



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 59 OF 2016

MUTUKU KYULEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal arising from Cr. Case No. 89 of 2014 in PM's Court at Kitui, Hon. B.M. Kimemia and judgement delivered on 9th September 2016.

J U D G E M E N T

1. **Mutuku Kyule**, the appellant herein was charged with the offence of defilement contrary to **Section 8(1) (2) of the Sexual Offence Act No. 3 of 2006 vide Kitui CM'S Court Sexual Offence Case No. 89 of 2014**. The particulars of the offence are that, on diverse dates between 25th September 2014 and 29th September 2014 at [Particulars withheld] village, Mulundi within Kitui County, he defiled (name withheld) a child aged 4 years.
2. The appellant was found guilty of the offence after trial and convicted. He was sentenced to serve life imprisonment. He was aggrieved by that finding and filed this appeal.
3. A brief summary of the prosecution's case reveals a sad story of a young child aged 4 years' old who was left at the hands of a grandmother because the mother was away in hospital for delivery of a baby. The evidence shows that the appellant, a worker employed as a farmhand by a neighbour living next to the victim's home took advantage of the situation and defiled her.
4. JKM (PW2), the mother to the victim testified that she was admitted in Kitui District Hospital between 25th September and 27th September for delivery and had left her 4 years daughter in the care of her grandmother. She was discharged on 27th September. She testified that when she was discharged on 27th September, she arrived home only to find her daughter showing unusual signs of fear. She stated that on 4th October 2014, she attempted to bath her daughter but surprisingly, she declined saying her grandmother would bath her because she was feeling pain in her private parts. The mother got curious and placed the child on the bed and examined her upon which she found out that her vagina had sores that were reddish. She also observed that her vagina appeared loose with a smelly discharge. Upon inquiry, the minor looked frightened to reveal who had defiled her but eventually the minor gave in and revealed that it was the appellant who had defiled her. According to the mother the appellant had been employed in the neighbourhood. The mother further testified that when he informed her husband, the father to the minor, and the grandmother, she was asked to remain silent and even threatened that if the perpetrator came to know she would be harmed. The mother however remained firm and strong and on 9th October 2014, she took her child to the hospital because the child was complaining of lower abdomen pain, had swollen glands between her legs besides not feeding well.
5. The child was treated at Kitui District Hospital and was advised to take her every two weeks for further medication and treatment.
6. The victim (PW1) testified and confirmed that the appellant defiled her when her mother was away in hospital. She further stated that he defiled her in his bed and gave her sweets and some medicine to take. She further claimed that the appellant gave her medicine to put into her vagina before he defiled her again. She testified that she bled and feeling pain she screamed for help.
7. Dr. P.N. Mutuku (PW4) testified on behalf of Dr. Cosmas Mutisya he confirmed that the minor was treated on 9th October 2014 after medical examination revealed that she had been defiled. According to the doctor, the victim's vagina was bruised and reddish. The hymen was also found broken and the vagina had whitish foul smell discharge. It produced the P3 form (P ex 1) which captured the findings of the doctor. He also tendered appointment card (P Ex 5), PRC form (P Ex 2) and age assessment report (P ex 3). The age assessment report indicated that the minor was aged 4 years. The doctor testified that the medical findings were consistent with penetration.
8. When placed on his defence, the appellant denied the charge, claiming that he was framed. He however, failed to reveal why he believed

he was framed. He however conceded that he was living and working a stone throw away from the victim's home.

9. The appellant availed witnesses who testified in his defence. The victim's father (DW2) testified that her wife and children had left him and went back to her maternal home after the incident. He denied knowledge of the incident and blamed his wife for framing the appellant. When pressed to explain why the wife would frame the appellant, the victim's father simply stated that she hated the appellant because he was a drunkard and spoke in a manner that did not please his wife.

10. AMM (DW3) also weighed in and testified that the victim was her granddaughter. According to him, the minor stayed with them when the mother went for maternity and that when the victim's mother returned, she reported that her daughter had been defiled. He denied knowledge of defilement saying that when the mother was away he did not hear of any defilement and that the child attended school. He conceded that, the appellant was an immediate neighbour.

11. MM (DW4) the grandmother who was left with the custody of the minor and other children when the mother (PW2) went to the hospital for delivery also claimed that she was not aware of the defilement. She testified that she was the one who was with the child when the mother was away and that the child never informed her that she had been defiled.

12. The trial evaluated the evidence tendered and found that the prosecution's case had been proved beyond reasonable doubt. The trial court dismissed the defence put forward and found that the appellant and his witnesses were not consistent. The trial court found that there was a conspiracy between the appellant and his witnesses to cover up the crime and that is why they threatened the victim's mother. The trial court found the minor truthful and on the basis of the evidence, he found sufficient evidence to sustain the charge and convicted the appellant sentencing him to life's imprisonment.

13. The appellant felt aggrieved against the decision and preferred this appeal raising the following grounds namely;

(i) That the evidence adduced by the prosecution was marred with contradictions, inconsistencies and full of fabrications.

(ii) That the investigating officer did not visit the scene of crime to get information to support his case.

(iii) That the prosecution's case was not proved to the required standard to warrant a conviction.

(iv) That his defence was vital was just dismissed

14. The appellant in his written submissions filed on 21st May 2021 raised additional grounds and submitted on them without leave of this court as provided under **Section 350 (2) (b) (iv) of the Criminal Procedure Code**. I will not consider them in this appeal but even if I was to consider them, had leave been sought, there would be no difference. There is no evidence that the rights of the appellant to a fair trial were violated.

15. The Appellant submits that there were inconsistencies in respect to the dates of the incident. He claims that while it was alleged that defilement had taken place between 25th and 29th September 2014, the victim's mother discovered the same on 4th October 2014 when she wanted to bathe her and that she took her to hospital on 9/10/2014. The appellant avers that while the child was taken to hospital after 12 days, the doctor concluded that she had been defiled not more than 24 hours prior to the examination and the defilement was recent.

16. The Respondent did not respond to this ground specifically but I have considered the same on merit and find that though the doctor's opinion on the age of the injuries noted on the victim's genitalia appears inconsistent with the evidence (oral testimony) given by the victim's mother (PW2), I find that inconsistency minor and insignificant. The doctor observed the minor and according to her, the girl appeared visibly shaken and traumatized. Her vagina was bruised and reddish with whitish foul smelly discharge. That could have swayed the doctor's opinion that the defilement had taken place recently. That inconsistency in my considered view is insignificant because it does not mean that the minor was not defiled. As submitted by the state, the evidence proved penetration and the fact that the appellant was positively identified. The decision cited by the appellant of Hon. Lessit J (as she then was) in **GNK versus Republic** is not relevant to the circumstances of this case.

17. The fact that the victim's mother stated in her evidence that her daughter had previously been defiled on 1/09/2014 where she could tell who the perpetrator was does not mean that the appellant is the one who defiled the minor between 25th September 2014 and 29th September 2014. He could as well have been the same perpetrator only that the minor could not reveal perhaps because of the threats which certainly featured prominently in this matter. The trial court, captured it well.

18. The appellant avers that the prosecution's case was not proved to the required standard which is beyond reasonable doubt. He avers that when the minor was examined, her inner clothes had blood stains and wonders how it was possible yet examination was done days after the defilement. He also argues that the grandmother (DW4) examined the minor and did not find anything unusual and did not see the blood stains. He has relied on the decision of **Joo versus Republic [2015]** where the court observed that the standard of proof in Criminal cases is high because it is better to acquit ten guilty persons than to convict one innocent person. The appellant insists he did not defile the girl and that the failure by the police to carry out proper investigation was fatal to their case. He claims that there was no infection noted by the doctor that there's no DNA done to link him with the offence.

19. The State/Respondent on the other hand has opposed this appeal. In its written submissions, the Respondent avers that it's case proved all the 3 elements of the offence of defilement to wit, age, penetration and identification of the perpetrator.

20. The State submits that the age of the victim was proved by PW4 through age assessment report P Ex 3. It adds that the issue of penetration was well proved by PW2, the mother to the victim, the victim herself and the doctor (PW4).

21. The State further points out that the evidence of the Investigating Officer I.P. Shamo Hamadi (PW3) show that the appellant was positively identified because the Investigating Officer stated that when the minor saw the appellant, she clung onto her mother because the appellant had warned her that he would kill her.

22. This court has re-evaluated the evidence tendered in the trial court with a view to coming up with our conclusion on whether the prosecution's case was really proved against the appellant to the required standard which is beyond reasonable doubt.

23. I have considered the evidence tendered by the victim's mother (PW2), the victim (PW1) herself and the medical evidence tendered by Dr. P.N. Mutuku (PW4). I must say without necessarily repeating word for word of what they stated in their evidence that their evidence proved beyond doubt that the offence of defilement had been committed by the appellant.

24. To begin with the evidence of the minor (PW1) her evidence clearly indicated that the appellant had defiled her and gave her sweets. This is what she stated in her testimony;

“The accused put his penis into my vagina at his bed. There was nobody around. I bled. My mum was in the hospital. My grandmother was at the shamba. He gave me sweets. He told me not to give to any other person..... after he defiled me, he gave me medicine that I drank (sic). He also put some medicine into my vagina. He again defiled me. I screamed. He covered my mouth with his fingers...”

The trial court observed the demeanor of the girl as she testified. This is what the trial court in part observed in its judgement; “I have no reason whatsoever to doubt the testimony of PW1, a child aged 4 years. She is honest and clearly recognized the person who defiled her and knew him by name. That person is the accused in this matter. She was the only eye witness when the act occurred. She suffered pain and trauma and at the time of arrest of the accused, she clung to her mother at the sight of the accused who had threatened to harm her in the event she disclosed him. That body language alone pointed to the fact that the accused was the perpetrator of the heinous crime to a “young mind”.”

25. The above observations show that the trial had reasons, which is well captured in the judgement, to believe that the victim was telling the truth. That alone fact, as provided under **Section 124 of Evidence Act (Cap 80 Laws of Kenya)** was sufficient to render a conviction on defilement even if there were no other evidence to corroborate. In this instance however, there were other corroborating evidence. The mother of the victim (PW2), who I must say exhibited quite extra ordinary courage and commitment to access justice for her daughter. She testified that she had come home after delivery which had seen her admitted in hospital from 25th to 27th September 2014. When she arrived home, she noticed her daughter behaving abnormally. According to her, her daughter showed signs of being frightened. Her concerns were confirmed on 4th October 2014 when she attempted to bathe her. She observed that her daughter's vagina had sores on the walls which were reddish in colour. She also observed that her vagina was loose and wide with a smelly discharge which she found unusual. These observations by the mother were quite consistent with the findings of the doctor who found that;

“the vagina was bruised and reddish. The hymen was broken and she had whitish foul smelling discharge. All these factors pointed to penetration.”

26. This court finds that in the face of the above strong evidence tendered by PW1, PW2 and PW4, which evidence is consistent and corroborative the trial court was spot on to find that the prosecution's case had been established beyond doubt that the girl had been defiled and the appellant was the perpetrator. I have re-evaluated the evidence and I have no doubt in my mind that the applicant was guilty as charged.

27. The appellant in my view mounted a defence which at best was simply to cover up the crime. He roped in the victim's father no less and the grandmother as well but the trial court correctly placed appropriate weight to their testimonies. I must observe once again that one cannot help but admire the courage of mother of the victim. She was threatened and urged to keep her mouth shut but she could hear none of it. She of course paid the price because she was forced to go back to her home but I am sure she was satisfied when justice was finally served. Had it not been her sacrifice and courage perhaps this case might not have seen the light of the day. Remember, she had just given birth but she single handedly took her daughter to hospital for treatment despite hostility she faced from her family.

28. The Investigating Officer (PW3) testified that when he arrested the appellant, the victim saw him and she clung onto her mother frightened because the appellant had threatened that he would kill her. That fact of fright was first observed by her mother when she first arrived home from hospital. I also find that the doctor who examined the minor noticed the same. He stated in her evidence in court;

“The child was very anxious because of the traumatic event and the doctor advised “psychological counselling”

29. The DW4, the grandmother of the minor despite feigning ignorance of the defilement conceded in her evidence in respect to victim's mother that;

“she is no longer at her matrimonial home because when she alleged that the accused had defiled her child, she said she would go back to her maternal home to be able to press charges.” This clearly indicates that the mother was intimidated and great efforts were made by the appellant and her relatives to conceal the crime. What a tragedy had their intimidation and threats come to bear fruits! The trial court which must also be commended was again spot on, on this because in his judgement, he correctly observed the following: -

“This is a very unique case where the supposedly guardians of the child turn against the child they are call to protect.” It is on that light that the evidence of the victim's father MM (DW2), the grandfather AMM (DW3) and the grandmother MM (DW4) was

viewed by the trial court. This court finds that the trial court was in order to make such findings in view of the circumstances obtaining in the case.

30. This court finds that defence put forward by the appellant was duly considered. As I have observed, the defence put forward was simply aimed at getting the appellant off the hook of the law. The evidence tendered by the Prosecution's however was strong enough with firm tenterhooks to make hi account for his heinous crime.

31. On sentence, the offence committed by the appellant going by **Section 8(2) of the Sexual Offence Act**, attracts only one sentence –Life Imprisonment. Looking at harm and the effect, the offence caused the minor as captured well by her mother (PW2) and the doctor (PW3), one cannot help but notice the trauma and the chilling psychological torture the appellants mindless action caused her. In my view the life sentence prescribed by law is no more than what he really deserved.

In the end, this court finds no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 11TH DAY OF NOVEMBER, 2021.

HON. JUSTICE R. K. LIMO

JUDGE