



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 141 OF 2012**

**KEFA MARITA NYANG'AU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) of the Sexual Offences Act No. 3 of 2006**, the particulars being that on the 30th of April 2011 at **[particulars withheld]** village in **LUMAKANDA**, the appellant unlawfully and intentionally caused his genital organ (penis) to penetrate into the genital organ (vagina) of **RW[1]**, a girl aged 9 years.

The appellant denied the charge but after trial he was convicted and sentenced to life imprisonment.

2. It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See ***Okeno v R [1972] EA. 32***

3. PW1 who was the complainant minor told the court that on 30/4/2011 at about 6.00pm, she had gone to collect milk from a local shop when just as she was handing over the milk container, the appellant pulled her into his house and put her in bed.

4. The appellant warned that he would kill her if she raised any alarm before removing her underpants then defiling her-he had closed the door. Other children realizing that she was inside the appellant's house surrounded it- the appellant warned her not to tell anyone what had taken place otherwise he would kill her. She later left and disclosed to her mother what had happened.

5. PW1's mother took her to **TURBO** hospital before making a report at **Mwamba AP line and Turbo Police station**. PW1 says the accused was a person she had seen before but he was not known to her. She only knew Mulei who owned the shop.

6. PW2 was **A M**, the complainant's mother told the trial court that PW1 was 10 years of age and produced her health card proving the same. She confirmed that on the material date, she had sent her child for milk and when she returned, she was crying and could not walk properly.

PW1 told her that she had been defiled by the **Mulei's** worker. She confirmed this by checking her private parts and rushed her to hospital and later reported the matter to the police. On cross examination she stated that the appellant was known to her as she used to collect milk from **Mulei**.

7. **PW3, No. 221297 CPL Janes Nyambereria** attached to **Mwamba Police base** told the trial court that on 30<sup>th</sup> April 2011, the complainant was taken to the station by her mother to report the incident where she had been defiled by a person known to her.

He booked the report and advised that the complainant go for treatment at **Turbo Hospital**. He later got a directive (on 2<sup>nd</sup> May 2011) to arrest the appellant and take him to **Turbo Police** station, and he did so on 3<sup>rd</sup> May 2011.

8. PW4 (Sgt. Albanus Kimongo) attached to Turbo Police station testified that the complainant was brought to the station on 1<sup>st</sup> May 2011 after which he took her to **Turbo hospital** for medical examination. He stated that upon examination it was found that the accused had been defiled and the person who had done it was known to her.

9. PW4 stated that the appellant was taken to Turbo Police Station on 3<sup>rd</sup> May 2011 and upon medical examination, he was found to have defiled the minor.

10. Dickson Kebut Korir (PW5) a clinical officer at **Turbo Health Center** testified upon examining PW1 on 30<sup>th</sup> April 2011 he noted that her underpant was blood-stained and she complained of pain in the abdomen and she was also not able to walk properly. He found that she

had whitish discharge from her private parts, deposits in the labia minora and her hymen was broken. A urinal test showed some blood.

11. In his sworn defence, the appellant told the trial court that on 3/5/2011 while on his way to church, three men accosted him and ordered him to accompany them to the police station where he was told that he had been charged. He was later brought to court.

12. The trial magistrate in his judgment pointed out that the evidence solely pointed to the appellant as the culprit, and paying heed to the provisions of section **124 of the Evidence Act** acknowledged that although the minor was the sole witness as to what actually transpired, his observation of her demeanour persuaded him that she was a truthful witness and he had no reason to doubt her testimony. He pointed out that the minor's evidence was consistent with what she narrated to her mother, and her evidence was corroborated by the medical findings of PW5. The trial magistrate also found that the Health Card produced confirmed that minor was 9 years old at the time of the incident. He thus accepted the evidence presented as proving the offence.

13. The appellant contested these findings on the amended grounds of appeal that:

- The trial magistrate failed to adhere to the **voire dire** procedure and disregarded the observation he had made concerning the minor's demeanour.
- The trial magistrate failed to consider that the variance between the name of the complainant in the charge sheet as **R W** and that given in court by the complainant and her witnesses as **R W**.
- The charge sheet was defective, as it failed to show or indicate the subject matter of the offence by not using the word unlawful in the particulars of the offence.
- The evidence of the prosecution witnesses was shrouded and tainted with discrepancies
- The document produced to prove the age of the complainant was not authentic, so the age of the complainant was not proved beyond reasonable doubt.
- The element of penetration was proved by the doctor or clinical officer without observing that no bruises or lacerations observed on the genitalia of the complainant

14. He canvassed his appeal through submissions arguing that the trial magistrate failed to analyze and evaluate the evidence thereby failing to find that the prosecution had failed to discharge the burden of proof yet the minor's evidence was not corroborated.

15. It was his contention that at various times the minor referred to herself **R. W** and **R.W** as did her mother. Further that the clinical card had a lot of discrepancies on the face of it as it did not indicate the age, sex and parentage and the names of PW1 and PW2 were at variance. He also submitted that the investigations were shoddy as the owner of the milk shop, one **MULEI** was not called as a witness. He also maintained that the prosecution's case was marred by contradictions and inconsistencies although he did not specify the inconsistencies.

16. In opposing the appeal Miss **ODUOR** on behalf of the State submitted that the evidence adduced by the witness was consistent, corroborated and linked the appellant to the offence. Counsel pointed out that age was proved by use of the minor's immunization card which showed that the minor was born on 24<sup>th</sup> April 2002, and was 9 years old as at the time of the incident. There was nothing to suggest that this card was doctored or obtained specifically to support the case against the appellant. I take note that the card was issued and was in use in the year 2002-long before this case even sniffed its way to the corridors of justice.

17. The appellant raised the issue of the defective charge sheet being a basis upon which his conviction was erroneous. **Section 382** of the **Criminal Procedure Code** provides thus;

**“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.**

**Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”**

18. The key question is whether the defects highlighted by the appellant occasioned failure of justice. The case of **PETER SABEM LEITU V R, C.R.A NO.482 OF 2007 (UR)** as cited within the Court of

Appeal case of **PETER NGURE MWANGI V REPUBLIC CRIMINAL APPEAL NO. 44 OF 2010** stated as follows;

**“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded...”**

They also cited the case of **NJUGUNA V. R [2002] LLR NO. 3735 (CAK)** where the Court in considering whether a defect in a charge sheet is fatal stated:

**“We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not**

**point out to us any sort of prejudice which the irregularity could or did occasion to him.** [Emphasis added]

I hold the view that the offence of defilement is by the very terminology used, denotes an unlawful act and it would be superfluous and with the greatest respect, a little outlandish to accompany it with the word unlawful. I do not consider that charge sheet as defective as to occasion prejudice or injustice to the appellant.

20. On the matter of proof of Age, the case of **FRED OMAR OMONDO V REPUBLIC CRIMINAL APPEAL NO. 59 OF 2011** contains several cases that address the issue of proof of age. The case of **JOHN OTIENO OBWAR -VS- REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 34 'B' OF 2010** for instance the following was stated;

**“Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence.**

21. In the case of **KAINGU ELIAS KASOMO -V- R. MALINDI CR. APP. NO. 504 OF 2010** the Court of Appeal stated that **“...the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.**

**Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentists.**

**The said assessments while useful and in defilement cases is just that.”**

22. In the case of **FRANCIS OMURONI VERSUS UGANDA, COURT OF APPEAL CRIMINAL APPEAL NO. 2 OF 2000** it was held thus:

**“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”**

In this instance the child's mother confirmed her year of birth which was supported by the immunization record.

23. As regards the names entered in the immunization card the minor's name is entered on the top part of the card-most probably because the space for entering the names was too small. The names of the minor's parents are recorded in the immunization card. As to the interchangeable use of **W** and **W** in reference to **R**, it is significant that at no point in the evidence was it suggested that the names were referring to two different persons...indeed the minor acknowledged both names as hers.

On the question of whether penetration occurred so as to occasion defilement, in the case of **DOMINIC KIBET MWARENG –VS- REPUBLIC 2013 (EKLR)** it was held that;

**“The critical ingredients forming the offence of defilement are:- the age of the complainant, proof of penetration and positive identification of the assailant...”**

24. The court of appeal in **HADSON ALI MWACHONGO V REPUBLIC CRIMINAL APPEAL NO. 65 OF 2015 (MOMBASA)** cited the case of **TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001** where the following was decided;

**“...the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured.”**

25. The testimony of the complainant that she had been assaulted was corroborated by both PW2, her mother and PW5 the clinical officer who had examined her and noted blood stained panty, and a broken hymen, so there was evidence that he had defiled a girl. Need I say more? This ingredient was sufficiently established

26. As regards identification I concur with the observation made by Miss **ODUOR** that the appellant was not a stranger to **RW**. The failure to call one **MULEI** as a witness was not fatal since there was no evidence that he was present when **RW** went to the shop nor did the appellant deny that he was at the shop. His lament is without basis and does not dent the weight of evidence presented at the trial. Consequently I hold and find that the conviction was safe and is upheld. His sentence is as provided under the law and I confirm it. The appeal is dismissed.

**Delivered and dated this 18<sup>th</sup> day of September Eldoret**

**H. A.OMONDI**

**JUDGE**

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[1] Initials used to protect her privacy and identity

