



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 330 OF 2015

DENNIS BARONGO ESTHER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. H. M. Nyaga–Senior Principal Magistrate delivered on the 5th March, 2014 in CMCR Case No. 1844 of 2010)

JUDGEMENT

The appellant **DENNIS BARONGO ESTHER** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law courts.

The appellant had been arraigned before the trial court on 20/7/2010 facing a charge of **DEFILMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that;

*“On diverse dates between 1st July, and 15th July, 2010 at [particulars withheld] Village in Molo District within Rift Valley Province did cause his penis to penetrate the vagina of **LK** a child aged 13 years”.*

In the alternative the appellant faced a charge of **INDECENT ACT WITH A CHILD CONTRAY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘**Not Guilty**’ to both counts and his trial commenced on 11/7/2011. The prosecution led by **CHIEF INSPECTOR MUTETI** called a total of five (5) witnesses in support of their case.

The complainant **LK** told the court that she lived with her siblings at [particulars withheld] village. The children’s mother was deceased and their father had abandoned them. **PW1** told the court that the appellant and his co-accused (who has not appealed against the decision of the lower court) used to come to their home and ply her with changaa after which the two men would defile her in turns. Initially the complainant made no report to any person as the appellant had threatened her.

PW2 IK told the court that she was the complainant’s teacher. On 7/9/2010 the children were given a lesson on Children’s Rights. The following day 8/9/2010 the complainant came and reported to her that she had been defiled. **PW2** took the child to the chief and the child identified the appellant as one of the men who was defiling her.

The matter was reported to the police and the complainant was taken for medical examination. The appellant was later arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an unsworn defence in which he denied the charge. On 5/3/2014, the trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentenced him to serve twenty (20) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal. The appeal was opposed by the learned State Counsel.

Being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same. **[see AJODE Vs REPUBLIC [2004] 2 KLR 81]**

In any case of defilement the prosecution must prove beyond reasonable doubt the following key ingredients of the charge

- i. The fact of defilement
- ii. The identity of the defiler
- iii. The age of the victim

In this case the complainant narrated to the court how the appellant would ply her with illicit brew and then he would defile her. The appellant who was a neighbour undoubtedly took advantage of the fact that the complainant was a child who had been abandoned by her only parent – her father.

The complainant told the court that she was defiled severally. She took no action out of fear but finally she opened up to **PW2** who was her teacher.

After the matter was reported the complainant was taken for medical examination **PW5 MACHARIA MWANGI** is a clinical officer who was attached to the Molo District Hospital. He told the court that upon examination the complainant was found to have old tears in her hymen. **PW5** concluded that there **‘there was evidence of penetration overtime’**. He produced her P3 form **P. exb 1**.

The evidence of the doctor corroborates the complainant’s allegation that she had been defiled. The tears in her hymen is evidence that penetration had occurred. I therefore find as a fact that the applicant was defiled.

The complainant has identified the appellant as the man who defiled her. She identified the appellant by name **‘Barongo’**. The complainant told the court that she knew the appellant well as he was a neighbour. Therefore aside from evidence of visual identification of recognition. I am satisfied that the appellant has been properly identified as the man who defiled the child.

The last issue requiring tangible proof in a defilement case is the age of the victim. The question of age is important as this will dictate the nature of the punishment to be meted out if one is convicted of that offence. In the case of **ALFAYO GOMBE OKELLO Vs REPUBLIC [2010] eKLR** the Court of Appeal stated as follows;-

“In its wisdom, Parliament chose to categorize the gravity of that offence 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. That must be so because dire consequences flow from proof of the offence under Section 8(1).....”

From this it is clear that the age of the victim is a fact in issue, one which must be proved beyond reasonable doubt. In the case of **KAINGU ELIAS KASOMO Vs REPUBLIC Criminal Appeal No. 504 of [2010]** the Court of Appeal held that

“Age of the victim of the sexual assault under Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in 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”.

Ordinarily age is proved by way of production of a medical age assessment report, a Birth Certificate or some other official document *e.g* an Immunization Card, Baptism Card, School Leaving Document etc. in cases where such documents are not available, courts have held that age may be satisfactorily proved by the evidence of a parent or guardian stating when the child was born.

In this case the complainant told the court that she was 13 years old. The child was not taken for an age assessment by a medical doctor thus no such report was availed. No birth certificate or other official document confirming the complainant’s age was produced in court. No parent or guardian testified to confirm the date when the complainant was born. In short no independent evidence was tendered to prove the age of the child.

The learned State Counsel urged the court to rely on the P3 form as proof of the child’s age. However the age stated on the P3 form is merely what the child herself told the doctor. **PW5** who produced the P3 form did not testify to having conducted any medical test to confirm that the age as told to him by the complainant was infact her true age. Further, I have perused the P3 form **P exb 1**. There is an obvious alteration on the age of the child. **PW5** did not mention having made any alterations and/or cancellations to the document. The alteration is unsigned thus it is not known who altered the child’s age on the P3 form and why. In the circumstances this court cannot rely on the P3 form as proof of the complainant’s age.

In his judgment the learned trial magistrate totally failed to address the question of the age of the complainant. At no time did the trial magistrate address his mind to the question whether the complainant’s age had been proved beyond reasonable doubt. In omitting to consider this crucial aspect of the charge, I find that the learned trial magistrate erred.

As it stands the prosecution failed to tender any evidence to prove that the complainant was aged 13 years. This is a fatal omission in a charge of Defilement. In the absence of any proof of the child’s age the conviction of the appellant was not sound as a critical aspect of the charge remained unproven. For this reason alone I quash the appellant’s conviction on the charge of Defilement. The corresponding sentence of twenty (20) years is also set aside. The upshot is that this appeal succeeds and is allowed by this court. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 16th day of June, 2017.

Appellant in person

Maureen A. Odera

Judge