



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 17 OF 2019

MUSYIMI KYALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

Being an Appeal vide Migwani Principal Magistrate's Court

Sexual Offence case No. 8 of 2018 judgement that was

delivered on 28th May 2019.

1. Musyimi Kyalo, 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 Migwani PM's Court Sexual Offence No. 8 of 2018.**

2. The particulars of the amended charge were that on 19th August 2018 at [Particulars Withheld], Migwani within Kitui County, the Appellant defiled (name withheld) a child aged 6 years.

3. The Appellant was found guilty upon trial and was convicted. Given the age of the victim and the nature of the offence, he was sentenced to serve life imprisonment. He felt aggrieved by both conviction and sentence and preferred this appeal.

4. A brief summary of the prosecution's case presented to the trial court shows that the victim of the offence was a minor who testified unsworn, that she was in pre-unit and that she had gone to collect firewood when the Appellant met her and offered to carry the firewood for her as they headed home. The Appellant was a cousin to the victim's mother and had been engaged as a farm hand by the father of the victim.

5. According to the victim, (PW1), the Appellant, assisted her to carry firewood and on reaching home, there was no one and therefore, found herself alone with the Appellant who took advantage of the situation to defile her. The minor hardly described what the Appellant did to her but was certain, he removed her trousers by force and slept on her and that she felt pain in between her legs. She testified that the Appellant then instructed her to go and shower.

6. The victim's mother (PW2) testified and corroborated the evidence of the minor. She found her daughter at home and found heavy and large pieces of firewood and wondered how the little girl could have carried the firewood. She inquired from her daughter who told her that the Appellant had assisted her carry the firewood but did much more as she told here that the Appellant had done something painful to her vagina. When she checked, she was horrified to find the girl's private part reddish on one side.

7. The victim's father too testified and narrated that he also came to learn about the incident when he arrived home.

8. The medical evidence tendered by Helen Mutua (PW4) a Clinical Officer at Mwingi Level 4 Hospital and Dr. Catherine Kago (DW5) a doctor at the same hospital in sum indicated that the victim had been defiled. Dr. Kago (PW5) in particular testified that she examined the victim and found no tears on the exterior area of the genitalia but there was bruising on the center side which was "reddish."

She further noted that the hymen was not torn but was bruised and reddish. She tendered the P3 (P Exh 3) and Post Rape Care form (P Ex 4).

Both the medical documents indicated that there was attempted defilement.

9. When placed on his defence, the Appellant denied committing the offence. He faulted the victim's mother stating that she framed him and after he turned down her sexual advances. According to him, the victim's mother later accused him for sleeping with her maids. He further claimed that, on the material day he claimed there was a commotion near a bush near their home and that's when he went to investigate, he found that the victim had accidentally fallen down and injured her face. He claims that the complainant informed him that she had been pushed into a ditch by her brothers. He insisted that he was framed.

10. The trial court upon evaluation of evidence tendered and that it sufficiently established that the Appellant had defiled the minor and convicted him to life imprisonment.

11. As I have observed above the Appellant was dissatisfied and lodged this appeal raising the following grounds namely: -

(i) That the trial court grossly erred in both law and fact when passing the verdict to convict and failing to note that the prosecution side did not prove their case to the required standard of proof i.e. beyond reasonable doubt.

(ii) That the learned magistrate erred in points of law and fact in failing to appreciate the facts that the appellant was not fully informed of all his rights as enriched in the constitution of Kenya 2010 contrary to article 49(1) (a) and 50 1,2 (a) (b) (c) (g) (h) (j) and 3 of the Constitution occasioning a serious derelictions of justice.

(iii) That the learned trial magistrate erred in law and facts in convicting the Appellant on overly contradictory uncorroborated and unreliable evidence in breach of the provisions of Section 163 (1) (2) hence insufficient and inconclusive to sustain the conviction occasioning a serious miscarriage of justice.

(iv) That the learned trial magistrate erred in law and facts in shifting the burden of proof to the Appellant defence contrary to the rules of natural justice contrary to Section 169 of the Criminal Procedure Code.

(v) That the trial magistrate erred in both law and facts when convicting the Appellant on incurably defective charges contrary to Section 214 of the Criminal Procedure Code and of the Sexual Offences Act No. 3 of 2006 hence miscarriage of justice.

(vi) That the sentence imposed on the Appellant was rather too harsh and excessive.

12. In his written submissions filed on 11th May 2021, the Appellant contends that the trial court erred by failing to conduct *voire dire* examination before taking the evidence of the minor. This ground was however a new additional ground raised without leave of this court. This court would not have found this ground sustainable in any event because the minor gave unsworn evidence and her evidence was well corroborated by evidence of PW2, PW3, PW4 and PW5. This court is further persuaded by the Respondent's contention and the cited case of **J.G.K versus Republic [2015] eKLR** where the court held that conviction can be sustained without *voire dire* being carried out so long as the unsworn testimony is corroborated.

13. The Appellant has raised an important ground in this appeal which is the first ground in his petition of appeal. He contends that the prosecution's case against him was not proved to the required standard of beyond reasonable doubt.

14. The Respondent has responded that it proved its case to the required standard by establishing the age of the victim and proving all the ingredient of the offence to wit, age, penetration and positive identification of the perpetrator. It submits that the evidence tendered by the victim mother to wit the birth certificate (P ex5) proved that the victim was 6 years old. According to the Respondent the medical evidence tendered by Dr. Kago (PW5) proved penetration contending that under **Section 2 of Sexual Offence Act**, penetration can either be complete or partial as defined under **Section 2 of the Sexual Offence Act**. It submits that there's prove that there was partial penetration and that the trial court was correct to make the same findings.

15. This court has carefully re-evaluated the evidence tendered by the prosecution in respect to the aspect of penetration and I must say that, the ingredient was not sufficiently proved. As correctly stated by the Appellant, the material medical evidence was tendered by Dr. Caroline Kago (PW5). The doctor stated that she examined the minor and found;

“The external genitalia was normal. There were injuries around the hymen, The hymen was reddish as if someone had attempted to penetrate it.....the clothes (of the child) were dirty, had no blood. The child was wearing the same clothes.....there was bruising on the outer side on the entrance of the vagina. The hymen was not torn but it is obvious bruising. It had reddishness.....”

16. This court finds that while the age of the victim was established to be 6 years and proved beyond doubt by the birth certificate (P Ex 5) tendered by the victim's mother (PW2), the question of penetration given the findings of the doctor was not established sufficiently to render a conviction.

I have considered and indeed evaluated the evidence given by the minor. She testified that the Appellant laid on her but she could not exactly tell what he did to her. She stated in part;

“.....he slept on me. He removed my trouser by force. He slept on me. I don't know what he did but I felt pain here (points between her legs).....”

17. The victim's mother (PW2) testified that when her child told her about what had happened she examined her vagina and "saw red colour on one side."

18. The evidence tendered by the prosecution in the above statement certainly established and proved that attempts were made by the Appellant to defile the minor but the attempt was not successful. I have perused the P3 form (P Ex3) and PRC form (P Ex 4) and both documents indicate that there was an evidence of attempted defilement. This means that the evidence tendered by the prosecution was mere consistent with an offence of attempted defilement rather than defilement. This is because there was absence of prove of penetration, whether partial or full penetration. I find that the trial court fell into error to find that there was evidence of partial penetration. It must be noted that in offences of this nature, given the consequences of finding of guilt, evidence tendered must be strong and watertight. This court finds that the Prosecution's case did not meet the threshold.

The conviction of a perpetrator must be safe in order to avoid miscarriage of justice.

19. This court finds that based on the evidence, I have evaluated above, the first ground of this appeal is merited. I am not satisfied that the Appellant's constitutional rights as enshrined in the Constitution of Kenya was violated by the trial court. In any event, if he opines that there was any infringement by whoever, he has a right to seek redress through alternative forum other than this appeal.

20. I am also not persuaded that there were inconsistencies or contradictions in the prosecution's case. The prosecution's witnesses gave consistent and corroborative evidence all of which pointed out that an offence of attempted defilement had been committed against the minor.

21. From the foregoing, this court finds that the conviction of the Appellant on the charge of defilement contrary to **Section 8(1) (2) of the Sexual Offence Act** was not safe and is hereby set aside and life imprisonment is reversed. I however find that the evidence tendered proved beyond any reasonable doubt that the Appellant had attempted to defile the minor which is an offence under **Section 9(1) of the Sexual Offence Act**. While the conviction on defilement is set aside, conviction on attempted defilement contrary to **Section 9(1)** is hereby entered against the Appellant. Under **Section 9(2) of Sexual Offence Act**, a person who is found guilty of attempted defilement is liable to imprisonment for a term of less than 10 years. Taking all the mitigating factors into consideration, the Appellant is hereby sentenced to serve 15 years and since he had spent roughly 1 year in custody awaiting court trial, the time spent in custody is subtracted from the 15 years sentence which means he will now serve 14 years in jail from the date of conviction (28/05/2019).

DATED, SIGNED, AND DELIVERED AT KITUI THIS 10TH DAY OF NOVEMBER, 2021.

HON. JUSTICE R. LIMO

JUDGE