



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.18 OF 2018

PHILIP KIPROTICH RONO.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original conviction and sentence by Hon. B. Limo(RM) in CMCC No.41 of 2017 delivered on 7/9/2018 at Kericho Law Courts)

JUDGEMENT

1. The Appellant was convicted with the offence of Defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence Act No.3 of 2006 and he was sentenced to life imprisonment in Criminal Case No.41 of 2017 delivered on 7/9/2018 at Kericho Law Courts.
2. The particulars of the charge are that on 27/7/2017, at [particulars withheld] village, SIGOWET location, SOIN sub county, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of TC, a girl aged 4 years old.
3. The prosecution evidence in brief was that PW1 was heading to her home on the material day in the evening when saw the Appellant lying on a child beside the road.
4. PW1 raised an alarm and the Appellant ran away. PW1 said the Appellant was wearing a black trouser. She said the child had blood on her thighs.
5. PW2, the father of the child, said he was called to the scene by a neighbour and he took his child to hospital. The child was operated and admitted at Kericho District Hospital for one and a half months.
6. The clinical officer who testified as PW3 said the minor had a tear to the lower part of the vagina – a 2nd degree perineal tear and a fresh torn hymen with hyperemic labia and active vaginal bleeding.
7. PW6 said she saw the Appellant going to the home of the complainant.
8. The complainant said the Appellant took her from her home and defiled her before being rescued by a woman.
9. The Appellant said in his defence that on the material day he was called by two people who told him that he was a suspect of defilement. He said they proceeded to the scene where the people wanted to lynch him but he was rescued by the area chief and he was later charged with this offence.
10. The trial court found the Appellant guilty as charged and sentenced him to life imprisonment. The Appellant is aggrieved by the conviction and sentence and he has appealed to court on the following grounds:

i) THAT the learned trial magistrate erred in law and in fact

by failing to appreciate that the Appellant's identification

was not positively established.

ii) THAT the learned magistrate erred in law and in fact by failing to appreciate that the evidence tendered by the prosecution was contradictory and inconsistent.

iii) THAT the learned trial magistrate erred in law and in fact by failing to conduct a *voire dire* prior to the complaints testifying.

iv) THAT the learned trial magistrate erred in law and fact by failing to find that the Appellant was not accorded an opportunity to recall and re-examine witnesses after the charge sheet was amended.

v) THAT the learned trial magistrate erred in law and in fact by sentencing the Appellant with a harsh sentence that was excessive in the light of the facts and circumstances of the case.

11. The first duty of the Appellate court is to weigh the evidence adduced before the trial court and to arrive at its own conclusion. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“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.”

12. The issues for determination in this Appeal are as follows:

i) Whether the complainant was defiled.

ii) Whether it was the Appellant who defiled her.

iii) Whether the age of the complainant was proved.

iv) Whether the evidence on record was sufficient to convict the Appellant in the absence of *voire dire*

13. I have weighed the evidence and I find that although the trial court did not conduct *voire dire*, the evidence against the Appellant is overwhelming.

14. The Appellant was caught red handed defiling the minor by the road side by PW1. The testimony of PW1 was corroborated by that of PW6 who found the Appellant going to the home of the complainant.

15. It is trite that for the Appellant to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

16. In the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

17. In the current case, PW1 found the Appellant on the act defiling the complainant, a minor aged 4 years old. The Appellant was arrested with the help of members of public and his clothes were blood stained.

18. The medical evidence confirmed that the minor had been defiled.

19. The birth certificate of the minor was produced and there is evidence that the minor was born on 5/6/2012 and therefore on 27/7/2017 she was aged 5 years old.

20. Although no *voire dire* was conducted, the evidence on record was sufficient to convict the Appellant.

21. The Court of Appeal held in **Athumani Ali Mwinzi v R Cr. Appeal No.11 of 2015** as follows;

“In appropriate case where *voir dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

22. I also find that the sentence was legal as the same is determined by the age of the complainant.

23. I accordingly dismiss the Appeal and I confirm both the conviction and sentence.

Delivered, signed and dated at Kericho this 24th day of September 2020.

A. N. ONGERI

JUDGE