



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 76 OF 2015

VINCENT KERA AMBUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case Number 1993 of 2014

in the Senior Principal Magistrate's court at Kapsabet – Hon. C. M. Wattimah (RM)

JUDGMENT

1. The appellant herein, **VINCENT KERA AMBUKA**, 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 on the 7th June 2014 at [particulars withheld] within Nandi County intentionally and unlawfully did cause his penis to penetrate the vagina of SV (*particulars withheld*) a child aged 7 years. The accused was also charged with an alternative charge of indecent act with a child in violation of section 11(1) 10 of the Sexual Offences Act no. 3 of 2006.
2. The appellant pleaded not guilty to both the main charge and the alternative count and a trial was conducted in which the prosecution presented the evidence of a total of 4 witnesses. PW1, the complainant (minor) testified that on 7th June, 2014 she had gone to the river with other two minors namely B and C when one Vinny, the appellant herein, came and chased away B and C before doing what she described as 'bad manners' to her. The minor explained that the 'bad manners' were done at her private parts at the place she uses to urinate while pointing between her legs. She stated that Vinny slept on her and threatened to cut her using a panga.
3. PW2 was the complainant's aunt, GA. She testified that she was, on 12th June 2014, called to the complainant's school where she was informed that the complainant was unwell and that she took the minor to hospital at Kapkangani where on examination, it was established that she had been defiled. The minor then disclosed that she had been defiled by one Vinny after which the appellant was arrested.
4. PW3, the minor's teacher one MC testified that she was at school on 12th June 2014 when she noticed that the complainant was smelling and walking with difficulty. She interrogated the complainant and established that she had been defiled. She then alerted the complainant's guardian who took her to hospital.
4. PW4 the clinical officer examined the complainant on 16th June 2014 and confirmed that she had been defiled as her hymen was broken, slightly red with some hanging parts on the upper side of the labia minora.
5. PW5 was the investigating officer. He testified that the appellant defiled the complainant on two occasions, the first time at the river and the second time when she was on her way to school. The complainant's treatment notes, P3 form and clinic card were produced as exhibits during the trial.
6. When placed on his defence, the appellant tendered an unsworn statement in which he denied committing the offence and explained that on the day that the complainant was allegedly defiled, he went about his normal duties as a cattle herder before going back home.
7. DW2, Philip Madonye, testified that he knew the appellant well as the appellant was his employee. He stated that he was surprised to learn that the appellant had been accused of defiling the complainant as the appellant was at their home on the material day and only left at 9.30pm.
8. After considering the evidence presented by the prosecution and the defence, the trial court found that the case against the appellant had been proved beyond reasonable after which he was sentenced to life imprisonment.

9. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal in which he faulted the trial magistrate for relying on the evidence of the prosecution witnesses which evidence was contradictory and did not include the evidence of crucial witnesses. In sum, the appellant contended that the prosecution's case was not proved beyond reasonable doubt.

10. At the hearing of the appeal, the appellant relied on his written submissions, which I have perused while Miss Mumu, learned counsel for the state, submitted that all the essential elements of defilement, namely; age of the complainant, penetration and the identification of the appellant as the perpetrator of the sexual assault had been proved beyond reasonable doubt.

11. As the first appellate court, the primary duty of this court is to reconsider and reanalyze the evidence tendered during the trial afresh with a view to arriving at its own independent findings. (See Okeno v Republic [1972] EA 32.)

12. I have considered the appeal filed herein, the record of appeal and the rival submissions of both the appellant and the state counsel. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.

13. The law is settled that the critical ingredients of the offence of defilement are the age of the complainant, penetration and the positive identification of the perpetrator of the offence. See Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013

14. In the instant case, the complainant's age was stated to be 7 years. In support of the complainant's age, PW2, the complainant's guardian testified that she was born on 15th August 2007. A clinic card that was produced in court as an exhibit showed that the minor was 6 months old as at 7th March 2008. On the issue of age, trial court made the following findings in its judgement:

"The court had an opportunity to see the minor in court and saw her demeanor. From observation and the documents presented before court, it is obvious that the complainant was below 11 years as at the 7.6.2014. If the child health card indicates that the minor was 6 months as at 7.3.2008. She was aged 6 weeks as at 29.8.2007. What is clear is that the exact date of birth cannot be ascertained but it is clear that the complainant was below 11 years as provided for under section 8(2) of the Sexual Offences Act."

16. In the case of Francis Omuroni vs Uganda Cr. Appeal no. 2 of 2000 it was held:-

"In defilement cases, medical evidence is paramount in determining the age of the victim. The doctor is the only person who can professionally determine the age of the victim in the absence of any evidence. Apart from medical evidence age may be proved by birth certificate, victim's parents or guardian, by observation or by common sense...."

17. Considering the holding in the above cited case and the evidence tendered before the trial court, I am persuaded that the age of the complainant, being 7 years as at the time of the incident, was proved beyond reasonable doubt.

18. Turning to the issue of penetration, I find that the prosecution presented sufficient evidence to prove that the complainant was a victim of defilement. The complainant narrated, in a spell-binding manner, the circumstances under which the appellant accosted her while at the river with two other minors whom he chased away before defiling her and threatening her with dire consequences if she made any noise. PW4, the clinical officer testified that upon examining the minor, he noted that she had a broken hymen which was slightly red with obvious hanging torn parts on the upper side of the labia minora which was generally red. It is therefore my finding that the injuries on the complainant's vagina provided sufficient proof of penetration. I therefore have no doubt that the complainant herein was sexually assaulted.

19. Lastly, on the identification of the appellant as the complainant's assailant, I note the appellant was well known to the complainant who referred to him by the name Vinny which is the short form of his name Vincent. The defilement took place in broad daylight when the complainant had gone to fetch water. The minor stated that the accused is their neighbor. I find that the complainant positively identified the appellant and having found that penetration and age were also proved beyond reasonable doubt, I further find that the trial court arrived at the correct verdict in convicting the appellant. I also find that the appellant's defence amounted to mere denial of the offence that did not dislodge the watertight evidence presented by the prosecution witnesses.

20. On sentence, section 8(2) of the Sexual Offences Act is clear on the penalty for the offence of defilement of a minor. The said section stipulates as follows:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

21. My finding is that the sentence of life imprisonment imposed on the appellant was lawful and indeed a mandatory sentence. I find that there is no basis for interfering with it. In sum, I find that the instant appeal is not merited and I accordingly dismiss it.

Dated and signed at Nairobi this 18th 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