



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E021OF 2021

DEDAN OWINO OGOLLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon Mitey delivered at Winam in Principal Magistrate's Court in Sexual Offence No 35 of 2017 on 23rd April 2021)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was convicted on the main charge and sentenced to fifteen (15) years imprisonment. The alternative charge was dismissed.
2. Being aggrieved by the said decision, the Appellant lodged this Appeal on 6th May 2021. His Petition of Appeal was dated 4th May 2021.
3. He filed his Written Submissions dated 24th May 2021 on 25th May 2021. The State's Written Submissions were dated 21st September 2021 and filed on 1st October 2021.
4. When the matter came up in court on 5th October 2021 for purposes of reserving the Judgment herein, the State indicated that it was conceding the Appeal herein. In this regard, both the Appellant and the State asked this court to render its decision based on the said Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. The Appellant listed one (1) ground of appeal in which he appealed against both conviction and sentence. Whereas the State conceded to the Appeal herein, the court cannot allow the Appeal blindly.
6. Just like in other instances, this being a first appeal, this court is under a duty to evaluate afresh the evidence adduced before the Trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This principle was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. In his Written Submissions, the Appellant submitted that the Prosecution did not prove the elements of defilement. He was emphatic that the lack of hymen did not mean that there was penetration as was admitted by Dr Corazone Deya (hereinafter referred to as “PW 2”).
9. He further contended that the Complainant's evidence ought to have been corroborated. In this regard, he relied on several cases amongst them **Mukungu vs Republic [2002] 2 EA 482** where the common thread was that corroborative evidence ought to confirm or verify the

evidence that has been adduced by a witness.

10. On the issue of sentence, he admitted that the Learned Trial Magistrate imposed on him the least sentence permissible under Section 8(1) of the Sexual Offences Act. His concern was that the Learned Trial Magistrate did not take into account the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the Supreme Court declared the mandatory death sentence unconstitutional.

11. On its part, the State submitted that despite the age of the Complainant having been proved and her having identified the Appellant through recognition, penetration was not proved.

12. Notably, whereas both the Appellant and the State relied on the case of **Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013** in support of their submissions that the Prosecution did not prove penetration, neither of them provided the court with copies of the said judgment and/or its eKLR citation. The court therefore considered the cases that the Appellant had provided copies of.

13. The court agreed with both the Appellant and the State that the Prosecution did not prove penetration. As the Appellant had pointed out, the fact that the hymen was broken was not proof of penetration by a penis or that indeed that it was him who broke the hymen. PW 2 testified that the hymen can be broken as a result of rigorous exercise.

14. Going further, the court noted that on physical examination of the Complainant's genitalia, PW 2 found the same to have been normal and her anus was intact. She did not note any discharge or spermatozoa. She, however, found trichomoniasis vaginalis. This court took judicial notice that this condition is a common sexually transmitted infection.

15. During trial, the Appellant did not question if the Complainant had been previously sexually active before her purported defilement. This was a pertinent issue for the reason that if indeed she had never had any sexual activity previously and he had been responsible for the said infection, then a medical examination could have been done to establish if the infection could have linked him to her. However, as the Appellant only alluded to his readiness to be examined when he was interviewed by the Probation Officer, this court did not find it necessary to interrogate this issue further as the same did not form part of the evidence that was adduced during trial.

16. The above notwithstanding, this court also noted that although the Complainant was allegedly defiled on 13th November 2017, PW 2 physically examined her and filled the P3 Form on 16th November 2017. By this time, the Complainant had already bathed and changed her clothing. Indeed, whereas physical examination immediately after the offence of defilement and rape cannot always be achieved, it is preferred and/or recommended for preserving crucial evidence to link a victim to his or her perpetrator.

17. The absence of the clothing especially inner clothing that the Complainant was wearing at the material time greatly weakened the Prosecution's case as the clothing could not be subjected to forensic examination. In addition, bathing also destroyed any evidence that a physical examination of the genitalia that would have been established.

18. Going further, the court noted from the proceedings of the Trial Court that the Learned Trial Magistrate requested for a Probation Report. In the said Probation Report dated 22nd April 2021 by Josephine K. Shemi Probation Officer – Winam, the Appellant denied ever having committed the offence and reiterated his testimony.

19. On the other hand, the Complainant's version of what transpired on 13th November 2021 changed. She told the Probation Officer that the Appellant had attempted to rape her and that she sought medical attention at Nightingale Hospital for body pains that she got while struggling with him. She explained that it was the nurse who advised her that what had happened to her was sexual assault.

20. She further told the said Probation Officer that she was told to **“round it up to defilement and she would be helped”** and that on being told the length of imprisonment for the offence of defilement, she felt that two (2) to three (3) years was sufficient and she therefore felt sorry that the Appellant had been convicted.

21. There could have been no clearer evidence that the Complainant was never defiled by the Appellant herein. However, having convicted him of the offence of defilement, the Learned Trial Magistrate may have had no option but to sentence him as stipulated in the Sexual Offences Act. Without belabouring the point, this court came to the firm conclusion that the Prosecution did not prove its case against the Appellant beyond reasonable doubt and the Learned Trial Magistrate erred in both fact and law in having convicted him.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 6th May 2016 was merited and the same be and is hereby allowed.

23. The effect of this decision is that the decision of the Learned Trial Magistrate that was delivered on 23rd April 2021 be and is hereby set aside and/or vacated as the conviction and sentence of the Appellant was clearly unsafe.

24. Accordingly, it is hereby ordered and directed the Appellant be set free forthwith unless he be held in custody for any other lawful cause.

25. It is so ordered.

DATED and DELIVERED at KISUMU this 8th day of October 2021

J. KAMAU

JUDGE