



**REPUBLIC OF KENYA**

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

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 42 OF 2019**

**SIMON NJOROGE WAIRIMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence dated 31<sup>st</sup> October, 2019 of Hon. D. N. Sure, SRM, in Engineer CMCR No. 32 of 2017)*

**JUDGMENT**

1. The appellant, Simon Njoroge Wairimu was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. The particulars were that on 4<sup>th</sup> June, 2017 at [Particulars Withheld] Village Nyandarua, he intentionally caused his penis to penetrate the vagina of EWN, a girl aged 15 years. In the alternative, he was charged with indecent at in that he unlawfully caused his penis to come into contact with the complainant's vagina.
2. After hearing five (5) prosecution witnesses and the appellant, the trial court convicted and sentenced him to 15 years imprisonment for defilement.
3. Aggrieved, the appellant has appealed against conviction and sentence. His amended grounds of appeal are as follows:
  - i. *That the learned trial magistrate erred in law and fact by failing to find that penetration was not proved.*
  - ii. *That the learned trial magistrate erred in law and fact by failing to appreciate that the conduct of the victim did not paint a portrait of someone who was defiled.*
  - iii. *That the learned trial magistrate erred in law and fact by sentencing the appellant to a harsh and excessive sentence not informed by the unique facts and circumstances of the offence.*
4. The issues arising from the grounds of appeal are as follows:
  - a) Whether the evidence and conduct of the complainant disclosed that she was defiled.
  - b) Whether there was penetration.
  - c) Whether the sentence meted was harsh and inappropriate.
5. This court's role is to re-evaluate the evidence on record and come to its own conclusions, noting that it did not have the benefit of hearing the witnesses and observing their demeanour (See **Okeno v. Republic [1972] EA 32**).
6. The brief facts of the case are as follows. EWN, a standard eight girl testified that on 3<sup>rd</sup> May 2017, she was at the appellant's house. He had been her boyfriend for almost a year, and on this day he had requested her for a date. At his house at around 11.00am, they entered the house and slept together. She said they had sex. After that the appellant left and locked her in the house. He returned later, opened the door and she went home to her aunt's place at about 7.00pm. When she got home, she found her aunt who took her to hospital to confirm if she was pregnant. PW1 further stated that her maternal uncle was responsible for her pregnancy.
7. PW2 PW is 14 years old. She was taken through a *voir dire* examination and the trial magistrate thereafter considered her able to testify

on oath. In her testimony she stated that she was in class 8 at [Particulars Withheld] Primary School. That on 4<sup>th</sup> June, 2017, PW1 asked her to escort her to their friend Stella's house. They did not find Stella at home. On the way back PW1 and PW2 parted ways and PW2 went home. Later she was asked by her aunt T if PW1 had been to her place and she confirmed that she had.

8. PW3 TW works at [Particulars Withheld] as the matron. She testified that EWN used to live there as an orphan. On Sunday 4<sup>th</sup> June, 2017 she woke up as usual and the children went to Sunday School. After service she returned to the home. At lunch time she discovered that EWN was not present. On enquiring, she was told EWN had taken a different route. She reported to her boss who reported at Kwa Haraka Police Station.

9. They went to search for EWN and were eventually led to PW2's house. PW2 confirmed that EWN had been there and had gone to the accused's house, where he directed them to. While they were planning to go to Accused's house they were alerted that EWN had been found. They interrogated EWN and the next day went to Kwa Haraka where they reported to the police. They also took EWN to Karangatha Health Centre after being given a P3 Form.

10. Dr. Jackline Rotich, PW4, is the Medical Officer Engineer County Hospital. She produced the P3 Form filled by Dr. Ntwiga on 8<sup>th</sup> June, 2017 who she worked with and with whose writing she was familiar. Dr. Ntwiga had examined EWN. He found her to have normal external genitalia, no lacerations, no reddening of labia, but the hymenal sheath had old tugs. She was sent for lab tests and the results were: Pregnancy test was negative, no spermatozoa seen on high vaginal swab.

11. The accused was also examined on 6<sup>th</sup> June, 2017. He had normal penis, no lacerations, no discharge, normal anal orifice. On lab test, nothing special was seen.

12. In his testimony the doctor said with respect to EWN that "*there was penetration but not of recent occurrence*". In cross-examination Dr. Rotich said if there was ejaculation you would expect to find spermatozoa as it can stay in the vagina for up to five days.

13. PW5 PC Dan Wafula of Haraka Police Station stated that he took over investigations of the case from Sergeant Catherine Nyambura; that on 4<sup>th</sup> June, 2017 a report was made by AM that one of their children was missing. The next day they returned with the child who claimed defilement. The child was taken to Engineer District Hospital where she was examined and defilement confirmed. EWN claimed that on 3<sup>rd</sup> June 2017, she met a boy (the accused) and they agreed to meet the next day. When they met as agreed they went to his house and had sex. Thereafter EWN went to Karangatha Market before going home. He produced EWN's Birth Certificate showing she was 15 years old having been born on 12<sup>th</sup> May, 2002.

14. The accused gave an unsworn statement. He said that on a Saturday he met the complainant at a club and they talked. The next day she came to his house but he was not home. Later, he was arrested and charged with defiling her. He denied ever inviting the complainant to his house; he also denied that he is her boyfriend, as she is married to someone else.

### **Analysis and Determination**

15. The trial magistrate correctly found that the issues of her determination were:

- a) the age of EWN,
- b) whether the accused's penis penetrated the vagina of EWN or whether the accused touched PW1's vagina with his penis.

16. The first issue on age was resolved by the production of the birth certificate. EWN having been born on 15<sup>th</sup> February, 2002, she was aged 15 years at the material time.

17. On the issue of penetration the trial magistrate found:

- that the accused had penetrative sex with EWN based on the demeanour of EWN and her familiarity with the accused. The aspect of familiarity was not demonstrated in the evidence.
- that the accused was deceived into thinking EWN was an adult for one year including 4<sup>th</sup> June, 2017, and that he ought to have known she was a minor if he simply asked her.

There was however, no demonstrative evidence of familiarity, nor was there any evidence that accused was deceived into thinking EWN was a minor.

18. Penetration is defined in **Section 2** of the **Sexual Offences Act** to mean:

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

The evidence of PW1 was that she had sex. The State cited PW1's testimony that she and the accused entered the house and slept together and had sex as evidence of penetration. The State argued that the medical evidence corroborated penetration.

19. I have carefully considered the evidence placed on record in the proceedings. With great respect to the trial magistrate, whilst it is true

that EWN stated that she was the accused's girlfriend for about a year, the evidence given for defilement relates to only one sexual encounter with him on 4<sup>th</sup> July, 2017. EWN said they slept together on 3<sup>rd</sup> May, 2017 and "did sex". There is no description of what happened between the two in that room other than that they had sex. Acts denoting sex are many and varied. They range from kissing, fondling, all the way to oral sex, and finally penetrative sex.

20. For defilement to be proved, there must be evidence of an act which causes penetration, and for this there must have been contact between the genitals of the two involved persons, and that the victim is a child. The DPP correctly cited the case of **Evans Wamalwa Simiyu v. Republic [2016] eKLR** where the Court of Appeal stated:

*"From the above quoted section 8(1), it is apparent that the offence of defilement is complete immediately there is an act that causes penetration and the victim of the act is a child. Section 2 of the Sexual Offences Act, defines an 'act that causes penetration' as 'an act contemplated under the Sexual offences Act'. The same section defines "penetration" to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.' As regards the definition of 'Child' Section 2 of the Sexual Offences Act, adopts the definition of 'Child' provided under the Children Act, that is 'any human being under the age of eighteen years.'" Therefore in establishing the offence of defilement proof of age is only relevant to show that the victim is under eighteen years of age and therefore a child within the definition of the Children Act. Thus the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator's genital organs into a child's genital organs regardless of the age of the child."*

21. Clearly, the contact of genitalia is the key ingredient of defilement. The evidence of PW1 did not disclose genital contact. The medical evidence disclosed that the hymenal sheath had old tags and the examining doctor said there was penetration but not of recent occurrence.

22. Thus, though there was penetration of non-recent occurrence, there is no evidence that the accused is the one that was responsible for the penetration. The complainant herself testified that her maternal uncle was responsible for her pregnancy, and that she had reported this to her aunt. That is an admission by her of penetration.

23. There is no evidence available on record to show, as found by the trial court, that:

*"The above provision (Section 8 (5-6) of the Sexual Offences Act) enabled the accused to establish he was deceived into thinking PW1 was an adult. I therefore find accused ought to have known PW1 was a minor, had he done simple due diligence of asking her age even if they met at a club..... With the above, prosecution have proved their case beyond reasonable doubt, I find accused guilty as charged....."*

The trial magistrate's above analysis does not find its grounding in the evidence on record.

24. The DPP argued that the appellant contended that the complainant consented to the defilement. This would be akin to the appellant conceding that he defiled the complainant. The evidence does not disclose any such concession by the appellant. Instead he denied the defilement. In Paragraph 16 of his submissions filed on 19<sup>th</sup> November 2020, with his amended grounds, he states:

*"PW1 also informed the court that the appellant was her boyfriend. Clearly PW1 got into the sexual act knowing quite well what she was getting herself into."*

25. I do not consider this to be an admission of anything. It is a submission, not evidence. In the appellant's evidence, captured in the proceedings, he denied that he was her boyfriend, and stated that he was not with her on the material day. It was for prosecution to prove the offence. It is never the burden of the defendant to disprove any facts.

26. The rest of the evidence of PW2, PW3 is circumstantial and the best it does is to show or suggest that PW1 was with PW2 on 4<sup>th</sup> June, 2017 and they parted company; that PW2 went home and PW1 went to church; whilst PW3's evidence discloses that PW2 was missing at lunch time, and when she went to look for her there was information that PW1 had been to PW2's house.

27. Ultimately, whilst there is evidence that PW1 had a sexual encounter, it appears from the medical evidence that that had occurred in the past as shown by old tags of the hymenal sheath. As put by the medical officer:

*"there was penetration but not of recent occurrence."*

28. As shown in the discussion above, there is no evidence that on 4<sup>th</sup> June, 2017 the accused had an encounter with PW1 in which he penetrated the complainant's vagina. I so find and hold.

29. In the end, I uphold the appeal and quash the conviction as unsafe and set aside sentence meted by the trial court. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

#### **Administrative directions**

30. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

31. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

32. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 4<sup>th</sup> Day of May, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. J. Karanga for the Appellant
3. Simon Njoroge Wairimu – Appellant present in Naivasha Maximum Prison
4. Court Assistant – Quinter Ogutu