



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 95 OF 2012

PAUL CHEGE WANYOIKE:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGMENT

The appellant, PAUL CHEGE WANYOIKE, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the offence were that on 4th September, 2011, at **[Particulars Withheld]** Centre, the appellant defiled the complainant, who was then 14 years old.

The trial court convicted the appellant for the offence of indecent Act contrary to Section 11(1) of the Sexual Offences Act. He was then sentenced to 20 years imprisonment.

In this appeal, the appellant has challenged both his conviction and the sentence.

The first ground of appeal was that the prosecutor was unqualified.

Mr. Kigamwa, learned advocate for the appellant, submitted that this court should not order for a retrial, because, in his considered view, the evidence tendered was very weak.

The alleged weaknesses are deemed to arise from the doubtful identity of the complainant. On the one hand, the charge sheet states that the complainant is named **J**, whilst on the other hand, the complainant gave her name as **C**.

Thirdly, the appellant said that the scene of crime was unclear. Some witnesses said that the offence was committed at a toilet, whilst others said that the offence was committed at a bathroom.

Another issue that was raised was about the failure by the prosecution to call an essential witness. The alleged essential witness is the person who allegedly heard the commotion, and who then talked to both the complainant and the appellant.

In any event, the complainant is said to have denied the contention that she was defiled.

Finally, the appellant submitted that his alibi defence was wrongfully, rejected, as the trial court failed to give reasons for the said rejection.

Mr. Omwenga, learned senior state counsel, opposed the appeal.

He submitted that the prosecutor was qualified.

He also said that the identity of the complainant was clear. In his view, there was an error in the Treatment Notes; but the said error could be cured pursuant to section 382 of the Criminal Procedure Code.

As regards the scene of crime, the Respondent submitted that it was at the same place, although some witnesses called it a bathroom whilst others called it a toilet. It was the understanding of the Respondent that some people call toilets, bathrooms.

The appellant was well known to the complainant, and therefore, there was no room for any error in the identification of the appellant, as the assailant.

And because the appellant was positively identified, the Respondent submitted that the prosecution evidence displaced the appellant's alibi.

Finally, this court was invited to substitute the conviction for Defilement, with a conviction for Indecent Assault. The reason for that is that the Respondent deems the evidence on record as sufficient to sustain conviction for Indecent Assault.

But the appellant countered that contention by pointing out the evidence on record could not even lead to a conviction for Indecent Assault.

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Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions from the evidence, whilst bearing in mind that I did not have the benefit of observing the witnesses when they testified.

However, the first issue that I wish to address relates to the qualification of the prosecution.

The prosecutor in this case was PC Odindo. In effect, his rank was below that of an Assistant Inspector of Police.

Pursuant to Section 85(2) of the Criminal Procedure Code, there was a requirement that a public prosecutor, if he was a police officer, had to be of a rank not below that of an Assistant Inspector of police.

However, that requirement was deleted by Act No. 7 of 2007. Consequently, there is currently no legal requirement that for a police officer to be a public prosecutor, he had to be, at least, of the rank of an Assistant Inspector.

As that requirement was deleted before the appellant was prosecuted, I find no merit in the appellant's contention that the prosecutor in his case was unqualified.

Meanwhile, the complainant gave her name as C. However, the charge sheet cites her name as J.

Was that one and the same person?

The appellant urges me to find that those two names do not refer to the same person.

But the Respondent said that the only error was in the Treatment Notes, in which the complainant's name was given as J. In the circumstances, this court was invited to hold that the error could be cured under Section 382 of the Criminal Procedure Code.

After a careful perusal of the evidence available, I find that the matter is not as simple as suggested by the Respondent. She testified that her name is C, and that name is also shown on the Child Health Card.

However, both the Treatment Notes, as well as the P3 form cite the name J.

Logically, it can be assumed that the complainant knew her name. Therefore, when she told the court that she was C, that must be her real name. And the accuracy of that fact was confirmed by the Child Health Card.

But the charge sheet and the Treatment Notes bear the name J.

As the complainant would have presented herself before the medical officer of health, for examination, it would have been expected that the complainant would have cited her actual name, C. At present, there is no factual explanation why the charge sheet and the Treatment Notes have the name J.

Meanwhile, PW1 said that the incident took place at a bathroom. PW2 and PW3 also talked about the bathroom.

Those three witnesses testified that they were at the scene of crime.

However, the Clinical Officer (PW4) said that the incident took place at a toilet.

First, it is noted that PW4 did not visit the scene of crime. Secondly, the bathroom was next door to the toilet, as PW2 indicated. Therefore, I do find that there are no contradictions or inconsistency in the evidence concerning the exact place where the offence was committed.

When the Clinical Officer examined the complainant, she found that the complainant's hymen was broken. The complainant also had mucual whitish discharge on the edges of the vaginal wall.

The Clinical Officer concluded that some sexual intercourse had taken place. She said that there had been ***“some form of penetration, and this can be established because the hymen was broken.”***

When the appellant was put to his defence, he said that he was shocked to have been charged with the offence of defilement.

He attributed the whole case to a grudge between him and he complainant's father. He therefore denied committing the offence.

Whilst noting that the doctor ascertained that the complainant was the victim of Defilement, this court notes that the complainant said;

“The person tried to insert his penis into my vagina, and that is when I heard someone walking behind the bathroom.”

The complainant was 14 years old. Therefore, she was not an infant. She ought to have known the difference between an act of penetration and an attempt, by the assailant, to defile her.

As the complainant did not testify that the assailant actually inserted his penis into her vagina, the Respondent asked this court to hold that the evidence proved the offence of Indecent Assault.

The charge sheet had set out the Alternative Charge, as one of Indecent Act. The particulars of

that Alternative Count were that the appellant intentionally and unlawfully caused his penis to come into contact with the thighs of the complainant.

In my considered opinion, the complainant denied what had actually taken place. And it is not difficult to appreciate why she did so.

When the appellant was first brought before the court, he told the court that the complainant was his girlfriend.

The complainant had visited the appellant's house over a period of three (3) days, prior to the material day. She told the trial court that she used to help the appellant cook and wash his clothes during those 3 days.

Clearly, therefore, there was some friendship between the appellant and the complainant, prior to the incident.

It would therefore appear that the complainant had reason to want to protect the appellant from the charge of defilement.

Nonetheless, the complainant testified that the appellant tried to insert his penis into her vagina.

There is no doubt that the appellant and the complainant had known each other from a date prior to the incident. Therefore, this was a case of recognition.

The evidence of recognition was corroborated by PW2 and PW3, who saw the appellant leaving from the bathroom where the complainant was.

The evidence of PW1, PW2 and PW3 placed the appellant firmly at the scene of crime. Therefore, the said evidence completely displaced the alibi defence which he appellant tendered.

The penis of the appellant definitely made contact with the thighs of the complainant, when the appellant was trying to insert his penis into the vagina of the complainant.

Pursuant to Section 2 of the Sexual Offences Act;

“Indecent act means an unlawful intentional act which causes -

a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

b) exposure or display of any pornographic material to any person against his or her will.”

In this instance, the appellant committed an indecent act with the complainant, who was a child. He was therefore properly convicted for the offence.

Pursuant to Section 11(1) of the Sexual Offences Act, that offence attracts a sentence of imprisonment for not less than 10 years.

The appellant was jailed for 20 years. I find that that sentence was lawful. I therefore have no reason to interfere with it.

The appeal is dismissed.

DATED SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF NOVEMBER, 2013

FRED A. OCHIENG

JUDGE