



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 250 of 2011

FARIS KIIRU KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No. 340 of 2011 by Hon. T. W.C Wamae SPM, Naivasha dated 11th May 2011)

JUDGMENT

The appellant was charged and convicted of the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, 2006** and was sentenced to twenty years imprisonment.

Aggrieved by both the conviction and sentence the appellant has filed an appeal to this court on five (5) grounds that can be reduced to two as follows:-

1. That the conviction was against the weight of the evidence;
2. That the learned trial magistrate failed to consider the appellant's defence.

In support of his appeal the appellant filed written submissions in which he contends that the medical evidence did not confirm that the complainant was defiled; that the medical evidence did not link the blood discharge from the complainant's genital organ to defilement; that the doctor who examined the complainant did not testify. He has also argued that the complainant was not a credible witness; that there was a possibility that the complainant's brother was responsible for the defilement; that the complainant took a long time to report the alleged offence and that the delay distorted any available evidence. He maintained that there was a grudge between him and the complainant's parents.

Learned counsel for the respondent in opposing the appeal submitted that there was enough evidence against the appellant; that the complainant knew the appellant before the alleged offence; that the complainant who was twelve (12) years old gave a credible account of the offence and identified the appellant as the culprit; that medical evidence confirmed that the injuries sustained by the complainant were consistent with defilement and that the sentence of twenty (20) years was lawful.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence adduced in the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

At the trial, the complainant, who was at the material time a girl aged 12 years told the court that on the

material date at about 5.30 pm while going home from school in the company of her friend, MN, they found the appellant at their school gate. The appellant asked her to go with him to his house to collect her father's belongings. She asked her friend, MN, to accompany her to the appellant's house but the latter refused. Without her friend, the complainant accompanied the appellant to his house and upon arrival the appellant put her on his bed and defiled her. After he finished he let her go but threatened to kill her if she reported the matter to anyone. As a result of the defilement she bled and had pain in her private parts for along period of time but did not disclose to her mother about this incidence until about three weeks when she reported the matter to her grandmother.

MN, the complainant's friend, confirmed; that after the appellant rejected the complainant's suggestion that she accompanies them to the appellant's house, she (MN) went to her home. Later the complainant told her that the appellant had defiled her. P.W.3, the complainant's mother recalled that on the material day, the complainant arrived home bleeding from her private parts. Though the complainant did not explain what had happened to her, she took her to the hospital for treatment. When the complainant's situation worsened, she disclosed to her grandmother, P.W.4, that she had been defiled by the appellant on 10th January, 2011. The matter was then reported to the police and the complainant taken to Naivasha Hospital where she was treated and a P3 form issued by Dr. Waititi, on whose behalf the form was produced by Dr. Etole Miriam (P.W.5). Dr. Waititi also examined the appellant and issued a P3 form. The appellant was arrested and charged.

In his defence the appellant denied having committed the offence. He alleged that on the material day he had gone to Nyeri to sell potatoes.

The foregoing constitutes the evidence upon which the trial court found the offence of defilement proved beyond reasonable doubt and convicted the appellant.

Upon evaluation of the evidence, I have no doubt that the complainant was defiled. It is also not in dispute that the complainant was 12 years at the time of offence and further that the appellant and the complainant knew each other prior to the day in question. The only issue for determination is whether there was sufficient evidence to link the appellant with the offence.

The only direct evidence against the appellant was given by the complainant. The complainant described the events leading to incident as follows:

“I was walking home from school with my friend, MN. At the school gate we met the accused. He told me to go to his house and collect some items he had been given by my father. I wanted to go with MN but accused refused. We went to accused house. I stood outside. Accused opened padlock. He then came out and held my left hand and took me to his house. He put me on his bed. He removed my biker and under pant. He removed his trousers and pant. He put his penis in my vagina. He held my mouth with his hand so that I could not scream. After he finished I ran home. I left my biker and pant in his house. Accused said he would kill me if I reported the matter to anyone. I did not report to my mother.....”

There is evidence by the complainant and her friend, MN, that the appellant was with the complainant shortly before the alleged incident. The complainant's mother, shortly after the alleged incident noticed that the complainant had problems with her genitalia and the problem was later on noticed by the complainant's teacher. However, they did not suspect that the complainant was defiled. When the complainant's problem persisted the complainant's mother called the complainant's grandmother to whom the complainant confided that her problems began after she was defiled by the appellant and that she had not reported the incident to her mother because the appellant had threatened her with death.

The doctor who examined the complainant noted that her hymen had been broken and there was a white discharge. Regarding the appellant he noted pus cells but laboratory examination did not reveal anything unusual.

From the totality of this evidence, I am persuaded that the appellant was properly identified as the person

who lured the complainant to his house where he defiled her. The learned trial magistrate found the complainant to be a truthful witness.

The appellant's defence of *alibi* was displaced by the evidence of the complainant and that of MN. The two children knew the appellant before the alleged incident as he (appellant) once worked for the complainant's father. Regarding the alleged grudge between the appellant and the complainant's mother, I find no evidence to support that claim. I also note that the same was not raised at the trial. Even though the alleged offence was not reported immediately, I find that the complainant, being a minor, might have been genuinely scared to report the same as a result of the threat issued by the appellant.

For the foregoing reasons, I find no good reason for interfering with the decision of the trial court. The sentence imposed by the trial court was lawful in the circumstances of this case. Consequently, I affirm the trial court's decision and dismiss the appeal.

Dated, Signed and Delivered at Nakuru this 28th day of September, 2012.

**W. OUKO
JUDGE**