connect or disconnect the Appellant to the offence.

21. Counsel also submits that the trial court did not adequately analyse the evidence by the defence. That he simply dismissed it as being a mere denial, without giving any reason for that. His final submission is that the prosecution did not prove its case against the Appellant.

22. M/s Eunice Gitau for the Respondent in her submissions considered the three ingredients for proving a case of defilement. It is her submission that the case was proved beyond reasonable doubt in respect to all the three ingredients.

23. She submits that Pw1 identified the Appellant as the perpetrator. Relying on section 124 of the Evidence Act it is her submission that Pw1's evidence on identification did not require any corroboration. That the said evidence was not shaken and could safely be relied on without any corroboration. She refers to the case of **R –vs- Geoffrey Amkwach Kajjado HCRA No. 8 of 2016** to support her argument.

24. It's her submission that both Pw1 and the Appellant had been placed at the scene of the offence by both the prosecution and the defence. She argues that it was established that both Dw2 and Dw3 left the house at some point and so could not for sure state that the Appellant was never left alone. This then leaves Pw1's evidence unshaken. She contends that expecting the prosecution to adduce further evidence beyond the one on record would be requiring it to prove its case beyond any shadow of doubt which is not the law

25. She relies on the case of **Miller –vs- Minister of Pensions 1942 A.C** where Lord Denning held on **“beyond reasonable doubt”** as follows:

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

She equally relies on the case of **Bakare – vs- State 1985 2NWLR (supreme court of Nigeria)** to buttress this point. On the demand for a DNA it is her submission that the same was not necessary for the Appellant as it is not a mandatory requirement.

Analysis and determination

26. This is a first appeal and this court has a duty to re-analyse and reconsider the evidence and arrive at its own independent conclusion. The court should also bear in mind that it did not see nor hear the witnesses and so give an allowance for it. See the case of **Okeno –vs- R E.A 32** where the Court of Appeal stated thus of the duty of first appellate court:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424.”

27. Further in **David Njuguna Wairimu –vs- R (2010) eKLR** the Court of Appeal stated as follows:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

28. Section 8 of the Sexual Offences Act which deals with cases of defilement provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years.

29. I have duly considered the evidence on record, the grounds of appeal, submissions by both parties cited. I find the critical issue falling for determination to be whether the prosecution proved a case of defilement against the Appellant. As has been correctly put by the counsel appearing for both parties, proof of a case of defilement requires the establishment of three (3) main ingredients. These are:

(1) Age of the complainant

(2) Proof of penetration of the complainant’s genital organ

(3) Identification of the penetrator.

30. In his submissions at **page 2** Mr. Nzavi states as follows:

“Your Lordship we submit that in the present case only 2 elements; that of the age of the victim and the fact that there was penetration were proved by the prosecution during the trial of the case.”

M/s Gitau for the Respondent has made a similar submission. The birth certificate produced as EXB3 shows that Pw1 was born on 5th October 2003. She was therefore 15 years plus 2 months on the date of incident which was 4th December 2018. Penetration was proved by the evidence of Pw1 and the medical evidence by Pw3 **Anthony Gitonga** who examined her. Treatment notes (EXB4), filled PRC form (EXB7) and the P3 form (EXB6) were also produced. I therefore find that the first two ingredients were well proved.

31. The only other issue to be determined is whether there was sufficient evidence identifying the Appellant as the perpetrator of this act against Pw1.

32. It was Pw1’s evidence that she went to Dw2’s home at around 6:00 pm. It’s not indicated whether it was dark or not. She was however clear that she did not know the perpetrator prior to the incident. The question that quickly pops up is how she identified him. The Court of Appeal in the case of **Francis Kariuki Njiru & 7 others –vs- R (2001) eKLR** stated the following on the issue of identification:

“The Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

33. It is therefore clear that reliance on such evidence of identification must be “*absolutely watertight*” to justify a conviction. It is for this reason that this court has to analyse the evidence on identification of the Appellant as the perpetrator of this offence.

34. It is the evidence of Pw1 and Pw2 that a neighbor brought her daughter called F to stay at Pw2’s home since she was off to hospital. F was by then in standard six. She was obviously above ten (10) years of age.

35. F left to go and play with Dw2 at the latter’s home. At around 6:00 pm Pw1 went to get F from Dw2’s home. According to her evidence. She did not find F. This is what she says:

“I did not find her they had been sent by Dw2’s uncle namely Dennis Kivuva.” When I called F the accused responded and told me to enter the house.”

36. She does not say who it is that told her Dw2 had been sent by the Appellant. She also says Dw2 and another or others had been sent. Who is this other or others who had been sent by the Appellant? Even after being armed with that information she says she still called out F’s name and that’s when she was told by the Appellant to enter into the house which she did. The Appellant then did what she says he did and pushed her outside. This was around 7:00 pm.

37. The evidence on record is that Pw1 had not known the perpetrator prior to this date. In cross examination she said she was given the perpetrator’s name by Dw2. It is not clear when this was done. Was it before or after the report had been made?

Pw2 also told the court that she had not known the Appellant before this incident. At what point did she come to know him and under what

circumstances?

38. A perusal of the P3 form (EXB6) at page 1 on the brief details of the offence shows the following:

“She alleges to have been defiled by someone well known to her, kindly examine and indicate the degree of injuries.

The report shows that the perpetrator was well known to Pw1. Did she give his name to the police when they reported on 5th December, 2018 at 16:00hours?

39. Pw4 who received the report from Pw1 and Pw2 indicates in his evidence that he was told that when Pw1 called out F’s name a Dennis who is the Appellant responded, held her and defiled her. What names if any were given to Pw4 as those of the perpetrator?

40. Pw4 said it was not him who arrested the Appellant. It’s his colleagues who did on 17th December 2018. What had been the challenge in arresting him if he was known and identity given? None of those who arrested him testified to explain that.

41. The witness explained to the court that he was not able to visit the scene because the owners were never present. The court did not therefore have a picture of how far apart these houses/homes were e.g. Pw1’s home to Dw2’s home. F’s home to Dw2’s home etc.

42. Dw2 testified and supported the uncle’s defence. She denied having been sent anywhere as claimed by Pw1. Dw3 equally explained that she only left Dorcas’ house upon the latter’s arrival at around 7:00 pm. It was M/s Gitau’s submission that both Dw2 and Dw3 had at one point left the house hence leaving the Appellant alone and giving him an opportunity to commit the offence he is accused of.

43. This submission is not supported by the evidence on record. Dw2 in her evidence said when she escorted Pw1 and M she left the Appellant and Dw3 in the house. She said she was away for only ten (10) minutes and returned. On the other hand, Dw3 testified that upon opening the house for the Appellant and Dw2 she remained in that house upto the time Dorcas returned. Its then that she left to go and cook for her children. According to the Appellant, Dw2 and Dw3 there is no single moment when the Appellant remained alone in Dorcas’ house.

44. In his judgment the learned trial Magistrate tackled the issues of age of Pw1 and penetration of her genital organ very well. When it came to identification this is what he states at page 31 lines 11 – 14:

“From the evidence presented by the prosecution it is clear that the complainant minor was defiled by the accused. The evidence of the complainant minor is well corroborated by the evidence presented by the other prosecution witnesses”.

At the same page lines 16-19 he states thus:

“There is no doubt from the evidence presented by the prosecution that there was penetration. There is also no doubt that it was the accused who defiled the complainant minor as charged. The defense by the accused is a mere denial and cover-up and I dismiss the same”.

45. The trial court did not do any analysis of the evidence that led him to the conclusion that the Appellant was the perpetrator. At least it’s not shown in the judgment.

46. A lot of emphasis has been placed on section 124 of the Evidence Act which states as follows:

“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 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”.

47. For the court to rely on the victim’s sole evidence in a case under the Sexual Offences Act to found a conviction, it must be fully satisfied with the credibility of that evidence and must give reasons for relying on that evidence to convict an accused person. In this case the court relied on Pw1’s sole evidence on identification to convict without considering its shortfalls and the evidence adduced by the Appellant and his witnesses.

48. This is no way to say that Pw1 was not defiled. What happened to her was terrible and uncalled for. At the same time the prosecution had a duty to avail evidence to pin down the Appellant as the perpetrator. It had to show how Pw1 who had not known the perpetrator came to know him. Dw2 who is alleged to have given Pw1 the Appellant’s names denied Pw1’s story. The other children F and M would have been crucial witnesses. They were not called.

49. Infact in the clear circumstances of this case the Appellant upon arrest ought to have been subjected to an identification parade. Such evidence would have corroborated Pw1’s evidence on identification.

50. When the totality of the evidence is considered I do find a doubt lingering in my mind as to the guilt or innocence of the Appellant. He should have been given the benefit of that doubt.

51. I find the appeal to be meritorious and I allow it. The result is that the conviction is quashed and the sentence set aside. The Appellant should be released forthwith unless otherwise held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge