



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.132 OF 2018

GBK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Boke SPM delivered on 13th July 2018 in Kibera CM Cr. Case (S/O) No.35 of 2017)

JUDGMENT

The Appellant, GBK, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 6th May 2017, at [particulars withheld] in Riruta within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of DMB, a child aged 12 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged and sentenced to serve twenty (20) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the prosecution failed to establish the elements of the offence of defilement to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for making inferences which were not support by the evidence on record. He took issue with the fact that his conviction was based on unreliable evidence of the prosecution witnesses. He was aggrieved that the trial court failed to properly conduct *voire dire* before taking down the evidence of PW3 and PW4 who were minors. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She made oral submission to the effect that the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. She stated that the Appellant is the complainant's father. The complainant told the court that she was at home with the Appellant and her two younger siblings. The Appellant sent her siblings to a shop. The Appellant then sexually assaulted the complainant. Learned State Counsel averred that the Appellant threatened to stab the complainant with a knife if she told anyone about the ordeal.

Ms. Nyauncho further submitted that the complainant's evidence was corroborated by that of PW4, who found the Appellant in the act as he was sexually assaulting the complainant. She stated that the medical evidence adduced by the prosecution established the element of penetration. She averred that the age of the complainant was also established by the complainant's immunization card that was produced into evidence. It indicated that the complainant was born on 11th October 2004. She pointed out that the Appellant was the complainant's father and was therefore well known to her. In the premises, Learned State Counsel urged the court to dismiss the Appellant's appeal on conviction and sentence.

The facts of the case according to the prosecution are as follows: PW1, GM, is the complainant's mother. The Appellant is her husband. She stated that the complainant was born on 11th October 2004. She worked as a casual labourer at a flower farm. On 6th May 2017, she went to work as usual and came back home for lunch at about 1.00 pm. Her son, V, informed her that the Appellant sent him and his younger brother to the shop to buy milk. When they came back, they found the complainant on the bed with the Appellant. He told her that he heard her sister crying. PW1 inquired from the complainant what happened but she did not say anything. PW1 went back to work. She came back home at about 5.00 pm. She sat down and talked to the complainant who finally informed her that her father (the Appellant) had sexually assaulted her. PW1 confronted the Appellant the following morning. She also informed her neighbours about the sexual assault incident. She testified that the Appellant initially denied the allegations, but later admitted to have had sexual intercourse with the complainant. PW1 took the complainant to hospital for medical examination. She also reported the matter at Satellite Police Station. The Appellant was later arrested. PW1 told the court that she had been married to the Appellant for eleven (11) years.

PW2, David Maruti, resided at Ngándo Dagoretti Corner. He was a pastor at Emmanuel Fellowship Ministry. On 6th May 2017, PW1 called him and informed him that the complainant had been sexually assaulted. PW2 went to PW1's house. He found PW1 at her neighbour's house with her three children. PW1 was in tears. She informed him that her son V had told her that he saw the Appellant and the complainant in bed. She also told him that the complainant was sexually assaulted by the Appellant. PW2 took the complainant to his house. He interrogated the complainant in the presence of his wife. The complainant told him that the Appellant sent her two brothers to the shop. When they left, the Appellant took her to his bedroom and had sex with her. He then instructed her to take a shower and wash her clothes. He warned her against telling her mother what had happened. He also promised to buy her a new dress. The following day, PW2 went to church. The Appellant, his wife (PW1) and members of the public came to the church at about 7.00 am. Members of the public wanted to lynch the Appellant. PW2 locked the Appellant in a room and reported the issue to the Chief's Office. Police officers came to the scene and arrested the Appellant. The Appellant was arrested in possession of a knife which fell from his person during the arrest.

PW3, DMB, is the complainant. She stated that she was 13 years of age at the time of giving evidence. She was in class six at [particulars withheld] Primary School. It was her testimony that on 6th May 2017, she was at home with the Appellant and her two younger brothers. The Appellant sent her brothers to a shop to buy sugar, milk and *mandazi*. The Appellant ordered her to remove her clothes and lie on the bed. He also undressed and proceeded to insert his penis in her vagina. He threatened to stab her with a knife if she told her mother what had transpired. Her brothers came back to the house and found her in bed with the Appellant. The Appellant sent them back to the shop. He then instructed her to wash her clothes. He promised to buy her a dress.

PW3 stated that she did not tell anyone what had happened. When her mother PW1 came back home, her younger brother V told her that the Appellant sent them to the shop and when they came back, they found the Appellant doing '*bad manners*' to the complainant. The complainant finally came clean and told her mother, in the presence of a neighbour and the pastor, what had happened. She told the court that it was the third time the Appellant was sexually assaulting her. She spent the night at the pastor's house while her mother and brothers slept at the neighbour's house. The following day, she went to church with the pastor and his wife. The Appellant and members of the public came to the church. The mob wanted to beat him up. The pastor called police officers who came to the scene and arrested the Appellant. The complainant stated that the Appellant was her father.

PW4, VB, is the complainant's younger brother. He stated that he was 9 years old. The Appellant was his father. On the material day of 6th May 2017, he was at home with his brother, the complainant and the Appellant. The Appellant sent him and his younger brother to the shop. When they came back home, they found the Appellant and the complainant on the bed. He was doing '*bad manners*' to her. PW4 stated that he informed his mother when she came back home from work. That night, they slept at a neighbour's house. The Appellant was arrested the following day.

PW5, Dr. Edward Mbugua, was a clinical officer at Nairobi Women's Hospital. He adduced evidence on behalf of his colleague Dr. Parick Musyimi, in line with the provisions of **Section 33** and **77** of the **Evidence Act**. PW5 told the court that the complainant was examined at the said hospital on 7th May 2017. She was alleged to have been sexually assaulted by her step father on several occasions between 1st May 2017 and 6th May 2017. She appeared scared, anxious and emotionally distraught. Upon examination, the complainant had no visible physical injuries. Her vaginal opening was tender and painful. She had yellowish discharge which was indicative of an infection. Her hymen was broken. PW5 produced the complainant's Post Rape Care Form into evidence.

PW6, PC Robert Wambugu, and PW7, Sgt. Gilbert Otieno, of Ngándo AP Post, were the arresting officers. On 7th May 2017, PW7 received information that members of the public at [particulars withheld] Village wanted to beat a man suspected of having sexually assaulted his daughter. PW7 asked PW6 to accompany him to the scene. They found an irate mob outside the house where the Appellant had been locked. They arrested the Appellant and took him as well as the complainant to the police station for interrogation. The pastor handed over to them a knife which was alleged to belong to the Appellant. The complainant told them that she was at the house with the Appellant and two of her siblings. The Appellant sent her siblings to the shop to buy milk. When they left, the Appellant placed her on his bed and had sex with her. PW6 and PW7 escorted the Appellant to Riruta Police Station. They took the complainant to Nairobi Women's Hospital for medical examination.

PW8, Dr. Joseph Maundu, from Nairobi Police Surgery, examined the complainant on 12th May 2017. She was alleged to have been defiled on 6th May 2017. Upon examination, PW8 stated that the complainant's genitalia was normal. Her vaginal opening was tender and painful. She had a yellowish discharge. Her hymen was intact. PW8 produced the complainant's P3 Form into evidence.

PW9, PC Linet Kilimo, from Riruta Police Station investigated this case. She was assigned the case on 7th May 2017. The Appellant was already in custody. The complainant's mother came to the police station and availed the complainant's Post Rape Care Form from Nairobi Women's Hospital. The following day, PW9 went to where the complainant lived. She took the complainant and PW4 to the police station to record their statements. The complainant and PW4 informed her that the Appellant was their father. They told her that on the material day, they were in the house with the Appellant when he sent PW4 and his brother to the shop. He was left with the complainant in the house. He placed her on his bed and inserted his penis in her vagina. He promised to buy her a church dress. He also threatened to cut her with a knife if she told anyone about the incident. He then instructed her to take a shower and wash the clothes she was wearing. PW9 stated that she received the knife that the Appellant used to threaten the complainant from the arresting officer. The Appellant was arrested in possession of the said knife. PW9 produced the said knife into evidence. She also availed the complainant's immunization card which indicated that the complainant was born on 11th October 2004.

The Appellant was put on his defence. He gave sworn evidence. He told the court that he worked as a security officer in Ngándo. On 7th May 2017, at about 9.00 am, he was on his way home from work when he met PW2 and five other people. They wanted to take him to the police station. They first took him to his house. PW2 called other members of the public who beat him up. They were asking him to explain what happened. PW2 then made a call to police officers who came to the scene and arrested him. He was taken to the Chief's office and later escorted to Satelite Police Station. He was not informed the reason for his arrest. He was arraigned before the trial magistrate's court on 9th May 2017 where he learnt that he was being accused of defiling the complainant. He stated that he did not sexually assault the complainant. He testified that his wife PW1 and PW2 had a secret relationship and that they were framing him of the present charges. On cross

examination, the Appellant admitted that the complainant was his step-daughter.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comment regarding the demeanour of the witnesses (See Okeno vs. Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Section 8(1)** of the **Sexual Offences Act** provides that:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

For the prosecution to sustain the charge of defilement, there are three elements that the prosecution must establish. The first one is the age of the complainant. In the present appeal, the complainant stated that she was 13 years of age at the time of giving evidence. Her mother, PW1, testified that the complainant was born on 11th October 2004. The complainant’s immunization card produced into evidence confirmed that the complainant was born on the stated date. The complainant was therefore twelve (12) years of age at the time of the sexual assault. The Appellant did not challenge the evidence adduced with regards to the complainant’s age. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1) of the Children Act** to the required standard of proof.

The second element is penetration. **Section 2(1)** of the **Sexual Offences Act** defines penetration as:

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

In the present appeal, it was the complainant’s testimony that on the material day of 6th May 2017, she was at home with her father (the Appellant) and her two younger brothers. The Appellant sent her brothers to a shop to buy sugar, milk and *mandazi*. When her brothers left, the Appellant instructed her to remove her clothes and lie on the bed. He also undressed and proceeded to insert his penis in her vagina. He threatened to stab her with a knife if she told her mother what had transpired. Her brothers came back to the house and found her in bed with the Appellant. The Appellant sent them back to the shop. He then instructed her to take a bath and wash her clothes. He promised to buy her a dress. The complainant did not tell anyone what had happened. When her mother (PW1) came back home in the evening, her younger brother V (PW4) told her that the Appellant sent them to the shop and when they came back, they found the Appellant doing ‘*bad manners*’ to the complainant. The complainant eventually came clean and to her mother what had happened. She told the court that it was the third time the Appellant was sexually assaulting her.

The Appellant took issue with the medical evidence that was adduced by the two doctors, PW5 and PW8. The Appellant was of the view that the two medical reports produced in evidence were contradictory and did not corroborate the testimony of the complainant that she had been sexually assaulted. On re-evaluation of this evidence, this court is of the view that the medical evidence adduced by PW5 and PW8 established that indeed the complainant’s vagina was penetrated. The complainant was examined at Nairobi Women’s Hospital on 7th May 2017, a day after the alleged sexual assault incident occurred. The Post Rape Care Form adduced into evidence indicated that the complainant was scared, anxious and emotionally distraught. Upon examination, the complainant had no visible physical injuries. Her vaginal opening was tender and painful. She had yellowish discharge which was indicative of an infection. Her hymen was serrated. The doctor observed that the findings were highly indicative of sexual penetration. PW8 examined the complainant on 12th May 2017, approximately a week after the alleged sexual assault incident. He told the court that the complainant’s vaginal opening was tender and painful. There was presence of a pale yellow discharge from her vagina. Her hymen was intact.

This court is of the opinion that the medical evidence of the tender and painful vaginal opening as well as the serrated hymen corroborated the element of penetration as narrated by the complainant, even though the penetration was partial. The fact that the hymen was intact does not in itself imply that there was no penetration. In the case of Erick Onyango Ondeng vs Republic [2014] eKLR the Court of Appeal addressed itself as follows:-

“We agree with the first appellate Court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In Twehangane Alfred vs Uganda [2003] UGCA the Uganda Court of Appeal expressed the same view as follows:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

The medical evidence of the tender and painful vaginal opening as well as the serrated hymen are indicative of partial penetration, and corroborated the element of penetration as narrated by the complainant. The Post Rape Care Form indicated that the said findings were highly indicative of sexual penetration. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third element is whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He was her step-father. The Appellant admitted as much in his defence statement. The sexual assault incident occurred in broad daylight. The complainant’s testimony was corroborated by that of PW4 who witnessed the sexual assault incident. PW4 told the court that he walked in on the Appellant sexually assaulting the complainant. The identification of the Appellant by the complainant and PW4 was by recognition. He was their father.

The Appellant in his defence denied sexually assaulting the complainant. He did not give an account of his whereabouts on the material day of 6th May 2017. He told the court that his wife PW1 was having a secret relationship with PW2 and that they were framing him of the present charges. However this court notes that the Appellant did not bring up the issue of the secret affair during cross examination of PW1 and PW2. **This court is of the view that the Appellant's** defence was an afterthought and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant.

The Appellant submitted that the trial magistrate failed to properly conduct *voire dire* before taking down the evidence of the PW3 and PW4, who were minors. PW3 and PW4 testified that they were aged thirteen (13) and nine (9) years respectively during trial. A *voire dire* examination was conducted for both PW3 and PW4 before they gave evidence. After the *voire dire* examination, the trial magistrate noted that although PW4 was intelligent enough to understand and respond to questions posed to him, he did not understand the meaning and nature of an oath. The trial magistrate therefore allowed him to give unsworn evidence. PW3 was found to possess sufficient intelligence to understand the meaning and nature of the oath and therefore allowed to give sworn evidence. The trial magistrate's notes of her *voire dire* examination are as follows;

“I am 13 years old. My name is D.B. I go to school in standard 6, at [Nxxx. I go to school on Monday to Friday. On Saturday I do homework and Sunday I go to church. I go to Loreto Church. I go to Catholic Church. We are taught that a child of God must tell the truth. I know the Bible. I do not know the meaning of swearing but I can swear with the bible to tell the truth and the whole truth.”

This court, on perusal of the notes of the trial magistrate, is of the view that the trial magistrate sufficiently interrogated PW3's understanding of the nature of the oath and was satisfied that she appreciated the duty to tell the truth before receiving her evidence. Her *voire dire* examination was thus properly conducted. PW3 and PW4 were also cross examined by the Appellant. The upshot of the above reasons is that the Appellant's appeal against conviction by the trial court on the charge of defilement **contrary to Section 8(1) and Section 8(3) of the Sexual Offences Act is upheld.**

As regards the sentence, Section 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. It is important to note that the issue of mandatory minimum sentences in the Sexual Offence Act has been outlawed by various decisions by superior courts following the Supreme Court decision in *Francis Karioko Muruatetu & another vs Republic [2017] eKLR* (See Court of Appeal decisions in *Christopher Ochieng vs R [2018] eKLR* and *Jared Koita Injiri vs R [2019] eKLR*). The Appellant was sentenced to serve a custodial sentence of 20 years. The trial court did not take into account the Appellant's mitigation in awarding the mandatory minimum sentence of 20 years imprisonment.

The Appellant in his mitigation stated that he was the sole breadwinner of his family. He is a first offender. This court also notes that the Appellant has spent two and half years in custody after his conviction by the trial court. In the premises, this court sets aside the twenty (20) years imprisonment sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve fifteen (15) years imprisonment with effect from the date he was sentenced before the trial court i.e. 13th July 2018. **It is so ordered.**

DATED AT NAIROBI THIS 15TH DAY OF DECEMBER 2020

L. KIMARU

JUDGE