REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. E008 OF 2021

FELIX KIPRONO KOSGEI ……..……....APPELLANT

VERSUS

REPUBLIC…….……..…….RESPONDENT

JUDGMENT

[Being an Appeal arising from the Judgment and Conviction dated and delivered on 25th February 2021 and on Sentence passed on 11th March 2021 by Hon. Onzere E. M. (PM) in TAMU Principal Magistrate's Court Sexual Criminal Case No. 33 of 2020]

The Appellant, **FELIX KIPRONO KOSGEI** was convicted for the offence of **Defilement** contrary to **Section 8 (1)** of the **Sexual Offences Act**. He was then sentenced to 10 Years Imprisonment.

1. In his appeal against both the conviction and the sentence, the Appellant canvassed five (5) issues, which he set out as follows;

> ***"A. Whether penetration was established.***
>
> ***B. Whether the identification of the***
>
> ***Appellant was done to the required standards.***
>
> ***C. Whether the trial court neglected material discrepancies and contradictions in the dates and the injuries sustained by the complainant.***
>
> ***D. Whether the trial court erred in law and fact by advancing evidence that was never presented by any of the witnesses.***
>
> ***E. Whether the learned trial court erred in law and in fact in failing to probe the material allegations of bribery as raised by the Appellant, and to note that the Appellant was framed for the charges brought against him."***

2. Finally, the Appellant invited the Court to find that the prosecution did not prove its case beyond any reasonable doubt.

Penetration

3. Pursuant to **Section 2** of the **Sexual Offences Act** *"Penetration"* is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

4. The Appellant drew this Court's attention to the evidence of **PW5**, who is a medical officer. The said witness concluded that the Complainant was defiled because the hymen of the 12 year old girl, was not intact.

5. Both the Appellant and the Respondent noted that **PW5** had also testified that the outer genitalia of the Complainant was reddened.

6. According to the Appellant, the absence of bruises to the Complainant's labia minora and labia majora was inconsistent with the **PW5's** conclusion, that the Complainant had been defiled.

7. The Appellant invited this Court to find that the reddening of the Complainant's outer genitalia should be presumed to have been the result of her urinalysis test, establishing that the Complainant had an infection.

8. I have re-evaluated the evidence tendered by the Medical Officer. This is what she said about Urinalysis;

> ***"Urinalysis was done and there were blood cells seen in the urine, which means she had internal injuries."***

9. During cross-examination, the Appellant did not suggest to the Medical Officer that the reddening of the Complainant's outer genitalia was due to the process of carrying out the urinalysis test. By putting forward the theory about the cause of the reddening, at this stage, the Appellant was introducing a completely new line of defence, which was never advanced at the trial.

10. At an appellate stage, it is not open to the Appellant to introduce a new defence, as such a defence would not have been taken into account during the trial. The new line of defence cannot be used to find fault with the decision of the trial court.

11. In any event, there was other evidence which the Medical Officer tendered, on the issue of penetration.

12. First, was the blood cells seen in the urine, which was attributed to internal injuries.

13. Secondly, the Medical Officer said;

> ***"There were epithelial cells seen in the urine, an indication of an infection."***

14. Thirdly, the Complainant is said to have;

> ***"…. had white vaginal discharge but with no blood stains."***

15. In my considered opinion, the totality of the medical evidence provided proof of penetration.

16. Of course, the Appellant has focused on only one answer which was given during cross-examination of the Medical Officer. It is then that the Medical Officer said that he concluded that the Complainant had been defiled, as her hymen was not intact.

17. This Court has no way of ascertaining the question which prompted the witness to give that answer.

18. But it cannot be overlooked that there was other evidence on record.

19. When the said evidence was considered collectively, the only conclusion ascertainable was that the loss of the Complainant's hymen was attributable to penetration. I so hold because whereas the loss of a hymen could be attributable, in certain instances, to factors such as the use of tampons, masturbation, injury or some forms of medical examination; the facts presented in this case, do point only at defilement.

20. The learned trial magistrate held as follows;

> ***"From the evidence on record, the hymen was not freshly torn and that means that she was sexually active."***

21. I have carefully perused the evidence of the Medical Officer, but I did not find any reference to the hymen not being freshly torn. I do not understand where the learned trial magistrate derived that conclusion from.

22. Indeed, if the Complainant had been sexually active, the tearing of her hymen might have occurred before the date when the Appellant was alleged to have defiled her.

23. The trial Court also held as follows;

> ***"The P3 Form and the evidence of PW5 was that there was reddening of the outer genitalia, and this shows that there was contact with the genitalia of the M.C."***

24. If the evidence available had only proved that there had been <u>contact</u> between the genitalia of the Appellant and the genitalia of the Complainant, that would have fallen short of proving the offence of defilement. I so find because the offence of defilement is only committed when a person commits an act which causes <u>penetration</u>.

25. But, as I have already found, the evidence available on the record, proved beyond any reasonable doubt that the Complainant was defiled.

<u>Discrepancies & Contradictions</u>

26. In the Charge Sheet, the particulars of the offence were that the Complainant was defiled on 12th September 2020.

27. The Complainant testified that she was defiled on 12th September 2020. **PW2**, who is the Complainant's mother confirmed that the incident was on that date.

28. However, the Medical Officer (**PW5**) told the Court that **PW2** took the Complainant to the hospital on 11th September 2020. The history given at the hospital, by **PW2**, was that the Complainant was defiled on 11th September 2020.

29. During cross-examination, **PW5** reiterated that although the P3 Form was signed on 12th September 2020, the Complainant had been accorded treatment at the Fort Ternan Sub-County Hospital on 11th September 2020.

30. This is how the learned trial magistrate resolved the issue concerning the dates;

> ***"From the evidence of M.C and PW2, she was taken to hospital on the date the incident occurred. It therefore shows that the offence was committed on 11/9/2020 and not on 12/9/2020."***

31. It was the understanding of the trial court that the Appellant was able to decipher that the offence was committed on 11/9/2020. Therefore, the trial court was of the considered view that;

> ***"The variation on the dates does not affect the culpability of the accused."***

32. Assuming for a moment, that the offence was committed on 11th September 2020, nothing could have been easier than to specify that fact in the charge sheet.

33. There has been no explanation by either the prosecution, (during the trial), or by the Respondent herein, why the charge sheet indicated that the offence was committed on 12th September 2020, if it had actually been committed on the preceding date.

34. By specifying in the particulars of the offence, that the offence was committed on 12th, whilst it had allegedly been committed a day earlier, the prosecution is presumed to have intended the Appellant to defend himself in respect to an incident which did not take place on the date specified in the charge facing him.

35. Secondly, when the learned trial magistrate concluded that the offence was committed on 11th September 2020, the said conclusion was at variance with the actual testimony of the Complainant and her mother. In other words, the finding was not supported by the evidence tendered.

36. I find that the learned trial magistrate failed to justify why she arrived at a conclusion that was derived from logical analysis rather than a decision based on the actual evidence.

37. If indeed the offence was committed on 11th September, 2020, as the trial court held; that would imply that the said court ignored the express testimony of 2 key witnesses, who had testified that the incident took place on 12th September, 2020. I find that there was no legal or other plausible justification for overlooking evidence which had been tendered by witnesses.

Allegations of Bribery

38. When the Appellant was put to his defence, he stated, inter alia, that the mother of the Complainant had demanded Kshs 200,000/= from him, so that she would then drop the case.

39. The Appellant has submitted that the trial court ought to have probed his said allegations of bribery.

40. In my considered opinion, a trial court's mandate does not include the exercise of carrying out probes, in order to ascertain the truth or otherwise of what parties or their witnesses have said when they were giving evidence.

41. In its adjudicative role, the Court is called upon to evaluate the evidence already tendered before it.

42. The Appellant did not even cross-examine **PW2**, with a view to giving her an opportunity to respond to the allegations of bribery. If **PW2** had been cross-examined in that regard, the trial court would have had to give consideration to the material which came out during the trial.

43. In this instance, the Appellant had not even filed any complaint with the police, about the alleged bribery-attempt.

44. I find that the Appellant failed to prove that the trial court had an obligation to probe the allegations of bribery.

45. I also find that although the Appellant reiterated his innocence when he was called upon to put forward his mitigation, that could not change the conviction if the evidence was sufficient.

Identification

46. The offence was committed in broad daylight. Although the exact time was not specified, but it was between 8a.m when the Complainant went out together with other girls, to go and fetch firewood; and 12.00 noon when the Complainant returned home.

47. In the circumstances, it should have been fairly straight forward, for the Complainant to identify her assailant.

48. The Complainant said that the accused had been herding donkeys, just before he assaulted her sexually.

49. And the Appellant testified that he used to transport maize and other items, using donkeys.

50. The Appellant's witness **(DW2)** also testified that the Appellant was in the business of ferrying maize, using donkeys.

51. At the material time, the Complainant saw the accused very well. She testified that she used to see the accused playing pool, at the Centre.

52. Based on the foregoing evidence, the trial court concluded that this was a case of recognition.

53. However, I note that the Complainant did not know the name of the accused. The mother of the Complainant made it clear that she did not know the person who defiled her daughter.

54. During her cross-examination, **PW2** testified thus;

> ***"M identified the accused when he had been arrested. M was called to the Police Station after the accused had been arrested.***
>
> ***The people who arrested the accused knew the accused was the perpetrator.***
>
> ***The police knew the person they were arresting.***
>
> ***M did not identify the person***
>
> ***who defiled her prior to his arrest."***

55. The question that then arises is about how the police knew the identity of the perpetrator, when the Complainant had not told them about him.

56. Whilst the Complainant may have been seeing the Appellant playing pool at the Centre, she had not given that information to the police prior to the arrest of the Appellant.

57. The Complainant had testified that she only knew the perpetrator facially; and she did not know his name.

58. Meanwhile, the Arresting Officer **(PW3)** testified thus;

> ***"On 13.09.2020 at around 11a.m, I got a report from the mother of the victim. The mother came to the station and reported the accused had been spotted at Mukuyu area."***

59. Earlier, the mother of the Complainant had testified that she did not know the person who had defiled her daughter. Therefore, I am unable to comprehend how she was thereafter able to identify the Appellant as the perpetrator.

60. The Arresting Officer further testified as follows;

> ***"I went to the scene using a motorcycle.***
>
> ***I found the victim's cousin Edmond at the scene. Edmond pointed out the accused to me. I arrested the accused and I took him to the station.:***

61. After the accused had been taken to the police station, the Complainant went to the station, where she identified the accused as the person who had defiled her.

62. According to the Arresting Officer;

> ***"The victim identified the accused as the person who defiled her. The accused is nicknamed "Mrefu", and that's how he was singled out."***

63. There is no nexus between that piece of evidence and the testimony of the Complainant. She had expressly said that she did not know the name of the perpetrator. Therefore, when **PW3** said that the accused was singled out by his nickname *"Mrefu"*, it is unknown who had

singled out the accused by that name.

64. During cross-examination, **PW3** said that it was Edmond who identified the accused as *"Mrefu"*; but there was no indication that Edmond had been at the scene of crime when the offence was committed.

65. If Edmond was an eye-witness, he ought to have testified, but he did not do so.

66. And the Complainant cannot have given to Edmond, the perpetrator's name, as the Complainant did not know his name.

67. I therefore find that it is a complete mystery how the Appellant was identified as the perpetrator, prior to his arrest.

68. Based on the issue of Identification and the question concerning the inconsistency between the charge sheet and the oral testimony about the date when the offence was committed, I find that there is reasonable doubt about the guilt of the Appellant.

69. Accordingly, the appeal is allowed. I quash the conviction and set aside the sentence which had been handed down by the trial court. I order that the Appellant be set at liberty forthwith, unless he is being held on the basis of any other lawful reason which is unconnected to the offence for which he was convicted in the case from which this appeal emanated.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **15th** day of **February** 2022

FRED A. OCHIENG

JUDGE