



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E007 OF 2020

BOSCO RIOBA NYAITIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. L. N. Mesa Principal Magistrate in Senior Principal Magistrate's Court Criminal Case No. 12 of 2018 delivered on 2/5/2019)

JUDGMENT

Bosco Rioba Nyaitika, the appellant, was convicted by Hon. Mesa, Principal Magistrate Kehancha PM's Court on 2/5/2019 for the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offence Act. The appellant had been charged with the offence of defilement of an imbecile contrary to Section 146 of the Penal Code. The particulars of the charge were that on 20/4/2018 at [particulars withheld] village, Kuria West, caused his penis to penetrate the vagina of LMM, a child aged fourteen (14) years knowing her to be mentally challenged. The court found that the said offence had not been proved and instead convicted the appellant of the offence of rape contrary to Section 3(1) of the Sexual Offences Act .

The appellant was sentenced to serve ten (10) years imprisonment. Initially, by a charge sheet dated 14/5/2018, the appellant had been charged with the offence of defilement contrary to Section 8(1)3 of the Sexual Offence Act but on the 20/8/2018, the prosecution applied to amend the charge for reasons that the victim (child) was found to be an imbecile.

The appellant is dissatisfied with the whole judgment of the trial court and filed this appeal citing the following grounds:-

- i) That the trial court erred in denying the appellant the right to a lawyer contrary to Article 50(2)(g) and (h);**
- ii) That the prosecution did not prove its case to the required standard.**

He therefore prays that the conviction be quashed, sentence set aside and he be set at liberty.

The appellant filed his submissions on 6/4/2021, where he argued that despite the fact that he faced a very serious charge, the court ignored his pleas of talking to his lawyer contrary to Section 50(2)(g)(h) of the Constitution; that the amended charge sheet was defective because the ingredients of Section 146 of the Penal Code were not proved; that he was never issued with witnesses statements and amended charge sheet and hence breached his rights to fair hearing. It was also submitted that penetration was not proved nor was the age of the complainant proved.

Mr. Kimanthi, Learned Counsel for the State opposed the appeal through his submissions filed in court on 9/4/2021. Counsel submitted that the appellant had been charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. However, on 16/7/2018, the prosecution applied to amend the charge sheet which was read to the appellant and he denied the offence. Counsel submitted that the amendment was unnecessary as the Sexual Offences Act incorporated all matters of sexual based violence; that the appellant alleges that the charge was defective but counsel urged that Section 146 of the Penal Code under which the appellant was charged still exists; that the evidence of PW1 and PW2 supported the fact that there was penetration of PW2 and PW4 caught the appellant in the act; that the age of the victim was proved to be fourteen (14) years; that the complainant identified the appellant as the assailant and hence all the evidence disclosed the offence of defilement; that the court acquitted the appellant of the offence of defilement under Section 146 of the Penal Code and instead convicted him for the offence of rape which in counsel's view, the court applied the wrong principles because the substituted charge should be both less than and cognate to the offence charged; that an offence under Section 146 of Penal Code is not less than the offence of rape as they carry the same sentence.

As regards the claim that the appellants' right to talk to his lawyer under Article 50(2)(g) of the Constitution was infringed, it means that he already had a lawyer and he cannot claim that his rights were violated.

Counsel urged this court to convict and sentence the appellant under Section 354 of the Criminal Procedure Code.

This being a first appeal, this court has the duty to re-examine and analyze all the evidence that was tendered in the trial court and arrive at its own independent conclusions and findings. I am guided by the decision of **Okeno vs= Republic (1972) EA 32** where the court of Appeal said:

*An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya Vs. Republic [1957] E.A. 336**) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Rulwala Vs. Republic [1957] E.A. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."*

See also **Kiilu & Another vs= Republic (2005)KLR 174**.

The prosecution called witnesses in support of their case. **PW1 EMM** of [particulars withheld] and a neighbour to the appellant recalled the 20/11/2018. She left home early to go for casual jobs and returned home to find the complainant crying as she lit a fire. Upon interrogating the complainant, she disclosed that the old man who had been there took her by the hand, led her to the cassava plantation where he defiled her. She showed PW1 where she was raped. PW1 reported to the Chief who advised her to take the child to hospital. The complainant was treated and a report made to the police. She was also treated at Migori hospital.

PW2 LMM gave unsworn evidence as she was found not to possess sufficient intelligence to understand the meaning of the oath. She recalled that on 20/4/2018, she was at home when the appellant took her to the cassava plantation, threatened to cut her if she cried; removed her inner wear and slept on her; that he touched her private parts and she felt pain; that he caused his part of his body to enter hers and that she bled; that the appellant heard her grandmother returning and ran away. She was taken to hospital by the mother.

PW3 Dennis Chacha, a clinical Officer at Isebania Sub County Hospital filled the P3 Form in respect of LMM on 21/11/2018 in a case of Sexual assault. He found that the victim had bruises on the vagina walls, hymen was absent and the injury was one day old and caused by a blunt object. He concluded that there had been penetrative sexual intercourse. He also assessed her age to be fourteen (14) years old.

PW4 EG, recalled that on 20/4/2018, about 9:00 a.m, while weeding, she heard a girl crying and rushed to go and see what was happening. She found the appellant had pinned the granddaughter (**PW2**) on the ground and on seeing her, he jumped over the fence and ran, while the girl ran home. **PW4** escorted the girl home but found nobody. She later recorded her statement with the police.

PW5 SMW recollected that on 20/4/2018, **PW1** went to help him with weeding and left at 2:00 p.m and heard noises at her home. On going there, heard **PW2** tell the mother (**PW1**) what the appellant did to her.

PW6 Omar Mohamed was the investigating officer in this case. He received a report of defilement from the complainant and the mother on 21/4/2018. He issued them with a P3 Form which was filled at the Sub County Hospital. With the help of the area Chief, the appellant was arrested on 11/5/2018 in Rachuonyo area where he had gone into hiding. He produced the complainant's Health Card confirming the dated of birth as 18/4/2004.

When called upon to defend himself, the appellant opted to give an unsworn statement in which he generally denied knowing why he was charged.

Of Proof of age

After duly considering the evident in record, I have no doubt in my mind that it was proved that the complainant (**PW2**) was a child. Age can be proved by a doctor, documentary evidence like by a birth certificate, birth notification or through oral evidence of people who know the person well for example a mother or a guardian.

I am guided by the decision of the Uganda Court of Appeal in **Francis Omutoni vs= Uganda Criminal Appeal No. 2 of 2020** where it was held:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by birth certificate, the victims parents or guardian and by observation and common sense..."

In **Flappyton Mutuku Ngui vs= Republic Criminal Appeal 32/2013(2014) eKLR** the court of Appeal held that:-

...Conclusive proof of age in cases under the Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

I agree with the above positions because there may be a miscarriage of justice for victims in rural and remote areas who do not have birth certificates and cannot access them in good time.

In the instant case, a birth notification which is a document issued at the time of birth of a child was produced in evidence and it indicates that the complainant was born on 18/4/2004 (PEX4). This was sufficient proof of age.

Whether Penetration Proved:

In her testimony PW2 stated as follows:-

“...the accused took me to a cassava plantation He removed my underwear. He then slept on me before he ran away. He removed his underwear. He then held my hand. he touched me here(touching her private parts).I felt pain and the accused caused his part of the body to enter mine. The accused did not do anything else; Blood came out...”

PW4 corroborated PW2's testimony that PW4 found the appellant on top of PW2 and that he ran away on seeing PW4. The question is therefore whether there was penetration. Section 2 of the Sexual Offences Act defines penetration as follows: **“means the partial or complete insertion of the genital organ of a person into the genital organs of another person.”** PW2's evidence was corroborated by the findings of the clinical officer (PW3) who examined the complainant after a day and found injuries to the walls of PW2's vagina, and a broken hymen, which was evidence of penetration. Penetration was therefore proved.

The trial court found that there was no proof of the offence with which the appellant was charged with under Section 146 of the Penal Code because there was no proof that the child was an imbecile or that the appellant knew that she was one. Instead the court convicted him for the offence of rape under Section 3 of the Sexual Offence Act. The court found that rape was a cognate offence to defilement of a imbecile under Section 146 of the Penal Code.

Blacks Law Dictionary 9th Edition at page 1186 defines cognate offence as

“A lesser offence that is related to the greater offence because it shows several of the elements of greater offence and is of the same class or category.”

In this case, though the offence of rape and defilement under Section 146 of the Penal Code are of the same category in that penetration has to be proved, the offence of rape is not cognate to that under Section 146 Penal Code. Upon conviction for rape, one is liable to imprisonment for a term not less than ten (10) years imprisonment which can be enhanced to life imprisonment. Upon conviction for the offence of defilement of an imbecile, one is liable upon conviction, to 14 years imprisonment.

I find that the court erred in convicting the appellant for the offence of rape and I hereby acquit him of the said offence.

In this case, I fault the trial court for not asking the prosecution to amend the charge to proceed under the Sexual Offences Act which would also accommodate a charge under Section 146 Penal Code.

The appellant was known to PW2. He was weeding at their home on the material day. On this day when the incident occurred, PW1 had left the appellant there. PW4 found the appellant right in the act of defiling the complainant. According to PW4 the appellant ran off as he abused her. Infact PW2, stated that the appellant only ran off when her grandmother (PW4) arrived. This incident occurred during the day time and I have no doubt the culprit was properly identified (recognized).

The appellant complained that his rights under Article 50(2)(g) were infringed. Article 50(2) (g) guarantees an accused person's right to choose and be represented by an advocate and be informed of his rights promptly. I have seen the record of proceedings at page 3, the accused had instructed Mr. Muniko who had attended the mention in prison. Clearly, the appellant had not been denied a right to counsel. In fact the appellant had already had access to counsel by the time he requested to see his counsel on 16/7/2018. I find no evidence of breach under Article 50(2)(g).

The appellant also complained that his right to fair hearing under Article 50(2)(b) was breached. The right conferred under that Subsection is that an accused has a right to be informed of the charge with sufficient detail to answer it. The record shows that the charge was read to the appellant when he was presented in court on 14/5/2018 and the court ordered that all exhibits and statements be availed to the appellant. When the charge was amended on 20/8/2018, the amended charge was read to the appellant again and he denied the charge after which the case proceeded to hearing. The allegation of breach has no basis.

After carefully analysing the evidence, I find that the facts disclose an offence of sexual assault under Section 5(1) of the Sexual Offences Act. Section 5 provides as follows:-

“(a) Any person who unlawfully –

a) penetrates the genital organs of another person with:-

i) any part of the body or that person or

ii)

b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body,

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

In this case, the complainant did not specifically tell the court which part of the appellant's "body penetrated hers. She merely said, "a part" of the appellants body entered hers." I find the appellant guilty of the offence of sexual assault contrary to Section 5(1) as read with Section 5(2) and convict him accordingly.

The accused was sentenced to serve ten years imprisonment. Considering the circumstances of this case, that the appellant took advantage of the complainant after his mother left home when he should have been protecting her, the sentence is neither harsh nor excessive. I will not interfere with the sentence.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 17TH DAY OF JUNE, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kimanathi State Counsel

Ms. Nyauke court assistant

Appellant present