



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. E016 OF 2021

(From Original Conviction and Sentence of Hon. L. Kiniale in Criminal Case S.O. Number. 80 of 2019 by the Principal Magistrate's Court at Bomet)

DS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, DS, was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence were that on 10th day of July 2019 in Chepalungu sub-county within Bomet County, intentionally caused his penis to penetrate her vagina of CK, a child aged 15 years.

2. He faced an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act particulars being that on 10th day of July 2019 in Chepalungu sub-county within Bomet County, intentionally caused his penis to touch the vagina of CK a child aged 15 years.

3. The Appellant was further charged and convicted of a second charge of escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code. The particulars of the offence were that on the 19th day of August 2019, in Chepalungu sub-county, within Bomet County, being in lawful custody of No. 69609 PC Dominic Kandie and No. 117236, PC Silvano Kirwa, Chebunyo Police Post cell, escaped from the said custody.

4. The Appellant pleaded not guilty to all the charges and the case went to full trial in which the prosecution called four (4) witnesses. At the close of the prosecution's case, the court found that the Appellant had a case to answer and put him on his defense under section 210 of the Criminal Procedure Code. The Appellant opted to give a sworn statement and called no witnesses. By judgment delivered on 12th May 2020, the Appellant was convicted on both charges and sentenced to serve twenty (20) years and six (6) months' imprisonment respectively.

5. Being dissatisfied with the decision of the trial court, the Appellant instituted this appeal against the conviction and sentence on five grounds reproduced verbatim as follows:-

- a) That learned trial magistrate erred in law and fact in convicting him on evidence which did not meet the required standard;
- b) That the learned trial magistrate erred in law and fact by relying on extrinsic evidence that was not adduced during trial;
- c) That the learned trial magistrate erred in law and fact by depending on evidence which was based on theory and conspiracy between the Appellant and PW2 and that the said offence was not proven beyond reasonable doubt by the prosecution witnesses;
- d) That the learned trial magistrate erred in law and fact by convicting him on charges that were not tallying and were unfavourable to him; and
- e) That he prayed to be present during the hearing of the appeal to enable him to lodge more grounds of appeal.

6. The Appeal was canvassed through written submissions. The Appellants' submission were filed on 9th November,2021 while the Respondents' filed theirs on 28th January,2021

The Appellant's Submissions

7. The Appellant submitted that the sentence given was harsh and excessive and did not consider the period of 1 and a half years spent in remand . It was his view that the victim was well above 15 years old and therefore the appropriate sentence ought to be 15 years and not 20 as imposed by the trial magistrate. Further, he submitted that his constitutional rights were violated in that, he was denied his right to a fair trial in accordance with Articles 48, 50(2) and 25. He also submitted that his mitigation was not considered and that he was the sole breadwinner of his family since he came from a humble background. He urged the Court to find merit in his appeal in the interests of justice.

The Respondent's Submissions

8. The Respondent submitted on two main issues being: whether the conviction was safe and whether the sentence was judicious.

9. Firstly, the Respondent submitted that the evidence of the victim demonstrated that the Appellant had had forced sexual intercourse with the victim and that this fact was confirmed by the Medical Officer who stated in his evidence that there was an act of penetration, hence the victim testing positive on the pregnancy test. The Respondent submitted that the trial court correctly applied section 124 of the Evidence Act where the court could solely rely on the evidence of the victim in sexual offences provided that they were satisfied that the child/victim was telling the truth and recorded their reasons for believing so. That this was the assessment of the trial court in the present matter. The Respondent also submitted that the victim was able to positively identify the Appellant as her assailant since she had seen him severally on different occasions and was therefore known to her. Further, the Appellant had gone their home to threaten her and her father. On age the Respondent submitted that the victim's age at the time of the incident was proven through her birth certificate.

10. Secondly, On the second Charge of escape from lawful custody, the Respondent conceded the appeal on conviction on the premise that no material evidence was placed before the court for consideration based on the averments of the Investigating Officer who was PW3.

11. Lastly, on sentencing, the Respondent submitted that though the Appellant's mitigation provided good reasons for leniency, the court's hands were tied when it came to minimum mandatory sentences and thus, concluded that the sentence was justitious and legal. They urged the court to dismiss the appeal on the offence of defilement.

Issues for Consideration

12. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:

- i) Whether the offence of defilement was proven to the required standard thereby warranting a conviction.
- ii) Whether the offence of escape from lawful custody was proven by the prosecution.
- iii) Whether the sentence imposed was appropriate.

i. Whether the offence of defilement was proven to the required standard thereby warranting a conviction

13. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. (See *Pandya vs. Republic (1957) EA 336*).

14. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the sexual Offences Act No. 3 of 2006 and must each be proven for a conviction to issue. (see *George Opondo Olunga vs. Republic [2016] eKLR.*)

15. Section 8(1) of the Sexual Offences Act provides as follows:

"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) 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.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees.

16. The first element is age. The Court of Appeal in **Edwin Nyambogo Onsongo vs. Republic (2016) eKLR** stated as follows in respect of proving the age of a victim in cases of defilement:

"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

17. In the present case PW1 testified that she was born in 2004. PW2 who was her mother also confirmed this and produced her birth certificate marked PMFI-1. It indicated that she was born on 8th January, 2004. The alleged offence occurred on 10th July, 2019. She was therefore 15 years and 6 months old at the time of the offence. This dispenses with the first ingredient as adequately proven.

18. The second ingredient is penetration. Penetration is defined under Section 2 of the Sexual Offences Act as follows:

"The partial or complete insertion of the genital organ of a person into the genital organs of another person."

19. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

20. **Section 124 of the Evidence Act, Cap 80** provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him."

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

21. In the present case, the victim testified that the Appellant grabbed her near Faith church and pushed her into the bush. She testified that the person put her down and while holding her neck, 'did bad manners' to her. She further testified that the person removed her clothes and put his penis into her vagina.

22. Medical evidence was provided by (PW4) who was the clinical officer who examined the victim on 15th August, 2019. He testified that the victim's vagina was normal with no bruises and lacerations perhaps because it was almost a month since the incident had occurred. However, her hymen was missing and the pregnancy test was positive. There was no presence of epithelial cells as the incident had occurred almost a month before the medical examination but the medical report indicated that there was an old scar. PW4 concluded that there was penetration hence the pregnancy. He produced the P3 form (Prosecution Exhibit 2).

23. The Appellant argued in his defence that he was never tested to confirm that he was the one responsible for the pregnancy. Indeed the record shows that no DNA examination was done. However, there is no legal requirement of DNA to prove penetration. On this issue, the Court of Appeal in **AML vs. Republic (2012) eKLR**, authoritatively stated that: ***"The fact of rape or defilement is not proved by D.N.A. test but by way of evidence."***

24. This Court is therefore required to review all evidence that is available before it in order to establish if indeed penetration did occur. The fact of pregnancy, which the medical evidence, showed only goes further to re confirm penetration as pregnancy per se is not necessary to prove penetration. In this case, I have already found based on the evidence of the victim corroborated by medical evidence that there was penetration as stated by the court in **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR**, the court held that, ***"An essential ingredient in the offence of defilement is penetration and not impregnation."***

25. The Appellant in his submissions raised the issue of paternity since no DNA had been done. He wished to have paternity proved for a firm conclusion on who defiled the victim. However, the Court of Appeal settled the issue of paternity in proving defilement in the case of **Williamson Sowa Mbwanga vs. Republic (2016) eKLR** by stating thus:-

"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not

the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence, does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED vs. UGANDA, CR. APP. NO. 139 OF 2001)."

It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."

26. I conclude therefore that the second ingredient namely penetration was adequately proven based on the victim's evidence and the medical evidence as it was not necessary to have a paternity test.

27. The last ingredient is identification. PW1's testimony shows that she knew the Appellant and often met him on the road. Additionally, both PW1 and PW2 testified that the Appellant had come to their home on 11th August, 2019 while drunk in the evening and threatened them. In her testimony, PW2 stated that the Appellant went directly to the victim. The Appellant on the other hand stated that he went to the victim's home to demand payment of money owed him by PW2, the victim's mother. Regardless of whether he went to threaten the victim or get his money paid to him, it is clear that the Appellant was not a stranger to the victim and her family. It is therefore plausible that the victim was able to not only identify him but to recognize him as the person who committed the act.

28. It is my firm conclusion therefore that the offence of defilement was adequately proven by the Prosecution to the required threshold. I uphold the conviction.

ii. Whether the Offence of Escape from Unlawful Custody was proven by the Prosecution.

29. The prosecution conceded the appeal on the offence of escape from lawful custody. Section 123 as read together with section 36 of the Penal Code, Cap 63 Laws of Kenya. They state as follows:

Section 123 - Escape

Any person who, being in lawful custody, escapes from that custody is guilty of a misdemeanour.

Section 36

General punishment for misdemeanours

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

30. From the testimony of PW3, the Investigating Officer, the Appellant is said to have escaped from lawful custody while on transit to court to take plea. I note from the Charge sheet that the Appellant was under the custody of No. 69609 PC Dominic Kandie and No. 117236, PC Silvano Kirwa in Chebunyo Police Post cell. The only evidence adduced in respect of this charge is the testimony of PW3 as follows, "On Monday while on transit to court for plea, the accused escaped from lawful custody. He was later arrested on 12.12.2019 and charged with this offence."

31. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in **Miller vs. Ministry of Pensions (1947) 2 All ER, 372** stated as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

32. Similarly, in **Bakare vs. State (1987) 1 NWLR (PT 52) 579**, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

33. In this Case, I have reviewed the evidence tendered by the prosecution to prove this charge. I have also considered the Appellants

defence. I find that there was no cogent evidence to support the charge of escape from lawful custody and that the trial court was in error to enter a conviction. I therefore quash the conviction in this regard on the basis of insufficient evidence.

iii Whether the Sentence imposed was lawful.

34. This Court is guided by the principles in the Court of Appeal case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR** where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

35. From the above principles a trial court must take into consideration all the facts of a case as well as the mitigation from the accused person. I note that in the present case, the trial magistrate considered these adequately. She however noted that the accused person did not seem remorseful. Based on the fact that this Court does not have the privilege of examining the witnesses first hand, I am guided by the observations of the trial court.

36. The trial court sentenced the Appellant to 20 years imprisonment for the first count. The trial magistrate however did not mention whether she took into consideration the time spent by the accused person in custody as required by law.

37. Section 333 of the Criminal Procedure Code provides:

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

38. The Court of Appeal in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** stated as follows in this regard:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

39. **The Judiciary Sentencing Policy Guidelines(2014)** also provides guidance on this as follows:

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

40. In this case I have taken into account the circumstances of the offence and the sentencing guiding principles and authorities outlined above. I have also taken into account the Appellant’s mitigation on appeal and the period spent in pre-trial custody. I am persuaded to alter the sentence.

41. In the end,I uphold the conviction. The Appellant shall serve 15 years’ imprisonment from the date of arrest, being 11th December,2019.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 8TH DAY OF FEBRUARY, 2022.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant (acting in person), Mr. Muriithi for the Respondent, and Kiprotich (Court Assistant).