



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.183 OF 2017

(Appeal Originating from Nyahururu CM's Court

SOA.16 of 2016 by: Hon. S. Mwangi – SRM)

DAVID ASIRIKWA JEREMANI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **David Asirikwa Jeremani**, hereafter referred to as David, was convicted for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between 1/9/2015 and 11/9/2015, at [particulars withheld] area in Subukia Sub County within Nakuru, intentionally and unlawfully caused his genital organs, penis, to penetrate the genital organs of **J.W.M.**, a child aged 13 years.

Upon conviction, he was sentenced to serve 20 years imprisonment.

Being dissatisfied with the said conviction and sentence, he has challenged them in this appeal.

David was represented by learned counsel, Mr. Waichungo while the State was led by Ms. Rugut. David filed his appeal on 28/8/2017 and cited 10 grounds of appeal as follows:

- 1. That, the Learned Trial Magistrate erred in law and in fact for declaring PW1 a refractory witness and remanding her in custody whereas she was a hostile witness who ought to have been cross examined on her statement;***
- 2. That, the Learned Trial Magistrate erred in law and in fact in failing to find that the evidence on record did not support the particulars of the charge and that the appellant was charged in the wrong court;***
- 3. That the Learned Trial Magistrate erred in law and in fact in failing to find that the complainant's evidence was not corroborate by the medical evidence;***
- 4. That the Learned Trial Magistrate erred in law and in fact in failing to find that crucial witnesses were not called to corroborate the complainant's evidence;***
- 5. That the Learned Trial Magistrate erred in law and in fact in finding that penetration was proved;***
- 6. That, the Learned Trial Magistrate erred in law and in fact in failing to find that the P3 form and PRC forms had contradicting information and serious alterations;***
- 7. That the Learned Trial Magistrate erred in law and in fact in dismissing the appellant's defence;***
- 8. That, the Learned Trial Magistrate erred in law and in fact in failing to find that the appellant behaved like an adult and age was a non issue;***

9. That, the Learned Trial Magistrate erred in law and in fact in convicting the appellant on insufficient, uncorroborated evidence;

10. That, the learned Trial Magistrate erred in law and in failing to find that there was no evidence placing the appellant in Nakuru where the offence was allegedly committed.

Mr. Waichungo filed written submissions on 23/2/2018 which were highlighted at the hearing.

Ms. Rugut did not file any submissions but responded to the submissions orally.

This being a first appeal, it is required of this court to review all the evidence tendered in the trial court, evaluate it and make its own conclusions and determinations. See **Okeno v Republic (1972) E.A.32.**

The prosecution called a total of seven witnesses. PW1, J.W. after a *voire dire* examination was affirmed and she told the court that she was 14 years. The court declared PW1 a refractory witness after she had testified for a while and deviated from her statement with the police. She was remanded in custody for 8 days. After that, when she appeared in court, PW1 told the court that she left for the salon, then went with David, the appellant, to his sister's house in Nakuru where she stayed for one week and 3 days and that during time, she had sex with David for 2 days; that the David had sex with her during the day when his sister was away. After that, they went to Subukia to David's brother's house where they stayed for 2 days and police went there with her uncle Patrick; that David told her to run away with him. She stopped and went back to accused's brother's house where she was arrested by police. PW1 identified David as a person who worked for the grandparents. She said David was her friend and that he convinced her to go with him to Nakuru where he would marry her; that after they reached Nakuru, he left her at the sister's place as he went back to Subukia to monitor things so that he would not be suspected; that David returned a week later that he had sex with the PW1 twice.

PW2 Milka Cherop Kogei, a Clinical Officer at Subukia Sub County Hospital examined PW1 who had a history of defilement. PW2 did not find any injuries on PW1's genitalia but the hymen was perforated; she took a vaginal swab which had pus cells. She concluded that PW1 had been defiled because of the presence of pus cells.

PW3 MW is the mother of PW1. PW3 had taken PW1 to live with her grandparents JW and JN (PW5) as she attended [name withheld] Primary School in Standard 7. PW3 received a call from her mother that PW1 had gone to the salon on 1/9/2015 and not returned. PW3 left Nairobi for her home, she joined the search for PW1 with her sister **PW4 JW** but to no avail. She went to search in Nairobi and Nanyuki till 11/9/2015 when PW4 called to inform her that PW1 had been found at Subukia. PW3 found PW1 at the Police Station where she told her that David had taken her away to marry her. PW3 said David had gone to the home and informed them that he had seen a neighbour's boy call PW1 but on questioning the boy, he denied. PW1's clothes were found at the home of David's brother.

PW4, an aunt to PW1 also related how her mother called to inform her that PW1 left for the school on 1/9/2015 but had not returned home. PW4 went to their home to join in the search; that on 3/9/2015, David went to their home drunk and informed them that a neighbour's son had told him that he had seen a boy call PW1 but on asking the boy, he denied seeing anybody talk to PW1 except David. They suspected David and decided to search his home where they found the mother (DW2) but not PW1. They went to Njoro and Nakuru where David's sister lives but did not find PW1. David's mother informed them that PW1 was at David's brother's home where they went and found PW1 and David carrying nappier grass; that both PW1 and David ran off on seeing PW4 and group. They managed to catch PW1 but David escaped.

PW5 JM is PW1's grandfather with whom PW1 had been living with as of 1/9/2015. PW5 gave PW1 200/= to go to the salon at Subukia but she did not return and he started searching for her and reported at the police station and informed her children who joined in the search.

He received information that David was seen with PW1 on the way to Nakuru; that David had been doing some work for him but he did not go to work from 1/9/2015; that on 2/9/2015 he enquired from David about PW1's whereabouts, but he denied knowing; that they went to Nakuru on 11/9/2015 but on the way, he received a call that PW1 was at Githioro near Subukia at David's brother's home. On the way to the said home, David and PW1 who were carrying nappier grass, saw them and ran off but PW1 was arrested while David escaped. PW1 informed them she was married to David and admitted to having had sex with him.

PW6 PEGM, an uncle to PW1 said PW1 had left his home on 8/8/2015 to go and live with her grandparents in Subukia. On 1/9/2015 8.00 p.m., he was informed of PW1's disappearance and he joined in the search for her; that on 10/9/2015 while with PW5, someone informed them that David and PW1 had left for Nakuru but had come back to Subukia. Next day, they found both David and PW1 at Githioro at David's brother's home; that the two ran off but PW1 was arrested, taken to hospital and then to Police station.

PW7 PC Cosmas Tsuma of Subukia Police Station received a report of the disappearance of PW1 on 1/9/2015 at 8.00 p.m.; that on 7/9/2015, PW5 went to station and they went to David's mother's home but did not get PW1. They arranged to go to Nakuru on 11/9/2015 but while on the way to Nakuru, they received information that David and PW1 had been seen at Subukia. They went to David's home and the mother informed them that PW1 was at Githioro at her elder son's home. She led them to the home and when David and PW1 saw them, they ran off but they managed to arrest PW1. PW1 informed them that she had married David from 1/9/2015. David was arrested on the night of 13/14/2/2016 in a police raid and was identified by PW5.

When called upon to defend himself, David testified on oath and called 2 other witnesses. David admitted to having known PW1 as he used to work for the grandfather PW5, as a mason and he knew PW1 lived with the grandparents; that on 2/9/2015, PW5 went to his home at 6.00 a.m. and asked him to help look for PW1 because she had disappeared. They started the search in the area but did not find her; that by then, he was working for his brother **Joseph (DW3)** at Githioro where he would go at 6.00 a.m. and return to his home at 5.00 p.m. and after that they would go in search of PW1 which they did for 4 days; that after a week, he started staying at his brother's home and on 10th he received a call from PW1 and he enquired where she was and she said she needed help.

He informed DW3 that the call was from the missing girl. He tried to call PW5 to inform him about PW1's call but he did not get him; that PW1 arrived at Githiora at 7.30 p.m., that him and DW3 picked her up; that she wanted David to talk to PW5 on her behalf; that PW1 claimed to have gone to Naivasha where a friend called her for a job. David took her to the brother's house because it was late and that next day, he left at 5.00 a.m. and returned at 1.00 p.m. when he was informed that PW5 had been to his home with police and taken PW1; that he continued working for his brother till he was arrested on 14/2/2016. He denied having a sister in Nakuru. He denied having a relationship with PW1 or defiling her.

DW2 EKE is David's mother. She told the court that she lives with David at her home in Subukia but in September, 2015, he went to live with his brother after his work with PW5 ended; that David helped look for PW1 for 4 days before he went to the brother's home; that David called to tell her that the girl (PW1) had been found and she should inform PW5; that it is her who went to inform PW5 that the girl was at Githioro and on next morning, she went with police to Githioro and the girl ran away on seeing her aunt but that David was not present.

DW3 JA is David's elder brother. He stated that David went to stay with him in September, 2015 to do some work for him till 10/9/2015; that David informed him that the girl who had been missing had called and asked him to meet her at Githioro about 7.00 p.m; that they went together and took her to his house; that the girl told them that she had gone to work in Naivasha but there was no job and she feared going back home because she feared her uncle; that they told their mother (DW2) to inform PW1's grandfather that she was at his home; that they slept and early next day David left for Maili Saba and he told the girl to get grass for the cow together with another girl but she ran away. He chased and caught her and called the police.

I have considered all the evidence adduced in the trial court and the grounds of appeal and opposition thereto by the respondent.

In the first ground of appeal, the trial court was faulted for declaring PW1 a refractory witness instead of a hostile witness and urged the court to disregard PW1's testimony taken on 16/8/2016. Mr. Waichungo relied on the decision of Republic v Musyoka Miriti HCR.240/2008 (Meru) where the court considered Section 152 of the Criminal Procedure Code. The Section defines who a refractory witness is and gives guidance on how the court should handle such a witness. The section provides as follows:

“152

(1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence:-

(a) refuses to be sworn; or

(b) having been sworn, refuses to answer any question put to him; or

(c) refuses or neglects to produce any document or thing which he is required to produce; or

(d) refuses to sign his deposition

Without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.”

The court in considering the above section stated as follows:-

“It is clear from the above section (152 of CPC) that PW1 was not a refractory witness for the basic reason that the prosecutions complaint was not that she refused to answer questions put to her. She was accused of retracting her statement to the police. She was a hostile witness. The procedure adopted by the learned trial magistrate was wrong especially the decision to remand the witness in custody. Where the prosecution wishes to show that its witness has retracted previous statements made by him to the police, the prosecutor must apply to cross examine his witness as to such previous statement. In such circumstances the court must ensure that the provisions of Section 153 and Section 154 of the Evidence Act are observed. The witness will then be cross examined by the defence.

The purpose of such cross examination by the prosecution may extend, not only to establishing that the witness retracted his previous statement. The prosecution will be at liberty to cross examine their witness as to his credibility accuracy and veracity among other things. If the prosecution succeeds in shaking the credibility and injuring the character of its witness, the witness will be treated as a hostile witness.

The Court of Appeal in Maghanda v Republic (1986) KLR 255 at page 257 discusses the manner in which the evidence of a hostile witness should be treated by a trial court. That court held:

Halima was called to testify for the prosecution. she was declared a hostile witness. The magistrate said that therefore her evidence could be safely disregarded for, being the appellant's girlfriend, it was but natural that she would testify as a defence witness. The first part of the magistrate's statement strictly was a misdirection. The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court."

Ms. Rugut argued that the court was right in declaring PW1 refractory because she refused to answer questions.

In the instant case, the prosecutor observed that PW1's testimony was different from what she had recorded in her statement. In my view, the witness was not refusing to answer questions but was deviating from her statement to the police and the proper procedure should have been to declare PW1 a hostile witness after which she would be subjected to cross examination by the prosecutor and the defence so as to weigh the credibility, veracity and accuracy of her evidence. That was not done. Instead she was remanded for 8 days. When she came back to testify after the 8 days, it seems that she told the court what was recorded in her statement as there was no further complaint. PW1 was then subjected to cross examination by the defence counsel.

This was indeed an error on the part of the trial court to declare PW1 a refractory witness but the question is, what prejudice did David suffer? PW1 testified as per her statement to police. The defence cross examined her and I find that no prejudice was suffered by the defence as none was alluded to.

It is noteworthy that even in the case cited by counsel ***Republic v Musyoka Miriti (Supra)*** the court pointed out that the trial court erred but did not disregard the evidence of the witness.

The trial court was also faulted for failure to call crucial witnesses. Reliance was made on the case of ***Bukenya v Republic (1972) E.A. 549***. The complaint was that PW1 claimed to have been taken to David's sister in Nakuru and her husband but the prosecution never called them as witnesses. It is trite that the prosecution has the discretion to call all the witnesses it requires in support of its case and those that will assist the court arrive at a fair decision. The prosecution will only be faulted if it fails to call a witness for some oblique motive e.g. if the evidence will be adverse to their case. See ***Bukenya case (Supra)***.

In this case, PW1 could not even recall where she was allegedly taken to in Nakuru. PW3 told the court that they were unable to trace the said David's sister's home in Nakuru. David who could have helped trace the said sister denied that he had a sister living in Nakuru. However, from DW2's evidence, it is clear that David had several sister's living in Nakuru. DW3 said there is only one sister living in Nakuru. The defence evidence was contradictory and not convincing.

I find that the prosecution did not intentionally fail to call the sister or sisters of David though it did not make enough effort to call them. Another person who should have been called as a witness and whose evidence I will consider later is Philemon, the Clinical Officer who filled the P3 form. He was a crucial witness in view of the alteration made to the P3 form produced by PW2.

It is the appellant's contention that there was no corroboration of the prosecution's evidence. Under Section 124 of the Evidence Act, there is no requirement of corroboration in defilement cases. This court can base a conviction on the complainant's evidence if it believes the complainant and gives reasons for its belief.

The decision of the trial court was also challenged on grounds that penetration was not proved. PW1 testified on oath and was cross examined. She maintained that David took her to his sister's house that he had married her, left her there and came back for her after a week and they had sex twice. She explained that David removed his clothes and forced her to remove his before they had sex. PW1's evidence is corroborated in material particulars by that of PW3, 5, 6 and 7 that PW1 told them David had married her and they found her at DW2's home and both her and David ran off.

David denied having ever talked to PW1 but it is not understandable how, after disappearing from home, PW1 decided to call him to take her back home. The defence was not believable. The only logical conclusion that this court could arrive at is that it is David who lured PW1 away from home with the promise of marriage and when he realized that police were closing in on him, he decided to bring her to the brother's place.

David also denied having been with PW1 at the time PW1 was found but all the witnesses PW1, 3 – 7 confirmed that PW1 and David ran away on seeing the police arrive at DW3's home. I am satisfied that David was with PW1 and he had the opportunity to commit the offence. DW2 & 3 contradicted each other as to where David used to spend the night in September after leaving PW5's home; they also contradicted each other as to whether David had sisters in Nakuru. They lied to the court in a bid to save David. I prefer the prosecution evidence to that of the defence.

Having found as above, the next question is whether the offence of defilement was proved. David was charged with the offence of defilement.

The offence of Defilement is created Under Section 8(1) of the Sexual Offences Act which provides as follows:

"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

To prove the offence, the prosecution has to prove that there was penetration and that the victim is a child. Penetration is defined Under Section 2 of the Sexual Offences Act as ***“penetration, means “the partial or complete insertion of the genital organs of a person with the genital organs of another person.”***

In her testimony PW1 told the court that she had sex with David; that David undressed and also forced her to undress.

In the case of ***Peter Ngari v Republic CRA.231/2010 (2010) KLR*** this court was faced with nearly a similar issue where the victim described the act done to her as ‘rape’ and the court was of the view that the word ‘rape’ is a legal term for which facts needed to be adduced to describe what the victim meant by rape.

In the case of ***Ben Maina Mwangi v Republic CRA.47/2001*** Justice Lesiit found that the evidence adduced by the complainant did not disclose an offence of defilement as it did not describe the act.

In this case, it is the appellant’s submission that sex is a generic term and that it can happen in many ways without the genital organs of the players necessarily coming into contact. I do agree with that submission that PW1 did not disclose what happened between her and David and therefore, whether it amounted to penetration as required in the Sexual Offences Act. The prosecutor failed to lead proper evidence to describe the act and the trial court which had a duty to find out from PW1 what actually took place, did not do so. The finding of pus cells in the original swab by PW2 may have tended to point at the act of penetration but the evidence on perforation of the hymen was unclear and the fact that no injuries were found on PW1’s genitalia casts doubts in the court’s mind as to whether penetration took place.

In addition, the prosecution produced the P3 form and PCR Forms which were filled when PW1 was examined. PW2, a Clinical Officer who testified in court did not fill the P3 form but her colleague Philemon. PW2 admitted to having altered the P3 form at page 2 paragraph 2(a) where it was written ***“no injuries or bruises or any marks outside the genitalia observed. Non inflammation of masses noted. Hymen not intact (perforated).”*** It means the P3 form had read that hymen was intact, in brackets, perforated. The two statements of PW1 and Philemon were contradictory and I do agree with the defence submission that Philemon should have been called as a witness to explain what he saw when he examined PW1 and whether the hymen was perforated or not. PW2 admitted in court that she altered the P3 form that was authored by Philemon to add the word ‘not’ so that it read the hymen was ‘***not***’ intact. PW2 justified the alteration by saying that she was tallying the P3 form with the PCR Form”

Without Philemon’s testimony, this court cannot tell what PW2 and Philemon found on examining PW1.

It is trite law that a charge of defilement or rape is not necessarily proved by medical evidence but can be proved by other evidence direct or circumstantial – See ***Kassim Ali v Republic CR.App.84/05***, the court said ***“.....the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”***

However, in this case, the complainant having failed to tell the court what exactly happened between her and David, the court had to keenly look at the available medical evidence for corroboration. I find the medical evidence to be wanting and unhelpful in proving whether or not a penetration took place.

No doubt PW1 was a minor. A birth certificate was produced which indicates that she was born on 4/4/2002. By 2015, she was only 13 years old. Having considered the evidence on record, I am convinced that she was taken away from home by David who had the opportunity to commit the offence alleged. The finding of pus cells in PW1 is not conclusive of an act of penetration having taken place or that it was with the appellant. If it was an infection, the police should have gone further to have David medically examined which was not done.

The trial court therefore erred in arriving at the finding that penetration had been proved.

David faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The facts of the charge are that David caused his penis to come into contact with the vagina of the complainant. An indecent act is defined Under Section 2 of the Sexual Offences Act as follows:

“indecent act” means an unlawful intentional act which causes:-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) Exposure or display of any pornographic material to any person against his or her will.”

In her evidence, PW1 merely stated that David removed his clothes and also forced her to remove hers. The evidence does not disclose whether her genitalia, buttocks, breasts ever came into contact with those of David or any other part of his body. In my view, the evidence does not support the charge of indecent act.

Having considered all the evidence on record and though I do not believe the defence, I am convinced that David lured PW1 from her home, took her to Nakuru with a promise of marriage. I believe he must have been up to mischief with PW1 but the prosecution failed to lead sufficient evidence in support of the charge. David is a prime suspect, but suspicion cannot be a basis for a conviction in a criminal case. The prosecution has a duty to prove the charge beyond reasonable doubt it but failed to do so.

I find the conviction was unsafe. I hereby quash the conviction and set aside the sentence. David is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at *NYAHURURU* this *30th* day of *May*, 2018.

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Soi - Court Assistant

Appellant – present