



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 75 OF 2017

DAVID WEPUKHULU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in SOC Case Number 5 of 2015

in the Principal Magistrate's court at Iten – Hon. Nelly Chepchirchir Adalo (RM)

JUDGMENT

1. The appellant herein, **DAVID WEPUKHULU IVAN**, was charged with the first count of defilement contrary to section 8(1) as read with section 8(2) of the sexual offences Act no. 3 of 2006. The particulars of the offence were that on diverse dates from April 2016 to—1Ith July 2016 at unknown time at (particulars withheld), intentionally and unlawfully committed an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of NJ (particulars withheld) a girl child aged 6 years old. He also faced the alternative charge of committing an indecent act with the said child by touching her vagina with his penis.

2. The appellant pleaded not guilty to both the main count and a trial was conducted in which the prosecution presented the evidence of a total of 5 witnesses and at the close of the prosecution's case, the trial court found that a prima facie case had been established against the appellant who was then places on his defense and at the close of the trial, the appellant was found guilty of the main count of defilement and he was consequently convicted and sentenced to life imprisonment thereby triggering the instant appeal.

3. In his petition of appeal, the appellant faults the trial magistrate for convicting him when the evidence presented by the prosecution witnesses was wanting, contradictory and uncorroborated. He also states that the trial magistrate erred in failing to appreciate that the complainant was coached and that there existed a grudge between him and the minor's mother who owed him money in respect to the dues owed to him for the work that he had done for her.

4. At the hearing of the appeal the appellant relied on his written submissions which I have carefully considered while Miss Mumu, learned counsel for the state submitted that all the ingredients of defilement namely; age of the minor, penetration and identification of the appellant as the perpetrator of the crime were proved beyond reasonable doubt.

5. As the first appellate court, the duty of this court is to reconsider and reanalyze the evidence tendered during the trial afresh with a view to arriving at its own independent findings while bearing in mind the

fact that it neither heard nor saw the prosecution witnesses testify.

6. A summary of the prosecution's case was that the appellant was employed by PW2 as a herd's man. PW1, the complainant herein, who was at the time of the incident aged 6 years old, is the daughter of PW2. She testified that on diverse dates between April and July 2016, the appellant would defile her in their kitchen when she came home from school. PW2, noticed that the complainant was unwell and had pain and difficulty in passing urine and on enquiring from her what the problem was, the complainant informed her that she had been defiled by the appellant. PW2 checked the complainant's private parts and discovered that there was some pus like discharge after which she decided to take the minor to hospital where PW4, Dr. Winfred Kimosop noted that the complainant was terrified, in pain and walked with difficulty. On examination, PW4 found that the complainant's hymen was torn and that she had fresh and healed tears on the vagina as well as whitish discharge and blood stains. PW5, was PC Allan Njagi the investigating officer. He received the complainant's defilement report, issued her with a P3 form and arrested the appellant.

7. When placed on his defense, the appellant gave an unsworn statement in which he denied the offence and stated that he had been framed in the case by PW2 who owed him salary for the work he had done for her.

8. I have considered the instant appeal, the record of appeal and the rival submissions of the appellant and the state. I find that the main issue for determination is whether the prosecution proved all the ingredients of the offence of defilement to the required standards.

9. This Court is aware that the ingredients of defilement which were highlighted in the case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

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

10. On the age of the complainant I note that the minor's birth certificate was produced during the trial as exhibit. The offence was committed on diverse dates between April and July 2017 and I therefore find that the age of the complainant was proved to be 6 years.

11. On identification of the appellant, I find that the complainant knew the appellant very well as her mother's employee. She referred to him as Davy and positively identified him as the accused in the dock during the trial. She informed PW2 that it is the appellant who defiled her. The alleged defilement took place on diverse dates during the day when the complainant came back home from school. I find that the appellant was positively identified as the complainant's assailant.

12. As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

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

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

13. PW1 testified as follows as regards identification of the appellant and penetration at page 4 of the typed proceedings of the trial Court:

“That man is called Davie. He used to work for us. He was our herdsman. He came to our home recently. Davie did “tabia mbaya” to me..... He did tabia on me in April at about 5pm at home. I was home from school. He did “tabia mbaya” in our kitchen. I was seated on a stool while he was kneeling down. I had a yellow skirt. It was not school uniform. I had changed clothes. He pulled my skirt up and removed my inner pants. He had a trouser and underwear. He lowered his trouser to just below his thighs. He then removed his thing that

he uses to urinate and inserted it on mine that I use to urinate. I felt pain. It was not the first time that he was doing that to me..... I told my mother what Davie had done to me when I started feeling pain while urinating.”

14. The Appellant did not controvert the complainant’s evidence even though he claimed that the complainant had been coached to lie. I find that the testimony of the complainant was consistent and graphic. She explained defilement incident in great detail and in a step by step manner that left no doubt in the mind of the trial magistrate that she was indeed defiled by the appellant. The trial magistrate observed as follows on the testimony of the minor:

“PW1 passed as a young vulnerable child whom the accused had taken advantage of severally. The court observed the demeanour of the young girl. I am convinced that she was telling the truth.”

15. The doctor, PW4, also testified that the hymen of the complainant was broken and there was discharge and blood stains on her genitalia which had fresh and old tears. The doctor’s evidence corroborated the evidence of the complainant. I therefore find that the prosecution proved, beyond reasonable doubt, that there was penetration of the complainant by the Appellant.

16. One of the grounds listed in the petition of appeal is that the trial court failed to consider the appellant’s defence without giving any cogent reason. Section 169 of the Criminal Procedure Code provides as follows:

1. Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

2. In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

3. In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

17. I have examined the judgment by the learned trial magistrate, and I find that the Appellant’s claim is not supported. The trial magistrate set out the unsworn statement given by the Appellant in the said judgment, but found that the complainant was a truthful witness. I have examined the said evidence, and find that all the Appellant did in his defense was to describe the events on the day of his arrest and claim that the complainant’s mother had framed him in the case because of the debt that she owed him. I find that the appellant’s defense did not impeach the otherwise watertight case of the prosecution. I therefore find no reasons to interfere with the trial magistrate’s finding in this regard.

18. I further find that the prosecution proved all the elements of the offence of defilement and that the Appellant’s conviction was safe and based on sufficient evidence.

19. Turning to the appeal against the sentence, I note that the Appellant was charged and convicted of the offence of defilement under section 8(2) of the Sexual Offences Act, which stipulates that:

“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.”

20. It is to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment. While sentencing is at the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. I am

guided by the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret.**

21. I accordingly find that the instant appeal is unmerited and I dismiss it. I uphold and affirm the conviction and sentence of the Appellant for the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act, Act No. 3 of 2006.

It is so ordered.

Dated, signed at Nairobi this 6th day of December 2018

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 19th day of December 2018.

OLGA SEWE

JUDGE

In the presence of:

Appellant in person

Ms Mumu for state

Court Assistant – C. Towett