



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.106 OF 2016

JOSES KABURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 1077 of 2015 of the Principal Magistrate's Court at Nkubu by Hon. N.M Idagwa – Resident Magistrate)

JUDGMENT

JOSES KABURU, the appellant, was convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act.

The particulars of the offence were that on 4th July 2015 at [particulars withheld], Imenti South District of Meru County intentionally and unlawfully caused his penis to penetrate the vagina of **T.G** a child aged 8 years.

The appellant was found guilty of the offence and sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Kiautha Arithi, learned counsel. He raised 8 grounds of appeal which I have distilled as follows:

1. That the learned trial magistrate erred in law and in fact by convicting the appellant relying on uncorroborated evidence of a minor.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant without medical evidence linking him to the offence.
3. That the learned trial magistrate erred in law and in fact by failing to appreciate contradictory evidence tendered by the prosecution.
4. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant was returning to her home from an errand of milk delivery, she opted to use a shorter route through the appellant's home. She requested the appellant to open the gate for her. The latter asked her to first accompany him to a building his son was constructing. She complied and in the building, he defiled her.

In his defence the appellant denied any involvement in the offence. He pleaded an alibi and contended that he was implicated in the offence for he had terminated the services of the complainant's father.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

The proviso to section 124 of the evidence Act, allows conviction to be founded solely on the evidence of a sexual offence complainant without corroboration subject to observing some conditions. It states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The import of this proviso is that the evidence of the alleged victim has proved the allegation beyond any reasonable doubts and that but for the requirement of corroboration under section 124 of a conviction can be founded on it. However, it should not be used as a saving grace where no conviction can be founded on the evidence of the complainant. The other important fact to note is that the proviso applies to both adults and children. The court convicting must record the reasons for doing so.

In the instant case, I will endeavour to find if the trial court complied as I analyze the evidence.

It is settled law now that the medical examination of an accused person in a sexual offence is not a mandatory requirement though it may be of assistance, where available, in reaching a fair decision. The court of appeal in the case of **JOHN OTIENO MUMBO vs. REPUBLIC [2011] eKLR** observed as follows:

Indeed medical examination of an accused person is vital in proceedings where offences such as the one appellant faced in the lower court and is still facing an appeal are involved, but where such a procedural step has not been undertaken, it is not to be taken as being fatal to the entire prosecution's case, because if it had been undertaken then the resultant medical evidence would have been additional to any other evidence adduced and relied upon by the prosecution as either incriminating or exonerating the appellant in relation to the commission of the crime. In the absence of such evidence, the court has no alternative but to go by the evidence on the record.

This therefore means that the complaint about the failure to examine the appellant cannot stand.

The narration of **T.G** about the incident was as follows:

After she had delivered some milk at the door of E N, she decided to pass by the appellant's home. This was at about 7 a.m. She requested the appellant to open the gate for her. He told her that before he could do so, they should go and see a house his son was constructing. She complied and followed him and they went upstairs. When they reached an upstairs room, he removed her pair of trousers and underpants. He also removed his pair of trousers and underwear. While both were standing, the appellant inserted his "**dudu**" into her "**mapaja**". (dudu and mapaja are Kiswahili words for insect and thighs respectively). she went on to say that he inserted it in but did not push it very far inside. After he had finished, he said he was going to open the gate for her. she however opted to use a longer route. She said she never raised any alarm and there were no reasons why she did not do so.

The evidence of **D K** (P.W2) the complainant's mother and to whom the matter was reported immediately was that on checking the girl the only abnormality she noted was that her thighs were dry. Together with a neighbour called F, they checked on her genitalia but saw no abnormality.

There are glaring issues that ought to have raised a red flag in the mind of the learned trial magistrate. One, sexual liaison by adults where both are willing participants is usually painful to the female if not adequately prepared. For a child aged 8 years with a male adult, it must be excruciating. She never raised an alarm at the time of the alleged ordeal and evidence on record is as if the incident was as normal as breathing. She may be excused. Some people become numb due to shock and react later. We have, however, no evidence of any behaviour that suggest she was in shock or had aftershock effects. Her mother did not testify of any abnormal behavior when she returned home.

I have previously observed that proving penetration in an offence of defilement is one of the easiest and one need not be a medic. This is because victims are young and any penetration by an adult would leave behind a trail of evidence. When the complainant's mother and her neighbour Faith examined the complainant they did not notice any abnormality with her genitalia. Here we are talking about a mother who knew her daughter very well.

The complainant introduced in her evidence the language of adults in sexual matters. She said:

"After he had finished"

This is used in the adult world to mean ejaculation. The prosecutor was duty bound to ask her to explain what she meant. Without such an explanation forthcoming, one would be tempted to think, and rightly so, that she was couched.

The complainant went to school as if nothing had happened. I am persuaded to make a finding that nothing had happened.

The evidence by the clinical officer **Saberina Kamaithiri** (P.W4) introduced some material contradictions. She said that the complainant informed her that she had not worn her pants that day contrary to what she testified in court. She informed court that the appellant took off her pair of trousers and pant. One of her findings was that the vulva was reddish and tender. This to her was suggestive of sexual intercourse. Unfortunately at no time right from making the report to her mother or testifying in court did the complainant talk of pain. Her mother and Faith could not have missed to see the red vulva.

The appellant gave an alibi defence. It is trite law that once the alibi defence is pleaded, the onus is on the prosecution to prove it wrong. In the case of **WANGOMBE vs. REPUBLIC [1980] KLR 149** the court of appeal held inter-alia that:

when an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an un sworn statement at his trial, the prosecution or the police ought to test the alibi...

The alibi defence of the appellant weighed against the evidence on record was convincing.

After analyzing the evidence on record in totality, I find that the conviction was unsafe. The same is quashed and the sentence thereof set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at MERU this 26th day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE