



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 102 OF 2019

DANIEL KASEJA MUNANJUKHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence by Hon I. G. RUHU (S.P.M) in original Bungoma Criminal Case No. 71/2018 delivered on 20/06/2019)

JUDGMENT

1. The Appellant, Daniel Kaseja Munanjukhi, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act, 2006**. The particulars were that on 3rd September, 2018 at [particulars withheld] village, Kimilili sub-county within Bungoma County, he unlawfully and intentionally caused his penis to penetrate the vagina of MWL, a child of 16 years (*name redacted to protect the identity of the child*).
2. He faced 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**. The particulars were that on the 3rd of September, 2018 at [particulars withheld] village, Kimilili sub-county within Bungoma County, he unlawfully and intentionally caused his penis to come into contact with the vagina of MWL, a child aged 16 years.
3. A synopsis of the prosecution's case was that on 3rd September, 2018 at around 4:00 p.m., PW1 (MWL) went to the Appellant's house, this was her first time there. The Appellant who was a cobbler and her neighbour, had been instructed to repair MWL's shoes. MWL found the Appellant alone in his house and he asked her to be his friend or wife, an offer she refused saying she was still in school.
4. Upon the rejection, the Appellant grabbed MWL, pulled her into his bedroom, removed his clothes, before forcefully stripping off her dress and underwear. He put her on his bed and inserted his penis into her vagina three times without protection. MWL screamed and cried in pain during the ordeal, but nobody heard her. The Appellant had locked the door from the inside. The assault lasted approximately 6 minutes. When the Appellant was done, he gave MWL her shoes, opened the door and let her out. MWL then walked home.
5. At around 5:00 p.m. MWL got home in pain and tears. Her father, PWW, PW2, and mother MM, asked to know what was wrong and after some initial difficulty opening up, MWL told them what the Appellant had done to her. Being late in the day and due to security reasons, her parents took her to Kimilili sub-county hospital the next day where she was examined and treated.
6. The medical examination confirmed that MWL had penetrative sexual intercourse. MWL and her father made a report at Kimilili police station to P.C. Hellen Okumu, PW4, who received the complaint of the defilement. She recorded their statements, issued a P3 form and escorted them to hospital to have MWL examined for purposes of filling the P3 form.
7. On 5th September, 2018 the Clinical Officer filled the P3 form. The conclusion of the examination was that MWL had penetrative sexual intercourse. She had been defiled.
8. The report of the defilement was also made at Maeni Police Post by MWL's father on the advice of Kimilili police. On 3rd October, 2018 the Appellant was arrested by Bahai police officers and subsequently charged as set out above. The delay in arrest was as a result of the Appellant having gone into hiding for a number of days before resurfacing.
9. At the close of the Prosecution's case, the Appellant was placed on his defence as required under **section 211** of the **Criminal Procedure Code**. The Appellant chose to give sworn testimony in which he denied the offence and called 3 witnesses.
10. The Appellant stated that on the day and time in question, he was sensitizing farmers on farming issues, with DW3 and DW4 as a facilitator, at the One Acre Fund, the organization he worked for. That at the end of the day he walked home due to lack of fare. He arrived home at 7:00p.m and proceeded to his parents' homestead for supper before he went home to sleep.

11. The Appellant's defence relied on the testimony of DW2, DW3 and DW4, all of whom worked at the One Acre Fund, to explain his whereabouts and corroborate his version of events. The three defence witnesses were also present during the Appellant's arrest by two police officers at Friends Church Sikhendu on 3rd October, 2018.

12. At the close of the trial, the Appellant was found guilty and convicted on the main charge. He was sentenced to a term of 15 years imprisonment.

13. Dissatisfied, the Appellant filed an appeal dated 9th July, 2019 against both conviction and sentence. The grounds of his appeal were that the trial court based his conviction on contradictory, inconsistent, speculative and circumstantial evidence that was not corroborated. He also alleged that the age of MWL was not proven and that the court did not consider his defence.

14. The parties filed their respective submissions to the appeal which have been duly considered. A summary of the Appellant's written submissions of 5th August, 2021 was that his alibi defence in sworn testimony and the testimony of his three witnesses were not considered.

15. The Appellant submitted that there were contradictions between the medical findings and MWL's testimony regarding whether MWL was pregnant and had procured an abortion or not.

16. The Appellant further submitted that the trial court and prosecution strongly relied on the speculative and circumstantial evidence of a single identifying witness who demonstrated that she could tell falsehoods during *voir dire* examination. He asserted that the prosecution did not prove its case beyond reasonable doubt or warn itself of the risk of convicting on a single identifying witness.

17. The Appellant also submitted that it was not established when MWL's hymen went missing and that the discharge from MWL's vagina was never tested to ascertain if it was from the Appellant, or that it was he who committed the offence.

18. The Respondent filed submissions dated 19th July, 2021 stating that the Sexual Offences Act had been followed to the letter in the trial regarding defilement of children aged between 16 to 18 years. That the age of the victim was proved and there was penetration evinced by a missing hymen. The Respondent submitted that the Appellant was well known to MWL and PW2 as a cobbler and a neighbour, and that MWL had gone to pick her shoes from him thus placing him at the scene of the crime.

19. On the issue of the mandatory minimum sentence imposed on the Appellant, the Respondent submitted that taking into consideration the age of the Complainant and the circumstances of the offence, the sentence imposed was proper. The Respondent relied on the case of **Simon Kipkurui Kimori vs. Republic [2019] eKLR** to pray that the appeal be dismissed in its entirety for lack of merit and the sentence to be upheld.

20. This being the first appeal, this court has a duty to re-examine all the evidence adduced before the trial court afresh, analyse it and arrive at its own conclusions bearing in mind that this court did not see or hear the witnesses testify and make allowance for it. The court is guided by the decision of the Court of Appeal in **Kiilu & Another vs Republic [2005]1KLR 174**, where it was held:

"An Appellant on first appeal is entitled to expect the evidence as a whole submitted to 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 conclusion."

21. In the instant case, the Appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**. **Section 8(4)** provides that:

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

22. The offence of defilement as created under **section 8(1)** of the **Sexual Offences Act** and faced by the Appellant required the prosecution to prove that MWL was below the age of majority, that she was sexually penetrated and that the Appellant was the assailant.

23. In **Criminal Appeal No. 32 of 2017 G.O.A vs Republic [2018] eKLR** the elements required to be proved in a charge of defilement were restated as follows:

"The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence."

24. From the evidence, it can be established that the age of MWL at the time of the defilement was 16 years of age. MWL produced a birth certificate indicating that she was born in May 2002 and was therefore 16 years old at the time of the defilement. She stated her age during the trial to be 17 years and her father similarly stated her age to be 17 years. From the Clinical Officer's assessment, MWL was about 16 years old at the time of the examination. This is conclusive evidence of MWL's age, and it was not disputed during the trial.

25. On proof of penetration, there was evidence indicating that MWL had penetrative sexual intercourse as evinced by her missing hymen. MWL was alone when the incident occurred. She narrated in detail how the Appellant had forcefully penetrated her after she repulsed his advances. She narrated how the Appellant pulled off her clothes, then removed "his organ used for peeing and inserted it into her vagina." MWL's father corroborated her evidence on the state of her clothes when she arrived home. He stated that MWL's white skirt was torn when she came back home on the fateful day.

26. On proof of penetration this can be established either by the victim's evidence, medical evidence, or any other cogent evidence. Similarly, the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence. (See - **Remigious Kiwanuka vs. Uganda; S. C. Crim. Appeal No. 41 of 1995** (Unreported); **Kassim Ali vs. Republic, Cr. App. No. 84 of 2005 (Mombasa)** and the Court of Appeal case of **Dennis Okello Mateba vs. Republic [2020] eKLR**).

27. MWL was examined by PW3, Catherine Akiru, a Clinical Officer at Kimilili sub-county hospital. The Clinical Officer found that the MWL's hymen was missing. She however could not establish how long her hymen had been missing. She also observed that there was a heavy discharge from MWL's vagina but her external genitalia was normal with no tears or bruises. Her urine was normal. MWL was tested for syphilis, HIV/AIDS, and pregnancy all of which were negative. She was however given medication to prevent pregnancy and HIV/AIDS.

28. The Clinical Officer had received treatment notes from her colleague who treated MWL following the defilement. The notes were not produced in the trial court owing to the Appellant's objection, but the Clinical Officer confirmed that the minor had been defiled.

29. MWL and her father testified that medicine was prescribed to help her to abort which they inferred to mean that she was pregnant. The pregnancy test however indicated that MWL was not pregnant, and that she was given medication to avoid pregnancy. This can be explained by the term commonly known as the "morning after pill" which may be prescribed for rape victims to prevent pregnancy.

30. In any case pregnancy is not an ingredient required to prove defilement. This court held in the case of **Ismail Ibrahim Kofa vs. Republic [2014] eKLR** that:

Pregnancy of the complainant is only relevant in as far as it is proved that it was caused by the appellant as a result of the alleged defilement. I state this because the Appellant has spent a lot of energy challenging the pregnancy as an ingredient of defilement when the issue is not pregnancy per se but defilement resulting in pregnancy.

It would appear that the Appellant in his submissions argued that no DNA test was done to confirm he was the father if MWL was pregnant. However, the issue of DNA does not arise because MWL was not found to be pregnant.

31. From the foregoing, I find that evidence tendered on the element of penetration was sufficient to provide proof to the required standard.

32. Lastly on the issue of the identity of the perpetrator, MWL and her father identified the Appellant as the perpetrator. They testified that he was their neighbour and that MWL went to the Appellant's house to collect her shoes which he had repaired. MWL's father testified that when he asked his other child, E, where his sister was, E told him that MWL had gone to collect her shoes from Daniel, the Appellant. This lends support to MWL's evidence that she went to the Appellant's house at the material time. MWL's report to her parents immediately she returned home was that she had been defiled by the Appellant. She arrived home in tears and her clothes were torn.

33. The Appellant first testified that he only came to know MWL on the day of his arrest. He however did not dispute that she was a neighbour living less than a kilometer from where he lived with his parents, and that her grandfather is her uncle. Therefore, by the Appellant's own admission they were related.

34. The Appellant disputed the fact that he was home on the date and time in question. Together with his witnesses he provided an alibi defence in which he stated that he was at work on the day in question and could therefore not have defiled MWL. If an accused person alleges that he was not present at a place or at the time an offence was committed, and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi. (See - **Karanja vs. Republic [1983] KLR 501**).

35. As a general rule of law, if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence. The burden of proving his guilt remains throughout on the prosecution. (See - **R. vs Johnson (1961) 3A 11ER 969**).

36. This being a criminal trial, the burden of proof rested with the prosecution to prove their case against the Appellant beyond reasonable doubt. The court notes however that the Appellant told the court that he was away at work at One Acre Fund on the material date and that there was a work register that would prove that he could not have been at the scene of the crime. However, the Appellant did not provide the register which was in his power to produce to confirm attendance of duty on 3rd September, 2018 and neither did his witnesses DW2, DW3 or DW4. They did not produce a register despite the Appellant telling the court that one of them would do so. Instead, DW2 and DW4 testified that the One Acre Fund did not have any attendance register.

37. DW3 testified that she worked with the Appellant on the date in question and that they parted ways at 5:00p.m. DW4 also stated that she was with DW3, and the Appellant and they finished their activities at 4:30p.m., made their way to DW4's home where she served them tea before the two left and went to their respective homes. MWL's father testified that the distance from the Appellant's home to his home was minimal and required a fare of only Kshs. 20/= if he was to use a motorcycle. The court observes that between 4:30 p.m. when the Appellant had tea at the home of DW4 to 7:00 p.m. when he arrived at his parents' home, he had ample time to commit the act he is accused of.

38. The court has warned itself of the dangers of convicting a person on the strength of the evidence of a lone identifying witness. In the instant case, the parties were alone together in the light of day and were known to each other. The evidence of the witness was not shaken in cross-examination. The proviso to **section 124** of the **Evidence Act** allows the court to base a conviction on the evidence of a single witness if the court believes it. In this case the evidence of MWL was credible.

39. Having considered the Appellant's defence in the context of the rest of the evidence on record, I find that it has not raised any reasonable doubt capable of denting the prosecution's case. From the evidence of MWL's father there was no bad blood between him and the Appellant before the incident and there was no reason for his family to fabricate such evidence against the Appellant. After analysis of all the evidence

and submissions, I agree with the findings of the trial court that it is the Appellant who defiled MWL. The conviction is therefore sound, and I affirm it.

40. Where the victim of a sexual offence is between the ages of sixteen and eighteen years, such as PW1 was, **section 8(4) of the Sexual Offences Act** provides for a sentence of imprisonment for a term of not less than 15 years upon conviction. The court considers that the Appellant has not given any mitigation and that the trial court gave him fifteen (15) years imprisonment which is the minimum lawful sentence. Having considered all the circumstances of this case, I find that the appeal both on conviction or sentence has no merit. The appeal is thereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 1ST DAY OF DECEMBER 2021.

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L.A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in person.

In the presence of.....State Counsel.