



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 03 OF 2019**

**BETWEEN**

**DOUGLAS WEKESA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal against Conviction and Sentence imposed in S.O Criminal Case Number***

***31 of 2017 in the Senior Principal Magistrate's court at Kimilili by Hon. C.Menya (SRM) on 28.12.18)***

**JUDGMENT**

**The trial**

1. **DOUGLAS WEKESA (hereinafter referred to as the Appellant)** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the main count are that

**On 01<sup>st</sup> June, 2017 in Kimilili within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of NNB a girl aged 10 years**

**THE PROSECUTION'S CASE**

2. The prosecution called 8 witnesses in support of the charges. PW1 **NNB**, the complainant recalled that on the material day at about noon, she was at home alone when the Appellant who was riding a bicycle stopped by the road near their home and asked her for a stone so that he could repair his bicycle. It was her evidence that when she took the stone to the Appellant, he held her hand, dragged her into a maize plantation and defiled her. **PW2 GLORIA SIFUNA** stated that on the material date and time, she was going to the shops when she heard the Appellant ask the complainant to give her a stone to repair his bicycle. It was her evidence that on her way back, she saw the bicycle and she proceeded home and not finding the complainant went back where he had seen the bicycle. She said she then saw the Appellant running away and she found the complainant in a maize plantation and she informed her that the Appellant had defiled her.

3. **PW3 MB** the complainant's mother stated that complainant was born on 05<sup>th</sup> June, 2007. She recalled that on the material date at about 01.00 pm, PW2 informed her that the complainant had been defiled by a man who sells charcoal. She said she took the complainant to hospital and while there the Appellant was also brought in and the complainant identified him as the one that defiled her.

4. **PW4 JB** the complainant's father testified that complainant was born on 10<sup>th</sup> April, 2007 and he produced a church dedication card **PEXH. 3**. **PW5 EW** complainant's uncle testified that after the Appellant was arrested, he was taken to hospital and when the complainant saw him identified him as the person that defiled her.

5. **PW6 BEATRICE AKOSA**, a clinical officer produced the complainant's P3 form **PEXH. 1**. She stated that upon examining the complainant on 02nd June, 2017 a day after she was allegedly defiled, her hymen was broken but she had no other injury. **PW7 CI SHEILA KWATUKHA** the investigating officer after receiving complainant's report investigated the case and caused the Appellant to be charged. **PW8 CATHERINE AKIRU** a clinical officer produced the complainant's age assessment report **PEXH. 4** which showed that she was between 10 and 12 years.

## THE DEFENCE CASE

6. When the appellant was put on his defence, he denied the offence.

7. The learned trial magistrate considered the evidence and finding the charge proved convicted the Appellant and on 02<sup>nd</sup> January, 2019 sentenced him to life imprisonment.

### The Appeal

8. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 07<sup>th</sup> January, 2019. From the 5 grounds of appeal and written submissions and additional grounds of appeal filed on 24<sup>th</sup> July, 2019, I have deduced the following issues: -

1. **That charge sheet was defective**
2. **That the complainant's age was not proved**
3. **Crucial witnesses did not testify**
4. **The complainant was mistaken concerning the identity of the assailant**
5. **That the life sentence is unconstitutional**

9. When the appeal came up for hearing on 06<sup>th</sup> August, 2019, Appellant submitted that he was wholly relying on the written submissions. Mr. Akello, learned Counsel for the state opposed the appeal and submitted that although the complainant's age was proved by way of an age assessment report and penetration by way of a P3 form, he conceded to the appeal since there was no evidence concerning the arrest of the Appellant and how he was identified as the assailant.

10. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

- i. Age of the victim.
- ii. Identity of the offender
- iii. Penetration.

11. Together with the grounds of appeal, I will also consider the main ingredients of defilement which are age of the victim, penetration and identity of the assailant. grounds of appeal raised by the appellant.

1. **That charge sheet was defective**
2. **Crucial witnesses did not testify**
3. **That the life sentence is unconstitutional**

12. The Appellant states that some crucial witnesses. He did not state who this witnesses were and what value they would have added to the case. In any case, **Section 143** of the **Evidence Act** provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact.

13. The age assessment report **PEXH. 4** shows that complainant was between 10 and 12 years at the material time. The complainant's church dedication card **PEXH. 3** shows that she was born on 10<sup>th</sup> April, 2007 and was therefore 10 years when the offence was allegedly committed. I am therefore not persuaded that the charge sheet is defective.

14. Concerning the question of penetration, the law under **Section 2** of **Sexual Offences Act** defines penetration to entail: -

***“partial or complete insertion of a genital organ of a person into the genital organ of another person.”***

15. The P3 form **PEXH. 1** produced by PW6 was filled on 02<sup>nd</sup> June, 2017 a day after complainant was allegedly defiled. The complainant did not have any injury and there was no evidence that the hymen was freshly broken thereby casting doubt on the prosecution case that the complainant had been defiled.

16. The complainant stated that she knew the Appellant who was a charcoal seller. PW2 to PW5 similarly stated that the Appellant was a charcoal seller a fact that the Appellant conceded. There is however no evidence explaining how the Appellant was identified before he was arrested. Complainant purported to identify the Appellant after he was arrested. There is evidence that the only reason that the Appellant was arrested was because it was alleged that the man who allegedly defiled complainant was a charcoal seller.

17. No doubt there are many persons that sell charcoal on bicycles. It was therefore important for the prosecution to ensure that the Appellant had been properly identified and that he was not mistaken for another charcoal seller. It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002** had this say about suspicion in a criminal case:

***“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported)), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”***

18. From the evidence on record, there appears to me that an attempt was made to defile the complainant. The assailant was however not identified to the required standard and Appellant ought to have been given the benefit of doubt. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts.

19. *Having said that*, I agree with the state that there are good grounds for allowing this appeal. Had the appeal not succeeded, I would have been obligated to interfere with the sentence of life imprisonment imposed on the Appellant for the reason that mandatory sentences have been declared unconstitutional. (See the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** and Court of Appeal decisions in **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**)

20. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

**DATED AND DELIVERED IN BUNGOMA THIS 09TH DAY AUGUST, 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Brendah**

**Appellant - Present**

**For the State - Mr. Akello**