



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 14 OF 2015

G O OAPPELLANT

-VERSUS-

STATE RESPONDENT

JUDGMENT

Background:

1. When the Appellant herein **G O O** was arraigned before the Chief Magistrate's Court at Migori on 09/04/2014, he faced the charge of defilement and that of committing an indecent act with a child in the alternative. He denied both counts.
2. A total of seven witnesses were called and at the close of the prosecution's case, the trial court placed the appellant on his defence.
3. By a judgment delivered on 22/07/2014, the appellant was found guilty of the offence of defilement and was accordingly sentenced to 20 years imprisonment.
4. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal on 20/02/2015 which by an order of this court made on 30/09/2015 the same was deemed to be properly on record.
5. The Appellant raised for grounds of appeal which he tailored them as follows:-
 1. *That the trial magistrate did not consider the contradicting witnesses testimonies;*
 2. *That the trial court relied on irregular medical evidence which did not meet the legal standards of acceptance;*
 3. *That the trial court totally disregarded the defense evidence resulting in prejudice.*
 4. *That the trial court disregarded total violation, infringement and treat to my constitutional rights."*
6. At the hearing of the appeal, the Appellant relied on his written submissions filed on the 13/10/2015 in which he expounded on the foregoing grounds of appeal and relied on the judicial authority of **Uganda =vs= Sebyala & Another (1969) EA 264** on the issue of an alibi and that of **Albamis Mwaria Mutua =vs= Republic, Criminal Appeal No. 120 of 2004** (unreported) on the issue of breach of the Appellant's rights. He prayed that the appeal be allowed and he be set at liberty.

7. In opposing the appeal, the State urged the Court to revisit the evidence which is watertight and dismiss the appeal.

Discussion & Determinations:

8. This being the Appellant's first appeal, the role of this appellate Court of first instance is 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, analyse 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.

9. In discharging the said duty, this Court 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, were proved and as so required in law; beyond any reasonable doubt.

10. 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. I will consider each separately.

a. **On the complainant's age:**

11. The issue of the age of the complainant who testified as PW1 was settled by PW7 one Dr. Joseph Otieno who assessed the age to be between 12 – 14 years. He produced the age assessment report as an exhibit.

b. **On the issue of penetration of the complainant's private parts:**

13. **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.’

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).

14. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

15. In demonstrating this particular ingredient of the offence, the complainant had the following to say:-

“... He covered my mouth and defiled me once “Akinibaka”. He tore my inner pants when I woke up I found a torn panty my grandmother came and found me bleeding from my private parts.... I had not known any other man sexually before this incident...”

16. **PW2** was the complainant's uncle who was also a minor aged 13 years who was sleeping together with the complainant in the night of 06/04/2014. He stated that:-

“.... I heard someone saying “leave me” “leave me” “Niache” “Niache”. I woke up and switched on the lights. I saw blood coming from the complainant from her private parts...”

17. When **PW3**, who was the complainant's grandmother and PW2's mother, came into the house where the complainant had had slept together with PW2, after being called by PW2. she stated that:-

“... I asked him how and he said he has done a bad thing with complainant. I ran to the house where they sleep. I found the complainant bleeding. There was blood on her under pants.

18. The foregoing evidence was adequately corroborated by that of the Clinical Officer, **PW6**. He produced all the complainant's treatment notes from [particulars withheld] Dispensary as well as the P3 Form which he had filled in on 08/04/2014. He confirmed that there was evidence that the complainant's hymen had been freshly broken and noted the presence of injuries on the genitalia with bruises and hyperemia on the labia and vulva. There was also a white vaginal discharge which was blood stained. He concluded that the complainant had been sexually assaulted in her private parts by the use of a forced penile penetration.

19. It was hence proved that there was indeed penetration of the complainant's private parts by a male genitalia organ.

c. **Whether the appellant was the perpetrator:**

20. The complainant stated that she was sleeping with her uncle, PW2 in the night of 06/04/2014 which she readily remembered to have been a Sunday and at around 10:00 p.m. to 11:00 p.m. she woke up to find someone having sex with her. As she struggled to free herself, her mouth had been covered and could not scream. When PW2 eventually put on the lights, she recognized the assailant as the appellant who was their neighbour and knew him very well.

21. PW2 who was sleeping on the same mattress with the complainant on the floor was woken up by the complainant's struggle. He quickly switched on the electricity light in the house they were in which was adjacent to PW3's main house. PW2 then saw the assailant and recognized him to be the appellant. He was their neighbour and had seen him before and his house was about 150 metres away. PW2 even engaged the Appellant and asked him what he was doing in their house and the Appellant told him that he did not know anything. Further, both PW2 and the complainant recognized the way the assailant was dressed in that night to be the same as the way he was so dressed in court when they testified one week later.

22. Both the complainant and PW2 clarified that the door to the house they were sleeping in did not lock properly and one could easily gain access by slightly pushing it from outside and that explained how the Appellant found his way into that house.

23. The Appellant in his defence admitted that he was a neighbour to PW2's family and that he knew PW3 and her son PW2. He however denied knowing the complainant as well as the other siblings to PW2. He also denied being the assailant.

24. The identification of the Appellant in the case was based on visual identification/recognition at night. It is not in doubt that the complainant and PW2 were the appellant's neighbours as they both lived in the same home. The possibility of them knowing the Appellant quite well can only be real. That is why when PW2 went to inform her mother on what the assailant had done to the complainant, PW2 described him by his name “G O”. Likewise, when PW2 switched on the light and saw the Appellant he is recorded thus:-

“... I asked him G what you are doing here....”

25. The complainant also described the Appellant by name in stating that:-

“... At night G came and pushed the door and defiled me once switched on the light and that's when we could see him the person defiling me)..... Jared asked G how he entered the Accused ran away....”

26. There is equally no doubt that the house in which the complainant and PW2 slept in had electricity lighting. They stated that when the light was put on both of them clearly saw and recognized the intruder as the Appellant herein.

27. I have to take caution of relying on evidence of identification as it can be erroneous even in cases of recognition and cause miscarriage of justice to an accused. This was so broadly discussed in the case of **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system as follows:-

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

28. Closer home, the Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated that:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

29. It was further held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

30. The above discourse does not mean that there cannot be safe recognition at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at

night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

31. I am also aware that courts have repeatedly held that the best way of recognizing someone is by the name. In **Simiyu vs. Republic (2005) 1 KLR 192**, the Court of Appeal stated that there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. In the case of **R. Vs. Alexander Muturi Rutere alias Sanda & Others (2006) e KLR**, the court again stated that if a witness is known to an accused but no name is given to the police, then giving the name subsequently is either an afterthought or the evidence given is not reliable. And in the case of **George Bundi M'Riberia Vs. Republic (Court of Appeal Criminal Appeal No. 352 of 2006)** (unreported) the Court again reiterated that failure of a witness to give the name of an assailant at the earliest opportunity weakens the evidence of that witness. In this case both PW2 and the complainant gave the appellant's name at the very first instances.
32. Taking all the foregoing into account, this court is satisfied that the circumstances which prevailed in the night of 06/04/2014 were conducive to sustaining a positive recognition of the Appellant without any error.
33. Apart from the evidence of recognition, there is also the aspect of how the Appellant was arrested. PW4 who was the arresting officer testified that in the morning of 07/04/2014 while in the company of his colleague, PW3 among others and having received the report of the complainant's sexual assault by the Appellant who was identified to them by name, went to the Appellant's home to arrest him.
34. On knocking at the door to the Appellant's house and having introduced themselves as police officers, the Appellant who was right inside refused to open the door. As PW4's colleague went to the window and opened it, the Appellant opened the door and rushed outside running away indeed naked. The officers gave chase and arrested the Appellant whom they then led to the police station.
35. It ought to be noted that an act of a suspect avoiding arrest adds to the inference of guilt on his/her part. I so find in the circumstances of this case.
36. Despite the foregoing analysis the Appellant however denied committing the offence and raised the issue of a grudge with PW3. He stated that that was a time when the Area Chief wanted PW3 to return to her husband's home and was about to chase her away from the local trading centre. During that time, the Appellant offered to use his motor cycle upon payment to ferry PW3 back to her husband and that is why PW3 was not happy with him and harbored a grudge.
37. I have perused the evidence of PW3. When the Appellant cross-examined her, he did not bring out the issue of the grudge at all. I can only find that the issue of the grudge was an afterthought.
38. The Appellant likewise contended that it was not possible that he was the assailant since he had been diagnosed with HIV but the complainant had not been so infected. To that end, the Clinical Officer, PW6, responded that:-

“..... It was so early to note infection on the girl which might have been infected...”

I equally so find.

29. This court therefore finds that the Appellant was positively placed as the perpetrator of the sexual act on the complainant.
30. However before I come to the end of this judgment, I wish to deal with two other issues as raised by the appellant.
31. On the allegation that the prosecution evidence was riddled with contradictions especially when the complainant stated that she was in *[particulars withheld]* during the *voir dire* examination and during her examination-in-chief she stated that she was in *[particulars withheld]*, this Court finds that the said difference to be curable under **Section 382 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya** as the Appellant has not demonstrated how he suffered any miscarriage of justice as a result of the misspellings in the school's name.
32. The other issue is contained in the fourth ground of appeal that the trial court disregarded and in total violation; infringed his constitutional rights. The Appellant in addressing this ground in his submissions brought out the issue of the alleged grudge with PW3. Respectfully, this court does not see how the trial court infringed the Appellant's rights in dealing with the aspect of the alleged grudge. The trial Court considered the issue in its judgment and like before me, rejected the same.
33. In dismissing that ground I reiterate that it remains the sole duty of a party alleging breach of rights to clearly state the rights allegedly contravened and how they were violated. A bare assertion like in this case by the Appellant does not stand the test worth upholding.

Disposition:

34. On the re-examination of the evidence and the law, I come to the finding that the Appellant was properly found guilty of defilement and convicted accordingly. Since **Section 8(3) of the Sexual Offences Act, Chapter 62A of the Laws of Kenya** prescribes the minimum sentence for defilement when the victim is between the age of 12 and 15 years, as the case herein, to be 20 years, the sentence which was imposed on the appellant is not only the minimal but so remains lawful.
35. Consequently, the appeal is unsuccessful and is hereby dismissed.

DATED, DELIVERED and SIGNED at MIGORI this 13th day of NOVEMBER, 2015

A. C. MRIMA

JUDGE