



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**NAKURU**

**CRIMINAL APPEAL NUMBER 23 OF 2019**

**ABSOLOM AMBAKA OKILA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***(Being an appeal against conviction and sentence in Nakuru Chief Magistrate's Adult Criminal Case Number 152 of 2016 by Hon. E. Kelly (Senior Resident Magistrate)***

**J U D G M E N T**

1. On 19<sup>th</sup> July 2018 No. 86213 PC Veronica Wanjiku testified:

*“On the date the offence was reported I was at Mwariki Police Post. The complainant accompanied by her father came to police station. Complainant reported she had been defiled by the accused in court (point to accused person) and another. Both... watchman in the complainant's residence. Complainant was 15 years. Birth Certificate – P. Exhibit 4 complainant later gave birth to a child, Birth Notification – P. Exhibit 6. We had DNA done for child and complainant and the other accused person EZ memo P. Exhibit 7. Government Analysis Report P. Exhibit 8. When the matter was reported complainant was taken to hospital. P3 form was filled P. Exhibit 8. Accused person is before the court.”*

2. The medical evidence was produced by PW3 or PW4 (it is not clear from the record), but Doctor Stephen Onyango from Nakuru Provincial General Hospital produced the P3 filled by Doctor Njoroge. He said when Doctor Njoroge examined the complainant he found an old torn hymen, she had laceration on the face and neck, whitish vaginal discharge. He also produced an ultra sound report. The record shows that the trial magistrate recorded;

*“Summarises contents of P3....PRC”*

3. On 26<sup>th</sup> October 2016, PO testified that on 2<sup>nd</sup> May 2016 his daughter LKO went to him while crying and reported to him that;

*“The 2 accused persons (points) have been defiling her.”*

He said that she had also told her mother. He testified that one Colubas was the night watchman, and Absalom was the day watchman. He went on to state;

*“One day, I went to the shop to buy scratch card in the evening Colubas did not see me come back I hid in some flowers at about 9.00 Colubas came out of the house with my daughter gave her chips, he had a torch and then he lay on top of L. I saw him insert his penis in my daughter's vagina. According to our custom, I should not pull off my daughter. He was strangling L. I waited when he finished I attacked him asked him why he was doing so. He became cruel. I took my daughter panty together with accused 1 to my employer accused said I allow him to wear a trouser then take him to the police.*

*Our custom does not allow me to drain blood out of a person I catch having sex with my daughter. I took Colubas to the police station. I was advised to take child to Nakuru PGH a scan was done. The P3 form was filled”.*

He said his daughter was always alone at home and testified further;

*“There was an Indian who also reported to me that he'd seen Absalom catch L and put her in watchman's house and defile her.*

*Absalom even snatched L a phone given to her a present and sold it. The Indian saw Accused 2 defile L around May 2016. Accused 2 even broke my bedroom window so he could get into the house in my absence and defile L. L would get sedated on drugs and just lie down. Accused 2 left his shoes in my house at our time. Absalom told a woman who sells us vegetables that there's someone who raped the child made her pregnant and hopes she gets a baby boy when he marries her. It's the two accused person in court/who defiled L. Absalom defiled my daughter at day time. He was day watchman Colubas was night watchman.*

*I found accused 1 Colubas defiling my daughter.”*

4. The complainant's mother MJ testified that, her daughter complained that Absalom had defiled her. That the complainant had lots of complaints and even complained to their pastor that Colubas had been defiling her. MJ testified that they took her to hospital where it was found that she was pregnant. That Colubas would defile the complainant at night and Absalom in the day, and on Sundays.

5. In her testimony the complainant testified and this is what the record says.

*“PW1 points at 2 accused person. I know them they did bad manners to me and I ended up pregnant. They removed my clothes inserted their penises in my vagina. Absalom inserted his penis in my vagina at night time and Colubas at day time. Absalom defiled me at night near the gate Colubas, at John's place a neighbour. John was not at home I was later taken to Nakuru PGH and tested and found pregnant.*

*- Pregnancy test seen is PMFI 1*

*- 2 P3 forms are MFI 2 and 3 respectively.*

*They defiled me for about 2 months both are watchmen at our place.*

*I used to feel pain. They were reported to their employer. The accused was taken to police station after I identified them. There's a small house near the gate. They always removed my parts I'm 15 years old.*

*Birth certificate is MFI 1 4 the doctor said I'm pregnant.*

*(witness has slight speaking impairment statements) I reported to my mother. It's only the 2 accused persons who ever inserted their penises in my vagina, sometimes in our house, Absalom would defile me.”*

6. From the charge sheets in the file, Colubas Lokitani Etan and Absalom Ombaka Okira were arrested on 31<sup>st</sup> August 2016 and charged separately in **Adult Criminal Case Number 152 and 153 of 2016**. The two matters were consolidated on 28<sup>th</sup> September 2016 and the charge read to them. I searched the whole file I did not see the consolidated charge sheet. However, at some point Colubas absconded and the prosecution applied to withdraw the charge against him under **Section 87(a) of the Criminal Procedure Code**. The application was allowed on 24<sup>th</sup> April, 2018 and prosecution granted leave to amend the charge. The amended charge was read to the appellant on 19<sup>th</sup> September, 2018. He pleaded not guilty to **defilement Contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006**, and in the alternative, **Indecent Act with a Child Contrary to Section 11(1) of the Same Code**.

7. The charge stated that;

*“On diverse dates between 2<sup>nd</sup> May 2016 and 27<sup>th</sup> August 2016 and [Particulars Withheld] Estate Nakuru Township within Nakuru County, jointly with another not before court, intentionally and unlawfully committed an act by inserting your male genital organ namely penis into female genital organ namely vagina of XY a child aged 15 years, an act which caused penetration.”*

In the alternative that on the same dates, place and time;

*“jointly with another not before court intentionally and unlawfully committed an Indecent Act by touching the private parts namely vagina of XY, a child aged 15 years.”*

8. Upon amendment of the charge and the taking of the plea, the trial court proceeded to hear PW4, PW5 and close the case for the prosecution. Thereafter the appellant was put on his defence where he described his arrest together with his co-accused who was his colleague, and their being told that they had defiled the subject herein.

9. On 20<sup>th</sup> February 2019 the trial court delivered its judgment, found the appellant guilty of **defilement Contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006**. On 7<sup>th</sup> March 2019 the trial court sentenced the appellant to twenty-five (25) years imprisonment. He was aggrieved and he filed his appeal. On the following Amended Grounds of Appeal;

*1. THAT the learned trial magistrate erred in both law and fact when she convicted me in the present case and additionally imposed a severe sentence, yet failed to note that the trial was unfair.*

*2. THAT the learned trial magistrate erred in both law and fact when she convicted me in this instant case on mistaken identity.*

*3. THAT the learned trial magistrate erred in both fact and law when she convicted me in this case yet failed to note that the age of*

*the alleged complainant was not proved.*

*4. THAT the learned trial magistrate erred in both law and fact when she convicted me in this case on unproved evidence of penetration.*

*5. THAT the learned trial magistrate erred in both law and fact When she convicted me in this case on circumstantial evidence yet failed to apply the principles applicatble in similar cases.*

*6. THAT the learned trial magistrate erred in both law and fact by convicting me in the present case yet failed to consider my plausible and un rebutted defence.*

These he filed together with his detailed handwritten submissions.

10. At the hearing of the appeal he reiterated his defence. He pointed out that the DNA results ruled out that he was the father of the child and wondered why he was in jail.

11. In opposing the appeal Ms. Nyakira for the state submitted that the ingredients of defilement; age, penetration and identification of the perpetrator had been proved. That then it was the complainant's testimony that she had been defiled by the two (2) accused persons, that they were responsible for her pregnancy; that even though the offence was reported five (5) months after defilement, the defence was outweighed by the case for prosecution, and the DNA evidence was immaterial.

12. This being a first appeal, it is the duty of this the court to subject the evidence tendered before the trial court to a fresh evaluation, re-assessment and analysis, and to draw its own conclusions, always bearing in mind that I never saw or heard the witnesses testify.

13. I have considered the submissions by the appellant and those by the state prosecutor. The issues raised by the appellant are that the trial was unfair, that his was a case of mistaken identity, the age of the complainant and penetration were not proved, and that his defence was not considered. In summary the prosecution had not proved its case to warrant the conviction and sentence meted out to him.

14. The onus is on the prosecution to prove its case against the accused person beyond a reasonable doubt. The accused person has the right to be presumed innocent until proven guilty and any doubts must be resolved in favour of the accused. These are the general principles in dealing with criminal cases.

15. Although this was not raised by the appellant the first thing I noted was the defective charge sheet where the appellant was charged to have committed the offence of defilement jointly with another not before court. As it is not possible that the two (2) accused persons would have simultaneously inserted each his penis into the vagina of the complainant. That is why the **Sexual Offences Act** has an offence called "gang rape" or "gang defilement" which takes of a situation where more than one person commits the offence of defilement or rape against another in the same transaction. In **Isaac Nyoro Kimita & another v Republic [2014] eKLR** the Court of Appeal held that , true, the charge was defective but the defect was not fatal.

16. Nevertheless, from the evidence on record there is no incident described either by the complainant or the other prosecution witnesses where these two (2) accused persons were together when the alleged defilement took place. The evidence as tendered is that one committed the offence at night, the other one during the day. In any event the prosecution and the court ought to have noted the defect and had the charge drawn properly. Be that as it may, I did not find that the appellant was prejudiced in any way.

17. In the particulars the complainant was named as "XY". This was in an effort to conceal the identity of the complainant and I believe to protect her. I noted that there was no evidence on record to show that any nexus was made between XY and PW1. The matter proceeded on the assumption that the appellant knew who XY was and the relationship between XY and the complainant.

18. The **Sexual Offences Act at Section 31** deals with the protection of of vulnerable witnesses. It sets out the categories of those witnesses that the court may find vulnerable at **Section 31 (2)**. At **Section 31(4)** the court is required, upon declaring a witness to be vulnerable, to direct that the witness be protected, and the protection measures are set out therein.

***"S. 31 (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -***

***(a) allowing such witness to give evidence under the protective cover of a witness protection box;***

***(b) directing that the witness shall give evidence through an intermediary;***

***(c) directing that the proceedings may not take place in open court;***

***(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or***

***(e) any other measure which the court deems just and appropriate."***

Hence under the **Sexual Offences Act**, the Investigating Officer Could only have redacted this information pursuant to an order of the court, and this being a criminal case the appellant was entitled to have the full particulars of the charge presented to him so that he could properly

defend himself.

19. The record also shows that the trial court did not abide by **Section 214 of the Criminal Procedure Code**, which provides that;

*(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—*

*(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge; (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*

The appellant was not informed of his right to apply for the recall of have the witnesses for fresh hearing or cross examination now that he was facing a fresh charge.

20. From the forgoing it is evident that the appellant's submission that he was not given a fair trial was not far-fetched.

21. Was the age of the complainant proved? The Certificate of Birth given on 9<sup>th</sup> November 2001, showed that she was born on 6<sup>th</sup> October, 2001, hence in May 2016, she had not yet turned fifteen (15) as her birthday was in October, she was 14 years 7 months. Nevertheless, she fell within the category of the age of between 12 and 15 years.

22. Was penetration proved? This circumstances surrounding this case indicate that the complainant's father saw with his own eyes one Colubas actually having penetrative sex with the complainant. What he says thereafter sounds like fiction. Which father would find a grown man defiling his daughter and allow him to finish in the name of a culture? What culture was this? It is not believable.

23. Regarding the appellant, it was the case for the prosecution that he defiled her during the night, and during the day when her parents were away. It is also the case for the prosecution one "Indian", the Indian reported witnessing the appellant grabbing the complainant and taking her inside the watchman's house and defiling her. It is again the case for the prosecution that the appellant broke a window of PW2's house to give him access into PW2's house to defile the complainant on PW2's bed and that he left evidence in the form of his shoes in PW2's house. In addition, was also alleged that appellant had taken the complainant's phone and sold it. None of these allegations was established in court. The Indian was not named or called to testify, no report of the break in, the shoes and the phone was made to the police.

24. There was mention of one John in whose house some of the acts were alleged to have happened. He neither called as a witness nor interrogated yet his house was alleged to be a scene of crime.

25. The circumstantial evidence does not add up to support the allegation of defilement in the manner the appellant is alleged to have committed it. The circumstance under which an offence is alleged to have been committed cannot be ignored. **Section 33 of the Sexual Offences Act** says as much, so that while we look at the three (3) ingredients, the fourth one, must be the circumstances, as evidence required to prove, whether a sexual offence is likely to have been committed in connection with the persons concerned.

26. The report was made five (5) months after the alleged offence. This required the investigating officer to move with diligence to gather every available piece of evidence to catch the culprits. In this case, except for the recording of statements, having the taking the complainant taken to hospital and sending samples for DNA testing, nothing else was done.

27. The P3 and PRC could only indicate the state of the complainant at the time of examination 5 months after the event. The vaginal discharge was not connected to a sexual intercourse, though the doctor said the complainant may have engaged in sex while pregnant. The injuries on the complainant were also not connected to any sexual encounter.

28. The case for the prosecution was that only the two (2) accused persons who had "inserted their penises into her vagina", meaning she never had sex with any other person except the two. The credibility of that piece of evidence is taken away by the fact that the DNA results showed that neither of the accused persons was the father of her child, meaning, she had had sexual intercourse with another person or persons. It was her testimony that the two (2) made her pregnant but again that was taken away by the DNA results.

29. It is trite that defilement is proved by evidence direct or circumstantial. The complainant's testimony is not believable as it was not supported by all the other evidence place before the court. Neither the circumstances of the offence nor the medical evidence supported the complainant's claims.

30. The story is even more incredible due to the allegation that numerous reports were made to the police, to the employer of the PW2 and the appellant but no action was taken. This exaggeration mode did not end with the testimony in court. In the Probation Officer's Report requested by the court, the parents to the complainant told the probation officer that as a result of the defilement the complainant had been infected with syphilis which had strained them financially. However, when the complainant was examined 29<sup>th</sup> August 2016, the lab tests were all normal save for the pregnancy test. It would be unsafe to rely on such evidence.

31. Be that as it may, it can be concluded that penetration was established by the existence of the pregnancy and the old torn hymen.

32. The identity of the perpetrator was however doubtful. Allegations of repeated acts of defilement by the appellant were not established.

The court was told that reports were made to the police but no such evidence was given in court. No investigations were conducted to establish these. To the contrary the medical evidence, the DNA results exonerated the appellant. This is because it was on the basis of the pregnancy that appellant was arrested and charged together with his co accused.

33. Taking into consideration the circumstances of this case it would be unsafe to ignore the DNA evidence that established that the appellant was not the father of the child.

34. I find that the conviction was unsafe. The same is quashed, the sentence set aside. The appellant is to be set at liberty unless otherwise legally held.

**Delivered, Dated and Signed at Nakuru this 15<sup>th</sup> day of June, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of:- VIA ZOOM

Edna Court Assistant

For state Ms. Wamboi

Appellant Present