



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 224 OF 2014

PIUS MUTISYA KITING'O.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. D.G. Karani PM in S.O.A. [Case No. 13](#) of 2010 delivered on 6th November 2014 at the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant has appealed against his conviction and sentence of twenty (20) years imprisonment. The Appellant was charged in the trial Court with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the 27th day of February 2010 at [particulars withheld] sub-location, in Yatta District within Eastern Province, the accused intentionally and unlawfully caused his penis to penetrate the vagina of W M K a child aged 15 years.

The Appellant was also charged with an alternative offence of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the 27th day of February 2010 at [particulars withheld] sub-location, in Yatta District within Eastern Province, the accused intentionally touched the vagina of W M K, a child aged 15 years with his penis.

The Appellant was first arraigned in the trial Court on 19th July 2010 and he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to twenty (20) years in prison.

The Appellant being aggrieved by the judgement of the trial magistrate, preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in his Petition of Appeal dated 18th November 2014 and filed in Court on 19th November 2014. The grounds were that the prosecution did not prove its case against the Appellant beyond reasonable doubt; the trial magistrate erred in convicting the Appellant and deciding the case against the weight of evidence, and in failing to consider the DNA results which indicated that the Appellant was not the biological father of the complainant's child allegedly conceived following the defilement; the defence of the appellant was not considered; and that the complainant's evidence and P3 form did not support the charges against the Appellant.

The Appellant's Advocates, King'oo & Associates Advocates, filed submissions dated 20th October 2015. It was urged that the complainant and her father testified that the incident of defilement occurred on 27th February 2010 at 6.00pm, yet the said incident was not reported until the complainant was five months pregnant and there was no explanation why the incidence was not reported immediately.

It was also argued that the DNA profiling to ascertain the paternity of the child alleged to have been born as a result of the defilement was of paramount importance, as it was the only medical evidence that would prove that it was the Appellant who defiled the complainant as the defilement was reported when she was 38 weeks pregnant, and no specimens could be taken to prove sexual molestation. It was submitted that the trial magistrate erred in failing to consider the DNA results which clearly indicated that the Appellant was not the biological father of the complainant's child. It was further submitted that there was no explanation by the prosecution regarding the failure to call the government analyst to testify, thus the evidence was inadequate.

The Appellant cited various decisions in support of its argument including **Lazarus Wanjala Musubili & Another vs Republic, Criminal Appeal No. 27 & 28 of 2004**; **Joseph Musyoka Mutemi vs Republic, Criminal Appeal No. 152 of 2013**; **Mohammed Yusuf Racho vs Republic, Criminal Appeal No. 80 of 2014**; **Abdisalan Burale Abdi vs Republic, Criminal Appeal No. 82 of 2008**; **Gaileth Mubarak Elkana vs Republic, Criminal Appeal No. 48 of 2013**; and **John Mbiku Ngutu vs Republic, Criminal Appeal No. 75 of 2014**.

In opposing the appeal the Prosecution Counsel, Tabitha Saoli, filed the submissions dated 19th November 2015. The learned counsel argued that the prosecution had proved its case beyond reasonable doubt. Further, that it was the testimony of the complainant that she had disclosed the issue of her pregnancy to her mother when she was five months pregnant. It was stated that PW2 had earlier gotten information from her son that the complainant was sick, and upon inquiring from the complainant is when she got the truth. PW2 also reported to the matter to her husband and he had in turn found out that the Appellant was responsible for the pregnancy.

The counsel also submitted that PW2 had testified that after a family meeting with the Appellant, he did not deny the charge. They further argued that it was the testimony of PW6, the clinical officer that the hymen of PW1 was not fresh upon examination. They stated that on the issue of late reporting, the Appellant had threatened to kill PW1 if she mentioned the ordeal to anyone. It was submitted that her evidence was consistent and unshaken. Further, on the issue of the DNA, they stated that the court could only consider a report that had been tendered in evidence by competent witness which in this case did not happen.

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**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses. PW1 was the complainant W M. She testified that she was born on 17th November 1994, and that on 27th February 2010 at about 6.00 p.m. she was coming from church when she encountered the Appellant on her way home. She stated that the Appellant was a distant relative and that he was holding a panga, and that when she got to where he was he dragged her and forced her further into the shamba. She tried to scream but he threatened to cut her with the panga. He then proceeded to undress her and pushed her on the ground and had sex with her.

PW1 further testified that after he was done he threatened to kill her if she mentioned the incidence to anyone. She stated that she walked home and went to sleep as she was feeling pain in her private parts. She stated that she did not tell anyone, and after two months she started experiencing nausea, vomiting and stomach-aches. She said that she only disclosed the incident to her mother in the fifth month when her clothes stopped fitting and in turn her father was informed. She said her father summoned the Appellant who admitted the same and blamed the devil.

PW1 was then taken to hospital where she was confirmed pregnant and she later gave birth on 23rd October 2010. She produced the child's immunization card, lab request forms, P3 form and the Hospital discharge summary in evidence. She further stated that the Appellant had gone into hiding until 15th July 2010 when her father saw him and arrested him. She said that she had told her brother what had happened on the same day of the incident.

PW2 was the complainant's mother, F M M, who testified that sometime in April 2010 she received a call from his son who told her that PW1 was unwell. She then bought her medication and Later on 1st July 2010 the complainant told her that her clothes did not fit her any longer, and upon inquiry she found out that the complainant was pregnant. The complainant had later told her that the Appellant was responsible.

It was PW2's testimony that the complainant had been fearful of disclosing the matter to her due to the threats by the Appellant. She affirmed that the appellant was an uncle to the complainant in the Kamba customary law. She stated that she told the father to PW1 who then summoned the Appellant together with his brother and uncle, and that they had a discussion where the Appellant confirmed that he had defiled the complainant. She later took the complainant to hospital where they were issued with a P3 form.

PW3 was PC Nancy Umazi Wali who was the investigating officer in the case, and stated that on 6th July 2010 she recorded the statements of PW1. She stated that at the time she noticed that the complainant was pregnant. She stated that the Appellant had gone underground and was arrested on 15th July 2010 by PW1's father and members of the public. PW3 also testified that there was an order for a DNA test, and that she had escorted PW1, the Appellant and the child to Matuu General Hospital where their blood was drawn for DNA testing. She later escorted the samples to the Government chemist on 25th November 2010.

PW4 was T M K, the father to the complainant, who testified that in April 2010 his wife had disclosed to him that his daughter W had been defiled. He then called a family meeting between the Appellant and themselves, where the Appellant had pleaded for forgiveness. He stated that after that the complainant had been taken for examination in the hospital and it was then that the Appellant had disappeared for about two weeks. He eventually apprehended him in on 15th July 2010 as he attempted to flee. PW4 stated that the complainant had not disclosed the incidence since the Appellant had threatened to kill her.

PW5 was J M M, who testified that she was a member of the community policing in [particulars withheld]village. She said that on 15th July 2010 at about 18.30 hours she had received a call from PW4 who informed her that he spotted the Appellant who had defiled his daughter. She stated that she assisted in escorting the Appellant to the police station where a police report was lodged.

The last witness was Benjamin Maingi (PW6), a Senior Clinical Officer at Matuu District hospital. He testified that he had filled a P3 form for the complainant, and that no specimen was taken from PW1 as she was pregnant. He stated that he had recommended a DNA test be done. He went on to produce the P3 form in evidence.

The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in that respect. The Appellant gave sworn evidence and did not call any witnesses. He stated that he had not defiled the complainant. Further, that on the day of the alleged defilement he was working in the shamba of Maloi Kivuva who had employed him. He denied being in a family meeting with complainant's parents and admitting to the defilement. He denied going into hiding afterwards and stated that he did not try to flee when he was being apprehended by PW4. He stated that the DNA test had shown that he was not the father of the child born by the complainant.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and I find that the main issue raised in this appeal is whether Appellant's conviction for the offence of defilement was based on sufficient and satisfactory evidence.

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.”

In the present appeal, PW2 produced a child health card as P Exhibit 1, that showed that the complainant was born on 17th November 1994. Therefore at the time of the alleged defilement on 27th February 2010, the complainant was 15 years old. The complainant testified that the defilement took place at 6.00 pm and she identified the Appellant who she stated was previously known to her and was a distant relative. PW2 and PW4 also confirmed that the Appellant was a relative and was known to them.

As regards the requirement of penetration, the same is defined under section 2 of the Sexual Offences Act to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” The complainant testified in this regard that she met the Appellant on the material day being 27th February 2010 at 6.00 pm, and that he had a panga. He then got hold of her and dragged her to a shamba, where he pulled down her panty, unzipped his trousers, inserted his penis into her vagina, pushed her to the ground and had sex with her.

The Appellant has alleged that this evidence is not sufficient to convict the Appellant on the grounds that the report of the defilement was made 5 months later, and the DNA results showed that the Appellant as not the father of the complainant’s child born out of the alleged defilement. The proviso to section 124 of the Evidence Act provides that no corroboration is required in cases involving sexual offences, where the court believes that the complainant is telling the truth. I am also in this regard guided by the holding of the Court of Appeal in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (Nyeri)** where it was stated that;

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

I however agree with the Appellant that the late reporting of the offence on 6th July 2010 as testified to by PW3 does water down the complainant’s testimony and credibility, as well as the prosecution’s case, as there could have been other intervening factors that may have given rise to the said report other than the alleged defilement. There was therefore need for corroboration of the complainant’s evidence in this case. In this respect, and contrary to the Appellant’s allegations, no DNA report was produced in evidence that showed that the Appellant was not the father of the complainant’s child who was born as a result of the alleged defilement.

The trial Court did on 5th November 2010 make an order for the paternity test to be carried out, and PW3 testified that she did escort the Appellant, complainant and child to Matuu General hospital on 24th November 2010 and their blood samples were extracted, which samples she escorted to the Government Chemist on 25th November 2010. A second order for DNA tests was given on 10th January 2012. However no evidence was tendered as to whether this second test was carried out. The failure by the prosecution to produce a paternity report or DNA report is significant in this appeal, as it would have been the only evidence in the circumstances that would have conclusively linked the Appellant to the alleged defilement or otherwise.

I therefore find that the prosecution failed to prove the element of penetration beyond reasonable doubt, and it was therefore unsafe for the learned trial Magistrate to convict the Appellant on the evidence on

record. I accordingly allow the Appellant's appeal, quash his conviction and set aside the sentence imposed upon him. I direct that the Appellant be set at liberty forthwith, unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 7th DAY OF DECEMBER 2015.

P. NYAMWEYA

JUDGE