



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. 9 OF 2014

(FORMERLY NAKURU CRIMINAL APPEAL NO. 174 OF 13)

(Being an appeal against conviction and sentence in Naivasha Criminal Case No. 204/2014- E. Kimilu Ag. P.M.)

DAVID CHEGE WAHINYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted for the offence of Defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act. In that on 28th January, 2014 at Nyandarua County he cause his penis to penetrate the vagina of G.M.M. a girl aged 17 years. He was sentenced to serve 15 years imprisonment.
2. Through his advocate Mr. Mburu, he has now appealed to this court against conviction. The nine grounds of the petition of appeal challenge the quality of the evidence upon which the conviction was based. The gist of the petition is captured in the first ground which states that:

“The evidence on record factual and medical does not support the charge of defilement Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act.....”(sic)

3. The submissions on ground 1 & 2 challenge the prosecution evidence related to exhibits. It is argued that an alleged torn and stained brown biker or panty allegedly worn by the complainant was not produced, and further that the P3 form did not support the allegations of defilement and that the trial magistrate erred by considering findings in part 3 of the P3 form which is intended for a male complainant. Further that the Complainant had initially denied that she had been assaulted but only admitted the same upon being coerced at the police station.
4. Regarding ground 3 it is the Appellant’s submission that the failure by police to produce the first report being O.B. No. 73 of 23rd January, 2014 on the Complaint was prejudicial to the Appellant. The Appellant also complains that the trial magistrate failed to make any findings on the submissions made by the defence (ground 4). Submissions on grounds 5, 6, 7 & 8 the emphasize the issue of the reluctant Complainant and doubts regarding medical evidence with particular regard to the admitted previous sexual encounters between the Complainant and the Appellant. The case of **Dominic Kibet Mwareng -vs- Republic (2013) eKLR** was relied on.
5. The DPP through Miss Waweru opposed the appeal through written submissions. The DPP reiterated the evidence tendered on trial and countered that the issue of identity of the assailant,

- age of the victim and penetration had been established through the same. It is the DPP's contention that the accused's defence consisted of mere denials.
6. As stated in the case of **Okeno -vs- Republic 1973 E.A. 322** the first Appellate Court has the duty of subjecting the trial evidence to a fresh analysis and to make its own findings thereon. Even then, the court will not interfere with findings of fact based on the credibility of witnesses unless such findings are plainly wrong and no tribunal could have arrived at such. **See Republic -vs- Oyier (1983) KLR 424**
 7. The prosecution evidence through the four witnesses who testified at the trial was as follows. The Complainant G.M.M. (PW1) at the material time was a student at [particulars withheld] Secondary school. She was 17 years and some months old. She had gone home prior to 28.1.14 because she was claiming to be unwell. She left her mother S. G. N. (PW3) at 1.00 p.m. on 28/1/14 to return to school but on inquiry at 3.00 p.m. (PW3) learned that the Complainant had not arrived at the school, which was only 15 minutes away.
 8. It is the evidence of the Complainant that on the way to school she was intercepted by the Appellant who was known to her. He operated as a *boda boda* business in the area. That the Complainant sat with the Appellant by the road side and that he showed her pornographic images on his mobile phone while caressing her. Shortly he removed her to a bushy area and had sex with her for about an hour. Then the couple returned to sit by the road side where PW3 met them and summoned police. Both were arrested and taken to Naivasha police station. Police referred them to the District Hospital for examination. P3 forms were completed and the Appellant was charged.
 9. In his defence the Appellant stated that the Complainant was known to him and that she approached her on 28th January, 2014 to take her to school as a *boda boda* operator. On arrival at the gate of the school he met the Complainant's mother and police who arrested the duo.
 10. Upon review of the evidence on record, there is no dispute that the Complainant and the Appellant were well known to each other and that the two spent several hours together on the material afternoon. The age of the Complainant is not disputed. This appeal turns, in my view on one issue; whether penetration occurred on the date of the alleged offence.
 11. The complainant on her evidence which was tested by cross examination on two occasions was that the Appellant was known to her, indeed that she had had sexual inter course with him on an earlier date namely on 16/12/13. She maintained that the Appellant intercepted her on 28/1/14 and after showing her some pornographic images or video took her to a bushy area for sex. This was at about 2.00p.m. She remained with him an hour having sexual inter course before moving back to sit with him by the roadside where the mother found her.
 12. Despite the Complainant's consistency in the trial, the Complainant's mother (PW3) said that the Complainant initially denied that she had sex with the Appellant on 28/1/14.. She stated in her evidence in chief that;

“I asked (Complainant) what they were doing and she never told me anything. They were interrogated separately and denied having done anything. We decided to proceed to Naivasha police station and she denied but she was taken to hospital. The doctor examined and it was confirmed she had been defiled. Later I continued to interrogate G. And she told me they had on that date I found her along the road on 28/1/14. She was crying while at the police station whenever I ask her what they were doing with Chege (Accused). After we went home same day she told me they had done sex.....(sic)”.

13. During cross-examination PW3 stated that the Complainant was placed in custody after the examination and remained there until 30/1/14. She further stated. **“I do not know whether she was defiled in a cypress bush. She told me about defilement when from hospital”.** Also the investigating officer **Cpl Cheron** stated in her evidence in chief that both the Appellant and the Complainant initially denied Sexual contact and that the Complainant was placed in custody.
14. However, after she had been examined at the hospital the Complainant narrated the events of her meeting and eventual sexual intercourse with the Appellant on her way to school to **PW4. PW4** also confirmed in cross-examination reports that there was earlier sexual contact between the Appellant and the Complainant.

15. It is evident that the Complainant was reluctant to disclose to her mother the events of 16/12/13 and indeed these only seem to have surfaced on 28/1/14 after the mother caught her with the Appellant by the road side. It is equally true that there was opportunity for sexual intercourse between her and the Appellant on 28/1/14 as she had left home at 1.30 p.m. and was found in his company at 4.30 p.m.
16. The question that the trial court needs to consider carefully is whether indeed sexual contact, that is penetration, did occur on the material date. For my part, whether or not the stained or torn brown biker was tendered was not a significant matter despite the Appellant's submissions. In this case, the Complainant herself told the court that on 28/1/14 the Appellant used a condom, which was obviously not recovered.
17. Secondly, despite the Complainant's allegation that the Appellant used force or threatened her, this is not a relevant matter in a case of defilement but is at any rate not consistent with her described conduct on 28/1/14. Indeed had she been forced to have sex with the Appellant, it is unlikely that she would later accompany him freely and sit with him by the road side where she was found by her mother. Equally, if he had threatened her or used force on the first encounter on 16/12/13, there is no explanation for her failure to report to her mother. The Complainant was after all a girl aged over 17 years at the material time.
18. On the medical evidence the only significant finding on the PRC forms (Exhibit 2B) regarding the examination of the genitalia, was that the hymen was torn. However the P3 forms completed soon after indicates that no physical injuries were detected in the same except whitish discharge on vulva, with itchiness. The results of the analysis of the said discharge are contained in part 5 of the P3 form.
19. It was indicated thereon that pus cells and epithelial cells were noted in the high vagina swab Specimen. The objection to these results as they appear in the P3 form by the Appellant in this appeal are misplaced. Part 5 of the P3 form is not reserved for male sexual victims but rather for **"Details of specimens or smears collected in examinations 2, 3 and 4 of Section C"** which refers to female and male victims. The clinical officer who produced the P3 form Exhibit 2A was **Tabitha Wanjugu Ndungu (PW2)**. She did so on behalf of a colleague clinical officer.
20. PW2 stated in her evidence that while no injuries were noted on the complainant's genitalia, there was visible white discharge indicating an infection. Further that the high vaginal swab (HVS) showed pus and epithelial cells, also indicative of infection. In cross examination she stated that the infection could result from sexual intercourse or use of contraceptives, but in this case defilement was the cause, and that epithelial cells were found in all human openings.
21. Noting that the first examination (PRC Exhibit 2 B) showed torn hymen, but not the P3 form (Exhibit 2A) the witness stated that the hymen was torn "immediately prior to arrest" but no bleeding was noted. She admitted that the PCR sketch where any injuries would be noted showed that the genitalia was normal.
22. All this is confusing. The two medical documents contradict each other, but also contain contradicting statements by themselves. Starting with the PRC, the sketches shows the genitalia is normal but also indicates elsewhere on the portion reserved for **"Genital examination of the survivor"**, that the hymen was torn. There is no indication in the PRC of whitish discharge reported in the P3 form. The P3 form indicates at Section C 2(a) reserved for examination of genitalia that there were no physical injuries but that there was **"visible whitish discharge in vulva with itchiness"**, at No. 5 reports the results of the HVS, pregnancy Hepatitis B and VDRC examination, all of which are negative.
23. Thus, if indeed the prosecution was relying on the presence of the infection manifested by the presence of whitish discharge and epithelial and pus cells, the same had to be connected to the Appellant- that he infected the appellant during sexual intercourse on the stated date. That would rule out infection from other sources as given by **PW2**. Besides, it is unlikely that an infection even if contracted in the alleged sexual encounter on 28/1/14 could have developed within hours of sex to present in the manner described by Medical evidence: **discharge with pus and epithelial cells**. The trial court did not advert its mind to these aspects of the medical evidence while dealing with it in the Judgment.
24. As regards the alleged torn hymen, the trial court did not consider the two contradictory reports on this matter. This is what the learned magistrate stated *inter alia*:

“This evidence (complainant’s) was corroborated by medical evidence. It was ascertained by the clinical officer that the Complainant had been defiled and her hymen broken. She had no visible injuries since the accused had used a condom at the time of defilement. She had a whitish discharge.....It is obvious that (the) Complainant would not have been bleeding on the 28/1/14 since it was not her first time for her to have sex with accused”.

25. Firstly, if a condom was used on the material date, the chance of the alleged infection arising from intercourse on 28/1/14 is distant. The trial court correctly noted that the Complainant’s hymen was likely torn during the first and not the second sexual encounter. Thus the two medical reports did not corroborate the evidence of the Complainant with regard to the second incident as the trial magistrate concluded.
26. The trial court also failed to note the discrepancies in the PRC (Exhibit 2B) and the P3 form (Exhibit 2A) relating to the Complainant. It is true that under Section 124 of the Evidence Act even without medical evidence the court may convict an accused person on the evidence of the victim alone, if it found it true, and gave reasons for so finding. But where medical evidence is tendered as in this case, which creates doubt in the evidence of the complainant, the court must proceed with utmost care to satisfy itself that its findings are well grounded.
27. The defence complaint that the court did not deal with submissions it made on these discrepancies are valid. Had the court done so, it would have reached a different finding on the medical evidence. Thus the medical evidence was in tatters and could not support the Complainant’s evidence. The Complainant for her part only admitted to have been defiled after arrest and examination at the hospital. Pressure was evidently piled on her in this regard by **PW3** and **PW4**, the latter who stated that she “**interrogated**” the Complainant.
28. It seems to me that the only fact proved beyond doubt with regard to the material afternoon was that the Complainant delayed to return to school and was found seated by the road side with Appellant. Such behaviour should offend every responsible parent and **PW3** was entitled to seek police intervention in the matter, especially since the Appellant and the Complainant were no doubt in a love relationship which had led to earlier sexual inter course.
29. However as relates to sexual penetration on 28/1/14, I think PW1’s evidence is in the circumstances of this case a product of parental pressure, guilt and a desire to be released from custody perhaps more than the desire to tell the truth, regarding the date in question. The medical evidence is riven by material discrepancies that create serious doubt whether sexual penetration did in fact occur on 28/1/14. The prosecution should have considered bringing a charge relating to the 16/12/13 in light of the evidence gathered.

20. In my view, the trial court would have arrived at a different finding had it considered all foregoing matters. The Appellant’s sketchy defence notwithstanding, the evidence tendered did not rise to the threshold of proof beyond reasonable doubt and the consequent conviction is therefore unsafe. I do therefore quash the conviction and set aside the sentence of 15 years imprisonment, and order that the Appellant be set at liberty unless otherwise lawfully held.

Delivered on 13th this day of **May, 2016**.

C. Meoli

JUDGE

In the presence of:

For the DPP Mr. Koima

For the Appellant Mr. Mburu

Appellant present

Mr. Barasa Court Clerk