



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NUMBER 31 OF 2019**

**BISMARCK NGUMBAO MWASI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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*(From the Original Conviction and sentence in Mwingi Senior Resident Magistrates Sexual Offence No. 16 of 2016 dated 28<sup>th</sup> August 2019, Republic Versus Bismark Ngumbao Mwasi (Hon. G.W. Kirugumi-Senior Resident Magistrate).*

**J U D G E M E N T**

1. **Bismark Ngumbao Mwasi**, the Appellant was charged with the Offence of defilement Contrary to **Section 8(3) of the Sexual Offence Act** with the particulars that on **27<sup>th</sup> and 28<sup>th</sup> day of July, 2016** in **Mwingi Central**, within **Kitui County**, he defiled a girl name withheld) aged 15 years.
2. The Appellant also faced an alternative count of indecent assault of the same girl, but since he was convicted on the main charge, the alternative count is immaterial in this appeal.
3. The prosecution called five witnesses at the trial, to wit the Complainant herself, (PW 1) the father to the complainant, (PW 2), a Medical Officer at Mwingi Sub-County Hospital (PW3), a Police Officer at Mwingi Police Station (PW 4) and another Clinical Officer from Waita Health Centre (PW5). The evidence of the five witnesses convinced the trial court that the prosecution's case had been proved beyond reasonable doubt. The Appellant was convicted for the offence of defilement as charged and sentenced to serve ten years' imprisonment.
4. The Appellant felt dissatisfied with both conviction and sentence and preferred this appeal, raising seven grounds namely:
  - (i) *Holding that the prosecution had proven its case beyond reasonable doubt when essential elements of the offence had not been proven.*
  - (ii) *Convicting the Appellant without subjecting him to medical examination to link him with the offence.*
  - (iii) *Failing to appreciate that the medical findings were overwhelmingly inconsistent with the offence of defilement in that no injuries were found on the labia areas of the Complainant, the hymen was not freshly broken and no bleeding or laceration were noted.*
  - (iv) *Shifting the burden of proof to the Appellant.*
  - (v) *Failing to consider the defence of the Appellant.*
  - (vi) *Failing to consider the doctor's evidence.*
  - (vii) *Failing to consider that the prosecution failed to comply with Article 50(2) (j) of the Constitution of Kenya.*
5. In his written submissions, the Appellant contends that, on 20<sup>th</sup> September, 2016, the trial court directed the case to proceed in the absence of his Counsel and that as a result he was not accorded a fair trial as envisaged under **Article 50(2) (g) of the Constitution**.
6. The Respondent has however, contested this ground contending that, the Appellant was granted the right to be represented by Counsel. The Respondent points out that, on 31.08.2016, the Appellant had applied for adjournment because his advocate was absent and the trial

court granted the Appellant the chance to get his advocate despite the fact that the Prosecution had witnesses and was ready to proceed.

7. This court has perused through the proceedings of 31<sup>st</sup> August, 2016, and finds that the Appellant actually applied for adjournment on grounds of absence of Counsel one Mr. Kinyua. The trial court adjourned the hearing to 20<sup>th</sup> September, 2016 and on that date, the Appellant also asked that hearing be adjourned to 2pm to enable his Counsel appear which request was declined by the trial court. The case then proceeded but the trial was adjourned mid-way because of a hitch in the prosecution's case on account of date on the charge sheet, which forced it to apply to amend the charge to reflect the actual dates on when the offences were committed. The trial was then adjourned to 24<sup>th</sup> October, 2016 when the Advocate was present. The particulars in the charge sheet were amended and the matter was fixed for hearing on 14<sup>th</sup> November, 2016 with the consent of the Appellant's Advocate. On 14<sup>th</sup> November, 2016, the Appellant's advocate was absent and despite the fact that the Prosecution had 4 witnesses, the hearing was adjourned.

8. On 17<sup>th</sup> May, 2017, the Appellant's advocate was also absent and the trial court placed aside the file to 12 noon, but still the advocate did not turn up. The matter then proceeded for hearing and the Appellant in my considered view, cannot turn back and blame the trial court when he had more than seven months to avail his advocate to defend him. He could not hold trial at ransom because of unexplained absence of his advocate. He was accorded sufficient time to get his advocate but he failed to get one.

9. This court is not convinced, that his right to be represented by Counsel of his choice was violated in any way by the trial court. The trial court or the Complainant were not privy with the arrangement the Appellant had with his advocate. It was upon the Appellant to give full instructions to his advocate to represent him from the beginning to the end of trial. I do not find any instance of infringement of his Constitutional right to Counsel during the trial.

10. The other ground raised by the Appellant is that, the Prosecution's Case was not proved to the required standard. He faults the trial court for relying on medical evidence tendered to conclude that the ingredient of penetration had been proved when the medical report indicated that, hymen was not freshly broken. He relies on the case of **James Gitonga Michemi versus Republic**, where the court found that, the absence of hymen on its own, was not sufficient to prove that penetration had taken place.

11. The Respondent has contested this ground, pointing out that, the evidence of PW1, PW2 and PW3 proved that penetration took place. The State further relies on the provisions of **Section 124 of the Evidence Act** contending that, the complainant testified truthfully and there was no evidence indicating that she was lying.

12. This court has re-evaluated the evidence tendered by the Prosecution at the trial as indicated in the proceedings. The Complainant gave vivid account of what took place on 27<sup>th</sup> July, 2016 and 28<sup>th</sup> July, 2016. In her own testimony, she stated in part;

**“..... we went to the house of the Accused.....I left Accused seated. I slept.....when he came to sleep, he said I give him. He removed his clothes. He did to me “tabia mbaya”. We slept until morning.....”**

The Complainant stated that, the Appellant locked her up in his house the whole of 28<sup>th</sup> July, 2016 and it was only on 29<sup>th</sup> July 2016, that her father stated that, the girl emerged after reports of her disappearance had been reported at Mwingi Police Station.

13. The medical evidence given by PW3, indicated that the hymen was broken though not freshly broken, but granted the medical examination was done on 4<sup>th</sup> August, 2016, which was more than 7 days after the defilement took place. The Clinical Officer, Pauline Monica (PW 5) diagnosed that, the Complainant had indeed been defiled.

14. This court finds that based on the evidence tendered, the question of penetration as defined under **Section 2 of the Sexual Offence Act** was established and proved beyond doubt by the evidence of PW1 and well corroborated by the evidence of PW4 and PW5, both of whom were medical experts.

15. This court therefore, in the light of the above, finds that, the trial court evaluated the evidence well in regard to penetration which is the key ingredient in the offence of defilement. The trial court arrived at the correct conclusion that penetration was positive and in reaching that conclusion, it cannot be faulted.

16. This court is also satisfied with the finding by the trial court that the age of the victim was well established to be 15 years at the time the offence was committed. The evidence by the father (PW2) who tendered child immunization card (P. Exhibit 4 and treatment card (Exhibit 1) tendered by the PW5 both indicate that the Complainant was 15 years old at the time. The Prosecution's case therefore, established and proved the age of the victim to the required standard in law.

17. The Appellant's contention that there was no proof of defilement because of lack of injuries on the labia areas, laceration or bleeding in my view, do not hold water because the cited injuries are not the necessary ingredients to be proved for the offence of defilement to be sustained. As observed above, the key ingredients in law are penetration, whether complete or partial and the age of the victim. The other injuries cited by the Appellant like presence of blood stains or lacerations are secondary matters of evidence which on their own, cannot prove or disprove defilement.

18. This court has noted that, the Appellant in his written submissions, raised new grounds without leave of this court as stipulated under **Section 350 (2) (b) (iv) of the Criminal Procedure Code**. The Appellant contends that, the P3 form was filled on 4<sup>th</sup> August, 2018 but a look at the P3 (Exb. 2) clearly shows that it was filled on 4<sup>th</sup> August, 2016.

19. The Appellant also contends that, the trial court erred by not conducting a *voire dire* examination before subjecting the Complainant to an oath in order to testify. However, the purpose of *voire dire* examination is to ensure that a child of tender years is speaking the truth

regardless of the fact that she/he may not understand the significance of taking an oath. This applies where the minor is of tender years.

20. In this instance, the Complainant was not a child of tender years, she was a girl aged 15 years as observed. **Sections 2 of the Children's Act**, defines a person of tender years to be a child under the age of 10 years. The trial court was therefore, right to administer the oath to the Complainant because she was old enough to understand the nature of oath.

21. The Appellant contention that his defence was not considered also holds water. He gave a brief unsworn statement of defence stating that he was framed. However, he tendered no evidence to prove that there was a grudge or differences between him and either the Complainant or her parents. That is exactly the finding of the trial court. This finds that the defence offered was weak and the same was not backed up with any shred of evidence. The trial court gave it its due weight and found that, the Prosecution's Case was overwhelming.

In the end, this court finds that, this appeal lacks merit. The conviction was well supported, the age of the girl was established and I find the sentence meted out justified. For the above reasons, this appeal is dismissed. The conviction and sentence are upheld.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 6TH DAY OF JULY, 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**