



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 149 OF 2017

CMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by T. A.

Odera, SRM, in Mumias SPMC Sexual Offence No. 17 of 2016 dated 7/12/2017)

JUDGEMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 15 years imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are:-

- (1) That the trial court failed to consider the provisions of Article 25 (c) as read with 50 (2) of the Constitution.
- (2) That the trial court failed to comply with section 19 of the oaths and Statutory Declarations Act.
- (3) That the trial court misapprehended the facts of the case hence violated the appellant's rights.
- (4) That the trial court failed to consider that there existed a land dispute between the appellant and the victim's family which culminated into the frame up in this case.

2. The particulars of the charge against the appellant were that on diverse dates between the 3rd day of April, 2016 and 9th day of May, 2016 at [particulars withheld] Village, Koyonzo Location in Matungu sub-county within Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of JWAS (herein referred to as the complainant/minor), a girl aged 16 years.

Case for Prosecution -

3. The prosecution called 6 witnesses. In summary their evidence was that in 2016 the complainant was a 16 year old primary school pupil. The appellant was her grandfather. That on the 3/4/2016 at 6 p.m. the complainant was on her way to school when she met with the appellant. He threatened to cut her with a jembe. He dragged her into a sugarcane plantation and defiled her. That as the act took place, a person called Tongwa PW4 went into the sugarcane plantation to relieve himself. The appellant ran away. Tongwa took the complainant's school books and went away with them.

4. That on 30/4/2016 the complainant was looking for firewood in a farm when the appellant went to her and demanded to have sex with her. He defiled her again after which he gave her Ksh. 200/=. The complainant ran away from home. Her father received the report of defilement. He arrested the appellant on the 5/5/2016 and took him to Koyonzo AP Post. He was handed over to Matungu Police Station. The complainant was traced and taken to Harambee Police Patrol Base. PC Maureen Opiyo PW6 escorted both the complainant and the appellant to Matungu Sub-County Hospital. A P3 form was issued to the girl. It was completed by a clinical officer PW3 at Matungu Sub-county Hospital. A pregnancy test was done at the hospital and she was found to be one month pregnant. The appellant was charged with the offence. He denied the charge. During the hearing the complainant's father PW2 produced the girl's ante-natal clinic card that indicated that she was born on 24/2/2000. This meant that in April, 2016 she was aged 16 years.

Defence Case -

5. When placed to his defence the appellant gave sworn evidence and called no witness. He stated in his defence that the complainant is his granddaughter. That on the 9/5/2016 Patrick Tongwa PW4 had found him answering a call of nature but he did not talk to him. He was

arrested on the same day. He denied that he defiled the complainant. He denied that he met her on the day of the alleged defilement.

Submissions -

6. The appellant submitted that his right to fair trial was violated in that no *voire dire* examination was conducted on the minor as required by Section 19 of the Oaths and Statutory Declarations Act.

7. The appellant submitted that there existed a grudge between him and the father to the complainant, PW2 over a land dispute. That this was confirmed by the complainant. He urged the court to quash the conviction and set aside the sentence.

8. The State did not make any submissions in the appeal.

Analysis and Determination –

9. This being a first appeal, it is the duty of the court to analyze the evidence adduced at the lower court, re-evaluate it and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify—See **Okeno-Vs-Republic (1972)EA 32**.

10. The appellant contends that the trial court erred in failing to conduct a *voire dire* examination on the complainant so as to justify her testimony being received in evidence. Section 19 of the Oaths and Statutory Declarations Act requires for the court before receiving the evidence of a child of tender years to satisfy itself that the child understands the nature of oath and if he/she does not to satisfy itself that the child is possessed of sufficient intelligence to justify the evidence of the child being received and that the child understands the duty of speaking the truth; in which case the evidence of the child may be received though not on oath.

11. There is no definition of a child of tender years in the Oaths and Statutory Declarations Act. The question as to who a child of tender years is was long time ago considered in **Kibangeny –Vs- Republic (1959) E.A 92** where the court stated that:-

“There is no definition in the Oaths and Statutory Declarations ordinance of the expression child of tender years for the purpose of S.19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by Lord Goddard, C. J. in R –Vs- Campell, (1956) 2All E.R 272,

‘whether a child is of tender years is a matter of the good sense of the court’.”

12. Recently in the case of **Patrick Kathurima –Vs- Republic (2015) eKLR** the Court of Appeal at Nyeri held that:-

“.....the age of 14 years remains a reasonable indicative age for purposes of Section 19 of Cap 15.”

13. In the premises a child of tender years means a child under the age of 14 years. In the case against the appellant a child immunization card was produced that showed that she was aged 16 years at the time that she testified in court. She was thereby not a child of tender years. There was no need for a *voire dire* examination to be conducted on her. The trial court did not err in not conducting a *voire dire* examination on a child of 16 years of age.

14. The fourth ground of appeal was that the charges were a frame up due to the grudge between the appellant and the complainant’s father.

15. The ingredients of the offence of defilement are:-

(1) proof of the age of the complainant.

(2) proof of penetration.

(3) proof of the identity of the perpetrator.

See **Dominic Kibet Mwareng –Vs- Republic (2013) eKLR**.

16. In the appellant’s case proof of the age of the victim was as stated above, proved by production of a child immunization card which indicated that the complainant was born on 24/2/2000 which put her age at 16 years at the time of defilement. The age of the complainant was thereby proved.

17. The complainant in her evidence stated that the date that the appellant defiled her in a sugar cane plantation where they were found by Tongwa was on 3/4/2016. She said that the second time when the appellant defiled her was on 30/4/2016 in a farm where she was looking for firewood. She stated that the appellant did not do anything to her on 9/5/2016.

18. Mr. Tongwa PW4 on his part stated that the date he found the appellant with his trousers down in a sugar cane plantation where he had gone to relieve himself was on 9/5/2016. He said that he did not find the appellant with the complainant. That when he returned to the road he saw a school bag. That Harrison also saw it and they wondered to whom it belonged.

19. Harrison Atitwa PW5 on the other hand testified that on 9/5/2016 at 6.30 p.m. he was at home when he heard some noise on the road that passes outside his home. He went to the place and found Patrick Tongwa who told him that he had found Mzee Otoy, the appellant, in PW5's sugar cane plantation with a school girl who had ran away and left her books behind. He, PW5, took the books to the father of the girl.

20. The complainant's father PW2 stated that on the 9/5/2016 at 6 a.m. A PW5 took a report to him that he had found his daughter, the complainant, being defiled by the appellant in a sugar cane farm and that the girl had ran away. That the girl was sought but she was not found until the next day. He interrogated her and she told him that the appellant had defiled her on three occasions. He took her to hospital and she was found to be three weeks pregnant.

21. From the above narratives, it is clear that the evidence of the complainant differed with the evidence of the other witnesses on the dates that she was defiled by the appellant. Her evidence was that the first time that the appellant defiled her was on the 3/4/16 in a sugar cane plantation where they were found by Tongwa PW4. The other witnesses however stated that the date that Tongwa found them in a sugar cane plantation was on 9/5/16. Even for that date Tongwa said that he only saw the appellant in a sugarcane plantation and did not see the girl.

22. More so confusing was the evidence of the complainant's father that it is Atitwa PW5 who told him that he had found the appellant defiling his daughter in a sugarcane plantation. However, Atitwa on his part said that it is Tongwa who told him that he had found the appellant defiling the girl in a sugar cane plantation. So between Tongwa and Atitwa who had found the girl and the appellant at the sugar cane plantation?

23. The complainant may have forgotten the dates when the incidents took place. Her evidence was that the appellant had defiled her on two occasions. She stated that the first incident had taken place at the sugar cane plantation. The other witnesses stated that the incident at the sugar cane plantation was the one that led to the arrest of the appellant. How then could the complainant have forgotten whether this incident was the first one for the appellant to defile her or whether it was the last one? How could she confuse between the first incident and the last incident? In my view such confusion can only occur if the evidence was a fabrication.

24. It is very important for witnesses in a criminal case to appear to be truthful. Where there are unexplained contradictions in a case can lead the court to concluding that the witnesses are not telling the truth. In **Ndungu –Vs- Republic (1979) 1KLR 282**, the Court of Appeal held that:-

“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his truth worthness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

25. The trial court did not address itself to the various contradictions in the evidence of the prosecution witnesses. It cannot be said that the contradictions were minor. They went to the core of the prosecution case on whether the appellant defiled the minor or not.

26. The complainant stated that there was a land dispute between her father and the appellant. Her father however stated that he has never had any differences with the appellant. How could he deny something that his daughter admitted? This further goes to show that the minor's father is not a trustworthy witness. Could it be that the charges were framed up due to the land dispute between the appellant and the minor's father? It is not known.

27. In view of the foregoing there was no sufficient evidence to prove that the appellant defiled the complainant. The appellant was wrongly convicted of the offence. The prosecution had not proved the charge against the appellant beyond all reasonable doubt. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 31st day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for state

Appellant - present

Court Assistant - George

14 days right of appeal