



REPUBLIC OF KENYA



KENYA LAW
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**Emuget v Republic (Criminal Appeal 47 of 2019)
[2023] KEHC 2341 (KLR) (Crim) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 47 OF 2019

JM BWONWONG'A, J

MARCH 15, 2023

BETWEEN

MAXWELL OSUNYO EMUGET APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. Boke, S.PM, on 7th December 2018 in Kibera Chief Magistrate's Court Sexual Offences Case No. 58 of 2017 Republic vs Maxwell Osunyo Emuget)

JUDGMENT

1. The appellant has appealed against conviction and sentence of thirty years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No 3 of 2006.
In his petition, the appellant raised five (5) grounds.
2. In ground 1 appellant has stated that the charge sheet was defective. In a coalesced form in grounds 2, 4 and 5 the appellant has challenged the totality of the prosecution evidence against him for being insufficient to sustain the conviction.
3. In ground 3 the appellant has faulted the trial court erred in failing to find that the mode and circumstances of his arrest were not justifiable.
4. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] e-KLR, 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 demeanour of the witnesses and hearing them give evidence and give allowance for that.

5. Dr Kizzie Shako (Pw 1) of Nairobi police surgery told the court that on June 15, 2017, she examined the complainant. She was 15 years old and had allegedly been defiled by a person known to her. She examined her, 10 days after the incident. She had old tears with a broken hymen, which was indicative of penal penetration.
6. SVA (name withheld) (Pw 2) told the court that she was born on July 10, 2001. She recalled that on June 4, 2017, she ran away from home after she had a quarrel with her mother. She walked along the Amboseli road from Kawangware until she reached Westend Towers. It was about 4.30 pm. The appellant noticed her and tried to comfort her as she was crying. She told him that she was a student and did not have anywhere to go. The appellant promised to take her to his home where he lived with his wife and child. The appellant also promised her that his wife would take her back home.
7. She told the court that she went with him to his house at around 7.00 pm. On arrival, she discovered that there was neither a wife nor a child in the house. The house was a mabati structure. He ordered her to go to bed with him but she refused. He threatened to stab her with a knife and she complied. He forced her to remove her clothes and defiled her seven times. At around 4.30 am he woke up and ordered her to dress up and follow him. They went to his work place, where she had found him the previous day. He instructed her to say that she was his cousin upon inquiry. After a while, he asked her to go.
8. The complainant told the court that she left and found another person who assisted her with a phone. However, she could not reach her brother. She walked and walked the entire day up to around 6.00 pm. She slept along the road on flower beds. The next day, a lady gave her some money for food. She walked up to Lavington and slept in a '*kibanda*'. On the 3rd day she walked to Kawangware 56. She asked for a phone from a lady selling vegetables and called her father. He promised to come and get her but did not.
9. The next morning, she left the area and continued walking. She noticed a familiar place where she had previously been. She went there and her cousin called her mother, who came for her. On the next day, she took her to Muthangari Police station, where they were referred to Nairobi Women's Hospital, where she was treated. Later she led the police to the building, where she had found the watchman who defiled her. She identified him to the police.
10. Peter Ngatia (Pw 3) of Nairobi Women's Hospital testified on behalf of Dr Kinuthia, who no longer was at the institution. He testified that he was conversant with his handwriting and signature having worked with him for four (4) years. He produced the PRC form. The complainant had been examined at the hospital on September 6, 2019 in respect of an allegation of defilement. She complained of pains in her private parts. Her vagina looked normal but the hymen had a crack with torn old lags. This was indicative of a broken hymen before, but there was forceful penetration. It was also a case of late presentation as the incident had not taken place on that day. No spermatozoa were seen.
11. NK(Pw 4) told the court that she is the mother of the complainant. On June 4, 2017 she had had an argument with her daughter and she ran away from home. She looked for her by making phone calls to no avail. The next day the complainant called through his brother's phone, but she could not establish her exact location. On Tuesday, she reported the issue to the police, who were to help her in tracing her daughter. She told the court that as she was still looking for her daughter, a cousin to her daughter called her, on her phone on a Thursday. She told her that her daughter was in her place. So she went there to pick her. She told her what had happened to her. She then took her to the Police Station and to Nairobi Women's Hospital, where she was treated and a PRC form filled.



12. She testified that she asked her sister, the complainant's aunt to proceed with the matter as she was required back to work. The complainant led them to the building for the arrest of the said watchman, who defiled her. She was not present during the arrest. She testified that she did not know the appellant.
13. Bernard Ouma Lakitar (Pw 5) testified that on 5th June 201, he was working at Sarit area as a construction worker. At around 6 am, he saw a girl coming out of a gate that was being opened in a hurry. She was heading towards him. She asked for his phone but he declined. She looked weak and was looking distraught. She told him that she was lost and was looking for his brother. He told the court that he called the said brother, but could not reach him. He then left for work leaving her there.
14. The next morning, the said brother called him inquiring about her whereabouts. He informed him of what he knew. He stated that he was called by the police and recorded a statement at the station. He took the police to the location where he had met the complainant.
15. No 5xxxx PC Veronica Thuo (Pw 5), the investigating officer told the court that in 2017, he was stationed at Muthangari police station. On June 7, 2017 the complainant's mother (Pw 3) made a report of a missing child. It was recorded in the OB and she was advised to continue looking for her child to return back after 48 hours. On June 9, 2017 she came back to the station with the complainant aged 15 years. She interrogated her and found out that she had been lost in Kajata area. She found a guard at the apartments opposite West End who promised to assist her. However, he took her to his home and defiled her.
16. She told the court the steps she took to ensure that she complainant got treated. On June 17, 2017 the complainant accompanied CPL Muthengi and PC Yegon to the place where she had met the appellant. He was arrested and charged accordingly.
The prosecution closed their case.
17. The trial court found that the appellant had a case to answer and was put on his defence. He gave sworn testimony and called two witnesses. He testified that he works with KK Security company. On June 17, 2017 he reported to work at West End Towers at around 6.45am. At around 3.00 pm he was arrested. He was identified by the complainant and her mother. At the police station, he was placed in custody. He denied defiling the complainant. He told the court he could not have taken her to his house, since he lived with his two brothers.
18. David Otieno (Dw 2) and Stanley Papai Osonyo (Dw 3) told the court that they are the appellant's brothers. They testified that they were living with the appellant during the time and they did not see him bringing anyone home.

Analysis and Determination

19. In ground 1 the appellant argued that the charge sheet was defective. However, in his written submissions, the appellant failed to submit how the same is defective. I have perused the charge sheet on record. I find that the charge sheet is not defective. The ground therefore fails and is hereby dismissed for lacking in merit.
20. In a coalesced form in grounds 2, 4 and 5 the appellant challenged the totality of the prosecution evidence against him. The appellant submitted that the evidence of the medical expert was that there was penetration. However, the same was not necessarily caused by him. Further, Pw 1 testified that she examined the complainant on June 15, 2017. However, the P3 report indicated that the examination was done on June 9, 2017. That this contradiction was fatal.



21. The respondent submitted that the testimony of the victim, her mother and that of the investigating officer was sufficient to prove the charge against him. The court was furnished with the complainant's birth certificate, which showed the minor was born on July 10, 2001 and was 16 years at the time of the incident. The medical evidence presented by PW 1 and Pw 3 confirmed that there was penetration. The appellant was also properly identified.
22. I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. I find that proof of age of the victim, proof of penetration, and positive identification of the assailant in sexual offences are all paramount.
23. The complainant's mother (Pw 4) indicated that the complainant was born on July 10, 2001 and was 16 years at the time of the incident. Her birth certificate was produced to that effect. The prosecution therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was committed.
24. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim. Pw 2 after a *voir dire* examination, gave a sworn evidence in which she testified how the appellant forcefully lured her to his house and defiled her. She told the court that the assailant removed his penis and defiled her seven times during the night.
25. The medical evidence produced confirmed that the complainant's hymen had a crack with torn old lags. This was indicative of a broken hymen before and there was forceful penetration. The conclusion by Pw 1 and Pw 3 was that the complainant was likely to have been sexually assaulted. There is no other possible explanation of what could have happened to the minor's genitals besides evidence that she was defiled.
26. Regarding the identity of the perpetrator, the complainant identified the appellant after the incident. He took police officers to the location where she had met him and he was subsequently arrested. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator.
27. After re-assessing the entire evidence on record, I am unable to fault the finding of the learned trial magistrate, that the appellant defiled the complainant and the elements of the offence have been proved.
28. In ground 3 the appellant submitted that the trial court erred by failing to find that the mode and circumstances of his arrest were not justified. The appellant complained that the investigating officer was not present when he was arrested. Further, the officers who were involved in arresting him were not called as witnesses.
29. In the case of *Bukenya & others vs Uganda* [1972] EA 549, the court addressed itself thus :-
 - (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
 - (ii) That Court has a right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
 - (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."



30. From the record, the arresting officer did not give evidence in court. However, failure to call the arresting officer is not fatal to the prosecution case in all situations. In cases where the evidence of the arresting officer is key in linking the accused to the crime, failure to call the officer will be fatal to the prosecution's case. In this case the victim, and the evidence of other witnesses was enough to establish the offence. The ground therefore fails and is hereby dismissed for lacking in merit.
31. The appellant also submitted that the trial court denied him the benefit of a less severe sentence. He claimed that his sentence was harsh.

Section 8 (4) of the act provides that:

“ A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

32. I find that the sentence was manifestly excessive taking into account the circumstances of the case. I therefore reduce it to fifteen years imprisonment and it will begin to run from the date of conviction.
33. The upshot of the above analysis is that the appeal fails in respect of conviction and is hereby dismissed, but has succeeded in respect of sentence as indicated above.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The appellant in person.

Mr. Chebii for the respondent

