



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.222 OF 2012

SELESTINE MURITHI MUGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the judgment of the Hon. D. A. Okundi (Mrs.) Senior Principal Magistrate) in
Kiambu Chief Magistrate's Criminal Case No.1751 of 2011*

delivered on 10th August, 2012)

JUDGMENT

Selestine Murethi Mugo, the appellant herein, was, in the main count charged with defilement contrary to Section 8 (1)(2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 19th day of August, 2011 at 7.45 pm at *[particulars withheld]* village Kihingo sub-location in Kiambu County intentionally and unlawfully committed defilement which caused penetration with genital organs namely penis into genital organ namely vagina of R M W aged 11 years.

In the alternative he was charged with indecent act contrary to Section 11(1) of the Sexual offences act No. 3 of 2006. It was alleged that he intentionally and unlawfully did indecent act with a child by touching her private parts namely the vagina.

He was convicted in the main count and sentenced to life imprisonment.

He was dissatisfied with both the conviction and sentence and he preferred this appeal.

In a memorandum of appeal filed on 17th of August, 2012, the appellant has raised the following grounds of appeal:-

- i. **The Prosecution did not prove its case beyond reasonable doubts.**
- ii. **That the charge-sheet was defective.**
- iii. **That crucial witnesses were not called to testify.**
- iv. **That he was convicted based on hearsay evidence that was not satisfactory.**

This is the first appellate court whose duty is to re-evaluate the evidence on record and draw its conclusions but bear in mind that it has neither heard nor seen the witnesses – see **OKENO –VS- REPUBLIC (1972) E.A 32, KARIUKI KARANJA –VS- REPUBLIC (1986) KLR, 190 AND PANDYA –VS- REPUBLIC (1957) E.A. 336.**

The appeal was canvassed before me on 4th of December, 2014. The appellant was in person while the respondent was represented by learned state counsel Miss Kimiri.

The appellant relied on his written submissions filed on 4th of December, 2014. He submitted as follows:-

Firstly, that the offence of defilement under Section 8(1) of the Sexual Offences Act was not proved. He cited the fact that the element of penetration was not demonstrated. In this respect, he submitted that, although the medical report of the complainant indicated that her hymen was ruptured, the doctor (PW3) who produced it testified that she presented herself with no physical injuries on her body. Further that PW3 testified that there was no vaginal discharge and there was no presence of spermatozoa and yeast cells which would be indicative of sexual assault.

Secondly, he submitted that the charge-sheet was defective. In this respect he stated that the charge-sheet indicated the age of the complainant to be 11 years at the time the offence was committed. According to him the offence was committed on 19th August, 2011 whereas the complainant was born on 8th of June, 2000 which placed her age as at 19th August, 2011 to be 11 years. Hence, the charge-sheet ought to have been amended to be in consonance with the correct sub-section of Section 8 of the Sexual offences Act.

Thirdly, that the evidence of the complainant was not corroborated. In this regard he submitted that crucial witnesses were not called to corroborate her evidence that indeed she was defiled by the appellant.

Fourthly, that the court failed to take into account that there existed a grudge between the appellant and PW2 such that had the court properly evaluated his defence it would have arrived at a different verdict.

Learned state counsel Miss Kimiri opposed the appeal. She submitted that the complainant's age was properly proved by way of an immunization card which was produced as P. Exhibit 2. The same indicated that the complainant was born on 8th of June, 2000. And so if the offence was committed on the 19th of August, 2011 the victim was aged 11 years at that time.

She also submitted that PW1 gave candid evidence on how the appellant grabbed her, put her on his bed and defiled her. That PW1 also testified that the appellant removed her biker and pants and as he defiled her, she screamed for help. People came to her rescue amongst them PW2, her brother who broke into the house and found the appellant in the act. PW 1 was thereafter taken to Kiambu district Hospital on the same date where a medical officer confirmed that her hymen was broken. In this respect, medical examination form (P3) was produced in court as an exhibit in prove that PW1 had indeed been defiled.

Miss Kimiri did also state that PW1 properly identified the appellant and in any event he was caught red handed in the act.

On the issue of a defective charge-sheet, she submitted that the appellant was charged under Section 8(1) (2) of the Sexual Offences Act whereas, the statement of the offence ought to have been framed as having been charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Nevertheless, this defect is curable under Section 382 of the Criminal Procedure Code.

On the issue of failure to call critical witnesses, it was her submission that the prosecution called all relevant witnesses it needed to.

She further submitted that the medical report was not based on hearsay evidence. It was a credible document which the trial court properly relied on. And in any case, the same was filled on the same date the incident took place.

This court finds the following issues relevant for consideration:-

- i. **Whether the offence of defilement was proved as required by the law.**
- ii. **Whether the charge-sheet was defective.**
- iii. **Whether the prosecution called all crucial witnesses.**
- iv. **Whether the trial court considered all relevant matters raised by the appellant.**
- v. **As a summary, whether the case was proved beyond all reasonable doubt.**

In total, the prosecution called a total of four witnesses. PW1, R M W was the complainant. She testified that on the 19th of August, 2011 at about 4.00 pm, she had gone to visit her brother one M. She then went to watch television at her aunt's place which was near M's house. It is then that the accused (Selestine Murethi) grabbed her hand and took her to his house, put her on his bed, removed her biker and pants and defiled her. She screamed after experiencing pain. Amongst the people who went to her rescue was her brother M who found the appellant still in the act. Those who accompanied M pulled the appellant out of the house and beat him up. They then escorted him to Kiambu police station where a report was made. PW1 was then taken to Kiambu District hospital where she was examined and treated. Thereafter she was issued with a medical examination report (P 3 form) which was filled by a medical officer.

PW2, B M W and a brother to PW1 told the court that his siblings on the material date had gone to visit him. At about 8.00 pm, he was told that they had gone to watch television at his uncle's place nearby. He proceeded to his uncle's house where he found the children watching television but the complainant was missing. He inquired from the other children where R M was and before he got an answer, he heard screams of a child coming from a house within the compound which was occupied by one of his uncle's workers namely the appellant.

PW2 then called another lady who was a neighbor to his uncle and together they went to the house where the screams were coming from. Upon knocking on the door no one opened. He then broke down the door which was locked from inside. That is when he found the appellant lying on top of the complainant. The appellant wore no trousers and PW1 had no pants on. He was defiling the complainant.

PW2 held the appellant while the woman who was accompanying him raised alarm. The villagers responded to the distress call and they came and arrested the appellant. The chief was also summoned by the villagers. The appellant was thereafter escorted to the police station. PW2 took PW1 to Kiambu district hospital where she was treated and discharged. At the Kiambu police station PW1 was issued with a P3 form which was thereafter filled by a medical officer.

PW3, Dr. Mohamed Faizae then of Kiambu district hospital testified that on the 25th of August, 2011 a P3 form in respect of PW1 who then was aged 11 years was filled by a doctor Kimani of the same hospital. He also testified that on the 19th of August, 2011 the said Doctor Kimani had examined PW1 on allegations of having been sexually assaulted at 8.00 pm on the same day at **[particulars withheld]** village in Kiambu County by someone known to her. He noted that PW1 had no physical injuries on the body but local examination of the genitalia revealed that the hymen was ruptured and therefore concluded that she had been defiled. He did however note that there was no vaginal discharge, neither was there spermatozoa nor yeast in her genitalia. There was positive test for G – negative rods. HIV test was negative.

PW3 produced the P3 form as P. Exhibit 1.

PW4 police Corporal woman Winnie Ingaiza testified that on the 19th of August, 2011 she and her colleague Sergeant Waiyego received the complaint from PW1 while accompanied by her mother. She referred them to Kiambu district hospital for treatment and thereafter issued PW1 with a P3 form. She testified that PW1's mother gave them PW1's immunization card which indicated that PW1 was born on the 8th of June, 2000 which placed her age at 11years as at the time the offence was committed. She recorded relevant statements and preferred the charges against the appellant.

PW4 further testified that PW1 told her that the appellant lured her into his house where he defiled her. That she screamed for help and her brother and other people came to her rescue. That they broke into the

appellant's house and rescued her. The accused was found defiling the complainant in his house and was arrested and escorted to Riabai Administration Police post and thereafter to Kiambu police station where he was charged.

PW4 produced PW1's hospital immunization card as P. Exhibit 2.

The appellant gave an unsworn statement of defence. He stated that he used to look after the cattle of his sister. He recalled that on the material date he did his normal work and at 6.00 pm, he was coming from selling milk at a hotel in Riabai when he met three men, one of whom was M. The latter asked him where he was coming from and he answered him. He noted that the said M was his long time enemy. He nevertheless, proceeded home. At the gate, the said M asked him for the keys to the gate but he refused to give him. A quarrel ensued between both of them which culminated into a physical fight. The other two men who accompanied M joined in the fight and beat him up thoroughly. Thereafter he found himself at Kiambu police station and three days later he was arraigned in court. He was surprised that he was charged with the offence of defilement which he denied.

Having evaluated the evidence on record, I will consider the first, third and fourth issues for determination together as they relate to the weight of evidence, and if the same crystallized together proved the case beyond all reasonable doubts.

Of worth noting is that the appellant was caught red-handed at the scene and in the act by PW2 who was among the members of public who headed to PW1's call of distress when she screamed as the appellant was defiling her.

PW1 was candid in her evidence that indeed the appellant had already defiled her by the time PW2 arrived at the scene. That is why she screamed because she felt pain as the appellant penetrated her vagina.

The act of penetration was proved by the doctor who examined PW1 on the same date she was defiled. The said doctor Kimani filled the P3 form which was produced by PW3, Doctor Mohamed Faizae then working at Kiambu district hospital. The same indicating that PW1's hymen was broken, an indication that she had been defiled.

It is important to note that a copy of the P3 form was not compiled in the record of appeal. But I have had the advantage of perusing the lower court original proceedings and the same is intact. The error in failing to compile it in the record does not in any way vitiate the strong evidence that PW1 was defiled.

The appellant submitted that the doctor who examined PW1 made an error in arriving at the conclusion that she was defiled because she did not present herself with any physical injuries. This submission is not tenable as the act of defilement is restricted to 'penetration' as defined under Section 8(1) of the Sexual Offences Act. The same reads:-

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

'Penetration' on the other hand is defined under Section 2(1) of the Act as, “.....**the partial or complete insertion of the genital organs of a person into the genital organs of another person.**”

In the instant case, the appellant was caught red-handed defiling PW1. He wore no trousers nor pants at the time. PW1 was also in the same shape. It took the effort of PW2 and other members of public to pull him off PW1. And as was confirmed by PW3 the act of defilement was complete as it was found out that PW1 had her hymen broken.

The appellant also submitted that PW1's evidence was not corroborated. Although under Section 124 of the Evidence Act, the evidence of a minor child need not necessarily be corroborated as long as the court is convinced that the child is telling the truth. In the present scenario, the appellant was caught in the act by PW2 who, in all respects, corroborated the evidence of PW1. This notwithstanding though, the record shows that PW1 gave a candid account of how the appellant grabbed her and took her to his house, where he defiled her. The trial court had no reason to doubt her evidence. This court also has no reason to doubt that she told the truth. Hence, I disregard the appellant's submission in that respect.

As to the proof of the age of PW1, the same was done by the production of her hospital health care card by PW4 as P. Exhibit 2. Again this exhibit was not compiled in the record of appeal but is intact in the original lower court record. The same attested that PW1 was born on 8th June, 2000. The offence was committed on 19th August, 2011. This placed her age at exactly eleven (11) years as at the time of the incident. It is not thus factual that PW1's age was not proved.

As to whether the charge-sheet was defective, the statement of the charge was framed as follows:-

“Defilement contrary to Section 8(1)(2) of the Sexual Offences Act No.3 of 2006”.

Section 8 sub-section (1) defines the offence of defilement while sub-section (2) provides for the penalty. In that case, the statement of the charge ought to have read as:

“Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.”

The error is clearly an act of poor draftsmanship which can be ignored as the same is curable under Section 382 of the Criminal Procedure Code. The same provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The appellant also submitted that the trial court failed to consider his defence to the effect that the charges were fabricated against him because he had a grudge with PW2. In his defence, he indicated that prior to his arrest he had fought with PW2 which led PW2 to implicate him with the offence. In arriving at her verdict, the learned trial magistrate noted as follows:-

“The defence by the accused borders on incredible. It defeats common sense that M would use his sister a child, to frame up charges of the kind herein and plan it in such a way that the child would be inflicted with injuries of sexual assault, whereby to fix a neighbor/relative. It is for this reason that I dismiss his defence as incredulous and proceed to convict the accused under Section 215 of the Criminal Procedure Code for the offence of defilement of a child aged 11 years.”

This clearly demonstrates that the learned trial magistrate gave due consideration to the appellant's defence which she found as lacking in merit and accordingly dismissed it.

This court is of the view that the said trial court arrived at the correct verdict in dismissing the appellant's defence. Given the circumstances under which the offence was committed, there is doubt that the

appellant's defence was an afterthought and lacked merit. I equally dismiss it in its entirety.

Finally, as regards the sentence, under Section 8(2) of the Sexual Offences Act, a person who commits an act of defilement with a child aged eleven years or less shall upon conviction, be sentenced to imprisonment for life. That is the penalty the trial court imposed and the same was within the law.

In the end, having carefully evaluated all the evidence on record, I find that the appeal has no merit and I dismiss it in its entirety.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 19th day of March, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. The Appellant in person
2. Miss Kimiri for the State/Respondent