



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 67 OF 2015**

**RAPHAEL KIDIGI MANAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(from the original conviction and sentence by Hon. S.K. Ngetich ,SRM,*

*in Mumias PMC Criminal Case No. 1196 of 2013 dated 27<sup>th</sup> April, 2015)*

**J U D G M E N T**

1. The appellant was convicted of two counts of the offence of defilement. In count 1 he was sentenced to serve 20 years imprisonment and in court 2 to serve 15 years imprisonment. Sentence was ordered to run concurrently. The appellant was aggrieved by the conviction and the sentence and filed this appeal raising the following grounds:

- 1) That the age of the complainants was not proved.
- 2) That there was no medical evidence to link him with the commission of the offence.
- 3) That the evidence tendered was uncorroborated, fabricated and lacked probative value.
- 4) That the trial court erred in rejecting his defence.

2. The charges against the appellant were that on 25<sup>th</sup> December 2013 at about 9 p.m. at Ekero market in Mumias District in Kakamega County, he intentionally caused his penis to penetrate the vagina of D.A (herein referred to as the complainant in count 1), a child aged 13 years and L.Q( herein referred to as the complainant in count 2) , a child aged 13 years.

**Case for Prosecution:**

3. The case for prosecution was that the two complainants were neighbours. That on the material day at 4 p.m. the girl called L.Q. was sent by her sister to Ebutalika village to pick some potatoes. She picked on D.A. to escort her to the place. The two girls set for the said place. That on getting to St. Mary's Hospital they met with a man who was wearing the uniform of a security guard. The man enquired from them where they were going. Upon telling him he convinced them to accompany them to his home so that he could give them fare for the place they were going. They went with him to his house. He detained them there. He prepared a meal. He then defiled them in turns. They slept at his house. On the following day the girls went to the home of a certain woman.

4. Meanwhile the mother to D.A. PW1 looking for the two girls. She found them at the home of the said woman. They told her what had happened. She took them to Mumias police station. Cpl Morris Otieno PW4 recorded their statements. The girls led him to St. Mary's school of the Deaf where they said they were defiled. They met with Timothy Khulunya PW5 who said that he was working with the appellant as a security guard with Wislane security firm. That at the material day he and the appellant were deployed at St. Angela's Vocational School of the Deaf. That on the material day he reported for duty at 5.30 p.m. The appellant went to take his supper. He returned after about 10 minutes in the company of the girls. He said that he owed them money. He left two girls at the gate and said that he was going to look for their money. He later went back at 6.30 p.m. and went away with the girls towards St Peter's Catholic Church. He did not report for work by the time he handed over work on the following day at 7 a.m. In the evening at 6 p.m. He reported for work. Police officers went to his place of work with the two girls. The appellant then went there. The girl's pointed him to the policemen. He was arrested. PC Otieno took the appellant to the police station. He escorted the girls to St. Mary's Hospital for medical examination. They were examined. He issued them with p3 forms that were completed by a clinical officer PW6 at Matungu sub county hospital. The clinical officer

found the complainant in count 1 with a broken hymen with reddish demarcation which was an indication that it was recently broken. He made a similar finding on the complainant in count 2. He concluded that the girls had been defiled. He completed their P3 forms. PC Otieno charged the appellant with the offences. He denied the charges. During the hearing, treatment notes from St. Mary's Hospital and the P3 forms were produced as exhibits. A baptismal card for the complainant in count 1 was produced as exhibit. It indicated that at the time the offence was committed, she was aged 13 years.

#### **Defence case:**

5. When placed to his defence the appellant gave a sworn statement in which he stated that on 24.12.2013 he was working at Sabatia where he was burning bricks. On the following day he travelled to Kambirina where he arrived at 4 p.m. He then came towards St. Mary's. He met Timothy PW5 with whom he had a boundary dispute and who had previously injured him on the leg. When he arrived at St. Jude policemen arrived in a vehicle. They called him. He went to greet them. He was told to enter in to the vehicle. He was taken to the police station and locked up. He was told to produce Kshs.2000/= for him to be released. He demanded to be taken to court. He denies that he defiled the complainants. He said that he does not know them. He denied that he was a security guard.

#### **Submissions:**

6. The state opposed the appeal. The prosecution counsel **Mr. Ngetich** submitted that the complainants identified the appellant. That Timothy PW4 who was an independent witness saw the appellant with the girls on the material day. That the clinical officer PW6 adduced medical evidence that proved penetration. That the charges were proved beyond reasonable doubt. He urged the court to dismiss the appeal.

7. The appellant submitted that it was not established where the incident took place as Timothy PW5 stated it was at St. Angelas Vocationed School of the Deaf yet the proceedings indicated that the minors were found at St. Peter Catholic Church.

That his defence that he was not working with Wislane lane security firm was not disapproved as no records were produced by the said company. He further submitted that the court did not consider his defence that Timothy PW3 had a grudge against him.

#### **Determination**

8. This is a first appeal. It is the duty of a first appellate court to re-examine and evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that it did not hear and see the witnesses testify – **Kinyanjui Vs Republic (2004) 2KLR 364**.

9. The appellant challenged the judgment of the lower court on four grounds - that the age of the complainants was not proved, that there was no medical evidence to connect him with the offence, that there was no adequate evidence against him and fourthly that the trial court failed to consider his alibi defence.

10. When the complainant in count 1, PW2, testified in court on the 30/7/2014, she stated that she was a Std 7 pupil at [Particulars withheld] Primary School. That she was aged 14 years. That she was taken to be Kakamega Provincial Hospital for age assessment where her age was assessed. However, the age assessment report was not produced in court as exhibit.

11. The mother to the complainant in count 1, L PW1, testified that PW1 was born on 1/1/2000. She produced a baptismal card Pexh 1, that indicated that the girl was born on the said date.

12. L.Q, the complainant in count 2 (PW3), testified in court on the 30/7/2014. She stated that at the time she was aged 16 years. That she was later taken to Kakamega Provincial General Hospital where her age was assessed. However, the age assessment report was not produced in court as exhibit.

13. The importance of proving the age of a victim of defilement was emphasized by the Court of Appeal in **Kaingu Elias Kasomo Vs Republic (2016) eKLR** where the court sitting at Malindi said that:

*“ Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim.”*

14. The age of a person can be proved by both documentary and oral evidence as was stated by the Court of Appeal in **Edwin Nyambaso Onsongo Vs Republic (2016) eKLR** (cited in the case of **Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR)**) that :-

*“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “.. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”*

15. The age of the complainant in count 1 was proved by the evidence of her mother PW1 that the girl was born on 1/1/2000. This evidence was supported by the evidence contained in the baptismal card Pexh 1 that the girl was born on the said date. The estimated age in part “c” of the P3 form was 13 years. This would put the age of the girl at the time of the commission of the offence at 13 years. The age of the complainant in count 1 was therefore proved to be 13 years.

16. The complainant in count 2 stated in her evidence in court that she was aged 16 years.

Her estimated age in part “ c” of the P3 form as per the findings of the clinical officer was 12 years. The police officer who filled part 1 of the P3 form estimated the age of the girl at 13 years. It is clear that the girl was below the age of 18 years. The offence of defilement in count 2 was thereby proved against the appellant.

17. The appellant submitted that there was no medical evidence to link him with the commission of the offence. He said that he was not taken for medical examination to ascertain whether he is the one who defiled the complainants.

18. However the position of the law is that defilement can be proved without medical evidence to link an accused person to the commission of the offence. In **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010** (cited in **Dennis Osoro Obiri Vs Republic (2014)eKLR**) the Court of Appeal held that :-

**“Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person ...under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief.”**

19. In **AML Vs Republic 201 eKLR**. The Court of Appeal stated that: **the fact of rape or defilement is not proved by a DNA (read medical) test but by way of evidence.**

The court can therefore convict an accused person in a defilement case without the support of medical evidence if the court is satisfied that the victim is telling the truth. Oral evidence is also sufficient to prove a charge of defilement In this case there was credible evidence of the two complainants that the appellant defiled them. Their evidence was corroborated by Timothy PW5 who saw the appellant in the company of the girls. There was medical evidence to prove that the girls had been defiled. The fact that the appellant was not examined to obtain medical evidence to linking him with the crime does not disapprove that he committed the crime. The appellant’s argument on medical evidence is therefore dismissed.

20. The complainants did not know the appellant before. It is clear that the complainants are the ones who identified the appellant in the presence of other witnesses – the mother to the 1<sup>st</sup> complainant, PW1, Timothy PW4 and the investigating officer PW4. The complainants are therefore the ones who led to the arrest of the appellant. Timothy corroborated the evidence of the complainants that he saw them in the company of the appellant. There is then no doubt that the appellant was the perpetrator of the offences. He was identified beyond reasonable doubt. The trial magistrate did not err in his finding that the appellant was identified as the perpetrator of the offences.

21. The appellant contended that Timothy PW5 had a grudge against him due to a boundary dispute. The trial magistrate in his judgment stated that the appellant did not cross examine PW5 on that issue. Indeed, the appellant did not cross – examine PW5 on that issue. That aspect of the defence can only have been an afterthought. The trial magistrate did not err in dismissing it.

22. The appellant submitted that the trial court did not consider his defence of alibi. The burden of proving falsity of an accused’s defence of alibi lies on the prosecution - see **Karanja Vs Republic** (1983) KLR 501.

23. Though the trial court did not state explicitly that it had considered the defence of alibi, it is clear that it did so as it stated that the appellant “held them (the complainants) the whole night in his house during which he forced them to have sex with them in turns”. The night referred to in the judgment is the night the accused was alleging that he was at Sabatia and not at Ekeru. The trial court therefore found that the appellant was at his home at Ekeru and not at Sabatia on the material night. The alibi was thereby considered and dismissed. On my own independent evaluation of the evidence, I find that the trial magistrate was correct in dismissing the defence of alibi. Timothy PW5 corroborated the evidence that the appellant was on the 25/12/2013 working at Mumias. That there were no documents from the security firm produced to prove that the appellant was working there did not displace the evidence of Timothy that the appellant was working with him at Mumias on the material day. Timothy was a credible witness that he was working with the appellant at the aforesaid security firm. The alibi was thereby disproved.

24. In the whole, the appellant was convicted on cogent and credible evidence. The appeal on conviction is dismissed.

25. It was proved that the complainant in count 1 D.A. was aged 13 years at the time the offence was committed against her. A person found guilty of defilement of a child aged between 12 and 15 is liable to imprisonment for a period of not less than 20 years. The appellant was given the minimum sentence. The sentence was lawful.

26. The trial magistrate held that the complainant in count 2 was aged 15 years. Her estimated age in the P3 form was 12 and 13 years. The apparent age of the girl was 13 years. The appellant is convicted in count 2 of defiling a child of 13 years of age. The sentence in count 2 is substituted with one of 20 years imprisonment.

27. In the foregoing the appeal on conviction on both counts is dismissed. The sentence on count 1 is upheld. The sentence in count 2 is set aside and substituted with one of imprisonment for a period of 20 years. Both sentences to run concurrently.

**Delivered, dated and signed in open court at Kakamega this 28<sup>th</sup> day of November, 2018.**

**J. NJAGI**

**JUDGE**

**In the presence of :**

.....for appellant

**Juma.....for state**

**George.....court assistant**

**Appellant –present**

**30 days Right of appeal.**