



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 17 OF 2019**

**GKL ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(An Appeal from the Judgment of the Resident Magistrate Honourable B.W Wachira in Kapsabet Magistrate's court***

***Criminal Case No. 28 of 2017 dated 25<sup>th</sup> January, 2019)***

**JUDGMENT**

GKL, the appellant herein, was charged in the lower court with the offence of defilement, contrary to *Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006*.

The particulars of the offence are that on the night of 15<sup>th</sup> November, 2017 at Koilot location within Nandi County, the appellant unlawfully and intentionally did cause his penis to penetrate the vagina of FJ a girl aged 17 years.

In the alternative, the appellant faced a charge of indecent act with a child, contrary to *Section 11(1) of the Sexual Offences Act No. 3 of 2006*.

The particulars hereof being that on the 16<sup>th</sup> day of November, 2017 at Koilot location within Nandi County, the appellant unlawfully and intentionally did cause his penis to come into contact with the vagina of FJ, a girl aged 17 years.

The prosecution case is that on 15/11/2017 PW-2 in this case left her daughter SJ (PW-1) the complainant in this case, EK who is her son and her husband one RR. She left them at Koilot where she was living then, before she shifted later to Kericho. She went to Moi Teaching and Referral Hospital to see a patient namely Priscilla Koskey. PW-2 was unable to travel back home that day and she called a neighbour to inform her children so, but she did not. At 10.00p.m, complainant's father was at the centre. The complainant was in the kitchen reading. The appellant herein who is her uncle (a brother to her father) went to the wooden window and pushed it open. He shone torch light on the complainant. Complainant also shone torch light on him. He told her to open the door and she declined. He asked her where her parents were to which she said they were not around. PW-1 asked him what he wanted but he kept on knocking on the window, telling her to open the door. She opened the door and ran outside. He chased after her and tripped her, as result of which she fell down. He drew out a knife and assaulted her. She screamed but nobody went to her rescue. He pressed her on the ground. He used his hand to cover her eyes and mouth. He placed the knife on her mouth and ordered her to remove the inner wear. She removed it. He made her lie on the stomach and had sex with her more than once. They then saw torch lights. The appellant rose and ran away. PW-1's cousin, one K, went to assist her. The appellant chased the two and they ran to K's home. The complainant had some injuries and was bleeding on the eyes and mouth. K's mother by the name of AR, administered first aid on her.

The following morning at about 6.00 a.m PW-2 was called by GR who told her that he had heard screams at her house. PW-2 called AR about it. AR told her that she was with the complainant. PW-2 spoke to the complainant who reported that the accused (appellant) had defiled her. Complainant's father by the name of RR went for her and took her to Koilot dispensary. She was treated and taken to Koilot Ap's camp. She was referred to Lessos Police station. They reported there and she was issued with a P-3 form.

PW-4, a clinical officer at Nandi Hills Hospital, on 16/11/2017 examined the complainant and filled her P-3 form. He noted that she had a bruise on the upper lip and tenderness on the left eye brow. She also complained of tenderness on the chest and abdomen. He did vaginal examination and noted the hymen was broken but was not fresh. There was a whitish stain on vulva and white discharge from vagina. Lab examination showed she was not pregnant.

The appellant was also examined. He was HIV negative. Urinalysis showed presence of pus cells. P-3 forms for both and treatment notes were produced as exhibits. PW-3 investigated the case. He obtained birth certificate of PW-1 showing she was born on 23/8/2001. By the time of the alleged offence she was 17 years old. He charged the appellant with the offences carried in the charge sheet.

All the four prosecution witnesses were cross examined by the appellant and revealed some relevant information. PW-1 said she had known the appellant for a period of 2 years. She however said when she went home he was in prison and had been seeing him for a period of one month. She disclosed that she shone torch light on him and identified him by his voice and face. When K rescued her, he saw the appellant. The appellant had claimed to be a police officer when he knocked on the door, of which was a lie. Lastly she disclosed that there was enmity between the appellant and the complainant's father. PW-2 on her part, among other things stated that on the material night her husband was taking beer in a bar. The appellant had bought him alcohol in the said bar. PW-3 the investigating officer disclosed that K could not record a statement due to his mental status. He also disclosed that the appellant had purported to be a police officer. PW-4 on cross examination revealed that the whitish discharge from vagina and vulva was of sperms. The complainant was HIV positive.

The appellant in his defence gave a brief unsworn statement. He stated that on 16/11/2017 at 9.30 a.m he was at his place of work. He was making clothes for a customer. At 3.30 p.m while on his way home for lunch, he met an AP's officer. The officer arrested him. He said he had been looking for him. He was taken to the AP's camp and later to the police station. He was booked and on 18/11/2017 he was taken to the hospital for examination. On 19/11/2017 the investigating officer demanded from him 50,000/-. On 20/11/2017 he was charged. He denied the offence. He knows nothing about it.

The trial court evaluated the evidence and found that the appellant was properly recognized by the complainant as the assailant. The offence of defilement as carried in the charge sheet was well proved beyond reasonable doubt. He convicted the appellant. The prosecution stated that they had no records and was a first offender. He was sentenced to serve 15 years imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

1. Upon his arrest he was not availed in court within 24 hours as provided for by Articles 49(1) (f) and 47(1) of the constitution.
2. The evidence does not support the charge.
3. He was not properly identified by PW-1.
4. The evidence adduced is inconsistent and contradictory and could not sustain the charge.
5. The available medical evidence did not link him to the offence.
6. Some mentioned crucial witnesses did not adduce evidence.
7. His defence was not properly weighed.

The appellant filed written submissions in which he expounded on his grounds of appeal.

The prosecution opposed the appeal. They averred that the ingredients for the offence were established. The adduced evidence is consistent and watertight. It was well corroborated.

The age, penetration and identification were well established. On identification, it was submitted that PW-1 directed torch light on the appellant and identified him as an uncle, a brother to her father. They had a conversation and she recognized his voice. She knew him before as they were living in the same area. The conviction was proper and the sentence meted of 15 years which is the minimum allowed for the offence.

I have carefully evaluated the charge, evidence adduced by both sides, judgment delivered, sentence meted, grounds of appeal and submissions by both sides. The issue in dispute and of which this court needs consider is whether the appellant was properly recognized as the culprit.

The offence took place at around 10.00 p.m, at night. PW-1 stated she was in the kitchen reading. She did not disclose the source of light she was using while reading. She alleged when the appellant pushed the wooden window open, he shone a torch at her. It is questionable why he had to use a torch to see her, if at all there was light in the kitchen. The complainant also said she shone torch light on him. It is not clear whether the appellant was in the dark outside or an illuminated place.

It is also not clear when the complainant got the torch she used if it was not the source of light she was using to read. For how long she shone the light on the appellant is not given. The appellant is said to be her uncle, a brother to her father. She knew him before then, physically and by his voice. She recognized him as such. She knew him for a period of about 2 years. Of interest is that throughout her evidence she did not disclose him by his name. We don't know whether there are other uncles, who are brothers to her father, who resembles the appellant. I find it odd that the appellant would have alleged to his niece, who knew him very well, falsely that he is a police officer.

There is no evidence that he had made an attempt to disguise himself. It is also odd that he demanded for the house to be opened after forcefully pushing the wooden window open. A known uncle had the option of knocking on the door, introducing himself and urging the niece to open for him. Without the fear of being identified, he had the said option. It is also odd that the complainant was scared of him and yet opened for him. When she asked him what he wanted she did not even address him as an uncle. There is no evidence of use of torch or any other source of light outside the house. Period of illumination in terms of time in the entire ordeal period is not disclosed.

The complainant said she knew him for a period of 2 years but when she went home he was in prison and had seen him for a month. In this regard it is not clear what the period of 2 years stands for. There is no evidence she had heard him speak before. She never described his

physical appearance or his voice anywhere before he was arrested. Her evidence that it is the appellant who committed the offence is not corroborated by any other evidence.

The evidence of PW-4 reveals complainant had discharge of spermatozoa. DNA or blood grouping was not done in an attempt to connect it to the appellant. The visit to the scene, which was on the ground, if well investigated would have probably availed evidence in an attempt to corroborate the complainant's evidence of recognition. The investigating officer should have tried to get the clothes the appellant was wearing at the material time and those of complainant, and find out whether they had collected similar dirt, matching the soil and plants at the scene. There should have also been an attempt to recover the alleged knife and torch, to check for blood stains and relevant dirt.

PW-2 alleged she had left the complainant together with her son, namely EK. We do not know between the complainant and the said EK, who is elder. It is not disclosed where the said EK was during the commission of the offence. PW-2 also disclosed that her husband at the time was in the bar taking beer bought by the appellant. The said husband, was not called as a witness. It would have been of interest to know if at all the appellant left the said bar and if he did, at what time.

If he had left the father to the complainant in the bar it is odd that he allegedly asked the complainant where the parents were, rather than where the mother was.

The total sum of the foregoing considerations is that the complainant's evidence of recognition of the appellant as the one who defiled her is uncorroborated.

Section 124 of the Evidence Act though entitles the court to convict a suspect in a sexual offence, on uncorroborated evidence of a minor, such should only happen where the court is satisfied that the child told the truth.

In the case of *Karani –vs- R [1985] KLR pg 280*, the court held:-

***“.....identification by voice is recognized but pointed out that care has to be taken to ensure that the voice recognized was that of the suspect.”***

In *Choge –vs- Republic [1985] KLR*, it was observed that voices may resemble. In this particular case, in my view, the complainant was not able to establish beyond reasonable doubt in the the lower court

that the voice she heard was that of the appellant herein.

On recognition of the appellant, in *R –vs- Turnbull & others (1976) 3 ALL ER 549* the court held:-

***“.....Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”***

The evidence of the complainant reveals that there is a possibility that she made a mistake of recognition of the appellant herein as the one who defiled her. She alleged that when she went home he was in prison. The prosecution indicated he was a first offender of which strengthens chances of the said mistake.

The bottom line is that the prosecution case did not establish beyond reasonable doubt that it is the appellant who defiled the complainant. The said doubt is resolved in favour of the appellant herein and is accordingly acquitted of the offence he was convicted of. He is set free

unless otherwise lawfully held.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 7TH DAY OF JULY, 2021.**

In the presence of:-

The appellant in prison

Ms Limo for state

Ms Gladys - Court assistant