



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.123 OF 2019

FREDRICK KITUKIA MWAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon.

V. KARANJA in Kitale CM'S Court Criminal Case No. 180 Of 2016)

JUDGMENT

The Appellant, Fredrick Kitukia Mwai, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 18th November, 2016, at [particulars withheld] Estate within Trans Nzoia County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of DC., a child aged 13 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged and sentenced to serve twenty (20) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that his conviction was based on unreliable evidence of the prosecution witnesses. He faulted the trial magistrate for relying on the contradictory evidence of the prosecution. He faulted the trial court for failing to appreciate that the medical practitioner's findings that the hymen was torn and old looking did not link him to the said offence. He took issue with the trial court for relying on evidence procured on the basis of poor investigations by the police. He was aggrieved that the trial court failed to appreciate that he was held in police custody for a period of more than 24 hours. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Omooria for the State opposed the appeal. He presented to court submissions to the effect that the prosecution established the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. He set out the brief elements required in a charge of defilement as age, penetration and identity. In that regard he cited the case of **Daniel Wambugu Maina vs. Republic [2018] eKLR.**

He submitted that the complainant's age was established by production of the birth certificate which was marked as **P Exh 1** proving that the minor was approaching the age of 13 years at the time of defilement. In so submitting, he relied on the case of **Mwalango Chichoro Vs. Republic Msa C. APPEAL NO 24 OF 2015(UR)** where the Court of Appeal addressed itself to the question of proof of age and held that:

“it is now settled law that age can be proved by documentary evidence such as birth certificate, baptism card, or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians' or medical evidence among other credible forms of proof”.

In that regard, it was submitted that the complainant's age was sufficiently proved beyond reasonable doubt that she was below the age of 18 years at the material time.

It was further submitted that PW1 testified that on 18th November, 2016 that the Appellant wrestled her down, closed her mouth, removed her skirt and underwear, put his penis into her vagina and pushed it in and had forced sexual intercourse with her. This evidence was corroborated by PW2 who testified that he found a girl had been raped in a corridor and his motor bike light lit on them and the assailant ran away. PW4 a Clinical Officer testified that the Complainant was taken to hospital with a history of defilement by a known assailant and had just completed her menses. It was further submitted that sexual intercourse can be proved without expert medical evidence and what the court requires is proof of the facts that the offence was committed even without medical evidence. In that regard the case of **Daniel Wambugu Maina vs. Republic (supra)** was cited.

As regards proof of identity, it was submitted that the complainant testified that the Appellant was their neighbour. She knew him well prior to the incident. He had wanted friendship with her but she had declined. Further, the appellant in his defence knew the complainant by her name and hence they were not strangers. It was thus submitted that the Complainant knew the Appellant and therefore chances of mistaken identity were remote as the Appellant was sufficiently recognized and identified. The case of **RORIA vs. REPUBLIC [1967] E.A 583** was cited. The court was invited to find that the circumstances were favourable to enable the complainant identify and recognize the Appellant.

It was submitted that the prosecution proved all the required elements of the offence as required by law. The burden of proof was not shifted to the Appellant. It was submitted that the prosecution discharged its burden of proof and had proven the case beyond any reasonable doubt.

On the ground that the relationship between the Appellant's wife and the complainant was a strained one and would have informed a frame up, it was submitted that the Appellant had raised this issue with PW3 who confirmed that the Appellant had no grudges with them.

On the ground that there were contradictions and inconsistencies in the prosecution's case, it was submitted that there were no such contradictions. He cited the case of **Twehangane Alfred VS. Uganda Criminal Appeal No. 139 of 2001** where the court noted that it is not every contradiction that warrants rejection of evidence, and further that the court will ignore minor contradictions unless the court forms the view that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

The facts of the case according to the prosecution are as follows:

PW1 **DC** stated that on the 18th November 2019, she was sent to buy maize flour by her sister-in-law. She did not get maize flour from the nearest shop. She went further and bought the maize flour. She walked back home. On the way, a man she knew approached her. The man had earlier requested her for friendship but she had declined. He claimed that she had made his wife hate her. He then wrestled her down to the ground, closed her mouth and removed her skirt upwards, removed her underwear and put his penis into her vagina and pushed it in. It was forced sexual intercourse. She saw a motor bike and identified the rider. She shouted his name. The Appellant ran away. The rider escorted her home. She stated that the accused had wanted friendship with her but she declined. He was their neighbour. She had informed his wife. They differed. She was born on 23rd March 2003 as per her birth certificate which was produced in evidence. She was aged 13 years.

PW2 **SM** a rider stated that he was delivering a battery at Nyota when he found a girl been raped in a corridor. The motor bike light shone on them. The man ran away. He picked the girl and took her to their house. He saw the man in jeans on top of the girl with his trousers removed.

PW3 **LW** stated that a Clinic Guard had called him and informed him that his younger sister (PW1) had been defiled. He travelled back home the following day and took her to Kitale Referral hospital for treatment. The complainant told him that Baba Grace (accused) had defiled her. He reported the matter and the accused person was arrested.

PW4 John Koima, the Clinical Officer produced the P3 form on behalf of Kirwa Labatt who is the deceased. He stated that the hymen was torn and old looking. Her vagina walls were red (swollen). She had just completed her menses. She had red blood cells. There was no conclusion in the P3 form. He produced the P3 form and treatment notes as PExh 1 and 2.

PW5 PC Purity Nabwire stated she was standing in for PC Umazi, the investigation officer who was undertaking a course at Kiganjo Police College. She testified that there was an allegation of defilement by the complainant against Baba Grace, the accused person. A P3 form had been issued and statements recorded. An arrest warrant was issued. The accused person was later arrested. She produced the birth certificate as P Exhibit 1. She testified that the minor was approaching 13 years at the time of the offence.

When put on his defence, the accused person gave sworn evidence. He stated that he met the complainant on the way on the material day. His wife was also going to the market. He greeted the complainant and his wife got angry. He stated that his wife and complainant have differences. He later travelled to Naivasha to receive his pastor. He denied defiling the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comment regarding the demeanour of the witnesses (**See Okeno vs. Republic [1972] EA 32**).

In the present appeal, the issue for determination is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Section 8(1)** of the **Sexual Offences Act** provides that: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

For the prosecution to sustain the charge of defilement, there are three elements that the prosecution must establish. The first one is the age of the complainant. In the present appeal, the complainant stated that she was 13 years of age at the time she testified before court. The complainant's birth certificate card produced into evidence confirmed that the complainant was born on the stated date of 23rd March 2003. The complainant was therefore twelve (12) years of age at the time of the sexual assault. **The Appellant did not challenge the evidence adduced with regards to the complainant's age. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act** to the required standard of proof.

The second element is penetration. **Section 2(1)** of the **Sexual Offences Act** defines penetration as:

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

In the present appeal, it was the complainant’s testimony that on the material day of 18th November 2016, at around 7:00 p.m. she was sent to shop to buy maize flour. She missed the maize flour in the first shop. She went further where she was able to purchase the same. She then returned home. On her way back, she encountered a man she knew. He approached her. He had earlier tried to initiate friendship with her. She had declined. He claimed that she had made his wife hate her. He wrestled her forcefully to the ground, closed her mouth, removed her skirt upwards and then removed her underwear. He put his penis into her vagina and pushed it in. He had forceful sexual intercourse with her. A motor bike rider came by and stopped. The rider had two passengers. The Complainant knew one of them and she called him out. The assailant was scared. The man whose name she had shouted came to her aid and took her home.

In a case of defilement, the prosecution is required to establish that there was penetration. **Section 2(1)** of the **Sexual Offences Act** defines penetration as ***“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”***

In the present appeal, proof of penetration was established by the testimony of the Complainant. She testified that the appellant wrestled her down, forcefully closed her mouth, removed her skirt upwards and then removed her underwear. He put his penis into her vagina and forcefully had sexual intercourse with her.

The Court of Appeal in **Kivuva Vs Republic** [2015] eKLR held as follows as regards specificity required in the proof of penetration:

“Evidence of sensory details such as what a victim heard, saw, felt, and even smelled is highly relevant evidence to prove the element of penetration, as a victim’s testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic strengthens the credibility of any witness’ testimony, and is particularly powerful when the ability to prove a charge rests with the victim’s testimony and credibility as it does in this appeal.”

PW2 testified that he was delivering a battery at Nyota area when he found a girl been raped in a corridor. The motor bike light shone on them. The man ran away. He saw the man in jeans which he had removed and was on top of the girl. She assisted the girl up and took her home.

The trial court observed that there was no evidence of bad blood established between the accused and the prosecution witnesses.

Section **124 of the Evidence Act** Cap 80, Laws of Kenya provides;

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

From a plain reading of the above section, it is clear that corroboration is not a requirement in sexual offences. All that is required is for the Court to record the reasons for believing the victim where the only evidence is that of the alleged victim.

The Appellant was aggrieved that the trial magistrate convicted him without the medical evidence linking him to the offence. In **George Muchika Lumbasi V Republic** [2016] eKLR the court addressed itself thus;

“Despite the existence of Section 36 it is now settled law that sexual assault is proved by evidence and not by medical examination. Evidence by the victim or even circumstantial evidence is enough to prove rape or defilement as the case may be. In the case of Flappyton Mutuku Ngui V. Republic [2014] eKLR while considering a similar issue of medical re-examination in a defilement case, the Court of Appeal found that there was sufficient medical evidence in support of PW2’S testimony which was trustworthy as to the person who had defiled her.”

In the present appeal, it was clear that penetration was established by the testimony of the complainant and that of medical evidence.

The third element is whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He was a neighbour. The Appellant admitted as much in his defence statement. The sexual assault incident occurred at about 7:00 p.m. The complainant’s testimony was corroborated by that of PW2 who witnessed the sexual assault incident. PW2 told the court that he walked in on the Appellant as he was sexually assaulting the complainant. The identification of the Appellant by the complainant and PW2 was by recognition.

The Appellant in his defence denied having sexually assaulted the complainant. He told the court that there was bad blood between the complainant and his wife resulting from an incident that he had greeted her. The wife got angry. The bad blood between them had occasioned the frame up. However, this court notes that the Appellant did not bring up this issue during cross examination of PW1 and PW2. **This court is of the view that the Appellant’s** defence was an afterthought and did not dent the otherwise strong culpatory evidence adduced by

prosecution witnesses connecting him with the sexual assault of the complainant.

The upshot of the above reasons is that the Appellant's appeal against conviction by the trial court on the charge of **defilement contrary to Section 8(1) and Section 8(3) of the Sexual Offences Act is hereby dismissed.**

As regards the sentence, Section 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. The Appellant was sentenced to serve a custodial sentence of 20 years. The trial court took into account the Appellant's mitigation in sentencing him to serve the mandatory minimum sentence of 20 years imprisonment.

This court also notes that the Appellant has spent one and half years in custody after his conviction by the trial court. In the premises, this court upholds the twenty (20) years imprisonment sentence meted by the trial court. It is so ordered.

DATED AT KITALE THIS 7TH DAY OF OCTOBER 2021.

L. KIMARU

JUDGE