



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 34 OF 2015

GILBERT KIPKURUI ROTICH.....ACCUSED

VERSUS

REPUBLIC.....STATE

JUDGMENT

The accused **GILBERT KIPKURUI ROTICH** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court on 19/11/2013 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (4) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On the 16th day of November, 2013 in Kuresoi District within Nakuru County intentionally caused his penis to penetrate the vagina of M C S, a child aged 15 years”.

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

The appellant pleaded ‘**Not Guilty**’ to both charges and his trial commenced on 22/4/2014. The prosecution led by **CHIEF INSPECTOR MUTETI** called six (6) witnesses in support of their case. **PW1 M C S** the complainant was a girl child said to be 15 years old. The complainant told the court that on 16/11/2013 she and her siblings were asleep in their kitchen while their parents slept in the main house. At around 10.00pm the complainant felt somebody undressing her while she slept. The man removed her biker and then lay on her and defiled her. The complainant screamed waking up her father.

PW2 P K was the complainant’s father. He told the court that on 16/11/2013 at 10.00pm he was asleep in his house with his wife. He heard his children screaming from the kitchen where they had been sleeping. **PW2** got up and dressed hurriedly. He saw a man running out of their home and he gave chase. He chased the man to a certain house where he found accused and apprehended him. The complainant identified the appellant as the man who had defiled her.

The matter was reported to the police. The complainant was taken to hospital for medical attention. The appellant was arrested and later charged with this offence of defilement.

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

On 15/1/2015 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of defilement and thereafter sentenced him to serve 15 years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appeal was opposed by the learned State Counsel. This being a first appeal the court is obliged to re-examine the prosecution evidence and draw its own conclusions on the same. In **AJODE Vs REPUBLIC [2004]2 KR 81** the court held that

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witness testify and make allowance for that”

In any case of defilement the prosecution has a duty to prove beyond reasonable doubt the following key ingredients of the offence

- (i) The age of the victim
- (ii) The fact of penetration
- (iii) The identity of the perpetrator

In this case the charge sheet indicated that the complainant was aged 15 years. However both the complainant herself and her father told the court that she was born on 15th December, 1999. Having been born in 1999 the complainant would have been aged 14 years in November, 2013 the time this incident occurred.

PW6 PC MERCY MAKENA who was the investigating officer produced as an exhibit the complainant's birth certificate **P exb 3**. The documents indicated that the complainant was born on 16th July 2001 making her out to be 13 years at the time when the offence occurred. This contradiction and anomaly between the evidence of the complainant and her father and the evidence of the birth certificate remains unexplained. As it is three different ages have been given for the child. The charge sheet says 15 years, the complainant and her father give her date of both as 1999 making her 14 years and the birth certificate gives her date of birth as 2001 making her 13 years at the time of the offence. I find that there exists no consistency on the age of the complainant. It is not for the court to decide which evidence regarding age to pick and believe. The prosecution has a duty to present evidence that is clear and consistent. In this case there is certainly no clarity regarding the age of the complainant.

The constitution in Article 50(b) provides that an accused person must be informed with sufficient detail of the charges he faces. Here the charge sheet gives the child's age as 15 years yet the same prosecution through **PW6** produces a birth certificate giving the age as 13 years. The court is left to wonder if any meaningful investigations were done before the appellant was charged.

This uncertainty regarding her age was prejudicial to the appellant. Defilement is a very serious offence which carries very stiff mandatory penalties upon conviction. The length of this mandatory sentence will depend on the age of the child – victim. Where there is such uncertainty regarding age, then the appellant cannot be said to be able to properly defend himself as he is not sure which penalty he is likely to face.

In view of the anomalies mentioned above I find that the age of the complainant was not proved beyond reasonable doubt.

On the question of the fact of penetration the complainant told the court that a man broke into the kitchen where she was sleeping with her siblings and began to undress her. The man removed her biker and then he defiled her.

Following the incident **PW3 E C** the mother of the complainant took her to see a doctor for medical attention. **PW5 DR. EDWARD WANG'OMBE KIBUCHI** told the court that he examined the complainant. He noticed she had a whitish discharge coming from her vagina and a lab test detected traces of spermatozoa. Complainant's hymen was missing. **PW5** concluded that

“There was penetrative intercourse”

He filled and signed the P3 form which has been produced in court as an exhibit **P exb 1**.

Given the weight of this medical evidence I am satisfied and find that the fact of penetration has been proved. The act of defilement has been proved beyond reasonable doubt.

The last ingredient requiring proof is the identity of the perpetrator. The complainant told the court that it was the appellant who defiled her. The incident occurred at 10.00pm. The complainant and her two siblings were asleep. The complainant states that she woke up to find someone undressing her. She states that despite the darkness she was able to see and identify the appellant because there was moonlight. The court is left to wonder if or how the moonlight penetrated into the kitchen where the children were sleeping.

In cross examination the complainant stated that the moonlight was **‘outside’** she did not mention that the light from the moon penetrated into the kitchen.

Given the circumstances prevailing the complainant had just been awoken from sleep and it was dark, the possibility of a mistaken identity cannot be entirely ruled out.

The complainant told the court that when the man was defiling her she screamed. Her two siblings who were sleeping in the same room as the complainant must have heard her scream. The two must have seen the person who was defiling their sister. Neither the brother nor the sister of the complainant were called to testify in this case. Their evidence was crucial as it would have served to corroborate the testimony of the complainant.

The prosecution has not given any reason or explanation as to why these two very important witnesses were not called. The court is entitled to draw an adverse inference from this glaring omission.

PW2 the complainant's father stated that he heard his daughter scream. He states that he saw a man running away and together with the village elder they gave chase. **PW2** says that he chased the man to a particular house **PW2** states that he knew the culprit was the appellant because his shoes were wet. Again this village elder who assisted **PW2** to chase the man was **not** called as a witness in this case.

Given that this was a community elder, I find this to have been a serious omission. This is a witness who was easily traceable. Again the

failure to call this witness leads to an adverse inference being drawn by the court.

PW4 ROBERT KIPTOO told the court that on the material night, he took supper with the appellant at 9.00pm. After supper the appellant left briefly and returned at 10.20pm. He undressed and got into bed.

PW4 has no idea where the appellant went or what he did. Shortly after the appellant's return to the house **PW2** came claiming that the appellant had defiled his daughter.

Both **PW2** and **PW4** made mention of some wet shoes which were recovered in that house and were said to belong to the appellant. Although these wet shoes were recovered they were not brought and exhibited to the court. Again no explanation is given for this omission.

In my view the identification of the appellant cannot be said to have been watertight. The prosecution deliberately failed to call several crucial witnesses. The possibility of a mistaken identity cannot in my view be ruled out. The evidence present to the trial court was contradictory and disjointed.

In my view the appellant's conviction was not safe. I therefore quash that conviction and set aside the 15 year sentence imposed upon him. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 13th day of October, 2017.

Appellant in person

Mr. Chigiti for DPP

Maureen A. Odero

Judge