



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

(CORAM: A.K. NDUNG'U)

CRIMINAL APPEAL NO. 1 OF 2017

ANTONY BARAZA WEPUKHULU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. J. Masiga (S.R.M.)

dated the 20th day of December 2016 in Murang'a S.O. 2 of 2015)

JUDGEMENT

1. The appellant, **ANTONY BARAZA WEPUKHULU**, was convicted and sentenced to 20 years' imprisonment for committing the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 7th day of January 2015 in Gathaiti Sub-Location, he unlawfully and intentionally caused his penis to penetrate into the vagina of EWN a girl aged 11 years.
2. The appellant has challenged the trial court's decision to convict and sentence him on the grounds that the decision was flawed both in law and fact. A summary of the grounds of appeal set out in his amended petition of appeal are as follows;
 - a) Critical elements of the offence of defilement were not proved;
 - b) The trial court did not adhere to provisions of Section 200 of the Criminal Procedure Code;
 - c) The trial court did not appreciate that there were material discrepancies capable of unsettling the verdict;
 - d) The trial court did not appreciate there was a grudge and the standard of proof had not been met.
3. This being a first appeal, I am required to analyse the evidence in its entirety, weighing any conflicting facts and reach my own conclusion. In doing so I will bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses testifying. (*See Okeno v. Republic (1972) E.A. 32. and Kariuki Karanja v Republic [1986] KLR 190*)
4. When the matter came up before the trial court, the complainant, EWN (PW1) in a sworn statement testified that she was assaulted by the appellant at home where she resided with her grandmother, her father and aunty on 7th January 2015 at about 2:00 p.m. She recalled that the appellant had been called into the house by her aunt (PW5) and served with a cup of tea and two pieces of chapati. As soon as PW5 left, the appellant locked the door and ordered her to remove her clothes. He undressed PW1 himself when she refused to undress, unzipped his trousers and inserted his male organ into PW1's genital organ.
5. PW1 recounted how the appellant had laid her on the sofa seat and had sexual intercourse with her. She testified that she felt pain and bled during the encounter which took a long period. She told the court that she did not scream for help because the appellant had gagged her with his hand and ordered her to remain silent lest he kill her. PW1 met PW2 after the appellant had left. She told her what had happened to her and PW2 informed her father. They escorted her to hospital and later to Kahuro Police Station where she reported the matter. PW1 testified that she knew the appellant as he used to work at her uncle's home.
6. TMM (PW2) testified that she found PW1 crying outside her home at about 5:00 p.m. on the material day. She confirmed that the

complainant had divulged to her that she had been defiled by the appellant. She also confirmed that she had called the complainant's father and accompanied them to Gathaithi Dispensary and later to Muriranjas Sub-District Hospital. She then escorted them to Kahuro Police Station where the police issued a referral note to PW1 for examination at Muriranjas Sub-District Hospital. She testified that the appellant was an employee of her brother-in-law. During cross examination, PW2 denied having a grudge with the appellant over a shamba.

7. The complainant's father, JNM (PW3) testified that he received a call from PW2 at about 6:00 p.m. asking him to go to her house urgently. He recalled that when he got home he found his daughter crying. He testified that the complainant told him that the appellant had locked her inside her aunt's house and defiled her and threatened her to remain silent. He took PW1 for medical examination at Gathaithi Dispensary where they were joined by PW5. They later went to record their statements at the police station. He denied having a grudge against the appellant.

8. RWM (PW5) testified that she left the appellant with her niece PW1 in her house and went for a visit. She recalled that she had assigned PW1 some house chores and had left the appellant taking chapati in her house. On returning back from her visit, PW5 did not find PW1. PW3 called her over the phone and asked her to meet him at Gathaithi dispensary where she met PW1, PW2 and PW3. PW1 told her that the appellant had defiled her. She testified that they were referred to Muriranjas Sub-District Hospital where they were advised to report the matter to Kahuro Police Station. She denied having a grudge with the appellant and denied ever requesting the appellant to have an intimate relationship with her. She also denied that she wanted to benefit from free milk, chicken feed, firewood and bananas for the appellant's work place.

9. Douglas Buti (PW4) a clinical officer from Muriranjas Sub District Hospital testified that PW1 had been examined at the hospital on 7th January 2015 at about 16:00 hours. He stated that on examination of her genitalia, it was noted that PW1 had bruises on the vaginal walls and a broken hymen. A physical examination showed that she was bleeding and a high vaginal swab showed a few spermatozoa, a few pus cells and numerous red blood cells indicative of bleeding. A urine test showed red blood cells and a few pus cells with spermatozoa. A blood test for syphilis and HIV came out negative. PW4 testified that PW1 was treated with antibiotics and P.E.P for HIV. He produced the P3 form as P.Exhibit No. 1.

10. The Investigating Officer, PC Jonathan Kyalo (PW6) recalled that he was at the police station when the complainant, PW2, PW3 and PW5 came in to report the case of defilement. He booked the report and referred PW1 to Muriranjas Sub-District Hospital with a P3 form he had issued. On 8th January 2015, the appellant was brought to the police station by PW7 who was the manager to the farm where the appellant worked. PW6 rearrested the appellant and placed him in the cells. He thereafter recorded the statements of PW1, PW2, PW3 and PW5. He also obtained a copy of the minor's birth certificate which he produced as exhibit No. 2.

11. Edward Mwangi Kamau (PW7) recalled that he had been called by the appellant's employer and informed that he had defiled a child. The appellant's employer instructed him to escort the appellant to the police station. He hired a motor cycle and took the appellant to Kahuro Police Station as instructed. He denied having a grudge against the accused person when questioned about it during cross examination.

12. In his defence, the appellant testified that on 7th January 2015, he went to work as usual. The manager of the farm where he worked as a shamba boy asked him to go with him to fetch grass but instead took him to the police station. He stated that he only got to learn about the charges he faced in court. He told the trial court that he had been set up because he had refused to assist the witnesses who had a dispute with their brother concerning his property when their brother employed him.

13. The appellant canvassed his appeal by way of written submissions while the state made oral submissions in opposition to the appeal. The issues arising from those submissions, the record of appeal and other material before this court are as follows;

- a) Whether the prosecution proved all the ingredients of the offence of defilement;
- b) Whether the trial court violated the appellant's right to fair hearing by violating the provisions of Section 200 of the Criminal Procedure Code;
- c) Whether the trial court relied on inconsistent evidence to convict the appellant;
- d) Whether the case against the appellant was instigated by bad blood and whether the prosecution proved its case to the required standard of proof.

14. I will first deal with the preliminary question which is whether the trial court violated the appellant's right to fair hearing by failing to adhere to the provisions of **Section 200** of the **Criminal Procedure Code**.

15. **Section 200 (3)** of the **Criminal Procedure Code** provides as follows;

200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

16. The record shows that the evidence of PW1, PW2, PW3, PW4, PW5, PW 6 and PW7 were taken by Hon. T. Nzioki (P.M.) before Hon. J. Masiga (R.M.) took over the conduct of the matter. The appellant's application to have the matter begin *de novo* was opposed by the prosecution on the grounds that all witnesses had testified and it would be hard to get them. It was on this basis that Hon. J. Masiga R.M. denied the application to have the matter begin afresh. The trial magistrate held that it would be difficult and unjust to call all witnesses again. And that it would be just that the matter proceed from where it had reached.

17. The appellant argues that the failure by the succeeding trial magistrate to recall the prosecution's witnesses after taking over the matter was a violation of his right to fair hearing. He relied on the case of **Ndegwa versus Republic [1985]KLR 534** where the Court held as follows on the significance of **Section 200 (3)**;

“(1) The provision of section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by the predecessor;

(2) The provisions of section 200 should not be invoked where the part heard trial is a short time and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution;

(3) No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration;

(4) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanor and credibility of witnesses should always be maintained; and

(5) A magistrate who did not observe the evidence is not in a position to assess the credibility and personal demeanour of all the witnesses.”

18. Conversely, learned counsel for the State argued that **section 200** of the **Criminal Procedure Code** could only be invoked where few witnesses had testified. Counsel cited the case of **Abdi Adan Mohamed v Republic** in support of this position.

19. In the case of **Abdi Adan Mohamed v Republic**, the Court of Appeal reaffirmed the principles laid out in the case of **Ndegwa v R**. The Court added that some considerations to be taken into account before invoking Section 200 of the Criminal Procedure Code include whether it is convenient to commence the trial *de novo*, how far the trial has gone, the availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

20. The hearing of the matter before the trial court began on 7th April 2015. By the time the succeeding magistrate, Hon. J. Masiga took over the matter in October 2015, all prosecution witnesses had testified. The prosecution opposed the application to start the matter *de novo* for the reason that it would be difficult to get the witnesses who had testified. It would, in my view, not serve the interest of justice and it would prejudice the prosecution to demand that it starts its case afresh if tracing the witnesses would be difficult. Again, justice would not be served by unnecessarily delaying the conclusion of the matter. I note the key witness in this matter was a child of tender years. The lapse in time would obviously affect her memory and recollection of the relevant facts. I therefore find that the trial court had good reason to proceed with the matter from where it had reached and the appellant's right to fair hearing was not infringed upon by failing to start the matter afresh.

21. I now turn to the substantive issues arising in the appeal.

22. It is the appellant's case that critical ingredients of the offence of defilement were not proved. He argued that in her evidence PW1 did not specify which male organ had been inserted into her genitals and it could not be assumed that it was the penis. He pointed out that there was no evidence of blood on the sofa where PW1 was allegedly defiled and her clothing had not been produced as evidence. He assailed the medical evidence on the grounds that the clinical officer did not disclose the approximate age of the injuries and further argued that the absence of the hymen was not proof of defilement. That in the absence of conclusive proof of penetration, it could not be said that the offence of defilement had been proved.

23. The critical elements forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. (See **Dominic Kibet Mwareng –vs- Republic [2013]eKLR**).

24. It is not in doubt that PW1 was 11 years old and a minor at the material time. The appellant's main complaint is that penetration was not proved. Penetration is defined in **Section 2** of the **Sexual Offences Act** as the partial or complete insertion of the genital organ of a person into the genital organs of another person.

25. Upon analyzing the testimony of PW1, I am convinced that her evidence was clear enough on the nature of her assault by the appellant. She testified that the appellant had had sexual intercourse with her which went on for a long period of time and caused her much pain. Her evidence was corroborated by medical evidence given by PW4. The clinical officer testified that he had filled and signed the P3 form on 8th January 2015, a day after the incident. In the P3 form which was produced as P. exhibit No. 1, the Clinical Officer indicated that the approximate age of the injuries was a few hours. The appellant's argument that PW4 did not indicate the age of the injuries is therefore untenable.

26. PW4 also testified that a physical examination of the complainant's genitalia revealed that she had bruises on her vaginal walls. A high vaginal swab and a urine test revealed a few spermatozoa, pus cells and red blood cells. It is quite apparent from these facts and more particularly the observation of spermatozoa that the complainant's vagina had been penetrated by a penis.

27. As to the identity of the appellant, PW1 testified that she knew the appellant as her uncle's employee. Her aunt PW7 also confirmed that she had left the appellant at home with her niece before he committed the heinous act. The evidence shows that the act was committed during the day. This, coupled with the fact that the identification of the appellant was not the identification of a stranger but the recognition of a person known to the complainant leaves no doubt in my mind that the appellant was properly identified as PW1's assailant. For these

reasons, the appellant's claim that the prosecution did not prove all ingredients for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences is dismissed.

28. The appellant also argued that there were material discrepancies in the evidence capable of unsettling his conviction. He pointed out that PW1 had testified that the offence occurred at 2 p.m., PW2 had stated that it occurred around 5 p.m. and PW3 had stated that the offence occurred between 4:00 p.m. and 5:00 p.m. He submitted that these inconsistencies lent credence to his claim that the case against him had been fabricated. He stated that there was bad blood between him and the complainant's family because he had realized that they were unprocedurally benefiting from his employer's farm produce and put an end to it.

29. While it is true that the prosecution's witnesses had varying estimates on when the incident took place, it was clear from their evidence that the offence occurred in the late afternoon on 7th January 2015. The complainant testified that the appellant assaulted her after PW7 left her in his company between 4:00 p.m. and 5:00 p.m. PW2 testified that she found the complainant outside her home at about 5 p.m. after the incident. PW3 recalled that he had received a call from PW2 at about 6 p.m. informing him of the incident. PW5 stated that she left the appellant with the complainant at about 2:00 p.m. and returned back home at 6:00 p.m. PW4 on the other hand stated that the complainant had been examined at about 4:00 p.m. The differences in time were minor and not sufficient to render the conviction unsound.

30. In *Philip Nzaka Watu v Republic, Criminal Appeal No. 29 of 2015 [2016] eKLR* the Court of Appeal noted that some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. At times, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. The inconsistencies in time were, in my view, inconsequential and not material as argued by the appellant.

31. I similarly dismiss the appellant's claim that the case against him was fabricated due to a grudge the prosecution witnesses had against him for refusing to cooperate with him in the misappropriation of his employer's property. His defence seemed farfetched and improbable when contrasted with the prosecution's case which was solid and unshaken in cross examination. The appellant was prodded about the purported set up during cross examination and he admitted that he had not reported the matter to the police.

32. In the end I find that the prosecution proved its case beyond reasonable doubt. I accordingly find this appeal to be unmerited and I dismiss it.

Dated, Signed and delivered at Murang'a this 11th day of November, 2020.

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A. K. NDUNG'U

JUDGE