



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. E006 OF 2021

NICHODEM BANGE MOTATIRO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment by Hon. N. Karimi Resident Magistrate in Kehancha

Principal Magistrate's Court S. O. A. Case No. 30 of 2020 delivered on 18/1/2020).

JUDGMENT

Nichodem Bange Motatira was charged before the Principal Magistrate's Court Kehancha for the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act.

The particulars of the charge are that on 4/4/2020 at [Particulars Withheld] Sub location in Kuria West, Migori County, intentionally caused his penis to penetrate the vagina, of LRM a child aged fifteen (15) years old.

In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

The appellant denied the charge. The case proceeded to full trial after which he was found guilty and convicted on the main charge. He was sentenced to seven (7) years imprisonment. There was no finding made on the alternative charge.

The appellant is aggrieved by the whole judgment of the trial court and preferred this appeal and raised the following grounds of appeal in his petition and submissions;

- i) That the trial court erred by not considering Article 50 1(g)(h) of the Constitution;**
- ii) That the offence of defilement was not proved as required in law;**
- iii) That the appellants' alibi defence was not considered by the court;**
- iv) That the sentence is harsh and excessive**

He therefore prays that the conviction be quashed and sentence set aside.

In his written submissions, the appellant argued that the offence of defilement was not proved because the key ingredient of penetration was not proved and the Doctor confirmed that he did not find any injuries to the complainants genitalia save that the hymen was missing and he did not say whether it was freshly removed or not; that the demeanour of the complainant was questionable and that no investigations were carried out to support the prosecution case. Lastly, that the court failed to consider his defence and the evidence of DW2, DW3 and DW4.

Mr. Kimanthi, Senior Assistant Deputy Director of Public Prosecutions filed written submissions on 26/4/2021 in which he supported the appeal. Counsel submitted that though the proviso to Section 124 of the Evidence Act allows the Court to convict, based on the sole evidence of a victim in a sexual offence, yet the court did not warn itself and did not record the reasons why it believed the evidence of the victim; that the prosecution evidence was not sufficient to result in a conviction. Counsel relied on the decision of **Bernard Kebiba vs= Republic (2000) eKLR** where the court considered the import of Section 124 of the Evidence Act.

On the issue of alibi defence, it was submitted that the appellant called witnesses in support of his alibi defence and it was the duty of the prosecution to displace the said alibi but it did not do so. He also submitted that since the victim was examined three (3) weeks after the incident, the medical evidence may have been compromised or not reliable; that though there was strong suspicion against the appellant, suspicion alone cannot be a basis for a conviction. He therefore concluded that the conviction was unsafe.

This being a first appeal, it behoves this court to revisit all the evidence tendered before the trial court, analyse and evaluate it and arrive at my own conclusion. However, in doing so, this court has to be alive to the fact that it neither saw nor heard the witnesses testify. For this proposition, I rely on the case of **Kiilu vs= Republic (2005) eKLR** where the court said:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to support the lower Court’s findings and conclusions; only then can it decide whether the Magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The prosecution called a total of four (4) witnesses in support of their case. PW1, LM aged fourteen (14) years was sent to the market by her mother on 4/4/2020, at about 5:00p.m. On her way back home, she met the appellant who is their neighbour and he called her by name. She responded on the second call but did not stop walking. She then met N, the appellant’s daughter who enquired why she was not responding to the appellant. The appellant was behind her. She stopped and the appellant said he wanted to tell her something but they had to move out of sight. He pulled her into the maize plantation where he informed her that he would do something to her but she should not reveal to anybody or he would kill her. He removed her biker and panty, removed his clothes, touched her breasts and she explained in Kiswahili what he did in her thing for urinating using his thing for urinating and after he finished, he told her to go home but since it was deep in the night about 1:00 a.m, he took her to his house, called his wife P whom he told that he found PW1 at Kennedy’s house where he was working. Next day, the appellant gave her 100/= and told her to go to [Particulars Withheld], to her grandmother’s place. She went and told the grandmother that she had gone to visit. She stayed with the grandmother till Friday and took a motorcycle back to the appellant’s home as he had promised to pay the cyclist. She later went home and her mother wanted to know where she had been but she did not tell her till after about a week. PW1 said that she feared the appellant’s threats to kill her. She ran off to [Particulars Withheld], to Pastor M’s place where her mother found her and they went to report to the police station and later she was taken to hospital. PW1 denied that the appellant had had any quarrel with her parents.

PW2 Denis Chacha is a clinical Officer from Kehancha District Hospital who examined the complainant on 29/4/2020. He found that her hymen was broken but there were no injuries to her genitalia. He stated that since, it had taken long before examination it was hard to find any injuries but that the absence of the hymen was indicative that penetration had occurred however qualified that a hymen can be broken in other ways like playing or crying. He assessed the complainants age at fifteen (15) years of age.

PW3 GM, the complainants mother recalled sending PW1 to the market about 5:00p.m while she was at the appellant’s home as the wife was her friend. She described the appellant as a balozi (village elder), that PW1 did not return and when she enquired from the appellants home whether PW1 had been there, it was denied that she was and that by then the appellant had also not returned home. The next day, she learnt from one of her children that PW1 had slept at the appellant’s home but on going to enquire; PW1 was not there as she had left. That PW1 stayed away till Friday when she returned to the appellants home and the appellant went to inform them of her return and asked PW3 not to beat PW1 because she had been at [Particulars Withheld]; that when PW1 returned home, she informed PW3 what the appellant had done to her and how he then took her to [Particulars Withheld]. PW3 reported the matter to another village elder and the Chief. PW3 said that the appellant’s 2nd wife is her friend and she even used to watch TV at the appellant’s home. PW3 denied the existence of any grudge or dispute between her and the family of the appellant. She denied having a romantic relationship with the appellant and that all the cases that the appellant has reported are meant to interfere with the defilement case.

PW4 CPL Justice Wambua of Kehancha Police Station received a report of defilement on 18/4/2019 and he commenced investigations. After close of investigations, he summoned the appellant and charged him for this offence.

After the close of prosecution case, the accused was called upon to defend himself. He testified on oath as DW1 and called three other witnesses. PW1 described himself as the elder (Balozi) and he denied committing the offence; that he knew the complainant as a neighbour. He stated that he works as a watchman and that he had come from a journey, reported to work at 6:45p.m and worked till morning. He denied having met PW1 at 5:00p.m and stayed with her till the morning; that he has been framed because of conflicts; that the complainant was not attending school faithfully and as a villager elder, he had to ensure she did; that PW1 had failed to go to school for some time and when he followed up, he was informed that the complainant has been staying away from home; that he was never a suspect of engaging in sexual activities with PW1; that he made a report to police and he also reported threats by the mother (DEXNO 1 and 2); that he had been in a romantic relationship with PW3 in 2018 and that they have a boundary dispute. He denied having a grudge with the complainant.

DW2 Joseph Juma Waisiko, a cousin to the appellant told the court that on 4/4/2020, he engaged the appellant as a cyclist to take him to Migori at 2:00p.m and returned home about 6:40p.m and the appellant went to his work place.

DW3 Michael Roswe Magaigwa, a watchman at Herigetter NGO recalled 4/4/2020; that the appellant arrived at work with somebody on a motorcycle and they spent the whole night together and it is not true that he was away with the complainant in a maize plantation.

DW4 John Getangita Rioba, Assistant Chief of Ihove Sub Location testified that the charges against the appellant are a frame up because the complainant had escaped from home from 18/4/2020, that he knew that PW1 is of truant behaviour and that the

complainant's family caused problems because the appellant was checking on PW1's school progress; that no report of defilement was made to him and that the complainants are trying to get back at the appellant because of early marriage plans they had for the complainant.

I have duly considered all the evidence adduced in the trial court, the grounds of appeal and the submissions of both counsel. Although the State supported the appeal, it is the duty of this court to examine all the evidence afresh, analyse and evaluate it and draw its own conclusions.

This is being a charge of defilement, the prosecution has to prove beyond any reasonable doubt, the following ingredients:-

- i) **The age of the victim;**
- ii) **Proof of penetration;**
- iii) **Proof of identity of the perpetrator;**

On the question of age, having considered the evidence on record, there is no doubt that the complainant was a child. She told the court that she was fifteen (15) years old though she did not know her date of birth. No birth certificate was availed but PW3, the complainant's mother said that she was born in 2005. The charge of defilement is a very serious one which upon conviction, carries stiff mandatory sentence and the age of the victim must be proved. In the case of **Richard Wahome vs= Republic Criminal Appeal No. 6 of 2014**, the Court of Appeal held as follows:-

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2, the mother of the complainant testified that the complainant was ten (10) years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 (the doctor) who examined the complainant herself.”

The same view was held in the case of **Muroni vs= Uganda Court of Appeal No. 2 of 2000** where it was held:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”

In this case, the age was proved by the mother's testimony, that she was born in 2005 and was therefore fifteen (15) years old as of 2020 when the offence occurred. The appellant and even the Assistant Chief (DW1 and DW4) confirmed that indeed the complainant was a minor who was still in school.

Proof of penetration

The appellant has vehemently faulted the trial court's finding that penetration was proved. Penetration is defined in Section 2 of the Sexual Offences Act as follows:-

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

The above provision was elaborated in the decision quoted by the trial court; i.e. **Twehangane Alfred vs= Uganda Criminal Appeal No. 139 of 2001 (2003) UGGA 6 and Cliff Odhiambo Oburu vs= Republic (2017) eKLR** where the courts held that penetration need not be complete, it can be partial or even the slightest penetration. In the instant case, the complainant explained to the court what happened to her in Kiswahili as follows:-

“alinifanya kwa sehemu yangu ya mkojo kwa sehemu yake ya mkojo.”

In the trial court's judgment, the court said that the above sentence means: **“This in ordinary meaning meant insertion of the penis into the vagina.”** I have no idea how the trial court understood the explanation given by the complainant. There is no indication that the appellant inserted his genital organ into the complainant's genitalia. The complete explanation was not clear at all and clarification should have been sought. Ordinarily, it is not a requirement that defilement be proved by medical evidence. In this case, the matter was reported over three weeks later and there would have been no possibility of getting medical evidence to corroborate PW1's evidence. I find that there was no proof of penetration and hence the offence of defilement was not committed.

The question then is whether an indecent act was committed on the complainant?

An indecent act is defined in Section 2 of the Sexual Offence Act as

“Means an unlawful intentional act which causes

a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.”

The complainant told the court that the appellant touched her breast and then said; ‘**alinifanya sehemu yangu ya nkojo na sehemu yake ya mkojo**’. Since the court did not seek clarification of what the complainant meant, all that the court can deduce is that the appellants genitalia came into contact with the complainant’s genitalia, and in my view, that act amounts to an indecent act as defined under Section 11 of Sexual Offences Act.

Whether the Appellant is the perpetrator:

The appellant is not a stranger to PW1. They are next door neighbours, whereas PW1 narrated how the appellant took her into the maize plantation and defiled her till late in the night and later made her disappear for five days, the appellant vehemently denied having committed the offence and raised an alibi defence.

The appellant stated that there was no grudge between him and the complainant. He however, claimed to have been framed because he had insisted and following up on the complainant attending school whereas she had become truant and was not regularly attending school. PW4 also claimed that PW1 had become truant and added that the appellant was framed because the parents wanted to marry her off. As clearly pointed out by the trial court, in its judgment, PW1 cannot have been failing to attend school, about April, 2020 when this incident occurred because the court took judicial notice of the fact that schools had closed in March 2020 due to the Covid 19 pandemic and they remained closed for

Most of the year. The allegation that the charge were trumped for that reason PW1 refusing to go to school cannot be true. DW4 was obviously lying to allege that the girl had disappeared on 18/4/2020 and the parents reported to him. He even contradicted himself when he went to allege that the appellant was unpopular for trying to stop early marriages of the complainant. He is the Chief and yet he could not tell where the complainant had alleged been married and he did not explain why he did not arrest the person who had married a minor.

On allegations that PW3’s family have had case with the appellant and even threatened the appellant, the OB report dated 17/7/2020, does not disclose the nature of the report and in any case, if there was any complainant, it was made after this offence had been committed and the appellant was already charged. It was not a true pre-existing grudge. No wonder PW3 said the said the reports that the appellant has made were meant to defeat this case.

As regards the allegation that the charges were trumped up because the appellant made a report to the Children’s Department of child neglect, the same was made on 22/4/2020 after the incident leading to the appellant’s arrest had occurred and besides, the name of the child who said to be neglected was LMN; These are not PW1’s names. PW3 stated that she is the one who complained to Children’s Officer about the defilement. The said report does not relate to this case and besides it was made after 4/4/2020 and it can not relate to a pre-existing dispute.

The appellant also alleged that being neighbours, there is a land dispute between the appellant and PW3’s family. He did not explain the nature of the dispute. Lastly, the appellant alleged that he had a love affair with PW3 in 2018. Apart from the fact that some of the allegations are unsubstantiated, the multiplicity of the allegations go to show that the appellant was on a fishing expectation.

The appellant raised an alibi defence that he was at work on 4/4/2020 together with DW3 at Navigators NGO; that he reported to work at 6:00pm till the next morning. The law is that even when an accused raises an alibi defence, he does not assume any duty to prove his innocence. The burden always rests with the prosecution to prove its case beyond reasonable doubt. **In Ssentale =vs= Uganda (1968) EA 36** the court said that;-

“the prosecution always bears the burden of disproving the alibi and proving the appellant’s guilt”

In **Victor Mwendwa Mulinge =s= Republic (2014) e KLR**, the Court of Appeal said;-

“It is trite law that the burden of proving the falsity if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja =vs=Republic*; the court held that in a proper case, a trial court may in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby present any suggestion that the defence was an afterthought.”

Even though, the appellant and DW1, claim that the appellant was at work on the night of the incident. DW4 the Chief of the area, who knew the appellant so well, told the court that the appellant works at the Ngo during the day. If he works during the day, then he cannot have been working on the night of 4/4/2020. I find the defence evidence to be contradictory and that is indicative that the alibi defence was untrue.

The complainant is the only witness to the alleged offence, which is common of most sexual offences. They are committed in secret. Under section 143 of the Evidence Act, a fact can be proved by the testimony of one witness unless the law requires otherwise. In the case of **Mohamed =vs= Republic (2006) 2 KLR 138**, the court stated as follows:-

“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

Under the proviso to Section 124 of the Evidence Act, there is no longer a requirement that there be corroboration in Sexual Offence provided that the court warns itself and gives reasons of the victim for its decision to rely on the uncorroborated evidence. Section 124 provides as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

In this case the trial court considered Section 124 of the Evidence Act and held that the complainant’s testimony remained unshaken even during cross examination and held that even without corroboration, she found that complainant’s testimony to be truthful and believed it. There is no reason for this court to fault that finding because the trial court had an opportunity to observe the demeanour of the witnesses.

The appellant also alleged that his Constitutional rights to fair hearing under Article 50 (2) (g) and (h) were violated. Article 50(2)(g) provide as follows: -

“50(2). Every person has the right to a fair trial which includes the right....

(g) to chose and be represented by an advocate, and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

The court appreciates that the said rights to fair hearing cannot be limited as provided under Article 25 (c) of the Constitution. The courts have held that an accused should be informed of the rights promptly most probably before plea is taken or before the hearing commences. See decision of Mrima J in **Chacha Mwita vs= Republic HCCRA 33 of 2019.**

“Article 50(2)(g) of the Constitution dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -

... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearing... (emphasis added).

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.”

I have perused the court record, although the court did not inform the appellant of his right to counsel before plea was taken on 30/4/2020 as required by Article 50(2)(g), the hearing was reserved for 5/5/2020 and Mr. Muniko Advocate came on record on that date. The appellant had services of counsel all through the trial and therefore there was no breach of his rights under Article 50(2) (g) or (h). That ground must fail.

In the end, I find that the prosecution proved that the complainant is a minor and the preparator was the appellant, a person well known to the complainant who accosted her when it was still daylight and even tried to conceal the offence thereafter by sending PW1 away. I have found that the offence of defilement was not proved and I acquit the appellant of that offence and set aside the sentence of seven (7) years imprisonment. Instead, I find him guilty on the alternative charge of committing an indecent act with a child and will sentence him to five years imprisonment. Sentence will take effect from the date he was sentenced by the trial court on 25/1/2021.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 7TH DAY OF OCTOBER, 2021

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kimanthi. State Counsel

Appellant in person

