



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 38 OF 2020**

**JACKSON KIPKOGEI ROTICH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. As at 21<sup>st</sup> November 2017 when she is said to have been defiled, MT was just over 17 years old as she was born on 29<sup>th</sup> September 2000. Jackson Kipkogei Rotich (the Appellant) is said to have defiled her and was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offence Act No. 3 of 2006.

2. The particulars of the offence the Appellant faced were:-

“On the day of 21<sup>st</sup> November 2017 at [Particulars withheld village in Keiyo South District within Elgeyo Marakwet County, intentionally and unlawfully caused your genital organ (penis) to penetrate the genital organ (vagina) of MT a child aged 17 years old.”

3. The case presented by the prosecution can be sketched. At about 1.00pm on 21<sup>st</sup> November 2017, VC (PW 1), the mother of MT, sent her to collect a phone. The evidence of MT was that on her way back home, the Appellant forcefully waylaid her into a forest, forcefully removed her skirt and underwear and defiled her. In distress she screamed.

4. A responder to those screams was Mercy Chelagat Kirui (PW 3). She is known to MT. On reaching where MT was, MT told her that she had been defiled by one Jackson Kipkogei Rotich (the Appellant). She says she saw the Appellant run away as she got to the scene. In the hurry, he left behind his National Identity Card, one piece of open shoes and a marvin hat.

5. PW3's further evidence is that she went to MT's home and informed PW1 of what had happened and PW1 visited the scene.

6. The matter was reported to Fluorspar Police Station on the same day and the victim was also treated. A Police Form 3 was subsequently filled by Desmond Kimutai Rotich (PW 4), a clinical officer at Muskot Health Centre. His findings were that there were marked bruises on the labias and presence of semen in the vagina.

7. In his sworn statement in defence, the Appellant stated that he was a boda boda rider. On 9/12/2017, some people, whom he assumed were clients, hired him to Kapteget Police Station. Instead of paying fare at the end of the trip, the two arrested him and locked him up in the cells on a claim that he stole the motor bike. He denied the offence.

8. In an amended hand written petition filed on 4<sup>th</sup> September 2020, the Appellant raises 6 grounds of Appeal:-

i. That the prosecution evidence was contradictory and inconsistent.

ii. That the prosecution evidence was tenuous and did not meet the threshold required of criminal law.

iii. That the recognition or identification evidence was not conclusive.

iv. That the prosecution evidence was uncorroborated.

v. That the learned Trial Magistrate erred in law and fact in failing to hold that circumstantial evidence must be one that irresistibly points at the Appellant as the exclusive perpetrator of the alleged offence with no other evidence to weaken it.

vi. That he was not accorded a fair trial.

9. The Court considers this Appeal on the basis of the guidelines set out in (Okeno vs Republic [1972] E.A 32). The evidence is submitted to a fresh and exhaustive examination with a view to the Court drawing its own conclusions with the caution that, unlike the Trial Court, the Appeal Court has not seen or heard the witnesses testify.

10. Having read the submissions filed by the Appellant it is apparent to this Court that the plank of this Appeal is that there was inconsistency in the evidence as to when the incident is said to have occurred and when the victim visited the clinic for treatment.

11. The evidence of PW1, PW2 and PW3 suggests that the incident happened on 21<sup>st</sup> November 2017 after 1.00 p.m. The further evidence is that the victim was taken to the clinic after the incident. It is for that reason that the evidence of the clinical officer (PW4) who treated the victim is at odds with the evidence of these 3 witnesses. His evidence was:-

“On 21/11/2017 in the morning, the Complainant who is aged 17 years was brought by the mother who gave the history of having been pulled into a bush where she was defiled.”

12. It would be odd that the clinical officer would be treating the victim in the morning of 21/11/2017 for injuries arising out of a defilement that happened in the afternoon of the same day. Yet pressed a little in cross-examination and re-examination the officer seemed unsure of about the time he saw the victim. The following are excerpts of his testimony:-

“I treated the girl in the morning hours. From medical examination, the Complainant was defiled. I treated the Complainant between 9 – 10 a.m. I am not sure let me confirm the time. I didn’t indicate the time when I examined the Complainant.”

Later he states:-

“I didn’t note the exact time I examined the Complainant. There is no section for indicating the time for examination. I remember seeing the Complainant in the morning. I am not sure. I can’t recall the time.”

13. If the quality of the other evidence was poor then that inconsistency may have proved problematic to the prosecution case. But before analyzing the further evidence I attend to the criticism levelled by the Appellant against the P3 Form.

14. He argues that it is not authentic for the following reasons:-

- i. It does not reflect the health facility where the Complainant was treated.
- ii. It was not signed by the officer who treated the Complainant.
- iii. It was not stamped.

15. This criticism does not seem well founded. The evidence is that the P3 Form was filled by PW 4 who also treated the Complainant. The further evidence is that the victim was treated at Muskot Health Centre. Looking at the P3 Form produced it is both duly stamped and signed. The evidence of PW4 is that he was the one who signed the Form. Nothing can possibly turn on the argument that the P3 Form is not authentic.

16. On the basis of the medical findings (P3 Form) that there were marked bruises of both labias and presence of semen at vagina, the Trial Court was justified in finding that the victim had been defiled.

17. As to who had defiled her, the evidence of the Complainant was not shaken. The assailant was known to her and the incident happened in daylight. It was her evidence that in the forceful incident, the Appellant torn her skirt and pant. Both of them were produced as exhibits 7 and 8 respectively. On screaming, PW3 came to the scene and she saw the Appellant run away from the scene. She, too, knew the Appellant.

18. Not without significance is that in the hurry of getting away from the scene, the Appellant left behind his National Identity Card, one piece of open shoes and a marvin hat. The National Identity Card was produced at trial (P. Exhibit 6). The Identity Card belonged to the Appellant. Upon giving his defence, the Appellant does not offer any explanation as to how his Identity Card would have left his possession and into the hands of the Police.

19. There is overwhelming evidence that places Appellant at the scene when and so soon after he had defiled the Complainant. That evidence is so strong that it overawes any inconsistency about the time when the victim received treatment. The Trial Magistrate cannot be faulted for returning a conviction.

20. As to the complaint that he was not accorded a fair trial, the Court has read the record of the Court carefully and does not see any infraction of the Appellant’s rights to a fair trial.

21. As there is no appeal against sentence, this Court dismisses the Appeal against conviction and upholds the Trial Court’s finding on both conviction and sentence.

**Dated, Signed and Delivered in Court at Nairobi this 1<sup>st</sup> Day of February 2021.**

**F. TUIYOTT**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Jackson Kipkogei Rotich (the Appellant) in person.

Miss Muhonja (D.P.P) for State.