



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 21 OF 2020**

**JUMA CHARO ALI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(An appeal from original conviction and sentence in lower court criminal case no. 13 of 2018 in the Principal Magistrates Court at kaloleni before Hon. L. N. Wasige (PM) in chambers dated 7<sup>th</sup> October 2019)*

**Coram: Hon. Justice R. Nyakundi**

**Appellant in person**

**Mr. Mwangi for the respondent**

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

The appellant was charged before Principal Magistrate sitting at Kaloleni with the offence of defilement contrary to Section 8 (1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge averred that the Appellant on diverse dates between 1<sup>st</sup> January, 2017 and 31<sup>st</sup> January, 2017 at [Particulars Withheld] Village, in Kilifi County within Coast Region, intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of **DNG** a child aged 17 years.

He was also charged with an Alternative Charge of committing an indecent act with a child. The particulars of the offence being that on diverse dates between 1<sup>st</sup> January, 2017 and 31<sup>st</sup> January, 2017 at [Particulars Withheld] Village, in Kilifi County within Coast Region, intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of **DNG** a child aged 17 years.

The appellant who denied the charge was tried, convicted and sentenced to serve 15 years imprisonment. Being dissatisfied with the Judgment of the Lower Court, the appellant filed the following amended four grounds of appeal:

- 1. That the Learned trial Magistrate erred in both law and facts by failing to consider the age of the complainant was not properly established beyond reasonable doubt.***
- 2. That the Learned trial Magistrate grossly erred in both Law and facts by relying on the evidence of a single witness which was insufficient to warrant a safe and justified conviction.***
- 3. That the Learned trial Magistrate erred in both Law and facts by failing to consider that the sentences imposed to the appellant was manifestly harsh and excessive in all the circumstances.***
- 4. That the Learned trial Magistrate erred in Law and facts by failing to adequately consider his defence.***

**Analysis and determination**

I remind myself that this is a first appeal and therefore both issues of fact and law are to be considered against the impugned judgement. Its trite that the first appellate court has to satisfactorily re-examine, or re-evaluate the evidence to entitle it to draw its own inferences and conclusions on the matter. This duty however is to be approached with caution for the court must bear in mind that there is a valid judgement of the trial court carefully weighed, considered and grounded on the evidence of witnesses and defence case.

When the question arises which witness is to be believed rather than another and that question turns on mannered demeanor, the appeals court must be guided by the impressions made by the trial magistrate who saw the witnesses, which the appellate court has no advantage of seeing or hearing. For this duty and precedent setting principles, (See the case of **Shantilal M. Ruwala v R [1957] EA 570, Pandya v R [1957] EA 336**).

In criminal cases before a trial Court one of the fundamental duties of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence. In **R v Subordinate Court of the First Class Magistrate at City Hall [2006] EA 330** it was held that:

***“When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person.”***

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence. In **Woolmington v DPP [1935] AC 462 Lord Sankey** stated in the following terms:

***“But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty.”***

It is only in exceptional cases the trial Court can ask the accused person to prove certain matters within his knowledge on a balance of probability. But even in those circumstances the burden of proof never shifts to the accused person. In **Miller v Minister of Pensions [1947] 2 ALL ER 372 Lord Denning** held as follows:

***“That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of court it is possible, but not in the least probable. The case is proved beyond reasonable doubt but nothing short of that will suffice.”***

This doctrine on the burden and standard of proof would be applicable in respect of this appeal.

I have carefully read the record and the Judgment of the trial court which formed the basis of the conviction and sentence against the appellant. From the grounds raised in the memorandum of appeal at the heart of the appeal is the question whether the prosecution discharged the burden of proof of beyond reasonable doubt.

On the authority of the case of **Charles Karani R Criminal Appeal No. 72 of 2013**, the court in construing the provisions of Section 8 (1) of the Sexual Offences Act, stated that:

***“The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.”***

The Act in Section 2 defines penetration as partial or complete penetration of child genitalia with that of a male for the act of carnal knowledge to be held to have taken place.

**PW1's** evidence was that she had dropped out of school in Class 6, that the appellant was her boyfriend from the year 2016. She stated that in the month of August, 2016, the appellant asked her to have sex with him. That she agreed to have sex with him in the forest, she did not scream or shout for help. The appellant removed his clothes and asked her to remove hers, she did and they had sex.

She further stated that she had sex with the appellant again in December, 2016 and in April, 2017 and after this she stopped receiving her menses. That it was her aunt who told her parents that she was pregnant. Her parents reported to her teacher who referred them to Kaloleni Police Station. She was later sent to Mariakani Hospital where she was examined and given Treatment Notes.

At reexamination, the victim confirmed that she was already pregnant by the time she had sex with the appellant in April, 2017. That in fact she gave birth in August 2017.

During the hearing of this appeal, the appellant submitted that the conditions were not favorable for the sexual intercourse against the complainant to take place. That the evidence was not sufficiently corroborated for the Learned trial Magistrate to find that the appellant committed the act of penetration.

In support of the appellant's case, the appellant drew attention of this court to the authorities and principles in **Martin Charo v R [2016] eKLR** suggesting to the court that the offence of defilement should not be limited to age and penetration. The appellant further submitted that the prosecution case failed to prove existence and non-existence of the crime committed.

Having considered the appeal and submissions by both learned counsels, it is now the singular duty of this court to determine the appeal.

As for the ingredient on penetration, its generally acceptable that medical evidence is not mandatory for the prosecution to satisfy this element to proof defilement. The case of **Kassim Ali v R Criminal Appeal No. 84 of 2005** in part the court held:

***“The absence of medical evidence to support the fact of rape is not a decision as to the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”***

At the trial on this ingredient the prosecution adduced evidence of the victim **(PW1) DNG**. In her testimony **(PW1)** told the court that she is seventeen years old and that she dropped out of school I Class six (6), she also stated that she was born in the year 2000 thereby bringing her age at the time of trial to 17 years. In support of this **(PW1)**'s evidence was corroborated by the evidence of **(PW2)** who told the court that the victim was born on the 22<sup>nd</sup> day of August, 2000 which **(PW4)** relied upon to charge the appellant with the offence of defilement instead of rape.

The next question which goes alongside with the first one on proof of penetration is whether the ruptured hymen finding made by the clinical officer was conclusive enough to find the appellant guilty of defilement in absence of any other concurrent credible evidence. The answer to me is to be found in a plethora of cases where courts have spoken strongly on this issue of ruptured hymen and proof of defilement. In **John Mutua Muyoki v R [2017] eKLR**. The Court of Appeal in this regard held as follows;

***“Therefore, in order for the offence of defilement to be committed, the prosecution must approach each ingredient beyond reasonable doubt. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration.”***

On the other hand, it is trite that in defilement or rape cases trial courts have to consider the nature of the evidence in consonant with the proviso under **Section 124 of the Evidence Act**. The strength of the authority in **Mohamed v R [2008] KLR and Jacob Odhiambo v R** observed that the court must satisfy the criteria that the victim told the truth and must record the reasons for such believe. In trials of this nature offences of defilement are usually committed in total privacy and secrecy. Even so, the prosecution duty is to prove directly or circumstantially that the victim has been defiled.

In this present case, **(PW1)** stated the appellant was her boyfriend from the year 2016 and they were in a relationship all this time. That the appellant asked her to have sex with him and she agreed. She further informed court that she had sex with the appellant a number of times thereafter.

Her testimony was also that she was already pregnant by the time she had sex with the appellant. Looking at the testimonies of **(PW1)** and **(PW2)**, both evidences show no proof of the element of penetration by the appellant against the victim. The evidence of **(PW2)** only points that the victim was born on the 22<sup>nd</sup> day of August, 2000, she also told the court that her in law informed her that the victim was pregnant, she went to the victim's school and spoke to the headteacher who advised her to report to the chief's office who later referred her to Kaloleni Police Station.

It is also important to note that there are parts of **(PW1)** narrative that are not reliable which distorted the cogency of her testimony. I believe, that she had reason to exaggerate and embellish evidence to distance herself from the guilty conscious. From her testimony, the court notes that the victim did not only engage in sexual intercourse with victim but with someone else who is not mentioned in her testimony. I am of the view that the evidence of the victim in all material aspects is in general terms that couldn't factually prove penetration beyond reasonable doubt. Infact from her testimony there is no evidence whatsoever on how the appellant penetrated her sexual organs.

The prosecution may prove its case directly or by circumstantial evidence of a single witness, and it need not exclude every reasonable hypothesis of innocence. However, I dare say that all efforts should be made to remove any doubt to the trial court when evaluating the evidence to make a case of beyond reasonable doubt and I note that this was not achieved. The testimony of the victim does not equally assist this court in coming up with a finding that indeed the offence of defilement was committed. The testimony of the victim **(PW1)** left out vital information that the prosecution elected to leave out.

I do not consider the burden of proof as having been discharged beyond reasonable doubt as postulated in **Miller v Minister of Pensions [1947] ALL ER 373**:

***“That degree is well settled. It needs not to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave the only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”***

To secure a verdict of guilty and a conviction against the appellant, fell short of the above threshold. To that extent, the appeal succeeds and appellant set free unless otherwise lawfully held for any reason brought to the attention of the court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Appellant
2. Mr Mwangi for the state