



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 67 OF 2018

KEVIN OMONDI AGAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Resident Magistrate's

Court at Tamu (Hon. Onzere SRM) dated the 7th June 2018 in Tamu SRMC SOA No. 4 of 2018]

JUDGMENT

The Appellant, **KEVIN OMONDI AGAN**, was convicted for the offence of **Defilement** Contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**.

1. He was then sentenced to Life imprisonment.
2. The Appellant lodged an appeal, challenging both the conviction and the sentence.
3. He contends that the Charge sheet was incurably defective.
4. Secondly, he stated that the evidence tendered was at variance with the particulars set out in the Charge Sheet.
5. Thirdly, he faulted the trial court for admitting in evidence, matters which were inadmissible.
6. The trial court was also faulted for failing to rely on the Appellant's Defence.
7. In any event, the conviction was said to have been against the weight of evidence.
8. As regards the sentence, the Appellant said that it was manifestly harsh and excessive. His view was that the trial court had flouted the principles of sentencing when assessing the suitable sentence to impose upon the Appellant.
9. When canvassing the appeal, the Appellant submitted that the doctor who had examined the Complainant when she was first taken to the hospital, had concluded that the Complainant was a victim of Domestic Rape.
10. The Appellant pointed out that it was a different doctor who came to the conclusion that the Complainant had been defiled. In his view, the doctor who concluded that the Complainant had been defiled, did not examine the Complainant.
11. Furthermore, the two doctors are said to have given contradictory evidence. One doctor said that there was no discharge seen or blood from the vaginal orifices, whilst the other doctor indicated that there was some whitish discharge from the Complainant's vagina.
12. **PW4**, Joseph Obiero is a Clinical Officer based at the Masogo County Hospital.
13. He examined the Complainant on 28th January 2018. On that occasion the Complainant had gone back to the hospital for the purposes of having her **P3** Form filled.
14. The Complainant was first examined at the hospital on the night of 27th January 2018. During that first visit to the hospital, the Complainant was not examined by **PW4**. It was a colleague of the Clinical Officer who examined the Complainant on that first visit.

15. It was the evidence of **PW4** that there was whitish deposit on the clitoris of the Complainant. He also said that there were signs of forceful penetration.

16. **PW4** made it clear that his findings were similar to those recorded by his colleague, in the treatment notes.

17. I have perused both the Treatment Notes and the **P3** Form.

18. On the treatment notes, there is a clear record as follows:

“There are signs of penetration.”

19. Thereafter, under the sub-heading “**VE**”, the following information was recorded;

“- Some whitish deposits evident around the clitoris, labia (external genitalia).

- Some signs of forceful penetration evident such as hypercolouration of the labia. Rape (Domestic Rape) Sexual defilement.”

20. It is the last 2 words “*Sexual defilement*”, which the Appellant describes as being in a different hand-writing from the other information contained on the treatment notes.

21. I note that in the said treatment notes, it was recorded that the Complainant had reported that she had been raped by a relative, who was known to her.

22. As the age of the Complainant was indicated on the treatment notes as being 6 years, the law presumes that the Complainant was incapable of giving her consent to a sexual act.

23. Rape connotes the penetration of the sexual organ of another person, without the consent of the said person. Therefore, the offence of rape is committed when a person who is capable of giving consent, is penetrated without his/her consent.

24. If the Complainant of the sexual penetration is a minor, the offence committed against him/her is defilement.

25. It does not matter that the doctor or any other medical officer who examined the Complainant, had described the sexual penetration as Rape. Such a description cannot convert the offence from one of defilement to one of rape.

26. Once the Vaginal Examination revealed the presence of penetration of the minor’s sexual organ, the evidence was sufficient proof of the offence of defilement.

27. In the **P3** Form, the Clinical Officer indicated that;

“There was no discharge seen or blood from the vaginal orifice.”

28. As far as the Appellant was concerned, that piece of evidence was at variance with the information on the treatment notes.

29. A closer look at the **P3** Form reveals that the Clinical Officer had expressly stated as follows;

“There was some whitish deposits evident around the clitoris labia (external genitalia). Some sign of forceful penetration such as hyper colouration of the labia.”

30. That part of the **P3** Form is a clear reflection of that which is in the treatment notes.

31. It is to be noted that the Clinical Officer described the clitoris and labia as being external genitalia.

32. I find absolutely no contradiction between the evidence of whitish deposits being found on the Complainant’s external genitalia, and the evidence that there was no discharge or blood from the Complainant’s vaginal orifice.

33. That which is deposited on the outer genitalia does not need to have come from inside the vagina.

34. The hyper colouration was on the labia. But however minimal the penetration, the offence would already have been committed; that is because defilement occurs when there has been either a complete or a partial penetration.

35. In this instance, the medical professional testified that there had been forceful penetration.

36. The Appellant has expressed doubts about the alleged penetration, because;

“It is only usual that if a minor is defiled, there should be blood which is caused by the forced penetration.”

37. Logically, the Appellant’s argument makes sense. However, in so far as it relates to the case before me, the said argument is nothing more than a theoretical assessment.

38. The witness should have been questioned about the absence of blood on the Complainant’s genitalia. He would then have had to explain the position. And his explanation would have been useful in enabling the court make an informed determination.

39. As the witness was not questioned about the absence of blood on the Complainant’s genitalia, I hold the considered view that the Appellant’s submission is a hypothetical one.

40. There is no factual foundation upon which the court can conclude that whenever a minor was defiled, there must be bleeding.

41. It therefore follows that, just because there was no bleeding, the court cannot presume that the Complainant was not defiled.

42. **PW1** is the Complainant’s aunt. She is a sister to the Complainant’s mother.

43. Meanwhile, the Appellant is a brother to **PW1**’s husband.

44. The Appellant’s mother testified that the Complainant lived with **PW1**. However, she also said that all her grandchildren, including the Complainant, used to sleep in her house.

45. **JK (DW5)** is the Appellant’s father. He testified that the Appellant’s house was within the same compound as the parents’ house.

46. On the material day, the Appellant had his breakfast at the house of **PW1**.

47. In effect, the Complainant and the Appellant were not strangers. They were relatives, and they lived within the same compound.

48. The Appellant’s mother testified that the Appellant and **PW1** were not in good terms, after **DW5** had objected to the intention of the Appellant, to marry the Complainant’s mother.

49. In my considered opinion that piece of evidence is inconsistent with the truth. I so hold because on the very day when the Complainant was defiled, the Appellant had gone to the house of **PW1**, early in the morning, and that is where **PW1** served him tea.

50. It would not make any sense for the Appellant to have breakfast served by **PW1**, if the two were not on good terms.

51. I also find that the alleged bad relations between **PW1** and the Appellant was imply an afterthought, because it was only introduced by the Appellant’s mother, who testified at **DW5**.

52. If indeed, there had been bad blood between **PW1** and the Appellant, it would have been expected that the Appellant should have given to **PW1**, an opportunity to comment on the matter.

53. But the Appellant made a conscious decision that he would not cross-examine **PW1**.

54. More specifically, the fact that the Appellant was given breakfast by **PW1** on the same day when the Complainant was later defiled, is a clear pointer at the absence of any bad blood between **PW1** and the Appellant.

55. The Appellant did not even question **PW1** on her evidence concerning the age of the Complainant.

56. Although, ordinarily, the prosecution is expected to lead evidence to prove the age of the Complainant, in a case of defilement, I find that in the circumstances prevailing in this case, there was no need for strict proof. I so find because the age of the Complainant was specified in the Treatment Notes and on the **P3** Form, which were admitted in evidence without any questions being raised.

57. That fact, coupled with the evidence of the Complainant’s guardian, and also because the Appellant and the Complainant knew each other very well, leads me to find that the decision not to raise any question about the Complainant’s age was informed by the fact that the Appellant knew the Complainant to be of the age about which **PW1** testified.

58. In the case cited by the Appellant, **MARK OIRURI MOSE Vs REPUBLIC, CRIMINAL APPEAL NO. 295 OF 2012**, the Court of Appeal noted thus:

“However, having said as above, we still think, even if the evidence of the Complainant was expunged because of that omission, the trial court still had the evidence of her mother, the evidence of her grandmother, and the evidence of Victor, the Clinical Officer upon which the appellant could still have been convicted as there was clearly evidence of penetration of the victim’s vagina with the appellant’s penis and the evidence of her age being six years was not challenged.”

59. The Appellant went into the house where the Complainant was. Inside the said house, there was electric lighting, and the lights were on. Therefore, the Complainant saw the Appellant clearly.

60. This was a case of recognition.

61. There was absolutely no room for any mistaken identification.

62. The Appellant led the Complainant outside the house and it is there that he defiled her. I find that there is no doubt about the identity of the person who committed the act of defilement upon the Complainant.

63. In that respect, the evidence of the Complainant was corroborated by the evidence of Sharon, who found the Appellant in the act.

64. If the Appellant’s Defence was accepted, it would imply that he was not at the scene of crime at the material time.

65. But the question which arises is with regard to the place where he was.

66. The Appellant said that between 7.20p.m and 9.00p.m he was at a bar. He then took Edwin Ouma (**DW3**) home, using a motor-bike.

67. He then joined Edwin for supper, at Edwin’s house.

68. Thereafter, he ferried a visitor from the home of Edwin’s mother, and took the said visitor to Kibigori.

69. The Appellant reached Kibigori at about 10p.m. He then talked with his girlfriend (**DW7**), until about 11p.m when he persuaded her to accompany him back to his house.

70. The Appellant and his girlfriend got home at about midnight, and they spent the rest of the night together.

71. On his part Fredrick Sombe said that he was with the Appellant at Makutano Junction Bar, on the material night.

72. Whilst the Appellant said that he left the bar at 9p.m, **DW2** said that the Appellant left the bar at 8.30p.m.

73. On the other hand, Edwin (**DW3**) said that he and the Appellant left the bar at 9p.m. But he also said that he and the Appellant watched the 9p.m news together, at **DW3**’s house.

74. **DW4**, K, is the mother of the Appellant. She said that the Appellant and Edwin arrived at her house at 8.30p.m.

75. If, as **DW4** said, the Appellant only left her house at 9.00p.m, it would follow that at 8.30p.m, the Appellant was not at the bar, as he had already reached his mother’s house.

76. And as the Appellant would then be at his mother’s house until 9p.m, he cannot have, simultaneously, been at Edwin’s house watching news and having dinner.

77. It is even more confusing when J, (who is the Appellant’s father) said that the Appellant had supper with him on the material night, and that it was not until 9.30p.m that they parted ways.

78. In fact, during cross-examination **DW5** (Joshua) said that the Appellant only left home at around 10p.m.

79. MA (**DW6**) is a “sister” to the Appellant. She said that the Appellant was “like a brother” to her.

80. On the material night, **DW6** had supper with the parents of the Appellant, at about 8.30p.m.

81. She stated quite categorically, that no one else was present at the house at that time.

82. As the learned trial magistrate noted;

“It is absurd that the accused was at 3 different places at the same time.”

83. Therefore, I share the views expressed by the trial court, that the evidence adduced by the Defence was intended to mislead the court. However, the court clearly saw through the conspiracy.

84. Furthermore, as the Appellant was recognized by the Complainant and also by S, he was firmly placed at the scene of crime. In the circumstances, I find that the conviction was well founded. The same is upheld.

85. As regards the sentence, I find that the Appellant has failed to demonstrate how the trial court allegedly flouted the principles of sentencing.

86. The Appellant was accorded an opportunity for mitigation, and he told the trial court that it could do what it pleased.

87. The trial court then sentenced the Appellant to Life Imprisonment. The said sentence was in accordance with the provisions of **Section 8(1)** of the **Sexual Offences Act**. In the result, the sentence is lawful.

88. In conclusion, there is no merit in the appeal: It is therefore dismissed in its entirety.

DATED, SIGNED and DELIVERED at KISUMU this 22nd day of January 2019.

FRED A. OCHIENG

JUDGE