



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCRA NO. 6 OF 2018

HENRY KINYUA KWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. SO 36 of 2017 of the Chief Magistrate's Court at Chuka).

J U D G E M E N T

1. **HENRY KINYUA KWIGA**, the appellant 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 charge as per the charge sheet were that on 23rd April, 2015 within Tharaka Nithi County, he defiled (name withheld), a child aged 5 years. The appellant also faced an alternative charge of committing an indecent act with a child but because he was convicted in the main charge, the alternative charge is not the subject of this appeal. It suffices to observe that the appellant denied committing the offence but after trial, he was found guilty of the main charge, convicted and sentenced to serve life imprisonment.

2. The appellant was aggrieved by both conviction and sentence and preferred this appeal listing down the following seven grounds namely:-

i. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment without following the law as the appellant was charged with attempted defilement.

ii. That the learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

iii. That the learned magistrate erred in both law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt.

iv. That the learned magistrate erred in both law and fact by convicting and sentencing the appellant to life imprisonment without considering that he is a hoary person.

v. That the learned magistrate erred in both law and fact by failing to note that the expert (doctors) report did not support the allegations made by prosecution witnesses.

vi. That the trial learned magistrate erred by failing to note that the case against him was fabricated due to vendetta between him and the victim's mother.

vii. That his defence was not considered.

3. A brief summary of the case against the appellant at the trial indicates that the appellant was initially charged with attempted defilement contrary to **Section 9(1) (2)** of **Sexual Offences Act** but the prosecution amended the charge with the leave of court on 24th October, 2017 from attempted defilement to defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The appellant took a fresh plea and denied committing the offence.

4. The prosecution's case at the trial hinged on the evidence of the minor (PW1) aged 5 years and 3 months as per the birth certificate, an eye witness who found the minor in the appellant's house and the medical evidence (P3) tendered indicating that the minor was defiled.

5. The minor testified and told the trial court that she was a nursery school pupil at [particulars withheld] Nursery School. She knew the appellant well by alias name "Maasai" and that as she was playing with one 'G' - another child, the appellant called her and took her to his

house where ***“he did bad manners”*** to her and told her not to tell anyone about it. She further stated that after the ordeal she went and told her mother who took her to hospital.

6. The complainant’s account of events was partly corroborated by DM (PW2) another child aged 10 years old who told the trial court that he found the complainant in the appellant’s house;

“seated on a bed without her pants and skirt”.

He dressed her and took her to the house where he informed her mother.

7. The mother, RMM (PW3), told the trial magistrate that it was around 5 pm upon returning home from work when she got information on what had happened to her daughter. It was her evidence that on receiving the information;

“ I checked the child on her private parts and saw it was interfered with and her pants were wet.”

She told the trial court that she then took the child to Chogoria Hospital and later reported the incident at Chogoria Police Station.

8. The medical evidence tendered by Lydia Kageni Nkonge (PW4) who told the court that she was a clinical officer who had worked for over 5 years with Dr. Priscilla Gachero who had been transferred to the Coast. She tendered the P3 filled by Dr. Priscilla Gachero as P. Exhibit 2 which indicated that the child’s hymen had been broken but no wounds or marks were noted.

9. In his defence the appellant denied committing the offence and faulted the victim’s mother for fabricating the case against him after they alleged differed over a relationship gone sour.

10. The learned trial magistrate evaluated the evidence placed before her found that the evidence tendered by the minor was candid, consistent and very straight forward. She further found that the appellant was well known to her and concluded that as per the medical examination, penile penetration had been proved. The trial court dismissed the appellant’s defence for lacking substance and on the basis of her finding convicted him.

11. This being an appeal, this court does not have the privilege of having seen the witness first hand give account on what took place. This court however is mandated to re-evaluate the evidence tendered and re -assess them and come up with own conclusions regarding the case.

12. The appellant had pointed in his 1st ground of appeal that there was an error on the part of the trial court by convicting him on a charge of defilement when the charge sheet read attempted defilement. However looking at the record, as I have already observed above, the charge was later amended and the appellant called upon to plead to now charge of defilement which he did. There is therefore nothing wrong with the legality of the conviction by the trial court.

13. The appellant has asserted that the evidence tendered against him at the trial did not meet the threshold and that the witnesses gave contradictory evidence.

14. This court has noted from the evidence of the minor (PW1) that there was some discrepancy in the sense that while she stated that she was found and taken home by one N, while DM (PW2) testified that he was the one who found the minor (PW1) at the appellant’s house and took her home. This court however, finds that the discrepancy or inconsistency is insignificant as the same did not lessen the weight of the prosecution’s case. The name "N" and DM could refer to one and the same person.

15. The only point that this court noted that perhaps needed interrogation is the medical evidence tendered. The doctor who examined the victim noted in the P3 that there is no lacerations, no wounds and no scratch marks. The P3 report (P.Exhibit 2) noted that the hymen was broken but did not offer any explanation to make her believe or opine that the absence of hymen was due to attempted rape and more crucially the same was not positive whether penetration took place or not. It is also evident that the wet substance described by the victim’s mother and noted by the doctor was not subjected to forensic analysis to establish what the substance was. This in my view left some lingering doubts and a matter for speculation which in my view is not sufficient to sustain a conviction in such a serious charge where the sentence is life sentence.

16. This court has also noted from patient’s Medical History Report from PCEA Chogoria tendered as P. Exhibit 1 that the minor reported no pain from the incident. This in my view raises doubts about whether penetration really took place particularly considering the age of the minor and the fact that no lacerations, marks or wounds were noted on the private parts when the doctor examined her barely 2 hour after the incident. The victim’s mother testified that she took the victim immediately to Hospital on the same day and it is likely that the doctor used the treatment charts to note that the injuries were 2 hours old. The same doctor as I have observed above did not take a positive conclusion that there was penetration and it was unsafe for the trial court to presume that penetration occurred whether partially or fully. This is because the absence of a hymen in a female on its own is not sufficient to prove that defilement or penetration occurred. In the case of *PKW –VS- Republic [2014] e KLR*, the Court of Appeal observed as follows:

“Hymen also known as vaginal membrane is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen……. There are times when hymen is broken by factors other than sexual intercourse.

.....the evidence of broken ruptured or torn hymen is not automatic proof of penetration through a sexual intercourse. It is upon the prosecution to establish, beyond reasonable doubt that it was ruptured during the alleged rape or defilement. It is noticeable that in this case the complainant never said her hymen was ruptured during the sexual intercourse she claimed she had with the appellant.”

In the instance case, there is no evidence that blood stains were noticed from the pants the minor was wearing. The victim’s mother (PW3) could have at least noticed blood stains if at all the hymen of the minor had been ruptured during the defilement if penetration had taken place. The doctor who examined the victim did not notice any laceration mark or any other evidence suggesting that penetration had occurred. The medical evidence tendered as well as the other evidence tendered did not prove the element of penetration (which is key in a finding of conviction in defilement) contrary to Section 8(1) of Sexual Offences Act) beyond mere suspicion. I have keenly evaluated the evidence tendered by DM (PW2) and one comment caught my attention. He told the trial court that as he passed the appellant’s house;

“I heard L’s voice laughing.”

In my considered opinion again considering her age, chances of her laughing during or after such an ordeal is nil and that in my view should have raised doubts in the mind of the trial court on whether penetration either partially or fully had been established by the evidence tendered.

17. This court finds that the evidence tendered by the prosecution was insufficient, for the reasons advanced, to prove beyond reasonable doubt that the offence of defilement had been committed. The key ingredient in the offence which is proof of penetration was missing from the prosecution’s case. A mere absence of hymen, without more evidence to connect the absence of the hymen with actual the sexual intercourse, is not sufficient to prove a serious charge such as the one facing the appellant. There has to be prove beyond reasonable doubt that the offence of defilement was committed.

18. At the same time, this court finds that while the evidence tendered insufficient to found a conviction on the main charge, the evidence tendered in my view was sufficient to find a conviction in the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. I have reassessed the evidence given by the minor who had told the trial court that the appellant did “*bad manners*” to her. The evidence was corroborated by PW2 DM who found the minor seated on appellant’s bed without her pants and skirt.

In addition to the above, the victim’s mother (PW3) evidence on what she observed from her child’s private parts indicates beyond reasonable doubt that though evidence of actual penetration was missing, there was an attempt. The same opinion is shared by the doctor who examined the minor and perhaps that may have infomed the police in their initial decision to charge the appellant with attempted defilement. To that extent I find that the prosecution case against the appellant in the alternative charge was established and proved beyond reasonable doubt.

In the conclusion, this court finds that this appeal partly succeeds for the reasons aforesaid. The conviction on the main charge of defilement and sentence imposed by the trial court was erroneous and the same is set aside. In its place, I enter conviction on the alternative charge and pursuant to the provisions of Section 11(1) of Sexual Offences Act he is sentenced to serve 10 years imprisonment and the term he has already served shall be taken into account in computing the period he will serve in jail.

Dated, signed and delivered at Chuka this 22nd day of May 2019.

R.K. LIMO

JUDGE.

22/5/2019

Judgment dated, signed and delivered in the open court in presence of the appellant in person and Momanyi for State/Respondent

R.K. LIMO

JUDGE

22/5/2019