



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 200 OF 2015.**

**EPHANTUS IRUNGU MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's court at Makadara Cr. Case No. 2425 of 2014 delivered by of Hon. E.S Olwande on 13<sup>th</sup> November, 2015).*

**JUDGMENT**

**BACKGROUND**

Ephantus Irungu Mwangi, the Appellant herein, was charged with the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act. The particulars of the charge were that on 18<sup>th</sup> May, 2014 at **[particulars withheld]** Slums in Nairobi within Nairobi Area County,, intentionally caused his penis to penetrate the vagina of K.M, a child aged 10 years.

In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the charge were that on 18<sup>th</sup> May, 2014, the Appellant, at **[particulars withheld]** slums in Nairobi within Nairobi area county, intentionally and unlawfully, committed an indecent act with K.M by using his hand to touch her private parts namely vagina.

The Appellant was found guilty of the main charge and sentenced to life imprisonment. He was dissatisfied with the decision and he preferred this appeal .He was dissatisfied that he was furnished with prosecution witness statements which was a violation of his constitutional right to a fair hearing. He was also dissatisfied that the medical evidence relied on was not sufficient to sustain a conviction, that Section 169(1) of the Criminal Procedure Code was not relied with and that the case was not proved beyond a reasonable doubt.

**SUBMISSIONS**

The Appellant filed written submissions. He submitted that the case was not proved beyond a reasonable doubt. He faulted the fact PW1's evidence was not corroborated. Further, that the age of PW1 and penetration which were key elements of the offence of defilement were not proved. He also submitted that his defence was not considered which contravened Section 169 of the Criminal Procedure Code.

Learned State Counsel, by Ms. Kimiri for the Respondent opposed the appeal. She submitted that

although there was no corroboration of PW1's evidence, the law does not place any mandatory requirement for corroboration of evidence of minors in sexual offence cases as long as the court believed in their evidence. Furthermore, PW1's evidence was nonetheless corroborated by the medical evidence which proved penetration. She relied on **Eric Onyango Ondeng' v. Republic, Criminal Appeal No. 5 of 2013** to buttress this submission.

She then submitted that although there was no documentary evidence to prove PW1's age, the same was sufficiently established by the oral evidence of PW1 and the medical reports adduced in evidence. She cited **JWA v. Republic [2014] eKLR** to buttress this submission.

In sum, she submitted that the case was proved beyond reasonable doubt and that therefore the conviction was safe. She prayed that the appeal be dismissed.

### **EVIDENCE**

It settled law that the duty of the first appellate court is to reevaluate the evidence and come up with its own conclusion but bear in mind that it has neither seen the witnesses nor heard their evidence. I will accordingly endeavor to summarize the evidence adduced before the trial court.

**PW1, M.K** who was the complainant gave evidence under affirmation. She was aged 10 years and a resident of **[particulars withheld]** slums. She was a class 4 pupil. She recalled that on the fateful day, which was a Saturday, she was playing outside the plot when at around 4.00 p.m. she was summoned by the Appellant. When she got to his door he forced her into the house and blocked her mouth. He then undressed her and forced her onto the sofa where he removed his penis and inserted it in her vagina. He then gave her 10 shillings and requested that she should not reveal what had happened to anyone.

She put her clothes back on and came out of the house crying and neighbours took her to her house. The following day she was taken to hospital by two ladies. She identified the Appellant as the person who defiled her.

**PW2, M M** was the grandmother to PW1. She recalled that on 18<sup>th</sup> May 2014 she arrived home at 8:00am from work and found PW1 crying. She sought to know the reason and the complainant informed her that a certain man had bought her sweets and ordered her not disclose anything. On the following day the house help found the child sleeping. Upon interrogation the child claimed she was defiled. There was also blood in her bedding. PW1 then disclosed to her what had happened. When she went home she found the Appellant who was a care taker at the plot about to be lynched by members of the public for the heinous act he had committed.

She took PW1 to Mathare MSF Clinic in Mathare where she was treated and a medical report and Post Rape Form was issued. She escorted the Appellant to the Chief's office. The matter was thereafter reported to Eastleigh Police Station. She testified that the complainant was admitted for about to the Clinic or a month. She testified that the Appellant used to give PW1 sweets a habit she discouraged him from doing.

**PW3, CHRISTINE KADU**, was a social worker within the Slums. The matter was reported to her by one Betty. She went to PW2's house and on confirming the incident hired a taxi and took PW1 to hospital. She was admitted at the MSF Clinic. She testified that PW1 described the assailant who PW2 quickly singled out as the Appellant.

**PW4, PURITY KAJUJU** was a Clinical Officer based at Mathare MSF. She treated PW1 on 19<sup>th</sup> May, 2014 who claimed that she had been defiled the previous day by someone known to her. The patient had trouble walking and looked very sad. Upon examination of her genitalia she established that there were several bruises, the inner labia walls were red and the hymen was intact. No spermatozoa was found. She prescribed a medical certificate and completed the Post Rape Care report. She produced the documents as evidence.

**PW5, Dr. SHAKAL** of police surgery examined PW1 on 21<sup>st</sup> May 2014. He found her external genitalia normal. The labia minor had reddened and that the hymen had a tear at 5 o'clock. The complainant had earlier been attended to at MSF Mathare. He filled and signed a P3 form which she produced as an exhibit.

He also examined the Appellant who had allegedly defiled the minor and found that he had normal genitalia. He had multiple abrasions on his face and his left eye was swollen. He again filled and signed the P3 form and he produced the same in court.

**PW6, No. 93220 PC NANCY BUKAYO**, she testified that she was from Eastleigh Police Base. She recalled that on 20<sup>th</sup> May 2015 she was summoned by the officer in charge and assigned the present case. The Appellant was already in the cells and the minor had been rushed to MSF hospital Mathare. She later escorted the complainant and Appellant to the Nairobi Area Police Surgery where they were examined and their P3 filled.

She thereafter recorded the statements of witnesses and charged the Appellant.

The prosecution then closed its case and the learned magistrate made a ruling that a prima facie case had been established. The Appellant was accordingly put on his defence. He gave a sworn defence and called one witness to corroborate the same. He testified as **DWI**. He testified that he worked as a cleaner at a rental premise in Eastleigh. He recalled that on 11<sup>th</sup> May, 2014 he was heading home from work and he went to a shop to buy some candles. As he was about to enter the shop he met the complainant's grandmother, PW2, leaving. After he purchased what he needed and as he was going home he was accosted by four men who started beating him alleging he had been terrorizing the woman.

The woman then emerged screaming that he had touched her child. Luckily some AP officers on patrol came and took him to the Chief's Camp where he spent the night. The next day he was taken to the police base and thereafter to Shauri Moyo Police Station where the charges were drafted.

He testified that PW2 used to live in the plot where he worked and after a month the landlord found garbage in her house and evicted her. She thereafter accused him of organizing for her eviction. As she left she warned the Appellant that she would teach him a lesson. He testified that he stayed in a very populous area near a road and therefore people would have seen him commit the offence. He testified that he worked the whole day on the fate day and he could not therefore have defiled PW1.

**DW2, JANE MUTHONI** was a caretaker of a flat in Eastleigh Section 3. She recalled that on 11<sup>th</sup> May 2014 the Appellant who had been employed as a caretaker in a certain flat in the area went to deliver water to the tenants and left the premises at about 9:30 pm. On the following day the Appellant informed her that he had been arrested. She testified that the Appellant had been working at the flat since 2013 and that his employer trusted him. She testified that the complainant's mother had once beaten the Appellant and she took him to hospital.

### **DETERMINATION**

After considering the evidence on record, I narrow down the issues of determination as; whether the Appellant's right to a fair hearing was violated by not being furnished him with witness statements, whether the case was proved beyond a reasonable doubt and whether his defence was considered pursuant to Section 169 of the Criminal Procedure Code.

The Appellant submitted that the trial court allowed him to proceed with the trial notwithstanding that he had not been furnished with the prosecution witness statements. I have had the opportunity of reading the entire trial record of appeal. At no time did the Appellant inform the trial court that he did not have the witness statements as a result of which he was not ready to proceed. Indeed, the trial proceeded uninterrupted for the entire period the witnesses were present. This was replicated when he tendered his defence. As such, that ground of appeal lacks merit and I dismiss it.

On proof of the case, the prosecution is enjoined to establish three main elements of the offence of defilement; identification of the perpetrator, penetration and lastly age of the complainant. With regard to identification, the grandmother of PW1 who testified as PW2 stated that she was told of the incident by PW1 and another one, Betty, PW2's house help. On arrival home, she found PW1 sleeping and Appellant almost being lynched by members of the public. She knew the Appellant before the incident and she testified that they used to live at the same plot but she later moved out. The Appellant did not refute knowledge of the complainant. In his testimony he said that the complainant's grandmother lived in a building where he had been employed as a caretaker. More importantly is the fact that PW1 too well knew the Appellant. She confirmed they lived in the same area before relocating from **[particulars withheld]** slums. Her evidence was very cogent that the Appellant called her from outside the plot into house where he blocked his mouth and viciously defiled her. Indeed, he had formed a habit of dishing sweets and money to PW1 as a way of enticing her to him, a habit PW2 had warned him against. I agree that there was no eye witness when the ordeal took place. However, under Section 124 of the Evidence Act, the trial court is enjoined to convict an accused notwithstanding the absence of corroboration if it believes the evidence of the minor victim. The trial court believed in PW1's evidence. I also have no reason to disbelieve her evidence. She struck me as a trustworthy witness. I then hold that the Appellant was positively identified by recognition.

On the issue of penetration, Appellant has submitted that the evidence of PW 4, the Clinical Officer, was that she examined the child the next day and found her hymen to be intact but there were several bruises around the external genitalia and the inner labia which was red. He submitted that the fact that the hymen was intact countered the trial magistrate's holding that there was penetration. The Respondent submitted that the intact hymen did not disprove penetration. She relied on **Erick Onyango Ondeng' v. Republic, Criminal Appeal No. 5 of 2013(Nairobi)** to buttress this point. The Appellant further submitted that the evidence of PW4 was contradicted by PW5 who filled the P3 form which indicated that the hymen had a tear at 5 o'clock. He submitted that this contradiction was of such nature as to make the evidence unreliable.

Penetration under the Sexual Offences Act is defined under Section 2 as **"...the partial or complete insertion of the genital organs of a person into the genital organs of another person."** It then behooves the court to determine whether the mere fact that the hymen was not broken rendered the absence of penetration. PW1 was candid that the Appellant inserted his penis into her vagina. The Post Rape Care Form indicated the reddening of the vulva area with extensive bruising of the inner labia walls. It is also commented that there was recent sexual activity. The form was filled on 19<sup>th</sup> May, 2014 and the offence is alleged to have occurred on 18<sup>th</sup> May, 2014. Therefore, the injuries were only a day old. In my view, the fact that the extensive bruising was in the inner labia walls was evidence of a partial penetration. Even if the penetration did not reach the hymen, it meets the definition given under **Section 2 of the Sexual Offences Act**. It does not, in the circumstances, matter that the P3 form indicated that the hymen had a 5 o'clock tear thus contrasting PW4's evidence. Whether the hymen was injured or the inner labia walls were extensively bruised amounted to one and the same act, penetration. I am further vindicated by the case of **Eric Onyango Odeng vs Republic (Supra)** in which the Court of Appeal delivered itself thus:

***"We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA (supra) the Uganda Court of Appeal expressed the same view as follows;***

***"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."***

Therefore, this court concurs and finds that penetration is not necessarily proved by a torn hymen or the presence of a tear. At the risk of repeating myself, I emphasize that the evidence given by the complainant was sufficiently corroborated by the reddening of the vulva area and the extensive bruising of her inner labial walls. This is further guided by the Post Rape Care form where it concludes upon examination of the complainant that there was recent sexual activity. It is therefore clear that the evidence adduced

clearly showed that the prosecution did indeed prove penetration.

The next ingredient that the court must look at is age. The prosecution did not adduce any documentary evidence at the trial to ascertain the complainant's age. The trial magistrate also observed this and concluded that the age of the complainant needed not be proved as an element of the offence but only for purposes of sentencing. This however was a misdirection on the part of the magistrate. The offence as laid out under Section 8(1) of the Sexual Offences Act is clear that:

***“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”***

It is therefore paramount to prove the complainant is a child in any charge of defilement. Furthermore, under the Sexual Offences Act, sentences for defilement are determined by the age of the complainant. Therefore, the age of the complainant remains a paramount element of the offence that must be proved. It is however now settled law that the age of the complainant must not be proved by documentary evidence. The same can also be done by visual observation and oral evidence. In so holding, I am guided by the Court of Appeal in **J.W.A. vs Republic [2014] eKLR** in which Koome, Musinga and Otieno Ondek, JJA held as follows:

***“The gists of the appellant’s appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and two courts below established the fact that the considered view that the age of an individual is a fact and the two courts below established the fact that the complaint was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1999 and was thus 10 years old in the year 2009, when the offence was committed; the P3 Form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years.***

Similarly, in the present case, PW1 candidly stated that her age was 10 years. The same age was reflected in her P3 form (Exhibit 2), medical report from MSF Clinic at Mathare and the Post Rape Care Form (Exhibit 1b). In the circumstances, I hold that the age of the complainant was sufficiently established.

In his defence, the Appellant distanced himself from the offence and instead blamed his woes on PW2. He alleged that after she was thrown out of the plot by the landlord, he castigated the move. In contrast, that assertion was ably dislodged by the prosecution’s evidence which was cogent and water tight. The sum total of my findings is that the prosecution discharged their burden and proved the case beyond a reasonable doubt.

The Appellant further alleged that his defence was not considered in arriving at a guilty verdict. Again, I have had the advantage of reading the learned trial magistrate’s judgment. From the last paragraph of page 4 to the end of the first paragraph on page 5, the learned magistrate meticulously summarized the Appellant’s defence which at the end of the judgment was found lacking in credibility. His ground of appeal therefore that his defence was not considered is also unmeritorious.

In the end, and after re-evaluating the entire evidence, I find that this appeal lacks merit and the same is hereby dismissed. I confirm both the conviction and sentence. It is so ordered.

**Dated and Delivered at Nairobi this 18<sup>th</sup> October, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. Appellant in person.
2. Miss Kimiri for the **Respondent.**