



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 120 OF 2013

RICHARD KIMEU MUSYOKI.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

(An appeal arising out of the judgment and sentence of T. A. Odera PM in Criminal [Case](#) No. 244 of 2012 delivered on 28th February 2013 at the Chief Magistrate's Court at Mavoko)

JUDGMENT

The Appellant has appealed against his conviction and sentence of life imprisonment. The Appellant was charged in the trial Court with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the 4th day of July 2012 at [particulars withheld] area Athi River District within Machakos County, he intentionally and unlawfully caused his male organ (penis) to penetrate the female genital organ (vagina) of one MS, a girl aged 10 years.

The Appellant was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the alternative offence are that on the 4th day of July 2012 at [particulars withheld] area Athi River District within Machakos County, he intentionally and unlawfully caused his male organ (penis) to come into contact with the female genital organ (vagina) of one MS, a girl aged 10 years.

The Appellant was first arraigned in the trial court on 9th July 2012 and he pleaded not guilty to the charge against him. He was tried and convicted, and subsequently sentenced to life imprisonment. The Appellant being aggrieved by the judgment of the trial magistrate appealed his conviction and sentence. His grounds of appeal as stated in his Petition of Appeal filed in Court on 23rd April 2013 are that the prosecution case was not proved to the required standard needed in law; the trial magistrate made an error in both law and facts by failing to evaluate the evidence adduced with caution; and that his defence was not properly considered.

The Appellant also availed to the Court supplementary grounds of appeal during the hearing of his appeal which were as follows:

1. That the learned trial magistrate made an error in both law and facts and misdirected himself by holding that the prosecution proved its case, whereas evidence brought forward by prosecution contained material contradictions and inconsistencies hence discredited the entire evidence adduced.

2. That the learned trial magistrate made an error in both law and facts by failing to appreciate that there was a likelihood for PW 2 to have been made a whistle blower by the school authorities for the purposes of covering up claims of the Appellant's salary arrears.
3. That the blood stained clothes allegedly worn by PW I were not produced in court, and the trial magistrate failed to make an adverse inference on the issue.
4. That the trial Magistrate made an error in both law and facts by failing to observe that the other children who were on the same bed at the time of incident were not summoned yet were crucial witnesses.
5. That the origins of the sexually transmitted infection and spermatozoa detected in the victim's vagina wasn't established hence no link to the Appellant's participation in the offence charged.
6. That there was no proof of penetration on 4/7/2012 as medical evidence indicated an old penetration hence the charge was not proved.

The Appellant reiterated these grounds in written submissions that accompanied the supplementary grounds of appeal, and referred to the testimonies of various witnesses in the typed proceedings of the trial court. He submitted that there were contradictions as to whether the case was reported to the complainant's parents; there was evidence that there were children sleeping in the same bed as the complainant on the night she was defiled who were not called to give evidence; according to the medical evidence the complainant's hymen was broken and old looking which meant that it was not broken on 4th July 2012, and that the prosecution did not establish the origins of the sexually transmitted infections detected on the complainant.

Mr. Mamba, the learned counsel for the State submitted that that the prosecution called five witnesses, and that PW 1 who was the complainant testified that the accused stayed with them since her mother was mentally unstable. It was her testimony that on 4th July 2012, the Appellant who was her uncle came home and ordered the door to be opened. The complainant stated that the Appellant proceeded to where she was sleeping, removed her underpants and defiled her. Further, that PW I was firm during cross-examination that this was not the first time she had been defiled, and that this evidence was enough prove of penetration.

The learned counsel stated that on 15th July 2012, PW 2 who was a teacher noticed the complainant with a stain and that her walking style was not in order. This caught her attention and upon inquiring, PW 1 told her what had happened the previous night. PW 2 reported the matter to PW 3 the headteacher, who in turn reported it to PW 6 the chief who caused the Appellant to be arrested. The matter was reported to the police and the complainant was taken to hospital at Athi River. PW 5 a clinical officer at the hospital noted that the PW 1 hymen was broken, and that she had a discharge and an infection.

It was also submitted by the learned counsel that PW 4, a government analyst stated in her report that the matter came to her attention after 4 days and therefore it was too late in the day, and the infection could not be established. According to the counsel for the State, the Defendant in his defence stated that he was a watchman at the same primary school which owed him money. However, that PW 3 admitted on cross-examination that they owed the Appellant money and were paying him in instalments, and that he had recently been paid Kshs 30,000/= by the school, and there was therefore no reason to frame him.

Lastly, the counsel submitted that the ground of other children being in the same room as the complainant was not raised by the Appellant during the trial in his defence, and that the sentence of life imprisonment was reasonable as the Appellant was in charge of PWI's household.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. After a *voire dire* examination, the complainant (PW 1) was found to be sufficiently intelligent but did not understand the meaning of an oath. She therefore gave unsworn testimony but was allowed to be cross-examined. PW1 testified that she was 10 years old, and a standard 3 pupil at [particulars withheld] Primary school. She stated that on 4th July 2012, the Appellant

came home and she opened the door for him. That she went back to bed and that the Appellant followed her to the bed and removed her panties and did “tabia mbaya” (bad manners) to her, which she explicitly explained as removing his “thing” and putting it in her vagina. The trial court asked PW1 to demonstrate where the Appellant put his thing and she pointed at her vagina.

PW1 testified that she felt pain and went outside and put on her panties, and then went back to bed where the Appellant continued to sleep. She stated that the next day she went to school and reported the “tabia mbaya” incident to her headteacher who reported it to the chief, and that she was taken to the police by the headteacher. Further, that she was taken to hospital and told the doctor what happened and that she was given an injection. She also said she was not able to walk as she had a problem on her vagina, and she identified the Appellant in court as the man who defiled her. She also testified that she reported the defilement to her parents who told her to report it at school.

PW2 was a teacher at [particulars withheld] Ranch School, and she testified that on 4th July 2012 as PW1 was going to class she saw a stain at the back of her dress which was a mixture of blood and discharge. Further, that she went to PW1’s class and called her out and took her to the headteacher’s office where she interrogated her, and that after some hesitation PW1 informed her that the Appellant had sex with her the previous night. PW2 testified that she reported the matter to the headteacher and PW2’s class teacher, and that the headteacher reported the matter to the sub-chief. She testified that she knew the Appellant who was a neighbor.

The headteacher of [particulars withheld] Ranch School (PW3) also testified, and confirmed that that on 4th July 2012 PW2 reported to him that she had seen PW1 walking with difficulty, and that after being questioned, PW1 reported that her uncle who was the watchman in the school had defiled her the previous night. PW3 stated that he reported the matter to the area chief, and that on 6th July 2012 the assistant chief came and interrogated PW1, and the Appellant was thereafter traced and taken to Athi River Police station. Further, that they took PW1 to Makadara health centre where she was treated on 6th July 2012 and 7th July 2012 and informed the relatives of PW1. PW3 testified that PW1 had a single parent and he knew her mother who is mentally challenged.

PW4 was a government analyst from the Government Chemist and she testified that on 11th July 2012 she received two items “A” being HVS on a slide from PW1 and “B” being blood from the Appellant, and that she was to examine them for semen and spermatozoa. Further, that she investigated the same at the laboratory and found that item “A” did not have semen and spermatozoa. She produced her report as an exhibit.

PW5, a clinical officer at Athi River health centre on his part testified that he examined PW1 on 9th July 2012, and that she stated that she had been raped by her uncle and that this was the third time. He stated that PW1’s hymen was broken and old looking, she had a whitish discharge and there was spermatozoa. Further, that she also had a sexually transmitted infection namely candidiasis candida and was H.I.V negative. PW5 further testified that they put PW1 on treatment and he produced his treatment notes and P3 form as exhibits.

The assistant chief to whom the report was made testified as PW6, and he confirmed that he received a report of the defilement of PW1 from PW3, and that he thereupon interrogated PW1 on 7th July 2012 in the presence of PW3 and her teacher. Further, that PW1 told him that the Appellant had found her in bed the previous day and defiled her. PW6 testified that he then looked for the Appellant and took him to Athi River Police station together with PW1. PW6 confirmed knowing the Appellant, and that PW1 was under his charge as PW1’s mother is “slow in thinking” and worked far from home.

The last witness for the prosecution was PW 7, a police officer attached to Athi River Police Station, and she testified that she investigated this case on 6th July 2012, and that she was at her office when PW1 was brought by PW3 and PW6 . Further, that PW1 told her that she stayed with the Appellant and on the material day she was sleeping with other children on his bed and he defiled her and warned her not to tell anyone.

PW7 further testified that PW1 stated that she was interrogated by her teacher, headteacher and the chief, and she told them of the incident. Further, that PW1 had been treated at Makadara health centre and Athi River health centre, and that she then escorted PW1 and the Appellant to Athi River health centre where their blood samples were taken which she forwarded to the government chemist and also issued a P3 form. PW7 stated that PW1 was assessed to be 9 years old at the Athi River health centre, and she produced the age assessment report as an exhibit.

After the close of the prosecution case, the Appellant was put on his defence. He made an unsworn statement and did not call any witnesses. He stated that on 6th July 2012 he left work at 6.00 a.m, and that at 10.00 a.m the area chief came and told him to see him in his office. Further, that he was arrested and taken to the police station later that day and later arraigned in Court. He stated that he was not told why he was arrested and was a stranger to the charges against him, and he denied the same. Further, that PW3 wanted to fix him as his school owed him salary arrears from the year 2008 to 2012, and he disagreed with them as they used to pay him salary arrears in Kshs 500/= instalments.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the main issue raised in this appeal whether the Appellant's conviction for the offence of defilement was based on consistent, sufficient and satisfactory evidence. The Appellant has disputed the evidence as being contradictory, that crucial witnesses were not called to give evidence, and also disputed the medical evidence on the ground that it did not link him to the broken hymen and sexually transmitted infection detected in PW1.

This Court in determining this issue is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

The Appellant was in this regard positively identified by PW1 as he was previously known to her, and she was under his charge. She described the Appellant as her uncle and testified that she was staying in his house. The age of the complainant was also proved by production of the age assessment report in the lower court as evidence, that showed that she was 9 years old at the time of defilement.

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

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

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

The complainant in this regard clearly testified that the Appellant inserted his “thing” which is the colloquial commonly used for a man's penis, into her vagina, and it is my view that this testimony leaves no doubt that there was penetration. The record of the trial court also shows that she demonstrated the act that was done to her by the Appellant, and it was evident that the Appellant did insert his penis into her vagina. Her testimony was clear, consistent and remained unshaken on cross-examination. The learned trial magistrate was satisfied that the witness was consistent and I find no basis to depart from this finding.

The medical evidence by PW1 merely corroborated the fact that PW 2 was defiled, and there is no requirement that for penetration to occur the hymen should be freshly broken. Further, the presence of a sexually transmitted infection is further corroboration of penetration but not an essential ingredient. The Court is also mindful of the proviso to section 124 of the Evidence Act which provides that no corroboration is required in cases of sexual offences where the court believes that the complainant is telling the truth.

The complainant's testimony has in this respect been found to be credible and truthful, and I find that the prosecution proved that there was penetration. The prosecution therefore proved all the elements of the offence of defilement and I find that the Appellant's conviction was safe and on the basis of sufficient evidence.

I will however still briefly address the grounds raised by the complainant, the first being that PW2 was a whistle blower who was out to frame him because of salary arrears owed to him by the school in which she was teaching. It is to be noted that there is no law against being a whistle blower, and it is in fact a civic duty that is to be encouraged. PW2 must on the contrary be commended for following up and taking further action upon her observation of PW1's circumstances, which resulted in the necessary action being taken to safeguard and protect PW1. In any event PW1 corroborated PW2's evidence that she had difficulty in walking after the defilement, and PW2 was therefore truthful in her evidence. PW3 also testified that his school had been paying the Appellant his salary arrears, and therefore there was no basis to frame him.

As regards the contradictory evidence as to when and by whom the complainant's parents were informed of PW1's defilement, the weight of that evidence and its effect has to be evaluated in light of the elements of the offence of defilement which have been demonstrated to have been proved, and I find that the contradictions noted by the Appellant were minor and did *not affect the main substance of the prosecution's case*.

Lastly, on the ground that the prosecution failed to call as witnesses the children who were in the same bed on the night PW1 was defiled, under **section 143 of the Evidence Act** no minimum and/or particular number of witnesses is required to prove a case. It is thus clear that in law, unless specifically stated in the relevant law, there is no need for more witnesses than enough to prove the offence.

PW1's evidence was the main evidence on what took place at the time she was defiled and she was the only direct witness as to the defilement. The prosecution also called other witnesses who gave evidence as to what transpired after the defilement, and also witnesses who gave medical evidence to corroborate the defilement. There was no indication or evidence given that the children the Appellant alleges were not called as witnesses were aware of the defilement of PW1, and therefore there was no prejudice caused to the prosecution's case resulting from the failure to call them as witnesses.

The Appellant in his grounds of appeal also appealed against the sentence. This Court notes in this regard that the Appellant was charged with, and convicted of the offence of defilement under section 8(2) of the Sexual Offences Act, which provides as follows:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

It is to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment, and while sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law.

See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret, in which the Court of Appeal** held, with respect to the minimum sentences provided under the Sexual Offences Act, that:-

“Those are minimum sentences and parliament appears to give no discretion to the court's to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the act which is prevention and protection from harm, from unlawful sexual act.”

In the present appeal, notwithstanding that the Appellant was remorseful, I am in the circumstances unable to vary or review the minimum penalty provided by the law. I accordingly uphold the conviction of, and sentence of life imprisonment imposed upon the Appellant for the offence of defilement contrary

to section 8(1) and (2) of the Sexual Offences Act.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2015.

P. NYAMWEYA

JUDGE

DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY 2015

JUDGE