



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 13 OF 2014

ASHFORD MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein, **ASHFORD MWANGI**, was charged with the offence of defilement contrary to Section 8(3) of the Sexual Offences Act the particulars being that on 7th May 2008 at [particulars withheld] Matunda Location in Lugari District within Western Province caused his genital organ namely penis to penetrate the genital organ (vagina) of CL (*particulars withheld*) a child aged 15 years.
2. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both the main charge and the alternative count.
3. The prosecution's case was supported by the testimony of a total of 7 witnesses and at the close of the prosecution's case, the trial court found that a prima facie case had been established against the appellant who was then placed on his defence.
4. In his sworn testimony in defence, the appellant denied any involvement in the defilement of the minor and blamed his woes on the complainant's mother for implicating him in the crime. He admitted having been previously charged and convicted of the offence of defilement. He also stated that he knew M N (PW 2).
5. DW2, Keneth Kiptoo Surgut testified that he had a chemist and that in the year 2008, a lady came with a young child and requested him to take blood specimen of the child but that he declined to assist the lady.
6. At the close of the trial, the trial magistrate found the appellant guilty of the first count of defilement and sentenced him to 20 years imprisonment.
7. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal and listed the following grounds of appeal in his petition of appeal.

- 1. That the learned trial magistrate erred in both law and fact by convicting and sentencing me without any sufficient evidence.*
- 2. That the learned trial magistrate erred in both law and fact in finding that the accused was positively identified when the prosecution witness No. 1 mentioned by PW2 did not testify and on cross examination of PW2 by the accused, PW2 told the court that she was informed by one witness who never attended court.*
- 3. That the learned trial magistrate erred in both law and fact in failing to consider the medical evidence adduced by PW6 which did not link the pain or elbow joint at the complainant claimed and therefore the evidence did not support the offence or incident in count two (11).*
- 4. That the learned trial magistrate erred in both law and fact by considering the medical evidence of PW6 that the clothes of the complainant had blood stains, when indeed the complainant had already washed her clothes.*
- 5. That the learned trial magistrate erred in both law and fact in failing to consider the medical evidence adduced by PW6 who indicated before court that on cross examination there were no spermatozoa to indicate that PW1 was defiled.*
- 6. That the learned trial magistrate erred in both law and fact in failing to know that there was a need of DNA report so that to indicate the truth between those blood stains whether it belonged to PW1 or not*

7. That the learned trial magistrate erred in both law and fact by not considering the appellant witness who testified before court that PW1 came to his chemistry, reason being to remove the complainant's blood and pour to the bed so that they could use as the exhibit towards the accused, but, the doctor refused to do that.

8. The appellant also filed written submission in support of the appeal in which he expounded on the grounds stated in the petition of appeal.
9. The appellant submitted that the *voire dire* examination on the minors PW1 and PW5 was not properly conducted. For this argument the appellant relied on the decision in the case of **Opondo vs Republic CR. Appeal No. 91 of 1999** (unreported) in which the Court of Appeal outlined the 3 stages to be followed in determining whether a child was to tender sworn or unsworn statement.
10. The appellant also submitted that the age of the complainant and penetration was not proved beyond reasonable doubt. It was submitted that the prosecution failed to present the evidence of crucial witnesses who were alleged to have been present at the time of the defilement and according to the appellant, the failure by the prosecution to present the evidence of the said witnesses shows that they would have given evidence that is adverse to the prosecution's case. For this argument the appellant relied on the decision in the case of **John Kenga vs Republic CR. Appeal No. 1171 of 1984** wherein the Court of Appeal acquitted the appellant on the basis that some of the witnesses mentioned were not summoned to come to court and testify.
11. On her part, Miss Mumu, learned counsel for the state submitted that the prosecution proved all the ingredients of defilement beyond reasonable doubt. On age, counsel submitted that the complainant was 15 years at the time she was defiled as her child immunization card showed that she was born in 7th August 1993.
12. On penetration counsel submitted that the complainant tendered sufficient evidence to show that she was defiled which evidence was corroborated by PW4, the Clinical Officer who confirmed that the complainant sustained injuries to her genitalia following the assault.
13. On identification, counsel submitted that the appellant was well known to the complainant and PW5 who confirmed that he saw the appellant with the complainant on the material day.
14. On sentence, counsel submitted that the 20 years sentence imposed on the appellant was illegal.
15. As the first appellate court, the duty of this court is to re-evaluate and re-analyse the evidence presented at the trial with a view to arriving at its own independent finding while bearing in mind the fact that it neither heard, nor saw the witnesses testify.
16. A summary of the prosecutions was that on 7th May 2008 at about 4pm, the complainant was at her grandmother's home in the company of PW5 S.M. (also a minor) when the appellant approached her and told her that her grandmother had sent him to call her. She heeded to the appellant's message and accompanied him to her grandmother's house where he grabbed her threw her on her grandmother's bed where he raped her after tearing her inner clothes. She tried to raise an alarm but the appellant slapped her and threatened to kill her if she made any noise.
17. After the ordeal, the complainant got up and saw that she was bleeding as her skirt, panty and mattress were blood stained. The torn blood stained skirt and mattress were produced in court as exhibits. She felt pain in her tummy and genitalia. The appellant was known to the complainant as she testified that he used to visit them at her grandmother's home.
18. On the same day at about 6pm, PW2, the complainant's grandmother came back home after a church meeting when PW1 told her what had transpired. She saw the blood stained mattress and escorted PW1 to Matunda Police Station. PW2 testified that the complainant could not walk or talk and that she was rushed to hospital the next morning.
19. PW3 was the complainant's mother. She testified that the complainant was born on 7th August 1993. She produced the child immunization card as an exhibit. She also testified that the police issued PW1 with a P3 form (exhibit 4) which was produced by PW4, the Clinical Officer from Matunda Sub-District Hospital. The P3 form indicated that PW1 was in great pain and could not walk properly. Her genitalia was blood stained and had a deep perennial tear and bruises. PW5 was with the complainant when the appellant called her to accompany him to her house of PW2. PW5 confirmed that the appellant was well known to him as he was a frequent visitor in their home.
20. PW6 was P.C. Margaret Kipkor from Matunda Police Station. She booked the complainant's report, issued her with the P3 form and visited the crime scene where she collected the blood stained mattress and skirt. She also testified that the appellant had a previous conviction on the offence of defilement from the Resident Magistrates Court at Kitale where was imprisoned for 6 years. A record of the appellant's previous conviction was produced as exhibit 6. PW7 was Bob Anandwa the Clinical Officer who treated the complainant following the defilement ordeal.

Analysis and determination.

21. I have considered the instant appeal, the record of appeal and the submissions made by the appellant and the state counsel. The main issue for determination is whether the prosecution proved the case against the appellant beyond reasonable doubt. In other words, did the appellant defile the complainant?
22. The critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration and the positive identification of the assailant. (See the case of **DOMINIC KIBET MWERANG VS REPUBLIC (2013) eKLR**).
23. In the instant case, the age of the complainant was stated to be 15 years as at the time she was defiled having been born on 7th August 1993. PW3, the complainant's mother testified on the complainant's dated of birth and produced her immunization card as an exhibit in

court. The complainant was reported to have been defiled on 7th May 2008 which means that she was 15 years as at the time of the sexual assault.

24. I am therefore satisfied that the minority age of the complainant was proved to the required standard. On penetration, I find that the complainant's testimony on the circumstances under which she was defiled was compelling and consistent. She narrated how the appellant duped her into going into her grandmother's house where he pounced on her, tore her clothes and defiled her. A blood stained mattress was recovered from the scene of the crime. Both the mattress and a blood stained skirt which the complainant wore at the time of the assault were produced as exhibits in court.

25. The complainant's testimony was corroborated by the testimony of PW5 who witnessed the appellant lead the complainant to the house of PW2, and the medical evidence of PW4 who produced a P3 form which showed that the complainant sustained bruises and tears to her vagina. There was also the evidence of PW7 who treated the complainant following the assault and confirmed the injuries that she sustained to her genital organs. I am therefore satisfied that penetration was proved beyond reasonable doubt.

26. Turning to the identification of the appellant as the perpetrator of the offence, I note that the appellant was well known to the complainant and PW5 as a frequent visitor to their home. The defilement incident took place in broad daylight at about 4pm. I find that complainant positively identified the appellant as her attacker as the circumstances under which she was defiled gave no room for mistaken identity.

27. Turning to the appellant's sworn statement when placed on his defence, I find that it contained mere denial of the offence which did not impeach the cogent and corroborated testimonies of the prosecution's witness.

28. I further find that the appellant's contention that the prosecution's case was lacking in the evidence of crucial witnesses was baseless because the prosecution presented sufficient evidence from a total of 7 witnesses who established that he committed the offence of defilement.

29. On sentence, Section 8(3) of the Sexual Offences Act stipulates as follows:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

30. It is therefore my finding that the sentence passed on the appellant was lawful.

31. In a nutshell, I find that the prosecution's case against the appellant was proved beyond reasonable doubt and I therefore dismiss the instant appeal for lack of merit.

Dated and signed at NAIROBI this 16th day of January 2019.

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019.

H. A. OMONDI

JUDGE

In the presence of:-

Mrs Mumo for state

Appellant present

Court Assistant – Ouma