



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. 16 OF 2017**

**KANYOE GAMBO KANYOE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal against conviction and sentence on 20<sup>th</sup> July, 2017 by Hon. L. N. Juma, RM**

**in Kilifi PM's Court Criminal Case No. 465 of 2013,**

**Republic v Kanyoe Gambo Kanyoe]**

**JUDGEMENT**

1. Kanyoe Gambo Kanyoe (the Appellant) is currently serving 20 years imprisonment having been convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 (SOA). The particulars of the offence stated that on diverse dates between 1<sup>st</sup> September, 2013 and 22<sup>nd</sup> October, 2013 in Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of LG, a juvenile aged 12 years.

2. The Appellant being aggrieved by both conviction and sentence appeals to this court through amended grounds filed on 11<sup>th</sup> October 2018 on the grounds that the trial magistrate convicted him on the uncorroborated evidence of the complainant; that the prosecution did not discharge its burden of proof; that the medical evidence adduced did not establish the truth; and that the trial magistrate failed to consider his defence which had created doubts in the prosecution case.

3. The Respondent opposed the appeal.

4. This being a first appeal the duty of this court is to consider afresh the evidence adduced at the trial in order to reach its own independent decision. In doing so, the court should give allowance to the fact that, unlike the trial court, it did not have the opportunity of observing the demeanor of the witnesses as they testified—see **Okeno v R [1972] EA 32**.

5. The complainant testified as PW1. Her testimony was that in September 2013 she was at home with her siblings and father when the Appellant went and knocked the door to their house and told her to accompany him to school to collect food. She requested the Appellant to allow her sister to accompany them but the Appellant refused. Her mother was away at that time. When they reached school, the Appellant touched her before removing her clothes and defiling her. The complainant told the court that she wanted to scream but the Appellant told her not to scream or tell anybody otherwise he would beat her. Her testimony was that there was blood on her skirt.

6. It was her evidence that when she went back home she did not report the incident to anyone. She testified that the Appellant defiled her four times on different dates before she reported the matter to Madam Chomba who took her to the chief. She was later taken to hospital and the police station. The complainant told the court that the Appellant used to guard the school.

7. When the complainant was cross-examined she stuck to her story adding that the students were at the dorms on the day she was sexually assaulted.

8. TN, the father of the complainant testified as PW2. His evidence was that on 19<sup>th</sup> October, 2013 he received a report from one Mama G that his daughter LG had been defiled. He went and reported the matter to the village elder and the Assistant Chief who escalated the matter to the police. PW2 testified that LG was born on 5<sup>th</sup> June, 2005 but he did not have her birth documents as they were burnt in 2001 when his house caught fire. He also testified that the Appellant was a night watchman at a neighboring school.

9. PW3 Ephantus Kanyoe Sanga the Assistant Chief of Chasimba Sub-Location told the trial Court that on 20<sup>th</sup> October, 2013 the head

teacher of K requested him to go and see her at her home. He proceeded there and found her with a young girl. The girl told him that she had been defiled by a watchman at [Particulars Withheld] High School. The girl also told him that the watchman used to give her food from the kitchen. The next day he took the girl to Kilifi Hospital for examination from where they proceeded to Kilifi Police Station where they reported the incident. They then proceeded to the school with police officers where the three watchmen were summoned and LG identified the Appellant. Upon cross-examination, PW3 denied having had any boundary dispute with the Appellant in 2013.

10. PW4 Dr. Hashim Suleiman from Kilifi District Hospital told the Court that he filled a P3 form for the complainant on 24<sup>th</sup> October, 2013. Upon examining the girl he noted that her vagina was red with pimples. The hymen was not intact but there was no discharge. PW4 also identified a post rape care form which he produced together with the P3 form as exhibits.

11. PW5 Corporal Clara Bingo told the Court that the complainant's age was assessed on 27<sup>th</sup> December, 2013. She produced an age assessment report as an exhibit.

12. In his defence the Appellant who testified as DW1 denied defiling the complainant. He stated that he was framed as a committee was formed to sack him and replace him with the henchmen of the members of the committee. When cross-examined he stated that he had never seen the complainant prior to his being charged. He further stated that he only knew the father of the complainant when he came to court to testify.

13. As was stated in the case of **Dominic Kibet Mwareng v Republic [2013] eKLR**, “[t]he critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.” In other words, whenever a person is charged with defilement, the prosecution should prove beyond reasonable doubt that there was penetration of the child victim by the person in the dock.

14. The Appellant submitted that the evidence adduced by the prosecution was contradictory. He pointed out that the complainant told the court that her mother had gone away to give birth whereas her father (PW2) talked of the mother of the complainant having gone to Mombasa.

15. The Appellant wondered how he could have knocked on the door of the house yet the complainant testified that she slept in the same house with her father. The Appellant submitted that it was unbelievable that the complainant had been defiled several times without reporting the incident to anybody. The Appellant pressed on that the complainant was dishonest and pointed out that she had claimed she was the only child but her father had stated that he had five children.

16. The Appellant urged this court to find that Section 124 of the Evidence Act is not applicable since the complainant was not a truthful witness.

17. Turning to the evidence of PW2, the Appellant submitted that the same was hearsay evidence as he was informed by one Mama G that the complainant had been defiled by a security guard at [Particulars Withheld] School.

18. As for the evidence of PW3, the Appellant asserted that the complainant was coached on what to tell the administrator (PW3).

19. Admitting that the doctor had confirmed penetration, the Appellant submitted that penetration is not evidence of sexual activity as the same can be caused by exercising and many other causes. He stressed that there being no fresh injuries, laceration, or discharge, the penetration could not be linked to him.

20. The Appellant went ahead and submitted that the defilement allegedly took place on 20<sup>th</sup> June, 2011 and the complainant was examined on 24<sup>th</sup> June, 2011 meaning that fresh injuries ought to have been noted. The Appellant must have lost track here for the offence is alleged to have been committed on diverse dates between 1<sup>st</sup> September, 2013 and 22<sup>nd</sup> October 2013. Maybe he relied on submissions that were copied and pasted from another appeal.

21. It is noted at this point that the complainant was first seen by a medical officer on 23<sup>rd</sup> October, 2013. It is therefore possible that any injuries inflicted during the first sexual encounter would have healed by the time the complainant was being seen by the medical officer.

22. In submissions filed on behalf of the State on 1<sup>st</sup> November, 2018 it was submitted that the ingredients of the offence of defilement had been proved beyond reasonable doubt. It was urged that the prosecution had therefore discharged its duty of proving penetration, the age of the victim and the identity of the perpetrator as stated in the cases of **Dominic Kibet Mwareng v Republic [2013] eKLR** and **Stephen Nguli Mulili v Republic [2014] eKLR**.

23. The decision in the case of **Douglas Muthanwa Ntoribi v Republic [2014] eKLR** was cited in support of the legal principle that recognition is stronger than identification.

24. For the prosecution to obtain a conviction in a criminal case, its story does not have to be consistent to the last word. People relaying information about the same event will have minor contradictions here and there. There cannot be picture perfect consistency. That would be a lie.

25. In the evidence that was adduced at the trial, the story that emerged disclosed the Appellant as taking advantage of a vulnerable child. He used food to bait her. Although the people who managed to extract the information from the complainant did not testify, that does not change the narrative.

26. The complainant testified on how she was lured from her house by the Appellant with the promise of food. After the first encounter, the Appellant went ahead and had sex with the complainant several times thereafter.

27. The father of the complainant and PW3 were later alerted about the issue. PW3 talked to the complainant and she revealed what had happened between her and the Appellant.

28. When the complainant was examined by a medical officer it emerged that her hymen was broken. This confirms that the complainant had been penetrated. The complainant clearly identified the Appellant as the man who defiled her. PW3 stated that the complainant picked the Appellant out of three watchmen. The Appellant's evidence that he did not know the complainant prior to his arrest cannot be believed.

29. Indeed the Appellant's testimony had no truth, when the Appellant cross-examined PW3 he created the narrative that he was in the dock because of a land dispute with PW3. In his defence statement he however talked of being framed so that a vacancy could be created for those in the school management. The defence was not only contradictory but farfetched. He did not explain how school committee members would only want his job and yet there were other watchmen at the school. The Appellant did not name any specific individual in the school committee. His defence was only meant to assist him evade punishment for the crime he had committed. His defence was rightly rejected by the trial court.

30. Looking at the evidence that was adduced at the trial, I come to the same conclusion with the trial magistrate that the Appellant defiled the complainant who was 12 years old at the time of the incident.

31. It is noted that although the Appellant was convicted for defilement punishable by Section 8(2) of S.O.A., the offence that was proved was punishable under Section 8(3) of the S.O.A. as the complainant was between the age of twelve and fifteen years. This error is corrected so that the Appellant is found guilty of defilement contrary to Section 8(1) as read with Section 8(3) of the S.O.A. It is, however, noted that the Appellant did not suffer any prejudice as a result of the error as the sentence of 20 years imprisonment imposed by the trial court is the minimum sentence available for a person convicted pursuant to Section 8(3) of the S. O. A. The sentence will therefore remain undisturbed.

32. The end result is that the appeal is without merit in its entirety. The appeal therefore fails and is dismissed.

**Dated and Signed at Nairobi this 10<sup>th</sup> day of April 2019**

**W. Korir,**

**Judge of the High Court**

**Dated, Countersigned and Delivered at Malindi this 30<sup>th</sup> day of May 2019.**

**R. Nyakundi,**

**Judge of the High Court**