



(From original conviction and sentence in Criminal Case No. 2897 of 2008 of the Principal Magistrate's Court at Nyahururu - C. K. Obara, R. M.)

BENSON MIANO GATIMU.....
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Benson Miano Gatimu (*the Appellant*) was together with F.N.K (*2nd Accused*) charged with the offence of Defilement contrary to Section 8(3) of the Sexual Offences Act, 2006 (*No. 3 of 2006*). The Appellant was on the evidence found guilty as charged, and was sentenced to 20 years imprisonment. The 2nd accused, was also found guilty, and being a student of 17 years of age was placed under supervision of the District Children Officer Nyandarua North, for a period of one year.

The appellant being aggrieved both with his conviction and sentence appealed to this court on four grounds, which may be summarized -

(a) that there was no identification parade to show that the appellant was the perpetrator of the act of defilement, (grounds 1 & 2),

(b) that there was no evidence of defilement, (grounds 3 & 4).

The appellant's case is that there was a long lapse of the duration between which the offence was committed and the date he was arrested, and that there was therefore doubt as to the identity of the person or persons who had committed the offence, and that in the circumstances there ought to have been held a Police Identification Parade to establish the identity of the person or persons who committed the offence of defilement, and the alleged voice identification was not without error.

The applicant's second argument was that there was no medical examination carried out on him, and as the victim's own medical examination showed that there was no evidence of recent sexual intercourse, and instead showed old marks of sexual intercourse, there was no evidence to convict him with such acts of defilement. The appellant therefore urged the court to quash his conviction, set aside the sentence imposed by the lower court, and set him free.

Mr. Omari learned State Counsel opposed the appeal. For reasons which I set out in the following passages of this judgment, I find no merit at all in the appellant's appeal, and the same ought to be dismissed.

For a conviction under Section 8(3) of the Sexual Offences Act, the prosecution must prove -

(1) an act of defilement and

(2) the child or victim must be the age of twelve and fifteen years of age.

In this case, the complainant recognized the appellant. The appellant had stalked her on the material day and forced her under threats of being killed, into a night of sex orgy in the room abandoned by the 2nd accused, for the use of the appellant, the 2nd accused, and two other local "toughs" who on sensing danger and possibility of arrest and being incarcerated in Police custody and eventually on conviction to long time jail terms, went underground and remain at large.

The appellant is right in his testimony that he was arrested sometime after the events he was charged convicted and sentenced to twenty years imprisonment. The reason is given by the evidence of PW1, after two nights of ordeal in the hands and mercy of four boys, and being chased away by the two, after repeated acts of defilement, was shy to confide in her mother. PW1 however confided in her father, a member of the local community policing committee. He in turn informed PW2 and PW3 who effected the arrest of the appellant and the 2nd accused.

PW4 who arrested the appellant and the 2nd accused corroborated the evidence of PW1. She had gone to pick her photographs from a photographer in Subukia. He had taken photos of her during KCPE. On her way back from Subukia, the appellant boarded the same matatu at Subukia and alighted at the same stage at M[...] and followed her. On the way, he alerted his friends that the quarry was on the way, and they got hold of her by force, led by the appellant while the 2nd accused happily lent the use of his room where they held and defiled her in turns and threatened to kill her if she screamed.

PW1's evidence shows that the appellant had sent another boy, a decoy to stalk PW1 while on her journey to and from Subukia. This decoy followed PW1 as she walked with her photographer, who sensing unease or danger asked her to take her photographs and take a matatu home, as the time was apparently getting late. PW1 obliged and as she boarded the matatu, the decoy also boarded, and also alighted at Gitare Bus stage where she had also alighted and then followed her as she briskly walked home. The time was about 8.00 p.m. Along the appointed place, the decoy shouted - "**there she is**", and out of the bush emerged the Miano Gatimu (*the appellant*) and F M (*the 2nd Accused*) and two other boys, K W and M S, who all came out of the bush and got hold of PW1. The appellant showed her a knife and threatened her with death if she screamed. They locked her inside a house, and then accessed the house one by one and told her to open her legs but she refused. The rest of her ordeal is best told in her own words -

"They slapped and kicked me. They told me if I do not obey, they will kill me. They told me to undress. I refused. They removed my clothes. They pushed me on the bed and each of them inserted his penis in my vagina one at a time for the whole night. Some holding me while one was defiling me. I remained with Francis (appellant) and K (2nd accused) the rest went to check if my mother was looking for me. When they came in the evening they told them my parents were looking for me. When the two were told that my parents were looking for me, they said they should chase me away. Francis and M (i.e. 1st and 2nd accused) defiled me again in turns. They pulled my hair and said I would regret."

Although PW1's father who was told by PW1 of her ordeal did not testify, PW2 and PW3 to whom he passed his daughter's complaint acted with speed and had the appellant and the 2nd accused promptly arrested. PW4 carried out the investigations, had P3 issued. The P3 which was produced by PW5 showed that although the tears were old, the hymen was torn as a result of forced sexual intercourse, though there was no presence of spermatozoa.

On being put on their defence, the appellant opted to give an unsworn statement. He was granted a whole morning and in the afternoon said - "**I leave it to the court.**"

With the foregoing evidence, the learned trial magistrate came to a correct decision. The complainant knew the appellant and recognized him. He was armed with a knife. The appellant and his companions defiled PW1 in turns, the whole night till the next day. They defiled the complainant in the morning as well and then chased her away to her father who was looking for her.

The evidence of PW5, the Doctor showed that the victim was defiled, the hymen was broken and had multiple tears. The Doctor assessed the age of the victim PW1 at 15 years of age. From the detailed description of her ordeal, there was no doubt that there was penetration as is defined under the Sexual Offences Act, 2006. In the circumstances the offence of defilement of a child contrary to Section 8(3) was duly proved. The conviction was proper, and so was the prescribed sentence of 20 years. I have no reason for interfering with it.

I confirm both the conviction and sentence, and dismiss the appeal herein as lacking any merit. It is so ordered.

Dated, signed and delivered at Nakuru this 22nd day of June, 2012

M. J. ANYARA EMUKULE
JUDGE