



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 8 OF 2019

RODGERS WAFULA DAUDI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence from Adult Criminal Case Number 209 of 2016 by the B. Mararo (Principal Magistrate) at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. The appellant Rodgers Wafula Daudi was charged **with defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006**. It was alleged that:

On the 10th day of October 2016 at [Particulars Withheld] Village in Mirangine Sub-County of Nyandarua County intentionally and unlawfully committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of (RMM) a child aged 13 years which caused penetration.

In the alternative that;

On the 10th day of October 2016 at [Particulars Withheld] Village in Mirangine Sub-County within Nyandarua County intentionally and unlawfully touched the vagina of RMM a child aged 13 years with his penis.

2. **PW1 RMM** testified that at the material time she was 13 years old and in class 6 (Date of birth 17/9/2003). On 10th October, 2016 while coming from school about 4.00 p.m., she was alone. She met Rodgers, a neighbour known to her, who chased her, caught her, lifted her (carried) her into the maize plantation, removed all her clothes and did *tabia mbaya* to her by inserting his penis into her vagina. She said that this particular incident was the third time. He left her in the maize. She feared telling her mother and told her teacher Mrs. Mutinda the following day. The teacher called her mother, to whom she reported in the presence of her teacher. They then went to the chief's office and were referred to Mirangine Hospital. On cross examination she stated that the appellant took her near the forest where there were flowers but there were no people passing by, and it was 30 metres from the road.

3. **PW2 RWK** testified that the complainant was her last born and was born in July 2003. She testified that on 11th October 2006 she was summoned by teacher, who told PW1 to say what had happened.

“On 11/10/16 I was summoned by teacher. Teacher told PW1 to say what had happened. I was referred to chief's office then to Mirangine. Police and referred to Olkalao Hospital and back to Mirangine. The P3 form was filled and I returned to Mirangine. I gave them Birth Notification accused was arrested later.

I took the child to hospital she was examined... she was 13 years last year. She said that the accused raped her. I know Rodgers he was my neighbour.

Cross-examination by accused:

You have been my neighbour for 3 years. It is the teacher who called me. It is truthful. Teacher told me... Teacher told me what she was told by PW1 I am telling the truth. You committed the act on the road. We have neighbours... My husband cannot defile my child. Your wife insulted me. You threatened to have me bewitched. I am telling the truth. It is not a plan to fix you. You were not examined. I was told by PW1... there were no eye witnesses.”

4. After PW2 testified appellant instructed counsel and PW1 was recalled for cross examination. She told the court that she knew the appellant, heard from people that appellant's name was Rodgers Wafula. She said appellant chased her for three minutes. She ran very fast towards home but he caught up with her at Kwa Mahihu (Baraka Flowers) and that he literally carried her into the maize plantation, she did not scream, but motorcycles and motor vehicle were passing by. That the appellant had defiled her two times before. That on 10th October 2016 she got home at 5.30 p.m. but did not tell her mother. The first two times she reported to her teacher who told her to wait for the third time. This time she reported the next day to Ms. Nyalunya, she said she washed her underpants. **PW2** was also recalled for cross examination. She told the court that the father of the appellant had insulted her, and tried to bewitch her unsuccessfully. She said the teacher who called her was Mrs. Muhunyo. That the complainant said she was defiled by Rodgers Wafula.

5. **PW3 No. 20003976 APC Stephen Kitony** testified that they arrested the appellant on 25th October 2016 on allegation of defilement. That one Chief Mburu directed them to the appellant's house. He said the chief told him that the offence was committed on 11th October 2016.

6. **PW4 Eunice Wenyo Migwa** testified that she was class teacher for complainant's class in 2016. That she noted that the class was doing poorly. To seek solutions, and so as to assist the students do better, she asked each one of them to write down their problems, that the complainant wrote that she needed help. She showed the complainant's note to the head teacher who summoned the parent because the complainant had written that she had been defiled. When the mother came the complainant said that she had been taken into a maize plantation and defiled. She did not name the person who defiled her. She identified a hand written note in court, which was marked MFI 5A and B.

7. **PW5 Janet Kidema** was assigned the case on 17th October 2016 for investigations. That the complainant alleged that the perpetrator was a neighbour and used to work with the father, and had done it had done it severally. That in fear she told the teacher and not her mother. She said the doctor confirmed that there was penetration. That the appellant was arrested by Administration Police Officers who escorted him to the police station where he was identified by the complainant. She said she conducted investigations but did not visit the scene. She testified that the road in question was used by many people. That she did not know the exact location where the incident had happened but that the appellant would waylay the complainant when she was from school.

8. **PW6 Danson Maina** was the clinical officer. He produced the P3 which had been signed by one Harun Maina who was on suspension from November 2016. According to him the complainant was defiled on 12th October 2016 and had an old broken hymen.

9. At the close of the case for prosecution the appellant was put on his defence. He made an unsworn statement of defence. He told the court how on 24th October 2006 he was picked by Administration Police Officers from the chief's camp. One of them beat him up telling him to tell the truth. They took him to Ndundori Forest, interrogated him, took his Kshs. 20,000/= injured his left arm. He said he had disagreed with complainant's mother in June 2016 when he turned down her advances.

10. In judgment delivered on 17th July 2018 the trial court found the appellant guilty, committed him and sentenced him to twenty-five (25) years imprisonment for the offence of defilement.

11. The appellant was aggrieved. He filed appeal on the following grounds;

1. *THAT I pleaded not guilty to the charges during plea time and I still maintain the same up to date.*

2. *THAT the learned trial magistrate erred in both law and facts when he found the appellant herein guilty in the present case and yet the prosecution's evidence tendered lacked merit and collaboration to warrant a conviction.*

3. *THAT the learned trial magistrate erred in both matters of law and facts when he moved ahead to convict the appellant in the present case and yet the age of the complainant was (PW1) remained unknown contrary to the law.*

4. *THAT the learned trial magistrate erred in both matters of law and facts when he moved ahead to convict the appellant in the present case and yet the appellant's rights were violated.*

5. *THAT the learned trial magistrate erred in both law and facts when he found the appellant guilty in the present case and yet the prosecution's case lacked proper investigation thus weakened the evidence in records.*

6. *THAT the learned trial magistrate erred in both matters of law and facts when he found the appellant guilty and yet there was no medical evidence such as DNA to prove the appellant being responsible for the allegation in question. (emphasis mine)*

12. He raised the following issues;

1. *Whether PW1's evidence was reasonable.*

2. *Whether PW1 was a reliable witness.*

3. *Whether PW1 had reported earlier twice to her teacher.*

4. *Whether there was any legal document to prove the complainant's age.*

5. Whether PW1's teacher confirmed the first and second time PW1 reported.

6. Whether there existed a grudge between PW2 and the appellant.

7. Whether there was any corroboration of evidence.

8. Whether there was any material evidence in support of PW1's claims.

9. Whether PW1 clearly stated where she had been while the other pupils went home.

10. Whether PW1 stated the scene of crime.

13. In his submissions he argued that the prosecution had failed to prove their case beyond a reasonable doubt and the trial court erred in making a finding of guilt on such evidence. That age was not proved. That the evidence was inconsistent, unreliable and not corroborated, that the complainant's testimony was incredible. She contradicted herself on the scene of crime, whether it was a maize plantation and forest with flowers, whether it was lonely/or motorcycles and motor vehicle were moving there. That the case was not investigated at all. How was it that the complainant could report having been defiled twice and be told by her teacher to wait for the third time. That crucial witnesses were not called, the teacher who allegedly summoned her mother, the teacher who received the initial report. That the trial was not fair, and the conviction was unsafe. He cited; **Robert Fenali Akhuya vs Republic [2002]**, **Erick Omondi Mboya vs Republic HCCR Application Number 190/011 Eldoret**, **Ekimat vs Republic [2005] 1KLR**, **1982 Eldoret**, **Nderitu Mwangi Kibui vs Republic Criminal Case Number 102/016 Nyahururu**.

14. For the state it was argued that the appellant's trial was fair because even if he did not have witness statement when his counsel came on board witnesses were recalled and cross examined. That the complainant was defiled as her hymen was broken hence penetration was proved. That age was proved as certificate of birth was produced. That appellant was a neighbour hence known to the complainant. That the sentence was legal. That the alleged grudge between the appellant and mother of complainant was not true.

15. Guided by **Okeno vs Republic** I have carefully considered the evidence, the submissions and authorities cited.

16. The totality of the issues for determination is whether the case for the prosecution was proved beyond a reasonable doubt.

17. The appellant is not disputing that an offence may have been committed against the complainant, however he denied he was not the one and the prosecution did not prove their case.

18. That the complainant's testimony created the impression of being incredible, she alleged that the appellant defiled her three times, that she reported the first two to her teacher who told her to wait for the third time so that they could take action. That sounds so untrue, how did the teacher or complainant know there would be a third time? Who did it these two other times. The only teacher who testified told the court that the complainant never mentioned the name of the alleged defiler to her. The handwritten piece of paper where complainant alleged to have written for help was not produced. In any event she never spoke about the alleged writing in her testimony hence the evidence of the teacher stands uncorroborated in material particulars, and becomes unreliable. About the scene of the offence, the complainant changed stories and the investigating officer added a third dimension, that the scene was near a place where motor cycles and motor vehicle were passing, but she did not know the exact spot. If that is so the complainant's testimony that the appellant chased her for three minutes and there was no one, she did not scream, shout for help when she was being chased or being lifted, it is not credible.

19. As to who defiled her, she did not tell the teacher on 11th October 2016 and even on 12th October 2016 the name was not mentioned in the presence of the teacher. It is noteworthy that she said that though she knew the appellant, she heard his name from people, hence it is doubtful that she came up with the name of the appellant.

20. What stands out in this case is the grudge by the complainant's mother who told the court that the appellant's father insulted her, and the appellant tried to bewitch her. These are very serious allegations and were made while she was on oath. The prosecution did not make any effort to demonstrate that this alleged grudge could not have contributed to the appellant's name coming up as the defiler. That possibility is not far-fetched and creates weakness in the case for the prosecution.

21. The P3 itself and Post Rape Care are not conclusive. The Clinical Officer who filled it on 13th October 2016 indicated that 'injury' was about one (1) day old, yet in the whole P3, there were no injuries recorded. Even in the vagina, there was no evidence of recent sexual intercourse, no discharge, nothing.

22. According to the arresting officer, the appellant was arrested on 25th October 2016 why was there delay in arresting him yet it was known he was the one! It does not add up.

23. Going by **Section 33 of the Sexual Offences Act**, the evidence on the circumstances of the offence did not prove that offence of defilement was committed on 10th October 2015 or that the appellant committed it. There are serious doubts in the case for the prosecution which render the conviction unsafe.

24. The conviction is quashed, the sentence set aside and the appellant set free unless otherwise legally held.

Dated and Signed and Delivered at Nakuru this 3rd Day of August, 2020.

Mumbua T. Matheka,

Judge

In the presence of: VIA ZOOM

Martin Court Assistant

For state: Ms Wambui

Appellant: Present

Mumbua T. Matheka,

Judge.