



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 139 OF 2018**

**MORRIS MUTHURI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The appellant was charged with the offence of defilement contrary to **section 8(1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006**. There was an alternative charge of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**.

2. It was alleged that, on diverse dates between 28<sup>th</sup> March, 2017 and 9<sup>th</sup> April, 2017 in Nkubu Township in Imenti South Sub County in Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **MM** a child aged 16 years. In the alternative count, it was alleged that the appellant touched the buttocks/breasts/anus of **MM** a child aged 16 years with his penis.

3. After trial, the trial court found that the prosecution had established the ingredients of the offence of defilement, convicted the appellant and sentenced him to 15yrs imprisonment.

4. Being aggrieved by that decision, the appellant lodged this appeal setting out nine (9) grounds of appeal which can be summarised to one ground; **that the trial court erred in law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt.**

5. This being a first appeal, the court is obliged to reconsider and re-evaluate the entire evidence and arrive at its own independent findings and conclusions but with the usual caveat that it never saw or heard the witnesses testify. (**See Selle vs. Associated Motor Boat Company (1968) E.A. 123**).

6. Six witnesses testified for the prosecution. **Pw1, MM**, the complainant, testified that on the 28<sup>th</sup> March 2017, she went to meet her cousin **BK, PW3** at Drips Pub, owned by the appellant. While thereat, the complainant, PW3 and the appellant smashed and took alcohol till late in the night. A disagreement arose on the complainant's phone whereby the appellant smashed and broke it. He promised to replace the same.

7. They later shifted base and went to Black Africa, Barad Restaurant, Kariene where the appellant booked a room and the three, the appellant, **MM** and **PW3** slept on the same bed. When the complainant woke up the following morning, she found herself sleeping alone with the appellant. She was naked while the appellant had his pant and vest on. She did not know how her clothes were removed. She had pain on her private parts and the back.

8. The appellant made her formulate a story that she had been kidnapped and taken to Isiolo in order to convince her parents of her whereabouts. The matter was reported to Nkubu Police station and the complainant was referred to Nkubu Consolata Hospital where HIV & HVS tests were done.

9. The complainant further told the court that on 9/4/2017, she went to the appellant's bar to check on her phone but they continued drinking with the appellant. They would later sleep in a room at that club together with another girl by the name Pam. She admitted to have previously been engaged in sexual intercourse.

10. **PW2, Seberina Kaimatheri** was a clinical officer attached to Kanyakine Sub District Hospital. She told the court that the **P3 form** was filed after 12 days and that she relied on the treatment notes from Consolata Hospital, Nkubu. She determined the nature of the offence as defilement because of the absence of hymen which was suggestive of involvement in penetrative sexual intercourse. She produced the **P3 form** as **Exh 1** and the treatment notes as **Exh2**. On cross-examination, she told the court that she did not see any tear in the complainant's private parts and that the appellant was not examined.

11. **PW3 BK** testified that on 28<sup>th</sup> March, 2017, she was with the complainant and the appellant at the latter's Drips Club. After taking

alcoholic drinks, they slept together at Black Africa (pub and lodging) and nothing happened. The following morning, she woke up the complainant at 6:00 a.m. and asked her if she was okay. Finding her okay, she left her with the appellant only to pick the complainant later from Drips Pub.

12. **PW4 BK**, brother to the complainant testified that on 9<sup>th</sup> April, 2017 her sister did not return home so the family resolved to look for her. He established that the complainant was at Drips Pub. He called his father and cousin who reported the matter to Nkubu Police station. They later went to Drips Club with the police and arrested the complainant.

13. **PW5, HKK**, father to the complainant corroborated the evidence of **PW4**. He narrated to court how his daughter went missing the night of 28<sup>th</sup> March, 2017 only to turn up and concoct a kidnap story. He produced the birth certificate of the minor and the receipts for the purchase of the mobile phone.

14. **Pw6, PC Cylene Mueni** the investigating officer narrated the course of the investigation. She confirmed that the complainant had retracted her earlier report about the alleged kidnap of 28<sup>th</sup> March, 2017. That the complainant had explained that the appellant did not have any sexual intercourse with her on the night of 9/04/2017 but he had touched her breasts and private parts.

15. In his defence, the appellant denied ever being with the complainant and **PW3** on the 28<sup>th</sup> March 2017. He stated that, on the material date, he was with his wife and two chefs at the Drips pub but later delivered an engine to Tharaka. He returned at 9pm to his club, had three beers and went home with his wife after the club closed at 11:00 p.m. On 9<sup>th</sup> April, 2017, he went to the pub, took stock then proceeded to carry people from Nkubu to Meru as he normally does until 10:00 p.m when he went home.

16. After analysing the evidence, the trial court concluded that the circumstances of the case were predetermined and well planned by the appellant with **PW3** to lure the complainant to the appellant's pub. That the appellant had the intention of having sexual intercourse with the complainant which intention he managed to make good on the night of 28<sup>th</sup> March, 2017.

17. The appeal was canvassed by way of written submissions. At the time of writing this judgment, only the submissions on behalf of the appellant had been filed. It was submitted for the appellant that the trial court failed to note that the absence of the hymen was not prove of defilement. That the exhibit (phone) was not produced. That the investigating officer did not avail the first report. That the examination report did not support the allegations and the trial court did not consider the appellant's defence.

18. Miss Muna, Learned Counsel for the appellant further submitted that there was no evidence of forcible entry and the absence of the hymen did not necessarily prove that the complainant was defiled by the appellant. In support of those submissions, Counsel relied on **KKM v. Republic [2017] eKlr**, **Ben Maina Mwangi v. Republic [2016] eKlr**, **David Asirikwa Jeremani v. Republic [2018] eKlr** and **Joseph Karaimu Muhumi vs Republic [2017] eKlr**.

19. During the trial the prosecution called six (6) witnesses whereas the defence called only one (1) witness. **Section 8(1) of the Sexual Offences Act**, provides:

***“A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and depending on the age of the victim i.e, if under eleven years shall upon conviction be sentenced to imprisonment for life.”***

20. In **Daniel Maina Wambugu v Republic [2018] Eklr**, it was held that by this definition, for the state to sustain a conviction against an offender, the following elements must be proved beyond reasonable doubt:-

***“a) penetration of the male offender into the genitalia of the female victim;***

***b) the age of the child must be established in view of Section 8(1), (2),(3) and (4) of the Sexual Offences Act;***

***c) evidence that the accused was positively identified as the perpetrator”.***

21. In the present case, the age of the minor was clearly established from the evidence of **PW1, 2, 5, & 6** and the birth certificate that was produced as **PExh3**. The appellant was also positively identified by the testimony of **PW1, 3 and 4**.

22. The main issue that is in contention is whether or not there was penetration of **PW1** by the appellant. There was admission by the complainant that the appellant did not commit sexual intercourse with her on the night of 9<sup>th</sup> April, 2017. She however alleged that he touched her breasts and private parts which I will consider later in these proceedings.

23. This therefore leaves the court to what happened on the night of 28<sup>th</sup> March, 2017. The complainant alleged that she was given alcoholic drinks in the evening of that day until after midnight by the appellant in the company of **PW3**. That that was her first time to take alcohol. After the appellant's bar closed, they headed to Black Africa Bar and Lodgings where they continued to take alcohol until after 2 am. The appellant then rented a room at that lodging where the three of them slept.

24. When the complainant woke up the following morning, she found herself naked and that she did not know what had happened to her. She felt tired and pain on her back and private parts. She was taken to Nkubu Consolata Hospital where treatment revealed that there was a broken hymen hence the medical officer came to a conclusion that she had been defiled.

25. The complainant was taken to hospital for examination two days after the incident. There was no spermatozoa that was seen as the

complainant had not only had a bath in the morning of 29<sup>th</sup> March, 2017, but there was a delay of two days before examination.

26. The complainant did not state that the appellant had sexual intercourse with her on that night. She only woke up confused and did not know what had happened to her the previous night.

27. The evidence on record shows that, the complainant had never taken any alcohol before the material day. On that day, they started drinking alcohol at 4pm until 2 am the following morning. These drinks were being provided by the appellant. He ended up renting a room at Kariene where he slept with the complainant and **PW3** who had lured the minor to the waiting hands of the appellant.

28. The question is, what was the intention of the appellant in; entertaining a minor who has never taken alcohol with alcoholic drinks for close to 10 hours and finally end up in a dingy lodging overnight? What was he doing with a minor who only found herself sleeping beside him naked with her private parts paining as well as her back? Why would he tell her to lie as to her whereabouts over night to her parents and the police if not to hide the heinous act that he had meted out on her?

29. I take note that the complainant admitted that she had previously had sex and therefore the absence of hymen *per se* could not be evidence of penetration, but its absence was important. However, taking all the circumstances of the case into consideration, I am satisfied that there was an intention to defile the complainant which the appellant successfully carried out. This is deducible from the following: -

- a) luring the minor to his bar and entertaining her with alcoholic drinks for close to 10 hours. This was meant to confuse the minor and make her defenceless at the opportune time when he needed to pounce on her;
- b) breaking the minor's phone to cut off any communication with her parents;
- c) securing a room for overnight sleeping with the minor at a dingy lodging at Kariene;
- d) the minor waking up in the morning and finding herself sleeping besides the appellant naked, a condition that she was not in at the time she slept;
- e) the minor waking up tired and experiencing pain both on her private parts and her back; the pain in the private parts was suggestive of forcible entry;
- f) the absence of the hymen.

30. The threshold of determining criminal cases is beyond reasonable doubt. The evidence produced at the trial proved the prosecution case to the required standard. The appellant's defence was to my mind an afterthought. He was placed at the scene of the incident by **PW1** and **PW 2**. He did not call his wife whom he alleged he was with at the material time to corroborate his story.

31. As a parting shot, I think the prosecution did a shoddy job. Since the acts of 28<sup>th</sup> March, 2017 and 9<sup>th</sup> April, 2017 were not connected, the alternative count should have been an independent and separate count by itself. There was evidence that the appellant touched the complainant's breasts and private parts on 9<sup>th</sup> April, 2017. That should have constituted a separate count by itself. The appellant is lucky that the prosecution slovenly decided to charge him with one count alone. They should have been two for which the sentence would have been deterrent enough.

32. The appellant used his bar to lure the minor into antisocial behaviour. He took advantage of the minor. He is unfit to be left to wander freely in the civilized world which should be curtailed. He is lucky that the trial court only meted out to him the minimum sentence of 15 years. From his conduct, a higher sentence would have been a just course.

33. In the premises, I find the appeal to be without merit and I dismiss the same.

**DATED and DELIVERED at Meru this 20<sup>th</sup> June, 2019.**

**A. MABEYA**

**JUDGE**