



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 13 OF 2016**

**CHARLES MWANGI MWAI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Charles Mwangi Mwai was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act before the Senior Resident Magistrate Kerugoya Law Courts in Criminal Case No. 3/2015. He pleaded not guilty and after a full trial he was found guilty, convicted and sentenced to serve life imprisonment.

The appellant was dissatisfied with the conviction and sentence and filed this appeal based on the following grounds:-

1. That the learned Trial Magistrate, erred in both law and fact by not considering that the evidence adduced did not support the charge.
2. That the learned trial Magistrate, erred in both law and fact by failing to consider that there were gaps and discrepancies regarding the evidence tendered.
3. That the learned trial Magistrate, erred in both law and facts by failing to consider that the evidence produced was uncollaborative.
4. That the learned Trial Magistrate, erred in both law and facts by not considering there was an existing grudge between the mother of the complainant and the appellant that resulted to the fabrication of the case.
5. That the learned trial Magistrate, erred in law and facts by not considering that the child was taken to hospital after two days for examination and the likelihood of the evidence being eroded was too high.
6. That the learned Magistrate erred in law and in fact by not considering that the Medical Officer did not conclude that there was penetration.
7. That the learned Magistrate erred in both law and facts by failing to consider the defence.

He pray that the conviction be quashed, the sentence imposed be set aside and he be set at liberty.

The State opposed the appeal and submitted that the case was proved beyond any reasonable doubts. The appellant's conviction and sentence were safe and the appeal should therefore be dismissed.

This is a 1<sup>st</sup> appeal which presents as a retrial before this court and calls on the court to consider the evidence and make its own independent finding. The court has however to leave room for the fact that unlike the trial Magistrate it did not have an opportunity to see the witnesses and assess their demeanor. This in line with the holding in *Okeno -v- R(1972) E.A 32*.

The facts of the case are that the complainant S.M.N was a child aged nine years. On 1/3/2015 at 7.00 Pm the appellant who was her neighbour gave her mangoes and told her to go to his home for more mangoes. The complainant went to the home of the appellant and while there the appellant armed himself with a knife and told her not to scream for help as he would stab her with a knife. The appellant undressed the complainant and he removed all his clothes then defiled the complainant on his bed. The complainant was rescued from the house and escorted to hospital. The doctor found that the hymen was broken, and lacerations were noted. The conclusion was that the girl was defiled. The treatment notes and P3 form were produced as exhibit 1 & 2. The appellant was then charged. A birth notification showing that the complainant was born on 20/10/2005 was produced as exhibit -3- and proved that at the time of the offence was committed she was aged nine (9) years.

The appellant gave a defence and denied the charge. He alleged that he has sour relations with the complainant's mother which led to the fabricated story.

Having considered the evidence, I am of the view that the evidence adduced by the prosecution was cogent and overwhelming and proved the charge against the appellant beyond any reasonable doubts.

The prosecution proved the three main issues for determination in cases of defilement which are as submitted by the state:-

- i) The victim and her age.
- ii) Penetration
- iii) The identity of the perpetrator.

The complainant gave evidence as PW-1-. After a voire dire examination the trial court found that she was aware of the nature of proceedings and proceeded to record her evidence. She was a child of tender years as defined under **Section -2- of the Children's Act** which provides:

***“a child of tender years means a child under the age of ten years”***

**The Oaths and Statutory Declarations Act, Section 19(1)** provides that the evidence of a child of tender years though not given on Oath may be received if in the opinion of the court the child is possessed of sufficient intelligence and understands the duty of speaking the truth. It provides:

***“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”***

The evidence of the complainant was properly admitted. The prosecution proved that the complainant was aged nine (9) years at the time the offence was committed with the production of the birth notification **exhibit 3**. as she was born on 30/10/2005. Prove of the age of the victim is important in sexual offences as the sentence to be meted out is dependent on it. He appellant was charged under **Section 8(1)** as read with **section 8(2) of the Sexual Offences Act**. It provides:-

***“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be imprisoned for life”***

Age becomes a crucial factor as it determines not only the section the person is to be charged but also the sentence. Where the prosecution charges an accused under the section it embarks on proving the age of the victim, penetration and the person responsible for committing the offence also called the perpetrator.

The prosecution discharged the burden to prove that the complainant was aged nine years.

The prosecution called PW-4- Doctor Ndirangu Karomo a medical officer at Kerugoya Hospital who produced a P.3 form which was filled by Stephene Nguni Muna. He testified that the hymen was broken and there were lacerations noted. The broken hymen in a girl aged nine years is prove that the child was defiled. The Sexual Offences Act defines defilement as follows:-

***“ A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”***

The broken hymen is prove of penetration and corroborates the testimony of the complainant that she was defiled. The complainant remained firm during cross-examination that the appellant is the one who defiled her.

The appellant was identified as the person who defiled the complainant. He was well known to her as they were neighbours. Furthermore her testimony was corroborated by PW2 and PW-3- who found the complainant in the house of the appellant. The complainant did not have her biker on and the accused had wrapped himself with a blanket. The defence of the appellant was a mere denial. The allegation that he was framed over a grudge with complainant is not true and is a clear afterthought as it was not put to PW-3- when she was cross-examined. Such allegation is sham. The appellant was identified as the person who defiled the complainant and this evidence was well corroborated.

I find that appellant was properly convicted. The trial Magistrate properly considered the evidence adduced in support of the charge and arrived at the inevitable conclusion that the appellant was guilty of the charge. Having considered the evidence, I am of the view that there were no discrepancies in the evidence tendered. In any case minor discrepancies will not weaken the evidence unless the discrepancies are such they raise doubts in the evidence tendered.

The medical evidence confirmed that there was penetration as I have pointed out above. The treatment notes which were produced as exhibit -1- show that the complainant was seen at the hospital on 2/3/15 at 1430 hours. It is not true that she was treated after two days. The P.3 form was filled on 4/3/2018. The doctor testified and was cross-examined. The medical evidence was reliable and corroborated the evidence of PW-1- on the fact of penetration.

On submissions, I find that the plea was properly taken. The record shows that the substance of the charge and every element was stated by the Court to the appellant and he pleaded not guilty. The appellant stated that he would plead in kikuyu. He pleaded not guilty and thereafter he participated in the trial. The charge sheet gave the date of the offence. Section 134 Criminal Procedure Code provides:

***“Every charge or information shall contain and shall be sufficient if it contains as statement of the specific offence or offences with which the accused person is charged, together with such particulars as maybe necessary for giving reasonable information as to the nature of offence charged.”***

The accused was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act. Particulars are that on 1/3/2015 at Kiarugu village he unlawfully and intentionally allowed his penis to penetrate the vagina of S.M.N a girl aged 9 years.

The particulars were sufficient to make the appellant to understand the nature of the charge. They were properly stated.

On the allegation that the charge sheet is defective for not giving the name of the minor. The particulars state that the appellant penetrated the vagina of S.M.N. a girl aged nine years. The age given shows that the complainant was a minor child. The minor child did give evidence in court and the appellant had a chance to see her. No miscarriage of justice was occasioned by not stating the complainant’s full names. Section 19 of the Children’s Act provides:-

***“Every child shall have the right to privacy subject to parental guidance.”***

The right of the child to privacy was observed by giving the initial and not the name which would disclose her identity and violate the right to privacy. Such protection is necessary as a sexual offence traumatises the child and would have adverse effect if her identity is disclosed before the age of eighteen as it would cause trauma and cause the child to be withdrawn. The practice has been to use the initial of the child on the charge sheet and proceedings to protect her identity. Failure to disclose the names of the child is in the best interest of the child. Article 53(2) of the Constitution provides:

***“A child best interest are of paramount importance in every matter concerning the child.”***

The submission is without merits. The charge and particulars were disclosed and the appellant ably answered to the charge and participated in the proceedings then finally gave his defence.

The charge sheet was in order and not fatally defective.

The appellant submits that though the witnesses stated that he was their neighbour he was arrested on 17/3/15 and the offence was committed on 10/3/15. The offence was committed on 10/3/15. The appellant was identified as the person who committed the offence. The allegation was not made against any other person. The investigating officer testified that failure to arrest the appellant was because they were still conducting investigation. The law does not set any time frame within which an accused person should be arrested upon being suspected of having committed an offence. Failure to arrest him does not raise doubt on the identity of the person who committed the offence. The appellant in his defence stated that he was arrested on 15/3/15 and the police officers explained to him that the reason for arrest was because he had defiled a child.

This incident took place in appellant’s house. There is evidence that the appellant chased away other children and led the complainant to his house where he defiled her. PW-3- the mother of the complainant found the appellant in bed with the complainant. The appellant was well known to the complainant and her mother as he was a neighbour and family friend. The evidence is one of recognition. It has been held that the evidence of recognition is better than that of identification. It was held in Peter Musau Mwanzia –v- Republic (2008) eKLR, court of Appeal,

***“In the well known case of R-v- Turnbull (1976) 3 All E. R. 549 at Page 552 it was stated: Recognition may be more reliable than identification of a stranger -----***

***We do agree that for the evidence of recognition to be relied on the witness claiming to recognize the suspect must establish circumstances that would proof that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger -----***

***Such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence can recall very well having seen him earlier on before the incident.”***

The circumstances of this case show that the witnesses knew the appellant very well. He led the complainant to his house in broad daylight and witnesses saw him. The complainant’s mother found him in his house and recognized him when he lit the lamp. This ground has no merits. The trial Magistrate found the defence of the appellant to be full of wild allegations which were not substantiated and rejected the defence.

The appellant submits that he did not understand the implication of a witness giving evidence on behalf of the other. This is with regard to the fact that Doctor Ndirangu Karomo testified that he testified on behalf of his colleague Stephene Ngige who was on leave. The law allows an expert witness to produce evidence of his colleague where he is able to know his handwriting and signature. The doctor testified that he was well versed with the handwriting and signature of his colleague doctor who filled the P3 form. Ignorance of the law is not a defence. The appellant has not stated that he suffered any prejudice. Section 77(1) of the Evidence Act provides:

***“In Criminal Proceedings any document purporting to be a report under the hand of Government Analyst Medical Practitioner or of any ballistic expert, document examiner or geologist upon any person or matter or thing submitted to him for examination or analysis may be used in evidence.”***

The witness Doctor Ndirangu Karomo (PW4) testified and was cross-examined. The submission is an afterthought and without basis. The medical evidence proved beyond any reasonable doubts that there was penetration. It is speculation to state that the broken hymen can be caused by anything. There is evidence which proves that the broken hymen was noted after the allegation of defilement. The submissions are without merits.

The prosecution adduced cogent evidence which proved the charge beyond any reasonable doubts. The prosecution proved the necessary ingredients of the charge which are the age of the victim, penetration and the perpetrator. The age was proved by production of birth notification which proved that the complainant was nine years at the time the offence was committed. It was produced as exhibit 3 and shows he was born on 20/10/05. Penetration was proved by medical evidence in the P3 form, exhibit 2, treatment notes exhibit I and corroborated the evidence of the complainant that there was penetration. The appellant was recognized as the perpetrator.

**In Conclusion:**

The prosecution adduced overwhelming evidence which proved the charge against the appellant beyond any reasonable doubts. The conviction and sentence were safe well founded and in accordance with the law. The appeal is without merits. I make an order that –

1. The appeal lacks merits.
2. The appeal is dismissed.
3. The conviction and sentence are upheld.

**Dated at Kerugoya this 31<sup>st</sup> day of July 2018.**

**L. W.GITARI**

**JUDGE**