



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 71 OF 2016

NAHAYO SYPRIANAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the conviction and sentence in original Kakuma RM CR. No.277/20-14 delivered on 1/7/2015 by E Wasike Senior Resident Magistrate)

JUDGMENT

The appellant **Nahayo Syprian** was charged in the magistrate court at Kakuma with the offence 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 are that on the 4th day of June, 2014 at [particulars withheld] Refugee Camp intentionally caused his penis to penetrate the vagina of U K a child aged 9 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the sexual offences Act. The particulars of the offence are that on the 4th day of June, 2014 at [particulars withheld] refugee camp in Turkana West district within Turkana County intentionally touched the vagina of U K a child aged 9 years with his penis. After trial magistrate found the appellant guilty of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the sexual offences act and sentenced him to serve ten (10) years imprisonment. The appellant was dissatisfied with the conviction and sentence and preferred this appeal.

The appellant in his grounds of appeal complained that during the trial the arresting officer did not testify; that the treatment records were not produced as exhibits; penetration was not proved; that the appellant was not given enough time to prepare his defence; that there was discrepancy of the time alleged offence took place; and that the trial magistrate failed to find that the charges were a fabrication as a result of the grudge that existed between the appellant and PW2 who had vowed to eliminate him and finally that the sentence meted out was too harsh and punitive.

The evidence before the trial court was that PW1 E K the complainant who is a child aged 9 years was at their house in [particulars withheld] zone 3 block 1 was alone in their house when at around 7pm when the appellant went into the house and covered her mouth with a cloth. He then undressed her and penetrated his penis into her vagina while he was still on the act the mother of the complainant PW2 N Y S came into the house and the complainant explained what had happened. The appellant tried to escape but she locked the door and called security personnel who came and arrested him. The complainant was taken to hospital where she was admitted for 2 days. She was examined by PW3 Ekiru James Kitile a medical doctor at IRC Kakuma main hospital where he found no tears, stains or blood on the clothing's. On general examination nothing significant was noted. He found no physical injuries on the vagina but there was a torn hymen and waterly discharge on the vagina which on examination was found to be semen. On cross-examination the doctor cautioned that there was penetration.

The appellant gave unsworn evidence. He testified that on 2/6/2014 he was going to school when he was arrested by police officers who took him to Kakuma 4 police post where he stayed for 2 days and on 5/6/2014 he was brought to Kakuma police station and arraigned in court on 9/6/2014 where he was charged with the present offence. It is upon this evidence that the appellant was convicted and sentenced.

The appellant filed written submissions in support of his grounds of appeal. Appellant submitted that the evidence of the prosecution witnesses was contradictory in particular whether the complainant was awake or asleep in the house when the incident occurred, on the actual time when the defilement occurred. The appellant also submitted that the evidence of the clinical officer in respect to the defilement was insufficient and contradictory and in particular whether the complainant who admitted or treated and discharged. Appellant finally submits that penetration was not proved as there were no injuries noted on the complainant's vagina by the doctor. The appellant submitted that these charges were a fabrication by the mother of the complainant to enable her secure the process of being relocated to the United States from the Refugee camp in the ground that they are a vulnerable family.

Mr. Gikunda for the state opposed the appeal. He submitted that the evidence adduced proved the alternative charge of committing an indecent act.

He submitted that the appellant was found in the house where the offence occurred and that the sentence of 10 years is the minimum allowed and cannot be said to be excessive.

This is a first appeal. In the first appeal the court has a duty to review the evidence, evaluate the same and come into its own conclusions but always bearing in mind that it never said or hear the witnesses testify (**Ekeno- v – Republic 1972 EA 32**)

The appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the sexual offences Act.

In a charge of defilement, under the sexual Offences Act, the prosecution must establish by evidence the three main ingredients of the charge. The prosecution must establish the age of the complainant to show that she is a child, must establish penetration which is the partial or complete insertion of the genital organ of a person into genital organ of another person and finally they must tender evidence of positive identification of the accused as the person who committed the defilement.

The age of the complainant is an important ingredient of the essence of **defilement**. In **Kalungu Elias Kasono – vs – Republic C.A Criminal Appeal No.504/2010** the court stated:-

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

The complainant in her testimony in chief testified that she was 10 years old at time of giving evidence. **PW2 N Y S** the mother of the complainant did not testify as to her age. **PW3 Ekiru James Kitili** a medical doctor at IRA Kakuma hospital who attended to the child testified that she was aged 9 years old. The age of the victim in sexual Offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court. In this case the complainant stated that she was 10 years old and the clinical officer estimated the age to be about 9 years old. I am from this evidence satisfied that the age of the child was established at 9 years old going to 10 years.

The prosecution must also prove in a charge of defilement, that there was penetration. Penetration is defined as the partial or complete insertion of a person's organ into the genital organ of another. In her evidence the complainant testified.

On 4/6/2014 at around 7.00pm, I was at home when I was raped by a person. The person is before court,

he is the accused. He is called Nahayo Sprian. We are not related. I was alone in the house as my mother had gone to the shop. It was not very dark as there was some light. I was in the compound. We were telling each other stories with M E. I was going to stop when the accused followed me and covered my mouth with a cloth. The accused person was around. The accused then undressed me and penetrated inside me. He used his penis to penetrate my vagina. My mother then came. I felt pain in my hips. My mum closed the door and called neighbours. The neighbours came and found the accused inside the house.

PW2 the mother of the complainant in her evidence stated

The complainant herein is my daughter. I recall on 4/6/2014 at around 7.00pm, I had escorted someone to the shop and on coming back, I found the accused person inside my house. When I had gone to the shop, I had left no one but my child was playing outside.

On entering the house, I found my child (PW1) crying and on asking, she said the accused person had defiled her. She said the accused had covered her mouth and so she couldn't scream. The accused then wanted to escape but I blocked him at the door step, I screamed and the block security came and apprehended the accused. The police were then called; they came and arrested the accused. PW1 was then taken to hospital in my presence. She was taken to Kakuma I Main hospital. I found the door slightly closed and so I just pushed in and it opened. I did not lock the door when I went to the shop as my child was outside. I had a torch with me and that is how I identified the accused. I found the accused dressed. PW1 was also dressed though she had no inner pant. I found the child on the bed and she said she had been defiled by the accused. I called my neighbor who is a woman who came and checked PW1's private parts.

PW4 Ekiru James the doctor when being cross-examined by the appellant stated:

"The victim was physically fine but she had some defects on her genitalia. I can't tell who defiled the victim (PW1). There was penetration on her private parts. There was a discharge on PW1's genitalia. It is by chance that PW1 was brought to the hospital immediately after the incidence.

It is not a must that blood must ooze out during penetration. We took a specimen and took to the lab for analysis and discovered that part of the secretion was semen.

From the evidence of the complainant and the examination by the doctor, it is evident that there was penetration of the complainant's vagina by a male person which led to ejaculation of semen which was found present in the complainant's genitals after examination. I am therefore satisfied that the prosecution proved the element of penetration."

The issue of positive identification of the appellant as the perpetrator of the offence was raised by the appellant in his submission. Both PW1 and PW2 testified that appellant was in their house. Infact PW2 the mother of the complainant who found the appellant in the house locked the door when he tried to escape and called people who had him arrested. The appellant in his defence testified that he was arrested while going to school on 2/6/2014 which was a different date.

His alibi evidence was been displaced by the evidence of the prosecution witnesses who placed him at the scene of the offence. I am therefore satisfied that the appellant who was known to the complainant and her mother was positively identified as he was arrested at the house of the complainant.

The learned trial magistrate in his judgment stated,

In this case, though the prosecution proceeded on the assumption that the child was 9 years old, no certificate of birth, or a clinical card or an age assessment report was produced in court so that the age of the child could be clearly ascertained. Offences of this nature are very punitive and so the standard of

proof should be beyond reasonable doubt. More so, the kind of punishment imposed in this act is premised upon certain age brackets and so the court should be extremely cautious when dealing with these kind of offences.

It would therefore be very unsafe for the court to convict where there is a serious Lacuna is as far as the exact age of the complainant is concerned.

Needless to say that the accused person has been charged with an alternative charge of “committing an indecent act with a child contrary to section 11 (1) of the sexual offences Act No.3 of 2006.

Basing on the facts and evidence on record it is clear that the prosecution was able to prove that the record of the accused person fulfilled the ingredients of the offence.

The upshot is that I hereby convict the accused person in the alternative charge of ***committing an indecent act with a child contrary to section 11 (1) of the sexual offences act no.3 of 2006*** and this is in pursuant of section 215 of the criminal procedure code (cap 75) laws of Kenya.

No doubt age is an important ingredient of the offence of defilement. In the case of **JOSEPH KIETI SEET – VS- REPUBLIC (2014) e KLR, H.C AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011**, the learned Mutende, J. held as follows;

It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni – versus- Uganda, court of appeal Criminal Appeal No.2 of 2000. It was 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 the present case therefore the age of the complainant was proved by her evidence that she was 10 years old and the doctor who in filling the P3 form estimated the age to be 9 years. This in my view was sufficient evidence to show that the complainant was between 9 – 10 years old. Once the court finds the age established that the offence of defilement was. Which was the main charge was proved.

The learned trial magistrate however found the appellant guilty of the alternative charge of indecent act to a child and convicted him. He then sentenced him to serve a sentence of ten (10) years. There was no cross-appeal by the state of this finding. This court therefore will not interfere with the conviction and sentence as the alternative charge.

In the result, I find no merit in this appeal which is hereby dismissed.

Dated at Lodwar this 18th day of May, 2017.

S N RIECHI

JUDGE