



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 60 OF 2018

SKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT.

1. The **Appellant SKM** 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 18th and 19th February 2017, at (particulars withheld) he intentionally caused his penis to penetrate the vagina of EN a child aged 4 years. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act (supra). The Appellant was tried and at the end convicted on the main count and sentenced to life imprisonment.

2. The Appellant was aggrieved by the said conviction and sentence thus provoking the instant Appeal via Petition of Appeal filed in court on 11th May 2018, raising the following grounds of appeal;

a) The Honourable Magistrate erred in law and facts in convicting the appellant on circumstantial evidence without observing that no witness claimed to have witnessed the ordeal

b) The Honourable Magistrate erred in law and facts in convicting the appellant on insufficient evidence.

3. When the Appeal came up for hearing on 4th December 2018, the court directed that the same be canvassed by way of written submissions. It was submitted for the Appellant that it was apparent from the court's record that the evidence tendered by the prosecution had glaring inconsistencies because firstly the minor told the court that she used to stay with the father at home whereas the children's officer told the court that the complainant used to stay with her aunt by the name K who was not called as a witness to corroborate this evidence and that PW2, 3,4 and 6 evidence was mere hearsay since they were reciting the testimony of PW2 in different versions and that PW6 did not tender any investigative evidence but rather joined the hearsay and that further the ingredients of the offence of defilement had not been proved. Finally, it was submitted that the trial magistrate erred in making a finding that the defence of alibi raised by the Appellant was devoid of merit yet the same was not challenged by the prosecution in cross examination.

4. The State on the other hand while opposing the Appeal submitted that all the ingredient of the offence had been proved and relied on the case of ***Josphat Muoki Muunda v Repulic [2016] eKLR*** for this proposition.

5. I am a first appellate court and as such I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis and drawn my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of In the case of ***KILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174*** the Court of Appeal stated thus;

i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

ii. 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; 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.

6. PW1 the complainant in this case testified that she used to stay at home with her father (the accused in this case), and that her father did

“tabia mbaya” to her in their house at night and that he inserted his **susu-kitu chake** and inserted it into her **susu** (pointing at private parts) and that she was taken to hospital. Her evidence towards this respect was never challenged by the accused person and the same remained strong, credible and consistent throughout the trial.

7. PW2 on the other hand a children’s officer attached to Imenti South Sub County office testified that on 22nd February 2017, in the afternoon while in the office of the Deputy head teacher and the complainant’s teacher came to the office together with the child and the teacher told her that the child had difficulties in walking. They interrogated the child who told them that the father had defiled her and they took the child to the police and reported and realized that there was a previous case involving the child and the accused and that the family was trying to cover up. He further testified that it was an open secret in the village that the accused had been defiling the child. Similarly his evidence towards this respect remained uncontroverted throught the trial including the very serious and damning allegations that it was an open secret in the village that the Appellant had been defiling his own child.

8. PW3 and 4 both teachers at [particulars withheld] primary school, while corroborating the evidence of PW2 testified that the complainant was a student at the school and that on 22nd February 2017 at about 2PM, they noted that she had difficulties in walking whereupon they interrogated her and she told them that she had pain in her private parts and that K had defiled her in that he had removed his penis and inserted into hers whereupon they took the child to the children’s officer and reported the case at Nkubu police station and later recorded statements. Again the evidence of these two particular witnesses remained unchallenged and uncontroverted throught the trial.

9. PW5 on the other hand a clinical officer at Kanyakine District Hospital testified and produced a P3 Form in respect of the complainant who had given a history of defilement by someone well known to her. On examination she indeed confirmed that she had been defiled.

10. PW6 who was the investigations officer in this case corroborated PW 2, 3 and 4’s testimony to the effect that indeed the complainant had been defiled.

11. As alluded to earlier, the evidence of all the prosecution witnesses remained firm, consistent, credible and overwhelming to say the least throughout the trial. The Appellant did not even attempt to rebut the same in cross examination. With regard to the contentions by the Appellant that there were glaring inconsistencies in the evidence of PW1 and PW2, because firstly the minor told the court that she used to stay with the father at home whereas the children’s officer (PW2) told the court that the complainant used to stay with her aunt by the name K who was not called as a witness to corroborate this evidence. It is my considered opinion that the alleged inconsistencies were not fatal to the prosecution’s case as they did not go to the root of the matter and further the same were not material since on the contrary there was overwhelming evidence by the prosecution to prove the 4 year old minor was defiled by her own father which was never challenged by the Appellant.

12. With regard to the allegations that the Learned Trial Magistrate did not consider the ingredients of the offence of defilement, the Trial Magistrate stated inter alia as follows in her judgment;

“The critical ingredients that form an offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant..... the complainant herein underwent an age assessment at Meru Teaching and Referral Hospital. The doctor determined her age to be between 4 to 5 years old. A report to that effect was produced in court as P.Exb2. Evidence on record also shows that at the time of incident, the child was in in ECD class. The average age of children in ECD class is 4 years. I am convinced that she was aged about 4 years old..... The indentity of the accused herein is not in dispute. The evidence on record is clear that he is the complainant’s father. It is thus clear from the evidence on record that the accused was not a stranger to the complainant. Undisputed evidence on record shows that the accused collected the child from her aunt’s residence in Nkubu and took her home where he stayed with her over the particular weekend. The complainant was very categorical and specific in her evidence that the accused defiled her in her house at night over that weekend.....on the issue of penetration, the clinician (PW3) who examined the complainant and filled up the P3 Form was firm and emphatic that the complainnt’s vagina was in pain and had reddened. That the hymen was missing too. She attributed this to penetrative sexual intercourse.

13. No one could have put it better than the Trial Magistrate; the allegations that the Magistrate did not consider the ingredients of defilement are thfore without basis and must fall by the wayside.

14. Similarly, with regard to the allegations that the Trial Magistrate did not consider the Appellant’s defence, she rendered herself thus;

I find the defence of alibi raised by the accused devoid of merit. The same is an afterthought and a mere denial. The accused had an opportunity to raise the defence during trial but chose not to. He only raised it in his defence, when the prosecution witnesses were no longer available to respond. The prosecution evidence squarely places the accused at the scene of the offence at the material time.”

15. Again, the allegations that the Appellants defence was not considered is without basis since the Trial Magistrate clearly considered the same and rightly so rejected the same as an afterthought.

16. Similarly, the contention by the Appellant that there were no witnesses who claimed to have witnesses this offence are without basis since it is common knowledge that offences of this nature are committed in private.

17. Taking into totality all the circumstances in this case, I find the Appellant’s appeal to be devoid of merit and the same is accordingly dismissed in its entirety.

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HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 28TH DAY OF FEBRUARY 2019.

In the presence of:

CA:-KINOTI

APPELLANT:- MR KITHINJI ADVOCATE FOR APPELLANT

APPELLANT – N/A

RESPONDENT: - MS MBITHE FOR STATE

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HON. A.ONG'INJO

JUDGE