



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 66 OF 2018

NAHASHON NDIRANGU MWANGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of senior resident magistrate Hon. E. Kelly at Nakuru 94 of 2016 delivered on 20th March 2019)

JUDGMENT

1. The appellant was convicted of the offence of **defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006** and sentenced to **23 years' imprisonment**. The particulars of the charge were that on 22nd August 2013, at Turi in Molo District within Nakuru County accused intentionally did cause his genital organ namely the penis to penetrate the genital organs namely vagina of **HG** a girl aged 14 years.
2. He was also charged with an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**.
3. The accused was sentenced to 23 years, 20 years being the minimum sentence, and 3 years as punishment for interfering with the witnesses.
4. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal as per his petition of appeal filed on 16th June 2021 are that: -
 - a. *That the learned trial magistrate erred failing to appreciate that the victim's age was not proved as required by law.*
 - b. *That the learned trial magistrate erred failing to appreciate there were crucial witnesses who were never called upon by the prosecution to testify.*
 - c. *That the learned trial magistrate erred in law and fact by failing to find that the prosecution's case was marred with contradictions and inconsistencies and as such counsel not found a safe conviction.*
 - d. *That the learned trial magistrate erred in law and fact by failing to consider the appellant's defense which was plausible and cogent.*
 - e. *That the enhanced sentence imposed was harsh and excessive and not informed by the facts and circumstances of the offense nor supported by evidence on record.*
 - f. *That I pray for the restitution of my surety which was never returned after my conviction and sentence since the convicting magistrate did not make orders for the release of the same.*
5. On 21st September 2021, when the appeal came up for hearing the appellant adopted his submissions and further testified that he had a conflict with the mother of the victim and he has been framed up. He stated that no birth certificate was produced as evidence before this court to prove the age of the victim neither were the soiled clothes adduced as evidence.
6. In the submissions filed, the appellant contends that the age of the complainant was not proved, as no evidence was adduced in respect of the age of the complainant. He submitted that the court misdirected itself by indicating that since the age was not disputed, the apparent age of the complainant is 14 years.

7. The appellant cited the case of **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** where the court of appeal stated as follows: -

” age of the victim of sexual assault under the sexual offences Act is a crucial component it forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”

8. The appellant further submitted that the prosecution failed to call a crucial eyewitness who had seen the victim lying on the ground. He further stated that the prosecution case was vitiated with numerous contradictions and inconsistencies; that the evidence of PW1 was inconsistent with that of PW3. He stated that the evidence of PW3 reveals that PW1 did not meet the appellant on the way carrying luggage and a panga as stated by PW1 and therefore evidence of PW3 reveals that PW1 was not under duress whatsoever. He submitted that the appellant was only carrying luggage and not any panga.

9. The appellant further submitted that it was not clear how the rape was reported as PW1 indicate she only reported the rape to the mother after PW3 had hinted that she has seen the accused and PW1 together.

10. The appellant further submitted that PW3 seemed to know much of what happened to the complainant yet she was not an eye witness. He submitted that the prosecution witnesses contradicted themselves and failed to prove the appellant's case beyond a reasonable doubt; that the doubt created by the prosecution witnesses should see the appellant acquitted.

11. The appellant further submitted that the court failed to consider his evidence to the effect that there was bad blood existing between the families of PW1 and that of the accused and the possibility of a fabricated charges and cited the case of **Iram Shazad & 2 others vs Republic (1986) eKLR**.

12. The appellant further submitted that the 3 years added as punishment for interfering with the witnesses is illegal; that there was no complaint by the witnesses to the court neither was evidence adduced.

13. He further submitted that the mandatory minimum sentence is unconstitutional. He submitted that the appeal is hinged on the violation of the appellant's fundamental rights as enshrined in the constitution; that there was no prove of penetration, the conduct of the victim and the harsh sentence to the appellant.

14. The appellant urged this court to issue orders for the release of deposit of Kshs. 200,000/= paid to the trial court as security and quash the conviction, and set the appellant liberty.

PROSECUTION CASE

15. The state counsel **Ms. Rita Rotich** submitted the victim was 14 years old when she was defiled by the appellant and the age was confirmed by her parent PW2 and PW4 who stated that she was born in 1999 as per the outpatient card and cited the case of **Jackson Mwanzia vs Republic**, where the court held that age of a victim can be proved by a P3 form.

16. The state counsel further submitted that the accused was positively identified by PW1 and PW2 and PW3 noted that PW1 had difficulties in walking when she arrived home from the farm. On penetration, she submitted that PW6 the doctor confirmed broken hymen, smelly bloody discharge, and tenderness on the vulva and the degree of injury was classified as grievous harm. She urged this court to uphold the conviction and sentence.

ANALYSIS AND DETERMINATION

17. This being the first appeal I will re-evaluate the evidence adduced before the court. I am guided by decision in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 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 (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings 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, see (Peters V Sunday Post 1978) E.A. 424.”

18. I have considered the trial court proceedings, the submissions by the appellant and the rival submissions by the applicant and note that the issue for determination is whether the offence of defilement was proved beyond reasonable doubt.

19. The key ingredients of the offence of defilement are

- a. Proof of the age of the complainant,
- b. Proof of penetration and
- c. Proof of positive identification.

20. On the issue of age, the complainant testified that on 22nd August 2013, she was 14 years old and the same was corroborated by the treatment card and P3 form. PW2 and PW4 the parents of the minor testified that the complainant was born in 1999 and was therefore 14years old. In the case of **Fappyton Mutuku Ngui vs. Republic (2012) eKLR** the court stated as follows: -

“conclusive” proof of age in cases under the Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

21. The P3 form and the treatment record indicated that the complainant was aged 14 years at the time she was defiled. I note that age was not disputed during the trial.

22. On the issue of penetration, **Section 2 of the Sexual Offences Act** defines penetration as: -

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

23. Record show that the medical report produced show that the hymen was broken, there was a foul smelly discharge from her vagina, the vagina was swollen; PW3 stated that after the complainant had left with the accused and came back after 30 minutes while not walking properly and was angry. This clearly confirm that there was proof of penetration.

24. As to whether the appellant was positively identified, I note that the offence was committed at 1500 hours; it was therefore possible for the complainant to see and positively identify the accused as the person who defiled her. PW1 stated as follows: -

“I had refused to help the accused person carry some luggage and walked past the accused and when I was walking to the shop, the accused held my hand from behind and told me to sit down when I refused, he closed my mouth and forced me to sit down and removed my biker.”

25. From evidence adduced, the incident occurred during the day; the accused and the complainant were neighbors and she therefore knew the accused before the offence was committed.

26. Though appellant had alleged that he was framed due blood between the accused and the father of the accused, the area chief was availed and he stated that he was not aware of their dispute. The appellant stated that on the material day, he was at work until 1600hrs but he never availed a witness to support his defence of *alibi*.

27. From the foregoing I find that the prosecution tendered overwhelming evidence on the commission of the offence of defilement by the accused person; the prosecution proved their case beyond a reasonable doubt.

28. In respect to sentence **section 8 (3) of the Sexual Offence Act** under which the appellant was charged provide as follows: -

“Section 8 (3)

A person who commits an offense of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

29. The court imposed the minimum sentence of a person convicted for defilement under Section 8 (3) of Sexual Offences Act which is 20 years and added 3 years for interfering with the witnesses. I however note that the appellant was not charged with offence of interfering with witnesses. A charge and trial would have given the accused an opportunity to defend himself. In my view it was erroneous to add 3 years.

30. FINAL ORDERS

1) Appeal against conviction is hereby dismissed.

2) Sentence of 3 years for interfering with witnesses is hereby set aside.

3) Sentence of 20 years for defilement to remain.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM

AT NAKURU THIS 17TH DAY OF NOVEMBER, 2021

.....

RACHEL NGETICH

JUDGE IN THE PRESENCE OF:

JENIFFER - COURT ASSISTANT

RITA FOR STATE APPELLANT IN PERSON