



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 156 OF 2015

JOHN BUSAURE WATI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. J Nthuku –Senior Resident Magistrate delivered on the 3rd June, 2015 in CMCR Case No. 12 of 2012)

JUDGMENT

The appellant herein **JOHN BUSAURE WATI** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant was first arraigned in court on 10/11/2012 facing a charge of **DEFILMENT CONTRARY TO SECTION 81 as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On the 29th day of December, 2011 at [particulars withheld] Estate in Nakuru District within Rift Valley Province, unlawfully and intentionally committed an act by inserting a male genital organ namely penis into a female genital organ namely vagina of FCK, a child aged 12 years which caused penetration”

The appellant also faced an alternative charge of **INDECENT ACT WITH A GIRL CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant entered a plea of ‘**Not Guilty**’ to both charges. His trial commenced on 30/8/2012 at which trial the prosecution led by **CHIEF INSPECTOR OYIER** called a total of four (4) witnesses in support of their case.

The complainant a 12 year old girl testified as **PW2** in the case. She told the court that on 29/12/2011, she was outside the family home washing dishes. The appellant who was a neighbor came and took her hand and led her to a nearby quarry. He then undressed her laid her on the ground and proceeded to defile her. Since the appellant had threatened to kill the child if she revealed what had happened. He gave her Ksh 50/= and told her to go home.

PW3 A MM was the complainant’s mother. She told the court that one ‘**Mama Z**’ alerted her to question her daughter closely. **PW3** did question the child who then revealed to her that she had been defiled by a

neighbor. The matter was reported to the chief and then to the police. The complainant was taken to hospital for examination and treatment. Eventually the appellant was arrested and charged with the offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on to his defence. He gave a sworn defence in which he denied having defiled the child.

On 3/6/2015, the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of Defilement. After listening to the appellants mitigation the court sentenced him to serve twenty (20) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

MR. OTIENO Advocate argued the appeal on behalf of the appellant. **MR. MOTENDE** learned State Counsel opposed the appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the prosecution evidence and to draw its own conclusions on the same (see AJODE Vs REPUBLIC [2004] KLR 82). Similarly in MWANGI Vs REPUBLIC [2004] 2 KLR 22, The Court of Appeal held as follows

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence”.

The first question to be answered in this case is whether the complainant was indeed defiled on 29/12/2011 as she alleged.

The complainant told the court that on the material day she was washing dishes outside the family home. The appellant come and led her to a nearby quarry. The complainant went on to narrate what followed in her own words

“There was nobody in the quarry he said nothing, he pulled my dress up and removed my panty laid me on the ground and lay on me. He had a trouser unfastened the belt and pulled the trouser and removed his inner wear. I saw his organ which is used for passing urine, he put it inside here (touches her genitals) and I felt pain and he pushed it in and out many times, he covered my mouth and I couldn’t scream. He gave me 50 bob when he finished and told me not to tell anyone”

The complainant has given her a very clear concise and indeed a graphic account of what transpired. In view of the details provided I find it unlikely that this narration is a fabrication. Furthermore I do not see what if anything the child would have stood to gain by faking up such a story. In many societies there is a stigma attached to victims of sexual assault. The child would not have claimed that she had been defiled if no such incident occurred.

In order to prove defilement there must be evidence of penetration. Aside from the testimony of the complainant herself on this point, there is also the evidence of **PW1 DR. JUSTUS NONDI** who was the doctor who examined the complainant. **PW1** testified that he examined the child on 19/11/2012. **PW1** noted that her hymen had an old tear and he gave the approximate age of the injury as about 7 days. He produced her P3 form as an exhibit. **P. exb 1.**

Counsel for the appellant submitted that the existence of old tears in the complainant’s hymen was evidence of previous sexual activity. He further suggested that the child had engaged in consensual sex with a person other than the appellant. Whether or not the child had previous sexual escapades is not the issue. Her character and morals are not on trial. In any event a child under the age of 18 years is deemed incapable under law to give consent to sexual intercourse. The matter in issue before this court are the events of 29/12/2011. The appellant was charged with having defiled the child on that particular date. Her previous sexual history (if any) is not a matter for determination in this case.

Whilst I do concede that the fact of old tears in the hymen is indicative of previous sexual activities, the fact that the complainant was defiled on 29/12/2011 as she alleged is not ruled out. **PW1** clarified under cross-examination that **“a hymen broken within 7 days is considered as fresh”**

In this case the complainant told the court that she was defiled on 29/12/2011. She was not examined by a doctor until 19/1/2012 almost three (3) weeks later. Based on the definition given by **PW1** the tear in her hymen would be classified as an **‘old tear’**. The medical evidence therefore is not in any way inconsistent with the testimony of the complainant. Based on the evidence on record, I find that the fact of penetration (and therefore defilement) has been proved beyond reasonable doubt.

The next question requiring determination is that of identification. Has the appellant been reliably identified as the person who defiled the complainant?

In her evidence the child identified the appellant as the man who defiled her. The incident occurred during the day time and visibility was good. The complainant spent ample time in close proximity with the appellant. She told the court that the appellant came to where she was washing dishes and took her to a nearby quarry. As he defiled her the appellant lay on top of the child. She had ample time to see and identify him.

The complainant told the court that the appellant was a neighbor who was well known to her as **‘John’**. **PW3** the child’s mother confirmed that the appellant was their neighbor. Likewise in his defence the appellant confirmed that he was a neighbor to the complainant’s family, when questioned later by her mother the complainant told her that it was **‘John’** their neighbor who had defiled her. She did not at any time waiver in her identification of the appellant. Given that the appellant was a man well know to the child there exists clear evidence of recognition. This evidence of recognition was held by the Court of Appeal in **ANJONONI & OTHERS Vs REPUBLIC [1989] KLR** to be **‘more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the persons knowledge of the assailant in some form or other’**. The appellant was a man whom the child knew very well and there is little possibility of a mistaken identity.

The question arose as to why the child took so long to inform her mother of the incident. The complainant in her cross-examination explained that

“I didn’t say because he said he will kill me”

It is clear that the child refrained from reporting the incident because the appellant had threatened to kill her if she did so. In the circumstances her silence was understandable.

Counsel for the appellant also raised the issue of failure by the prosecution to call what he termed **‘a crucial witness’** in the case. **PW3** the child’s mother told the court that a neighbour whom she referred to as **‘Mama Z’** is the one who alerted her to the fact that her child may have been defiled. It appears that this **‘Mama Z’** had seen the child in the company of the appellant and decided to alert **PW3**. The appellant in his defence confirms that **‘Mama Z’** was their landlady.

The said **‘Mama Z’** was never called as a witness in the trial. Was that failure to call her fatal to the prosecution case? I think not. This **‘Mama Z’** was not an eyewitness to the defilement. She was merely a concerned neighbor who decided to alert the complainant’s mother that there could be a problem with her child. Acting on this alert by **‘Mama Z’** **PW3** decided to question her daughter at which point the child revealed that the appellant had defiled her. The prosecution is not under any obligation to call as a witness every person mentioned in a trial. The prosecution is only obliged to call such witnesses as are required to prove their case beyond reasonable doubt. In my own view **‘Mama Z’** was not a crucial witness. She was more of a periphery witness. Failure to call her did not weaken the prosecution case at all.

Based on the available evidence I am satisfied that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant.

The last factor requiring proof in this case is the age of the victim. In the case of **ALFRED GOMBE OKELLO Vs REPUBLIC [2010]eKLR** the Court of Appeal stated thus

“In its wisdom Parliament chose to categorize the gravity of that offence (Defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt....”

Likewise in **KAINU ELIAS KASOMO Vs REPUBLIC [2010]eKLR**, the Court of Appeal sitting in Malindi held that

“Age of the victim of the Sexual offence 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”

How is age proved? Ordinarily by way of documentation such as a birth certificate. In this the complainant told the trial court that she was 12 years old. **PW3** the complainant’s mother also said that her daughter was 12 years old.

PW1 the doctor told the court that the complainant’s age was assessed by a dentist at the hospital and he produced the age-assessment report which gave her age as 12 -15 years old. **P. exb 3**. This was a scientific method of determining age by way of dental formula. Finally on this issue of age **PW4 PC FRANCIS MAKALI** the investigating officer did produce as an exhibit a copy of the complainant’s birth certificate **P. exb 5**. The document indicated that she was born on 25th May, 1999. This document provides proof of the child’s age. Therefore it has been proved beyond reasonable doubt that in December, 2011 when this incident occurred the complainant was about 12½ years old.

The appellant opted to make a sworn defence to the charge. He denied having defiled the child at all. The appellant claimed that the charges were fabricated due to a disagreement he had with the child’s mother over their use of hanging lines in the plot. The appellant further claimed that the investigating officer sought for a bribe of Ksh 200,000/= from him. On this latter claim this is clearly and afterthought. The appellant made no report to any authority regarding the bribe allegedly sought from him. Neither did the appellant raise this issue with **PW4** during cross-examination.

Regarding a grudge between himself and the child’s mother, the appellant did not raise this issue in specific terms when cross-examining **PW3**. Further even if he had problems with the mother, such a disagreement would hardly spill over to the child, so as to cause her to falsely implicate the appellant. The complainant was a minor who I am sure had no knowledge or indeed interest in the persons whom her mother may have quarreled with. In dismissing this defence the learned trial magistrate in her judgment at Page 36 line 1 stated

“I have looked at the cross-examination done by the accused persons counsel to the complainant’s mother when she testified and interestingly the issue of dispute over hanging line or the threat to teach the accused a lesson never arose at all. Had there been such a dispute or threat that would be the major line the defence would have taken in cross-examining **PW3**. The fact that it never arose, only leads to one conclusion ie the issue of a dispute over hanging lines only crossed the accused’s persons mind as an afterthought in an attempt to get something that will get him off the hook. That dispute never existed at all. Had he been threatened, he would have reported to the landlady as he says she was a decent woman or even to the police. What prevented him from complaining to an external source? Furthermore this is a defilement of a 12 year old and the accused wants this court to believe that the complainant was told by her mother to frame the accused person, this is not only ridiculous but also totally impossible....”

The trial magistrate clearly gave great consideration to the appellant’s defence and rightfully in my view dismissed the same.

From the totality of the evidence on record, I am satisfied that the charge of Defilement was proved beyond reasonable doubt. The appellant's conviction was sound and I do uphold that conviction. Section (3) of the Sexual Offences Act, provides for a mandatory minimum sentence of twenty (20) years upon conviction for the defilement of a child aged between 12-15 years. As such the sentence of twenty (20) year imprisonment imposed by the trial court was lawful and I do confirm that sentence.

The upshot is that this appeal fails and the same is hereby dismissed in its entirety

Dated and delivered in Nakuru this 28th day of April, 2017.

Mr. Ochang holding brief for Mr. Otieno for Appellant

Mr. Chigiti for DPP

Maureen A. ODero

Judge