



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 54 OF 2018

SILVESTER MUSYOKA KIMOLO.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was charged for **defilement contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006 as read with section 8(2) of the same Act.**

2. Particulars being that on diverse dates between January 2015 and 11/01/2016 in Kilungu Sub-county within Makueni county Appellant intentionally caused his penis to penetrate the vagina of IMJ a child aged eight (8) years.

3. COUNT II: committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. Particulars being that on diverse dates between January 2015 and 11/01/2016 in Kilungu Sub-county within Makueni County Appellant intentionally and unlawfully touched the vagina of IMJ a child aged eight (8) years.

5. He pleaded not guilty and matter was heard and he was found guilty and convicted and sentenced to serve life imprisonment.

6. Being aggrieved, the Appellant lodged appeal and set out four amended grounds namely: -

1. THAT the trial magistrate erred in law and fact by failing to find that elements of defilement were not conclusively proved to warrant a conviction.

2. THAT there were insurmountable inconsistencies, contradictions and uncorroborated and there was no proof that was tendered to the required threshold of proof hence the evidence as adduced was inconclusive to attain a conviction.

3. THAT the learned trial magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify.

4. THAT the learned trial magistrate erred in law and fact by failing to find that there existed a grudge and therefore implicated on this case.

7. The parties agreed to file submissions to canvass appeal but only the Appellant who filed, but the prosecution relied on the evidence on record.

APPELLANT'S SUBMISSIONS:

8. The Appellant submitted that from the given testimony by PW1, PW2 and PW3 there were a lot of contradictions in that:

- From the evidence of the witnesses it was hard to know whether PW1 was defiled once according to PW2 or severally according to PW3.

- Whether he was the only one who was alleged to have defiled her or whether there was Denis who had also defiled her.
- If indeed PW1 had some sexually transmitted infection, why the Appellant was not subjected to medical examination to see whether he had the same infection.
- Whether it was true according to PW1 that she was saying what she was told by her mother to say in court.
- Whether she was defiled in the Appellant's house according to PW2 at page 18 line 1 and PW1 at page 25 lines 8 or at the back of mama Luck's house according to PW1 at page 9 lines 18-19.
- Why the said K who informed PW2 of the alleged offence did not record his statement or give his evidence in court.

9. He cited the case of Republic –Vs- Francis Muniu Kariuki (2017) eKLR held: -

“Finally, if indeed, the conclusion was that the complainant had been infected with a venereal disease from the sexual assault, it would have made sense to subject the Appellant to medical examination also. This did not happen in this case. This further impugns the prosecution narrative and, certainly, reasonable doubts.....”

10. Also it was the Appellant's submission that the prosecution's case was tainted with material contradictions and inconsistencies which makes it dangerous to convict on such evidence. He cites the case of Charles Seda Otieno –Vs- Republic (2015) eKLR.

11. According to her, PW1 was defiled once and by the Appellant. Therefore, the said K ought to have been a witness in this case. It was prudent for the prosecution to avail the said K to testify and also tell the court whether PW1 told her it was only that day that she had been defiled or whether she had been defiled severally.

12. The Appellant also relied on case of Juma Ngodia –Vs- Republic – (1982 – 88) (KAR 454) where the C. A held: -

“The prosecutor has in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced have been unfavourable to the prosecution.”

13. See also the case of Paul Kanja Gitari –Vs- Republic (2016) eKLR.

14. The trial magistrate in his statement believed what PW2 said that Appellant had a good relationship, yet failing to note that:-

- PW2 herself stated that she had reported that the Appellant had stolen her money to the area chief.
- That, it was a coincident that on the day the alleged defilement (08/01/2016) was committed is on the same day that they disagreed with her husband and was chased away.
- That it is evident that the Appellant was not in good terms with PW2.

DUTY OF THE FIRST APPELLATE COURT

15. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.

EVIDENCE ADDUCED

16. On age of victim, PW1 who is IMJ testified that she is 8 years old. PW2, PNJ who is IMJ's mother testified that IMJ was born in 2008 and is therefore 8 years. In the notification of birth for IMJ produced as Pexh 1 shows that IMJ was born on 08/11/2008.

17. On evidence on penetration, PW1 testified that she was at home when the Appellant told her to go behind mama Lucky's house and that the Appellant told her to remove her under pant, which she did. The witness testified that the Appellant threatened to beat her up if she told anyone what he was about to do.

18. She testified that the Appellant told her to lie down which she did and the Appellant removed his clothes and lay on top of her. She stated that the Appellant used the thing he uses to urinate and put it in her thing, which she uses to urinate. It was her evidence that the Appellant did that for five times and then he told her to go home and say she was from the river and gave her Kshs.10/= to buy a dough.

19. PW1 further stated that she went and told T and K what the Appellant had done to her and that she also told her mother what the Appellant did. The witness testified that the Appellant had been defiling her since she was in class one and she is now in class two.

20. In cross-examination, the witness testified that her mother had told her what she should come and say in evidence and she stated that one Dennis had also defiled her.

21. PW2 testified that 11/01/2016, she was at Ndeini when a child called Kinformed her that the Appellant had had sex with IMJ. She testified that she confronted the Appellant in the presence of IMJ and IMJ revealed that the Appellant had sex with her and gave her money to buy a donut.

22. The witness testified that the Appellant requested that this case be settled out of court but she declined. In cross-examination, the witness testified that she told her husband that the Appellant had defiled IMJ and her husband did not take any steps as the Appellant is his brother and that her husband has been persuading her to withdraw this case as it is a disgrace to their family.

23. The witness further stated that the Appellant had stolen money from her but denied that she got bitter with the Appellant after the Appellant barred her from hiding her clothes in his house every time she had issues with her husband.

24. PW3, Eric Kasiamani testified that she examined IMJ on 14/01/2016 and she had a foul smelling whitish discharge from the vagina. He testified that IMJ's hymen had been perforated and laboratory results showed that she had a sexually transmitted infection.

25. The witness produced IMJ's treatment card (Pexh2), P3 form (Pexh3) and post rape care form (Pexh 4) which confirm that IMJ's hymen had been perforated and she had a sexually transmitted infection. PW3 testified that the perforation to the hymen was an old one. Mr. Kasiamani testified that the Appellant was not taken to hospital for examination.

ANALYSIS

26. In a case of defilement, the prosecution has to establish and prove that the victim is a minor, penetration and positive identification of the Appellant.

27. See the case of the **Machakos HCCRA NO. 296 OF 2010, Fappyton Mutuku Ngui –Vs- Republic** where the court held that;

“The ingredients to look out for in a defilement case are; the first is whether there was penetration of the Complainant's genitalia; the second is whether the Complainant is a child; and finally, whether the penetration was by the Appellant.”

28. Age of IMJ, PW1 in the charge sheet shows IMJ was 8 years old as at January 2016. PW1 who is IMJ, testified that she was 8 years old. PW2, PNJ who is IMJ's mother testified that IMJ was born in 2008 and was therefore 8 years.

29. In the notification of birth for IMJ produced as Pexh 1 shows that IMJ was born on 08/11/2008. It has therefore been proved beyond doubt that IMJ was 7 years 2 months as at January 2016.

30. The trial court therefore found that the 10 months' difference in the age was not fatal to the case considering that Section 8(2) of the Sexual Offences Act provides for the sentence where the victim was aged 11 years and below. IMJ therefore was a child of tender years within the definition of the Children Act. The above finding cannot be faulted.

31. The trial court found that, PW1 IMJ was a composed witness.

32. Despite being a child of tender years, she remained steadfast in her evidence. IMJ gave a recollection of the events, which had happened prior to the Appellant defiling her, and after she was defiled.

33. She described the events in an accurate manner and did not contradict herself in any way. IMJ testified that the Appellant had been defiling her for over a year and that is consistent with the history she gave to the medical officers who attended to her as shown in the P3 form, treatment card and post rape care form.

34. IMJ testified that she had been threatened by the Appellant and that could be the reason she did not report in the previous instances when the Appellant defiled her. The trial court found that IMJ had been threatened to an extent that the only option she had was to keep quiet. This court agrees with the afore-said finding.

35. IMJ nonetheless reported the defilement to K who was the Appellant brother an indication that she was aware a wrong had been committed against her. Even though K was not called to testify, IMJ gave direct and primary evidence as to what she told K and therefore failure by K to testify in this case is not fatal.

36. IMJ was sincere as she also stated that she had been defiled by one Dennis. If at all IMJ was lying against the Appellant, she could not have revealed to trial court that for the past one year, she had also been defiled by the said Dennis.

37. IMJ clearly explained to the court that the Appellant put his 'thing' which he uses to urinate IMJ with into her 'thing' which she urinates with. As earlier pointed out, IMJ is a child of tender years and by stating the thing used for urinating, she is taken to mean the penis and vagina.

38. Children of such a tender age refer to the penis as the thing used by boys while urinating and they refer to their vagina as what is used by the girls to urinate. This court therefore has no doubt that IMJ meant that the Appellant inserted his penis into her vagina.

39. Her testimony demonstrated that PW1 IMJ was a child who had been defiled for a long period by several people before her mother discovered the same. Thus, the trial court was justified in believing that it is the threats she got from the Appellant and the other perpetrators

who defiled her that kept her from reporting the abuses done to her.

40. In his defence, the Appellant gave an unsworn statement and stated that on 06/01/2016, PW2 went to his house and put her clothes there and she later Appellant him of stealing her money, which was in the clothes. He stated that PW2 went and reported the Appellant to the sub-chief and that she told him that she will make sure he is jailed.

41. The Appellant stated that on 08/01/2016 when he is said to have defiled **IMJ** he was not at home but had gone to collect medicine from one Mumbi who is now deceased.

42. The Appellant further stated that PW2 and her husband requested him to give him bricks so as to build a house but he declined and that is why they made up this case against him.

43. The Appellant claimed that this case was a frame up by PW2 but this court finds no evidence to prove that. To begin with, PW2 testified that she had had a good relationship with the Appellant and at times the Appellant used to accommodate her when she differed with her husband who is the Appellant brother.

44. The Appellant also alleged that PW2 and her husband made up this case against him but this court finds that, that is not true as from the evidence adduced, PW2 and her husband were not in good terms and their relationship had become more strained when PW2 decided to report this case to the police.

45. There was therefore no possibility of collusion between PW2 and her husband. PW2 further testified that her husband had lured her to report a lesser complaint against the Appellant but she denied the request and that was an indication that PW2's husband was on the side of the Appellant.

46. The trial magistrate noted that the Appellant did raise a defence of alibi at the defence stage.

47. The Appellant did not raise this defence at the earliest opportune time to enable the prosecution lead evidence to rebut the same. He did not even cross-examine the prosecution witnesses as to his whereabouts on the day he was said to have defiled I.M.J.

48. PW1 placed the Appellant at the scene of crime. His defence did not raise any doubts as to the overwhelming evidence adduced by the prosecution that the Appellant was at home on the day he defiled **IMJ**.

49. **IMJ** testified that she was defiled after she came from school and that is an indication that the act did not take place throughout the day and thus convincing that the Appellant was at their homestead and he defiled **IMJ**.

50. **IMJ** clearly identified the Appellant as the person who defiled her. The Appellant is the uncle to **IMJ** and they live in the same homestead. PW1 and the Appellant are related and they therefore knew each other well. There was therefore positive identification of the Appellant and there cannot be said to be a case of mistaken identity.

51. Thus the court finds that the appeal has no merit and makes the following orders;

1) Appeal is dismissed, conviction is affirmed and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 27TH DAY OF MAY, 2019.

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HON. C. KARIUKI

JUDGE