



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.12 OF 2018

(From the original conviction and sentence of 15 years' imprisonment in CMs court at Molo in criminal case no.2027 of 2016 by HON. J WANYANGA (RM) dated 3rd November 2017)

RKW.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act no 3 of 2006. The particulars of the offence were that between 2nd May 2016 and 11th July 2016 at [particulars withheld] in Rongai Sub County within Nakuru County intentionally caused his penis to penetrate the vagina of SRM a girl aged 9 years.
2. The 2nd count was Deliberate transmission of life threatening sexual transmitted disease contrary to Section 26(1) (a) of the Sexual Offences Act no 3 of 2006. The particulars of the charge were that on diverse dates between 2nd May 2016 and 11th July 2016 at [particulars withheld] in Rongai sub county within Nakuru having actual knowledge that he was infected with urinary truck infection (U.T.I) a life threatening sexually transmitted disease intentionally and wilfully had unprotected sexual intercourse with SRM which infected SRM with the said life threatening disease.
3. The Alternative charge was committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act no 3 of 2006. The particulars of the offence were that between 2nd May 2016 and 11th July 2016 intentionally touched the vagina of SRM with his penis a child aged 9 years.
4. The accused denied the charge and the matter proceeded to full trial where the respondent called several witness to prove its case. The appellant was placed on his defence where he gave unsworn evidence and did not call any witness. He was subsequently convicted and sentenced to 15 years' imprisonment hence this appeal. Before looking at the same it shall be necessary to summarise the proceedings before the lower court and thereafter analyse the merits or otherwise of the appeal.
5. **PW1 SRM** the complainant aged 9 years and in class 3 at [particulars withheld] primary school testified that she was walking home from school together with her friend S when they met the appellant who offered to buy them *kangumu* or doughnuts. One Michael who was a friend to S arrived with the appellant riding a motor cycle.
6. They then took them to the bush where the appellant defiled her and her friend S and Michael went separately. The appellant defiled her again on 3/5/2016, 4/5/2016, 5/5/2016, and 6/5 /2016 successfully.
7. On 6/7/2016 the appellant defiled her as well in the bush as her friend A watched. He also defiled her on 11/7 /2016 and gave her Kshs.30 which she used to buy *kangumu* and sweets. She took some of the *kangumu* and sweets and gave them to her friends and Rhoda her teacher saw them eating.
8. The teacher interrogated her and she told her she bought them using the money given to her by the appellant. S told teacher Rhoda that she had been defiled by Michael and that the appellant usually defiled her. They were taken to the hospital, examined and treated. She identified the treatment documents including the P3 form which had been filled.
9. She went on to state that she knew the appellant whom she would see in school or at the hotel and he would buy her *kangumu*.
10. When cross examined she said that the appellant used to work in school before he went to the hotel. She said that she did not report as

she threatened them.

11. **PW2 EAR** also a pupil at [particulars withheld] primary school aged 9 years and in class 3 testified that she was from school on 6/7 2016 with pw1 when they met Michael who bought them *kangumu*. On the way as they reached the railway line they met the appellant who got hold of them and dragged them to the bush.

12. He told PW1 to lie down and he removed her panty and proceeded to defile her as she stood watching. He told her to dress up after he was done. He thereafter proceeded to defile her as well as she laid on the ground. He then took off after that and she went home but she did not inform anyone.

13. She said that after a week pw1 informed the teacher and they were taken to the hospital and treated. She identified the p3 form issued to her. She said that the appellant works as a mason in their school.

14. **PW3 RHODA MAIYO** a teacher at [particulars withheld] primary school testified that pw1 and pw2 are students at the said school. She said that on 12th July 2016 at around 8am she found students making a lot of noise in the class and there was some food they were eating. She inquired the source and she was told the girls who had brought, namely S, S, M and A. She noticed that pw1 had kshs30. She questioned them and a boy classmate told her that there was a man that buys them food.

15. After interrogating her she learned from PW 1 that the appellant and one Michael usually buy them food and would defile them. She went and informed Agnes and thereafter the head teacher and she found that the appellant would defile PW1 and S.

16. When cross examined she said that she found the minors sharing snacks and they told her that it was him who had defiled them.

17. **PW4 AGNESS ROTICH** also a teacher at [particulars withheld] primary school testified that she knew pw1 , S and M who are all in class 3. She said that on 12/7/2016 pw3 brought the two girls to her so that she could also listened to their story. They took them to the headmaster's office and thereafter they escorted them to Rongai hospital where it was confirmed that they had been defiled. She positively identified the appellant.

18. **PW 5 SAMMY KIBUKU MUIRURI** the head teacher [particulars withheld] primary school testified that PW3 and 4 on 12/7/2016 accompanied by pw1 and 2 came to his office and informed him of what the minors had told them. He decided to take them to the hospital where they were examined and the matter reported at the police station. One of them mentioned the appellant who was working in the school as a mason. He went to the school and spotted him. He was arrested and taken to Rongai police station.

19. **PW6 BILDAD BARGOGE** from Rongai health centre examined the appellant and found after carrying out tests that he was HIV positive. He also produced his p3 form as well as age assessment report.

20. He examined PW2 AA and found her hymen broken as well as bacterial infections. He concluded that there was penile penetration. He produced her p3 form as well as PRC form and her age assessment report which concluded that she was 9 years old.

21. He also examined PW1 whom she found to be 9 years old and that her hymen was broken. He concluded that there was penile penetration. He produced the P3 form, PRC form and the age assessment report. The minors however did not contract HIV.

22. When cross examined he said that there was urine infection on both minors.

23. **PW7 PC ONCURU VERONICA** from Rongai police station carried out the investigation together with one Gilbert Sang. She said that the report of defilement was made by some teachers who later brought the minors and after interrogating them she recorded their statements. She went to the school and found that the appellant was working at the school and had him arrested.

24. She went ahead to produce the minor's age assessment reports as well as PW2 birth certificate. She also produced the appellant's age assessment report and the exhibit memo from the analyst. She produced underpants for PW2 as well.

25. When placed on his defence the appellant as indicated above gave unsworn evidence where he stated that he was a casual mason at Shalom primary school. He denied that he defiled the minors and he had never been in conduct with them.

26. He said that he was arrested on 12/7/2016 after coming back from lunch while working at the said school. He was taken to Rongai police station and he also when interrogated denied that he knew Michael.

27. At the said police station he met the two minors but he did not know them. He was taken to Rongai health centre where he was tested for HIV but was not told the results. He said that if he had defiled them they would have contracted HIV disease.

ANALYSIS AND DETERMINATION

28. The court directed the parties to file written submissions which they have complied. The thrust of the appellant's submissions and in line with his amended grounds of appeal dwells majorly on the fact that the evidence as presented were contradictory. He submitted that the person who usually buys *kangumu* for the minors was one Solomon and not the appellant.

29. He also submitted that the witnesses were not credible for instance one Stacey who was the cause of all the problems was not called to testify. He said that the medical evidence was not conclusive enough to warrant the charges against him. The fact according to him that the

hymen of the complainant was found torn was not necessarily because of the defilement but could have been caused by something else.

30. The learned state counsel on the other hand submitted that all the ingredients of the offence namely the age of the victim, the identity of the perpetrator and penetration had been proved. She submitted that there was no contradiction on the evidence presented contrary to the appellant's perspective. She prayed for the appeal to be dismissed.

31. The duty of this court is to re-evaluate the evidence afresh and come up with an independent finding as was found in the case of **OKENO VR REP. 1973 EA 32** where the court stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v 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 findings and conclusions; 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 v Sunday Post’.

32. There are three ingredients now common to prove the offence herein, namely, the age of the victim, penetration and the identity of the perpetrator.

33. As regards the first ground, this court is satisfied that the age was well proved by the evidence of the minor as well as the age assessment report produced. The minor's age of 9 years was not challenged.

34. The next issue is whether the minor was defiled. The minor described at least 6 instances when she said that she was defiled by the appellant. Apparently it appears that the defilement took place at the same venue or scene. The minor's evidence was corroborated by the production of the p3 form in which the clinical officer found that the hymen was torn and that there was some bacterial infection when further analysis was done.

35. This court based on the above evidence easily concludes that the minor was defiled. She was clear on the number of times she was defiled as well as the scene and this almost happened when the appellant would buy her and her friend *kangumu*.

36. The submissions by the appellant that the loss of hymen may have been due to something else does not carry water at all especially on the face of the glaring evidence presented to the court.

37. There was also exhibit 11(b) which was an analysis report by the Government chemist dated **28th April 2017** which concluded that;

“Based on the above findings the DNA profile generated by the stains from the victim's inner parts (item B) was a mixed DNA profile of REINAS KARUMBA WANJIKU (accused) and SILVIA ROSANA MORAA (victim)”.

38. As to the identity of the perpetrator, the complainant was very clear that it was the appellant. The minor had about 7 sessions of defilement with the appellant. The incident took place during the day and thus the identification was not an issue.

39. Beside this the evidence of PW2, another minor was not challenged. At least she witnessed the complainant being defiled by the appellant before she was also defiled by the appellant. Again the incident occurred in a grassland during the day.

40. The school head teacher PW 5 confirmed that the appellant was a casual mason in his school which position was as well confirmed by the appellant. He was thus known by the minors and there was no reason to doubt his identity.

41. The minor contradictions in the respondent's evidence for instance on whether the minor was found by PW3 having Kshs 30 does not water down the evidence. Whether one Solomon purchased *kangumu* for the minor does not again lessen the fact that by not calling him to testify the case against the appellant was weak. They are too minor to give the appellant any benefit of doubt or to challenge the respondent's case.

42. The appellants defence was of not much probative value for the simple reason that it was unsworn and beside that the same did not challenge the evidence against him.

43. In the premises, this appeal is unmeritorious. The appellant lured the minors by buying for them *kangumu* and subsequently defiling them. The same was to say the least barbaric considering that he was already HIV positive. Lucky enough they were not infected and it is hoped that they will not. Luckily the state did not cross appeal especially on sentencing which this court found it lenient.

44. The appeal is otherwise dismissed.

Dated at Nakuru this 17th day of December 2020.

H. K. CHEMITEI

JUDGE