



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 12 OF 2018

J N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's

Court at Maseno (Hon. R.S. Kipngeno SRM) dated the 8th February 2018

in Maseno SPMCCRC No. 1235 of 2014]

JUDGMENT

1. The Appellant, J N, was convicted for the offence of **Defilement**, and was sentenced to 20 years imprisonment.
2. He was also convicted for the offence of Giving False Information to a person employed in the Public Service, and was sentenced to serve 1 year imprisonment.
3. The learned trial magistrate ordered that the two sentences should run concurrently.
4. In his appeal, the Appellant has submitted that the alleged Identification of the perpetrator was achieved under very unfavourable conditions.
5. His view was that all the evidence adduced by the prosecution did not point at the person who had actually defiled the Complainant.
6. The Appellant said that the evidence pointed at the person named J, as the perpetrator of the offence. Therefore, the Appellant feels that he may only have been the scape-goat, after the police failed to arrest Jack.
7. It was the Appellant's further contention that he had been framed because of the grudge which existed between him and the Complainant's mother.
8. He pointed out that even after the alleged defilement, it is he who was carrying the Complainant's medication.
9. At that time, the Appellant was coming from the police station, and he was saying that the person who had defiled the Complainant was J.
10. I understand that to mean that the Appellant was not arrested immediately after the offence had been committed, and that he had been to the police station, but he was not detained.
11. Another issue which the Appellant raised was in relation to the age of the Complainant. In his view, the prosecution ought to have produced documentary evidence to prove the age of the Complainant.
12. His argument was made in the following way;

“Section 71 of the Evidence Act states that;

‘If a document is required by law to be attested it shall not be used in evidence until at least

one attesting witness has been called for purposes of proving its execution.’

It is my humble submission that failure to produce a birth certificate occasioned a miscarriage of justice.”

13. In answer to the appeal, Miss Barasa, learned State Counsel submitted that the state had proved all the ingredients of the offences for which the Appellant was convicted.
14. The Respondent pointed out that the age of the Complainant was proved through Exhibit No. 4, and that the act of penetration was proved through medical examination.
15. Being the first Appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions.
16. The Complainant, “**VIS**” testified that she was 10 years old.
17. It is common ground that the Appellant is the father of the Complainant.
18. Both the Complainant and the Appellant confirmed that the two of them lived alone, in the same house.
19. During cross-examination, the Appellant told the trial court that the Appellant was 10 years old at the time when the offence was committed.
20. Considering that the Appellant was the father of the Complainant, I believe that he must have known the age of his daughter. And given his own testimony on the issue of age, I am surprised that the Appellant should now be asserting that the age of the Complainant was not proved.
21. However, there is a written report dated 1st October 2014, which was prepared by **PW4, JOHN SHIGALI**, which shows that the Complainant’s age was 10 years old.
22. That conclusion was arrived at when PW4 conducted an Age Assessment of the Complainant, at Emuhaya Sub-County Hospital.
23. In the circumstances, I find that the evidence adduced by the Prosecution provided proof of the Complainant’s age.
24. PW4 also testified that he examined the Complainant and that the said medical examination revealed that the Complainant had injuries on her genitalia; her hymen was missing; and her labias were inflamed.
25. In the circumstances, there was clear evidence that the Complainant had been defiled.
26. The next question was about the identity of the person who defiled the Complainant.
27. The Appellant’s assertion, concerning the alleged unfavourable conditions, under which the Complainant identified her assailant, is difficult to comprehend.
28. I say so because this is not a situation in which the Appellant was a stranger to the Complainant. As the Appellant is the father of the Complainant, this was a case of recognition.
29. The Complainant testified that the Appellant had defiled her twice. Therefore, it was not just a single fleeting moment, about which the court could doubt the correctness of the identification of the offender.
30. Furthermore, the Appellant engaged the Complainant in discussions after he had defiled her. He told her to incriminate a person named Jack.
31. So, although the incidents took place at night, there was absolutely no possibility of mistaken identification.
32. I am completely convinced that the Complainant recognized the Appellant as the person who had defiled her.
33. Although the Appellant suggested that he was only framed because of some alleged land disputes, I find nothing that supports that contention. I so find because the alleged land disputes were only known to some elders, according to the evidence of the Appellant.
34. A, who is the Appellant’s in-law, knew nothing about the said disputes.
35. And the Appellant did not even suggest that the Complainant had any knowledge of the land disputes. Therefore, the Complainant cannot have been motivated by a dispute which she knew nothing about.
36. The Appellant described the Complainant as a “*top performer*” in school, who was mentally sound.

37. He also said that the Complainant loved him as her father.

38. In the circumstances, I find that the evidence of the Complainant was that of an intelligent girl, who loved her father, but who refused to be misled by her said father, to implicate Jack.

39. As regards the provisions of **Section 71** of the **Evidence Act**, I find that the written medical report, which incorporated the Age Assessment of the Complainant is not a document which, by law, requires the evidence of an attesting witness, for the purposes of proving its execution.

40. In any event, even if the said report could have required an attesting witness to prove that he had executed it, the author of the report produced it in court, thus authenticating it.

41. I appreciate that the Appellant was arrested more than 3 weeks after the incident took place.

42. Ordinarily, when a suspect had been positively identified, he would be arrested soon after the incident, unless he went into hiding.

43. In this case, the Appellant did not go into hiding.

44. Would that imply that there was lack of certainty concerning the identity of the person who had defiled the Complainant?

45. In my considered view, the delay is not attributable to any difficulty in identifying the offender. I find that it is the Appellant who tried to persuade the Complainant to implicate another person. In effect, he tried to direct the investigators along the wrong route.

46. However, the Complainant emphatically stated that it was the Appellant who had defiled her.

47. The Appellant could be commended for looking after the Complainant from her tender age, after the young girl's mother abandoned the Appellant. However, just because he had been a good father for almost 10 years, is not enough to exonerate him for culpability when the evidence adduced was so overwhelming.

48. In the final analysis, there is no merit in the appeal; and it is therefore dismissed.

49. I uphold both the conviction and the sentence.

DATED, SIGNED and DELIVERED at KISUMU this 27th day of September 2018.

FRED A. OCHIENG

JUDGE