



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 39 OF 2016

JKM.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. M. Irura, Senior Resident Magistrate in Isiolo Chief Magistrate's Criminal Case No. 617 of 2011 delivered on 08/06/2016)

JUDGMENT

1. Had it not been the frantic and sustained efforts by the grandmother to a sexually-assaulted girl, **V.W.** (hereinafter referred to as '**the complainant**') the possibility that the proceedings which culminated with this appeal would not have been taken out stands out as a reality.
2. The complainant's grandmother, **VWM**, who testified as the second prosecution's witness (hereinafter referred to as '**PW2**'), did not relent for over four months as she sought for justice to the complainant. PW2 lodged complaints at the Isiolo Police Station severally on allegations of the complainant's defilement against the appellant but despite the appellant being arrested and subsequently released, nothing much happened. Determined as she was, PW2 sought the intervention of the OCPD who referred the matter to the Isiolo Criminal Investigation Department. The matter was investigated and the appellant was accordingly charged.
3. The appellant was initially charged with four counts of defilement and thereafter the charges were substituted with one charge of defilement with an alternative charge of committing an indecent act with a child and another charge of deliberate transmission of HIV. The appellant denied all the charges and he was tried and convicted on the charges of defilement and deliberate transmission of HIV. He was sentenced to 20 years and 15 years respectively which sentences run concurrently as from 08/06/2016.
4. Being dissatisfied with the convictions and sentences, the appellant lodged an appeal, with the leave of Court, by filing a Petition of Appeal on 02/08/2016 challenging the conviction and sentence on the following grounds: -
 1. ***That, I pleaded not guilty to the allegation leveled against me whereby (20) years imprisonment was imposed.***
 2. ***That, the learned trial magistrate erred in both law and fact by failing to note that the evidence of the witness who stated that the complainant was defiled in the lodging was fabricated evidence due to lack of supportive evidence.***
 3. ***That, the learned trial magistrate erred in both law and fact by failing to note that the minor***

was taken to hospital for medical examination after (4) days.

4. That, the learned trial magistrate erred in both law and fact by failing to note that in each and every case of this nature there must be an independent finding from the clinical officer to prove if the accused was the right person who committed the alleged offence.

5. That, the appellant was not taken to hospital for medical checkup for the alleged offence.

5. The appeal was heard by way of both oral and written submissions. The appellant filed his written submissions alongside some two more grounds being that independent witnesses were not called to testify and that he was not supplied with relevant information which the prosecution intended to rely on during the trial and as such his right pursuant to **Article 50(2)** of the **Constitution** was infringed. He submitted that one Caroline was not called to testify even though her evidence was very crucial in the case. He relied on the cases of **R vs. Ward (1993) 2 All ER 557** and that of **R. vs. Stinchcombe (1992) LRC (Cri) 68** in buttressing the argument that he was not provided with the statements. The appellant urged this Court to allow the appeal accordingly.

6. The State through **Mr. Odhiambo** Learned State Counsel strenuously opposed the appeal. He submitted that both offences had been proved and that the appellant was properly convicted and sentenced. Counsel took the Court through detailed submissions in proof of penetration, the age of the complainant, that the appellant was the perpetrator of the offence and that the appellant willfully infected the complainant with HIV. Counsel further argued that the number of witnesses available were adequate to prove the charges and that the appellant never prayed for statements at all. To him, that was an oversight which was not fatal. He prayed that the appeal be dismissed.

7. This is the Appellant's first appeal. The role of this Court is now well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child and those of the offence of deliberate transmission of HIV were proved and as so required in law; that is beyond any reasonable doubt.

9. I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the parties' submissions. To be able to appreciate this analysis with ease, I will briefly revisit the evidence in this case.

10. A total of nine witnesses testified in support of the prosecution's case. They were the complainant who testified as **PW1**, the complainant's grandmother and guardian who testified as **PW2**, the complainant's grandfather and co-guardian one **JGM** who testified as **PW3**, **Lydia Kathure** who testified as **PW4**, the wife to the appellant one **DM** who testified as **PW5**, **No. 75238 Corp. Juliet Chepgetich** who testified as **PW6**, **No. 90797 PC Anna Wambui** who testified as **PW7** and **No. 82258 PC Maurice Munavi** attached to the CID Isiolo who was the investigating officer testified as **PW8**. The last witness was a Clinical Officer from Isiolo District Hospital one **Mohamed Duba** who testified as **PW9**. I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except **PW1** whom, as aforesaid, I shall refer to as the '**the complainant**').

11. The witnesses cumulatively narrated various encounters between the appellant and the complainant within Isiolo town. That the first encounter was on 10/07/2011 when the complainant had been sent by **PW2** to the shopping centre. That the complainant met the appellant whom he used to generally see within the centre and after the complainant refused the appellant's invitation the appellant forcefully held her and called a taxi which took them to one Farmers Lodge. That they checked into Room No. 25. That,

she was detained therein up to 12/07/2011 during which period the complainant had sexual intercourse with the appellant once. That she bled profusely from her private parts and it was the appellant who bought some sanitary towels for her. On release she informed PW2 who had already reported the complainant's disappearance together with PW3 to Isiolo Police Station. They again went to the Police station and reported all the developments a result whereof the appellant was arrested and both the appellant and the complainant were taken to Isiolo District Hospital for and were examined accordingly. That among the tests done to them was a HIV test where the appellant tested positive and the complainant tested negative. For reasons unknown to the complainant the OCS of Isiolo Police Station called PW2 and informed her that the appellant had not committed any offence and that he would release him. It so happened that the appellant was truly released from police custody without any charges preferred against him. PW5 however paid PW2 Kshs. 3,000/= out of the agreed Kshs. 4,000/= on account of the expenses PW2 had incurred in pursuing the matter. Likewise, PW5 confirmed that the appellant had been warned by the OCS on his relationship with the complainant before he was released from custody.

12. The second encounter was on 29/07/2011. That the complainant again met the appellant outside his bar in town. That the appellant held her hand and took her into the appellant's house and as the two were in the bedroom the appellant's wife, PW5, caught up with them and locked the door from outside. PW5 rushed to and called PW2 who turned up with PW3 and other members of public. That the appellant was arrested and taken to Isiolo Police Station where the appellant and the complainant were again taken to Isiolo District Hospital. The complainant explained that she had not engaged in any sexual act with the appellant because she was experiencing her monthly periods which fact was confirmed on examination as no evidence of sexual intercourse was gathered. The appellant was again set free by the police. It was PW5 who also took the complainant's shoes to the police and stated that she had sought for an explanation from the appellant on the lady's shoes in vain.

13. The third encounter was in the evening of 16/08/2011 where the appellant asked a lady called Caroline to and who lured the complainant into Caroline's house in the pretext of wanting to give the complainant something and thereafter the appellant appeared thereat and spent the night with the complainant in Caroline's house. That the appellant and the complainant had sex that night on two occasions. That PW2 caught up with the appellant and the complainant in the morning of 17/08/2011 and raised alarm. PW4 rushed to where the screams came from and found PW2 and other people at Caroline's house. That the appellant was arrested and taken to Isiolo Police Station in the company of PW2, PW4 and others. Both the appellant and the complainant were placed into custody until the following day when only the complainant was taken to Isiolo District Hospital for examination. That the said Caroline was also arrested and placed in custody alongside the two and that the complainant and Caroline were later released. Likewise, the appellant was released thereafter. No charges were preferred against the appellant and/or the said Caroline. PW2 sought an explanation from the OCS on the release of the appellant and the OCS told her that he was acting on instructions from senior officers of the Kenya Army who had directed that the appellant be released.

14. The fourth encounter was on 06/09/2011. In the evening of that day the appellant while in the company of his friend one Nderitu (not a witness) gave the complainant some juice and asked her to drink it as they were together. Shortly thereafter the complainant did not know what followed as she finally found herself sleeping in Nderitu's house with the appellant beside her. She was without her skirt and underpants and realized that she had engaged in sex although she did not know how it happened. She was then detained by the appellant in that house for the next eight days and they had severally had unprotective sex until 15/09/2011 when the complainant got an opportunity and fled. She reported the matter to PW2 and PW3 and they again lodged a complaint at the Isiolo Police Station. The appellant was arrested and later released without being charged.

15. The fifth encounter was on 17/09/2011 where the appellant and Nderitu went to the complainant's home at around 06:30pm but were chased away by PW2. A report was also made at the Isiolo Police Station and statements were accordingly recorded. Nothing followed thereafter. As PW5 got fed up with the unending relationship between the appellant and the complainant she went back to her parents' home and later rented her own house elsewhere.

16. The sixth encounter was on 11/11/2011. On that evening the appellant met the complainant as she had gone to the Isiolo town to buy dog food. He asked her for a discussion but the complainant refused. The appellant then held her and took away her shoes and instead gave her his slippers and told the complainant to follow him if at all she wanted her shoes back. The complainant did not follow the appellant but instead reported the incident to PW2. Several visits in the next three days were made by PW2 and the complainant to the appellant's home to get back the complainant's shoes in vain.

17. As the reality unfolded that no action was likely to be taken against the appellant the complainant took poison as she complained that she was tired of being harassed by the appellant. PW2 and PW3 had to look for a way out and they decided to seek the intervention of the OCPD. The matter was then referred to the DCIO who took over the investigations from the Isiolo Police Station.

18. The complainant was taken to the Isiolo District Hospital on 21/11/2011 where she was re-examined and found to be HIV positive. The complainant and the appellant had earlier on been tested for HIV on 12/07/2011 where the complainant had tested negative while the appellant tested positive. Two P3 Forms were later filled in respective to OB No. 59/12/7/11 and OB No. 50/18/8/11 and the appellant was arrested and charged.

19. The prosecution's evidence was crowned up with the evidence of PW9 who confirmed that from the evidence and history the complainant had severally engaged in sex and that the complainant had then contracted HIV although she had been HIV negative before. On the other hand, the appellant had been HIV positive all along.

20. The appellant was then placed on his defence and elected to and gave sworn testimony. He denied committing any of the offences and contended that PW2 had a grudge against him as PW2 had asked him not to employ her son but the appellant still proceeded and employed him and that PW2 had vowed that the appellant would leave Isiolo town. He also contended that he never knew that he was HIV positive. He dismissed the charges as a frame-up and pleaded that he be set at liberty.

21. The foregone is the background upon which the convictions and sentences rested on. That being so I will now venture to ascertain if the offences were proved in law.

22. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) On the age of the complainant: -

23. In sexual offences like the instant one, the age of the complainant remains very cardinal and must be strictly proved as the sentence on conviction vary with age. In this appeal, the age of the complainant is not in issue. The age of the complainant was proved by the Certificate of Birth No. 316749 which gave the date of birth as 05/01/1997. The Certificate was produced with the consent of the appellant. Going by the contents thereof the complainant was therefore around **14 years and 6 months old** when the incident allegedly occurred. The complainant was hence a minor in law.

24. I therefore find that the age of the complainant was properly settled by the trial court when referring to PW8 stated that '*...He produced the birth certificate in court as an exhibit which showed that at the time complainant was still a minor.*' I must however add that the trial court ought to have clearly stated the exact age of the complainant given that the age determines the sentence on conviction. Be that as it may, I find that the irregularity on the part of the trial court in stating that the complainant was a minor and not stating the exact age did not occasion any miscarriage of justice to the appellant as the appellant did not *inter alia* oppose the production of the Birth Certificate which confirms when the complainant was born and so her age. The irregularity is hence curable under **Section 382** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

(b) On the issue of penetration: -

25. **Section 2** of the Sexual Offences Act defines ‘**penetration**’ as: -

‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’

26. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

‘...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ....’ (emphasis added).

27. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

28. The complainant narrated the events as they unfolded between herself and the appellant. She vividly took the court through all the five instances where she engaged into sexual acts. She gave very clear descriptions of what happened on every encounter. She stated that she lost her virginity when she was engaged in sex during the first encounter with the assailant.

29. Due to the way the matter was handled by the Isiolo Police Station in the first instance, the two P3 Forms for the complainant produced as exhibits were filled on 28/11/2011. The first P3 Form related to OB No. 58 of 12/07/2011 when the complainant was taken to the hospital and examined on 12/07/2011. It was observed that she was bleeding from the vagina and that the hymen had been recently ruptured. The second P3 Form related to OB No. 50 of 18/08/2011 where no injuries were observed on the complainant.

30. It was PW9 who examined the complainant on the two instances when she was taken to the hospital and filled in the P3 Forms later. PW9 confirmed contents of the P3 Forms and stated that there was evidence of penetration into the complainant’s private parts by a male organ more so with the HIV infection on the complainant.

31. The Learned trial magistrate examined the demeanor of the witnesses during the trial and believed them to be truthful. Of the complainant the trial court stated that ‘... *Indeed the court had a chance to examine her and found her to be a candid witness.*’ The complainant’s evidence was also corroborated by the medical evidence contained in the P3 Form filled pursuant to OB No. 58 of 12/07/2011. I may however add that conviction in sexual offences can still stand even without any corroboration as long as the trial court complies with **Section 124** of the **Evidence Act** which provides that: -

“124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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, he court is satisfied that the alleged victim is telling the truth.”

32. From the above analysis and on evaluation of the evidence of the complainant and PW9 and the relevant exhibits thereto, this Court is satisfied that there was a penile penetration into the complainant's vagina. Penetration was hence proved.

c) **On whether the appellant was the perpetrator:**

33. The appellant vehemently denied any involvement in the alleged offences. From the record, the evidence touching on the appellant was by several witnesses. There is no doubt that the complainant and the appellant lived in Isiolo town and that the appellant used to see the complainant on the road. He however denied any relationship with the complainant. All the instances where the complainant stated that he encountered the appellant were on the road. The complainant described the appellant well including how they used to meet and eventually had sex. She also stated that the appellant had one eye a fact which even this Court confirmed during the hearing of the appeal. The complainant had also taken the police to the business and the home of the appellant where she identified the appellant and he was arrested.

34. The appellant also confirmed knowing PW2 well as he had employed a son to PW2 despite warning by PW2 not to do so and that as a result PW2 vowed that the appellant would not stay in Isiolo town. PW2 testified on the instances she intervened for the complainant and made reports to the police against the appellant including physically arresting the appellant and handing him over to the police. That was also the position with PW3 who was the complainant's grandfather. PW4 confirmed that at one-time PW2 raised alarm and he rushed to the scene where the appellant and the complainant were found inside the appellant's bedroom; that the appellant was arrested and she accompanied PW2 to take the appellant to the police. PW5 who was the appellant's wife testified that she was aware of the relationship between the appellant and the complainant and that after failing to convince the appellant to terminate that relationship she left the appellant's place and went back to her parents and later rented her own room and moved on with her life. PW6 and PW7 who were police officers attached at Isiolo police station confirmed that the appellant was severally arrested on allegations of defiling the complainant but was not charged on the OCS's instructions.

35. All the above witnesses were so clear and referred to the appellant as the assailant in all the incidences. They all knew the appellant well. However, the appellate raised a defence. He alleged that the case was a plot by PW2 to settle scores since the appellant had employed PW2's son against PW2's wish. I note that the issue of the grudge only came up during the defence hearing but rightly so the trial court considered it. That is on the settled principle in law that the burden of proof in criminal cases squarely rests on the prosecution throughout. Just like the way the trial court was not convinced by the defence, this Court also finds itself in a like position. I say so because several instances where the appellant was alleged to have been with the complainant were witnessed by other witnesses who corroborated the evidence of the complainant and as such the aspect of the plot does not really hold. In view of the way the defence was raised and the timing thereof one cannot resist the inference that the same was an afterthought. Be that as it may, the defence did not create any reasonable doubt in the prosecution's case.

36. As stated above the trial court had the advantage of seeing the witnesses testify and noted their demeanors. The court made a finding on the way the complainant testified and in explaining why it treated her as a truthful and credible witness. There is nothing placed before this Court to make me depart from that finding of the trial court.

37. I am also aware of the need and effect of a witness in readily giving the name of the assailant to the police or to other people immediately the incident arises. (See the Court of Appeal cases of **Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987, Juma Ngodia – v- R, Criminal Appeal No. 13 of 1983, Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986, Lesarau – v- R, 1988 KLR 783** and recently in the case of **Simiyu & Another vs. Republic (2005) 1 KLR 192**). The complainant in this case readily gave the name of the assailant to PW2, PW3 and the police. I am therefore satisfied that it was the appellant who had sex with the complainant severally. I therefore find that the appellant was rightly convicted on the offence of defilement.

38. I will now deal with the second charge of deliberate transmission of HIV. The appellant stated that he was not aware that he was HIV positive until when he was tested at the hospital. That was on 12/07/2011 where the appellant was then placed on ARVs and assigned number 41209402915. On that day the complainant tested negative for HIV. But the matter did not end there. There were several instances

which followed thereafter where the appellant and the complainant had unprotected sex. The appellant having been made aware of his condition on 12/07/2017 ought to have been more careful thereafter. By continuing to have unprotected sex with the complainant severally, there is no doubt that the appellant clearly wanted to transmit the HIV to the complainant. The conviction on this charge therefore stands.

Other grounds of appeal:

39. The appellant further raised two other grounds which are worth consideration. The first one is that he was not provided with copies of the statements to enable him to prepare his defence well. I have carefully perused the record and noted that indeed the trial court did not make an order for the appellant to be supplied with the statements. I have also noted that the appellant never requested for the statements at any point in time. The appellant pleaded to the charges with clarity. He therefore knew what he was facing and he was always ready to proceed with the hearing of the case even after the charges were substituted. The appellant cross-examined the witnesses thoroughly and clearly knew what he was engaged in.

40. Whereas it is a cardinal responsibility of a trial court to ensure that accused persons are provided with the evidence the prosecution intends to rely on in advance and even without the need of such accused persons applying for such evidence, I find that the appellant herein was not prejudiced in any way going by how he actively and bravely dealt with the whole case. I would have made a contrary finding had there been evidence that the appellant at least went further to request for the statements but the issue was not conclusively dealt with by the trial court. In saying so, I am alive to a Court of Appeal decision where the appellate Court overturned a conviction because the appellant therein had requested for copies of the statements which were not forthcoming a result of which the then appellant never took part in any cross-examination of the witnesses. That position is however distinguishable in this case.

41. The other ground was that crucial witnesses did not testify. **Section 143** of the **Evidence Act**, Cap. 80 of the Laws of Kenya which states that: -

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

42. The above provision of the law gives discretion to the prosecution to call any numbers of witnesses it desires in proof of any fact which is in dispute in a trial. It is however settled that whenever the prosecution fails to call a crucial witness without any justification then an adverse inference is made against the prosecution that the witness(es) would have been averse to the prosecution's case. (See the cases of **Bukenya & Others -versus- Uganda (1972) EA 549** and **Nguku -versus- Republic (1985) KLR 412** among many others). In this case however the prosecution evidence was adequate to sustain convictions in both charges. As stated by the trial court the said Caroline was indeed an accomplice and not a potential prosecution witness. The ground also fails.

43. As I come to the end of this judgment I hereby commend the sustained efforts by PW2 and PW3 in following up the matter with the police to a point of seeking the intervention of the Isiolo OCPD and likewise the direction taken by the OCPD in transferring the matter from Isiolo Police Station to the DCIO Isiolo for further investigations. The thorough investigations by PW8 one **No. 82258 PC Maurice Munavi** cannot go unnoticed. The officer unlike his counterparts at the Isiolo Police Station acted so professionally and diligently and eventually presented the case before court. As far as the OCS Isiolo Police Station is concerned it is clear that the said OCS was not in any way out to do justice to the minor girl child. The OCS should stand warned and be reminded that the Constitution has no room for public servants who do not uphold constitutional requirements. I therefore direct that the Deputy Registrar of this Court do serve certified copies of this judgment upon the OCPD Isiolo and DCIO Isiolo accordingly.

44. Having said so, this Court therefore finds that the appellant was properly found guilty and convicted of the offences of defilement and deliberate transmission of HIV.

45. On sentences, as the complainant was aged 14 years and 6 months old, the appellant was sentenced to the minimum prescribed sentence under **Section 8(3)** of the Sexual Offences Act. Likewise, the appellant

was sentenced to the minimum prescribed sentence under **Section 26(1)** of the Sexual Offences Act. The sentences are therefore legal and rightly run concurrently.

46. This Court now finds that none of the grounds of appeal put forth and supported by the submissions is successful. The decision of the trial court is hereby affirmed and the appeal is accordingly dismissed.

Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 29th day of November 2017.

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JUDGE