



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAKURU

CRIMINAL APPEAL NUMBER 29 OF 2019

YOBESH NYAKUNDI NYAMBEGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Molo Chief Magistrate's

Adult Criminal Case Number 52 of 2018 by Hon. R. Amwayi (Resident Magistrate)

J U D G M E N T

1. The Appellant Yobesh Nyakundi was charged with offence of **defilement contrary to section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of offence are that on diverse dated between 25th and 26th day of May 2018 in Molo Sub-County within Nakuru County intentionally caused his penis to penetrate the genital organ namely vagina of RK a girl aged sixteen (16) years old.

In the alternative, the accused was charged with offence of **committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**.

2. Four witnesses testified for the prosecution and the appellant gave a sworn statement of defence. At the end of the trial the appellant was found guilty of defilement, convicted and sentenced to fifteen (15) years imprisonment.

3. This being a first appeal the court is mandated to re-consider, re-evaluate, re-assess the evidence adduced before the trial court a fresh and arrive at its own independent determination of whether or not to uphold the conviction of the appellant see **Okeno vs Republic (1972) EA 36** always keeping in mind that this court neither saw nor heard the witnesses as they testified as the trial court did, and therefore it cannot be expected to make any decision as the demeanour of the witnesses. See also **Njoroge v Republic (1987) eKLR 19**.

4. Aggrieved by the trial court's findings the appellant filed this appeal on the following Grounds of Appeal dated 2nd April, 2019;

- 1. THAT the learned trial magistrate erred in law and in fact by convicting me on the basis of **uncorroborated evidence**.*
- 2. THAT the learned trial magistrate erred in law and fact by failing to note that the **age of the complainant was not proved**.*
- 3. THAT the learned trial magistrate erred in law and facts by convicting me on the basis of **evidence that was shoddy and immaterial**.*

He also filed Supplementary Grounds of Appeal;

- 1. THAT the learned trial magistrate erred in law and in fact by convicting the appellant on **insufficient medical evidence**.*
- 2. THAT the learned trial magistrate erred in law and in fact in failing to note that the **age of the complainant was not conclusively proved**.*
- 3. THAT the learned trial magistrate erred in law and in fact in convicting the appellant on **unincredible (sic) evidence of the prosecution**.*

4. **THAT** the learned trial magistrate erred in law and in fact in failing to appreciate that some **material witnesses were not called to clear doubt.**

5. **THAT** the learned trial magistrate erred in law and in fact in failing to take into account the **appellant defence which was truthful. (All emphasis mine)**

5. It is evident from the grounds that the appellant's position is that the ingredients of defilement were not proved, that the case for the prosecution was not supported by sufficient evidence, and that the court failed to consider his defence.

6. At the time of the trial the complainant testified;

"I am aged 18 years old...I am called RK. I come from Kibunja. I work in a hotel. I am aged 18 years old. I was born on 12/8/2001. On 25/5/2018, I was going for sports at [Particulars Withheld] Secondary we then came back late at about 7.00 p.m. I then passed through my friend's place to ask for a book. She is called SW I then found her and she told me she did not have the book. My mother then came and found me there. She asked what I was doing there and told me we go home. We went home and she started to quarrel me and beat me up. My step father then came and told her to stop. I then that night left home and went outside. I then went to my friend's place. She is called Sophia. I then spent the night there. On 26/5/2018, I then went to Yobesh's place in the evening. Yobesh was my friend. I went there at about 5.00 p.m. and stayed there. Yobesh lives alone. He then prepared supper and we ate. He was with his friends. While still sitting his door was knocked and it was my step brother. When I reached his house I slept with him and we had sexual intercourse. After we ate my step father came with my uncle and knocked. They came inside the house and found me. The house is one roomed. I was seated on the bed. My father then called the police and they came and we were arrested and taken to police station. The following day on Monday we were brought to court and accused taken to Nakuru. I was taken to hospital on Sunday. I was examined and treated. Several tests were done and I was given medication. We went to hospital with a police officer who had forms. I was given a form in the hospital. I was born in the year 2001. I am now 18 years old. I was born on 12/8/2001."

7. **PW2** VS was the complainant's mother. She testified;

"On 25/5/2018, I left home to my work up to about 5.00 p.m. The complainant had told me in the morning that they were going for sports. At about 5.00 p.m. I did not see her. I then called her sports teacher and she told me the children had gone home. I then went to her friend's place called Cena and I then asked her where complainant was. She told me that the complainant had boarded another vehicle. I then went back home and I slept on a chair but then I went back to her friend's place. When I reached there, I found my daughter there. She then told me that she was borrowing a book that I go home. I then picked a cane and caned her. We then went home and I also caned her. When we went to the house, I talked to her but she did not want to listen. I then caned her and her father told me to stop. I then stopped and I went to prepare food. After I prepared food I went to call them to come and eat, I found the other children but RK was not there. We then started to look for her till it was about 10.00 p.m."

She went to her sister's place but the complainant was not there. She went home. The following day 26th May 2018 this sister reported to the chief. PW2 further testified that this sister went to look for the complainant at the accused person's place. The accused told her that she was not there. PW2 personally went to appellant's place of work at about 4.00pm and asked the appellant whether he knew the complainant's whereabouts. The appellant told her he had not seen her. She went on to say;

"At about 9.00 p.m. a certain boy came and told me that he had heard RK speaking in Yobesh's house. I then told my husband to go for her. He left and later he called me and told me they had found her. I then went to Yobesh's place and I found the girl there. I then called AP who did not come. We then called police station who come arrested the accused person and took them to police station."

Regarding the complainant's age, she said;

"The complainant was born in August 2001. The birth certificate has got a different date which indicates year of birth as 2002. I have copy of birth certificate in court ...I do not wish to have the birth certificate card as exhibit. Last year complainant was aged 17 years old."

On cross examination she told the court that she was told by her cousin one K that RK was in the appellant's house. That she went to appellant's house at 11:00pm and found four people in the house including the complainant. In re-examination she said she went to appellant's house with her sister and neighbours and that it was her husband who found the girl.

8. **PW3** was Dr. Ema Wangui, Medical Officer at Molo Sub-County Hospital, Nakuru County. After giving her qualifications she told the court

I have in court the P3 in respect of RK who came to the facility with history of having been defiled. She came to hospital on 28/5/2018. The state of clothings – The clothes were not presented. She was in fair general condition and was in a good physical appearance. Examination on head and neck, thorax, abdomen, limbs were normal. She was put on PEP and P2. Examination of genitalia revealed that the outer genitalia was normal, inner was normal, and hymen was torn. There was no discharge.

She signed the P3 on the same day. She produced the PRC which was also filled on 28th May 2018. The date of birth age was indicated as 12th August 2018. She confirmed that the appellant was examined.

9. **PW4** No. 91763 PC Isaack Njoroge was the Investigating Officer. He testified that;

“On 26/5/2018, I was on normal police patrol with Cpl Bett and Police Driver Lang’at when we received a phone call from Kibunja AP Camp and told that a suspect had been arrested with a girl aged 16 years old in his house. We proceeded to the scene and found the suspect already arrested by members of public. We rearrested the accused and complainant and took them to Molo Police Station. The following day I recorded statements of the complainant and her mother and issued her with P3 form which was then filled at Molo Sub-County Hospital. I was also issued with Birth Certificate which show the age of complainant. She was born on 12/08/2002. I wish to produce a copy of the same as exhibit (P. Exhibit 3 – copy of Birth Certificate). I then charged the accused with defilement.”

(all emphasis mine)

On this evidence the appellant was place on his defence.

10. In his defence the appellant gave a sworn testimony. He told the court he was twenty (20) years old, and had been employed by the complainant’s mother in her hotel to make mandazi. That he decided to quit. That he heard complainant had disappeared but she never came to his house. That her father had a grudge with him because he had left their employment. That what she said about 26th May 2018 was not true. That he was from a party with his friends, and had not even reached his house. That he was arrested from the road and not from the house.

In arguing his appeal, the appellant relied on his written submissions.

On **penetration**, he argued that there was no proof. An old torn hymen without any other accompanying evidence could not be proof of penetration. He relied on **Court of Appeal** case of **PKW v R [2012] eKLR**. He also raised issue with the fact that the P3 was filled by Doctor Ngarama and produced by another doctor without the prosecution laying any basis for the same. The Post Rape Care (PRC) was filled by one Josephine Kinyanjui, again the prosecution did not lay any basis for the production of these document by PW5 and not the makers of the same or those who examined the complainant.

11. On **age** he argued that the same was not conclusively proved. Both complainant and her mother rejected the Certificate of Birth which was produced by PW6, the investigating officer, who said she was sixteen (16) years. Medical examination did not contain an age assessment. He relied on **Dominic Kibet vs Republic Criminal Appeal Number 155 of 2011** where the court said;

“...while the court may in certain circumstances rely, on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”

And **Francis Omuroni vs Uganda** where the court stated;

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence.”

12. On **the credibility of the case for the prosecution**, he submitted that PW1’s testimony was not credible. That it was evident from her testimony that the issue of sexual intercourse was an afterthought. That he was with his friends in the house was corroborated by the complainant’s mother. He pointed out the contradictions in the case for the prosecution.

- On how the PW2 learnt of the whereabouts of the complainant she said that at by about 9.00 p.m she was informed by a certain boy that complainant was in appellant’s house. At the same time that it was her cousin called K who told her. Neither this boy nor K were called as witnesses.
- On the issue of penetration that the complainant gave conflicting evidence. That she said that when she got to appellant’s house he made supper and they ate. *“After we ate my stepfather came with my uncle and knocked. They came inside and found me. I was seated on the bed.”* In the same breath she said *“When I reached his house I slept with him and we had sexual intercourse”*. He urged the court to observe this and find that the issue of sexual intercourse was an afterthought *and not the truth*. Her testimony as to who found her contradicted PW2’s who said that she and her sister found her in appellant’s house.”

He relied on the case of **RANKRISHAN PANDYA v REP (1957) 339** where the Court of Appeal for Eastern Africa held that *“It is trite law that where the evidence is contradicted or inconsistent, the Court should not rely upon it.”* and also the holding of the Court of Appeal in **NDUNG’U KIMANYI v REP (1979) KLR 282** that:-

“The witness in criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of court that he is not a straight forward person or raise suspicion about his truthfulness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

13. Further due to the failure of the prosecution to call witnesses who were mentioned, he urged the court to follow **Peter Gitau Muchere v Republic HCRA 364 of 2006 (Nairobi)**

“In the present case, with the evidence on record, I make that adverse inference that if the witness who were mentioned by the complainant as having responded to her screams were called to testify, their testimony would have been adverse to the prosecution case. Therefore, the conviction of the appellant cannot be safely sustained.”

14. This is because the prosecution failed to call the alleged K, who reported that complainant was in appellant's house, or the "boy" who reported the same, the neighbours who accompanied complainant's mother to the scene or the complainant's stepfather and uncle, who allegedly found the complainant in the house. Regarding his defence, he urged the court to find that the same had not been considered.

15. Ms. Mwangi appeared for the state and opposed the appeal on grounds that the ingredients of defilement were all proved. She conceded however that taking into consideration the age of the appellant of twenty (20) years at the time of the offence the sentence of fifteen (15) years imprisonment was harsh, and that could have been a mitigating factor, including the fact that the complainant took herself to the appellant's house.

16. I have carefully considered all the evidence and rival submissions. If the case for the prosecution is proved that there was an act of defilement, then this case presents the court with the scenario of the two adolescents, a 17 year old girl being in a relationship with a 20-year-old boy and the complete absence of coercion or manipulation. Even the prosecution almost conceded the appeal on account of the circumstances of the offence.

17. Did the prosecution prove the age of the complainant? The record shows that Investigating Officer said she was 16 years old, while the complainant and her mother said she was 17 years old and both rejected the certificate of birth that was in court. So what was the age of the complainant at the material time? I would say that the mother's testimony on the age of her child would be acceptable. Hence I would find that the complainant's age was 17 years.

18. Did the prosecution prove beyond a reasonable doubt that the appellant and the complainant had sexual intercourse on the night of 26th May 2018? The circumstances of the offence are that the complainant ran away from home on 25th May 2018 after being caned by PW2. She slept away from home and according to her, it was not the appellant's home. She alleged to have slept at a friend's house. That was not ruled out yet the prosecution went against her testimony and charged the appellant with being with her. Secondly, the complainant did not report to any one that she had been defiled. She was even a reluctant witness. On 4th October 2018 when the matter was scheduled for hearing her mother PW2 told the court that she had packed her clothes and left home for Nakuru on the 29th September 2018 and said she was not interested in the case. This was reported to the Chief on 30th. She rang her mother on 2nd October and told her she was not interested in the case. However, on 29th February 2019 she was in court and testified. There was no indication of what had happened in the intervening period.

19. Her conduct and the inconsistency of her testimony creates the impression that perhaps her testimony may not have been wholly truthful and the court ought to have been wary in relying on it, especially now that the other evidence did not support her testimony. Here I agree with the submissions of the appellant and find guidance in the case of **Ndung'u v R** cited above.

20. The report allegedly given to PW2 by some unknown person was that the complainant was heard talking in appellant's house. PW2's conduct towards her was that of suspicion as evidenced by the beating she got on 25th leading to her running away.

21. In her testimony the complainant stated that on the 26th she had sexual intercourse with the appellant when she arrived at his house at 5:00pm. She and the appellant were arrested the same night and she was taken to hospital the following day. There was no evidence of recent sexual intercourse from the medical report produced by the prosecution. In fact, the Post Rape Care indicated that outer genitalia, vagina, were normal. Hymen was 'torn, old'. There was no discharge or any other significant finding to support recent sexual intercourse except the comment that the two were friends and intercourse was mutual. No lab examination was conducted to establish that indeed there had been any intercourse 25th or 26th May 2018 between the two.

22. Hence the prosecution did not prove that there was penetration any sexual intercourse between the two as alleged.

23. Was the evidence contradictory and inconsistent? In addition to the inconsistencies pointed out herein above, the charge sheet indicated that the offence was committed between 25th and 26th. There was no evidence to support that as the complainant herself said she went to the appellant's house on 26th at 5pm. The police did not conduct any investigation to find out where she slept on 25th and had no justification for putting that date in the charge sheet. The appellant's arrest is another one. The complainant said after her uncle and stepfather found her they called the police who came and arrested her and the appellant. This is also what PW2 said. However, PW4, the investigating officer and arresting officer said he found when the appellant had been arrested by members of the public and rearrested him. It appears that the appellant may have been telling the truth when he said that he was arrested on the road as the arresting officer did not get him in the house.

24. It is also not clear why the two other occupants of the appellant's house alleged to have been found there by PW2 and her sister were not called as witnesses. Perhaps they would have confirmed the appellant's story and dented the case for the prosecution? That is a presumption that can be drawn from these facts.

25. The upshot is that there having been no evidence of sexual intercourse between the appellant and the complainant, the conviction was unsafe.

26. Regarding the severity of the sentence, I do agree with the state prosecutor that the same was harsh taking into consideration the circumstances of the offence.

27. It is note -worthy that the parents of the complainant seemed to have an idea that their daughter and the appellant were friends and that is why they went asking him whether he was aware of her whereabouts. By then the complainant's whereabouts were unknown. Taking into consideration their age difference, and again the circumstances of the alleged offence it was not fair that the appellant would go to prison for 15 years. That is why the holding in **Dimas Wafula Kilwake** on sentencing in sexual offences is a welcome relief, whereby now courts can deal differently with the real child molesters.

28. The appeal succeeds. The conviction is quashed. The sentence is set aside. The appellant is to be set at liberty unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 15th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of:-VIA ZOOM

Edna and Martin Court Assistants

For state Ms. Wamboi

Appellant Present