



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 53 (E011) OF 2020

(Appeal arising out of conviction and sentence of Hon. V. Karanja (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 289 of 2019 delivered on 15th December 2020)

LW.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

LW, the Appellant herein, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 22nd day of November 2019 at Nabeki farm in Chepchoina Location within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of FN, a child aged fourteen (14) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 22nd day of November 2019 at [Particulars withheld] farm in Chepchoina Location within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of FN, a child aged fourteen (14) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted on the main charge and sentenced to serve **twenty (20) years imprisonment**.

The Appellant is aggrieved by his conviction and sentence. He has filed an appeal to this court. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to take into account that he was not medically examined. He stated that the charges leveled against him were hinged on settling old scores he faced with his step parents. He faulted the trial court on relying on fabricated and incredible evidence. He lamented that the trial court ought to have considered that he was jostled by the police upon arrest. He challenged the evidence of the prosecution as having failed to call crucial witnesses to trial. He finally raised provocation with the trial court's alleged shift of the burden of proof. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, both the Appellant and the Respondent (Prosecution) presented to court and relied on their written submissions in support of their respective rival positions. The Appellant submitted the identification of the perpetrator was impossible as the incident occurred at night when the lighting was poor. It was his proposition that the Complainant ought to have given a picturesque testimony when describing the perpetrator including but not limited to his physical attributes, the apparel the perpetrator wore and voice recognition. He further hypothesized that he ought to have been medically examined. In their absence, he was thus improperly identified. He cited contradictory evidence on the testimony of PW1 and PW2 insofar as the time the Complainant was rescued thereby vitiating the evidence of the Prosecution. He added that since the Complainant was found to have an old looking hymen, he could not be charged with the offence of defilement as it was evident that she had sexual intercourse on previous occasions prior to the offence. He faulted the quality of investigations conducted. He stated that they were shoddy. He posited that the investigating officers ought to have taken photographs, presented the Complainant's clothing and taken DNA samples at the scene. Further, it was his presupposition that only a lab technician was supposed to testify on the medical evidence. As such, the evidence of PW4 did not suffice. He stated that since he was related to the Complainant, he ought to have been charged with incest and not defilement. Consequently, the charge sheet was defective. He further added that the charge sheet remained defective as the words "intentionally and unlawfully" were omitted from the description of the offence.

On the part of the Prosecution, Mr. Omooria submitted that all the ingredients to a charge of defilement had been sufficiently proved. He further stated that the absence of medically examining the Appellant did not disturb the findings of the court as the core elements on a charge of defilement were proved. He cited the allegations that the charges being cemented around strife as well as the Appellant being mishandled by the police, amounted to an afterthought as they were never raised at trial. He submitted that the witnesses called to testify gave sufficient evidence to support the charge. He further added that the evidence of a single witness was proof enough to convict an accused person as pronounced in **Section 124** of the **Evidence Act**. On sentencing, Learned Prosecutor submitted that the same served a deterrence purpose and must be upheld.

The facts established by the Prosecution and giving rise to the charges are recorded as follows; the Complainant, PW1, a class eight (8) pupil aged fourteen (14) years old at the time of the offence, was on 22nd November 2019 sent to the posho mill by her brother AJW, PW2. She then bumped into the Appellant on her way home from the posho mill at 2000hours. The Complainant was able to recognize the Appellant on sight with the help of the moonlight. The Appellant grabbed the Complainant by hand and proceeded to his house. The Appellant was well known to the Complainant as her friend. They had been in each other's company a number of times before the offence occurred. The Appellant, in the absence of the Complainant's volition took her to his bedroom. He told her that she would go home later. He intimidated to her that they would be having sexual intercourse to wit she declined. The Appellant thereafter removed her clothes, lowered her biker and pant and defiled the Complainant thrice for two (2) hours.

When it became apparent that the Complainant was taking too long to come back home, PW2 went to look for her. He found the Complainant and the Appellant red handed having sexual intercourse in the Appellant's house on his bed. PW2 revealed that the he is an uncle to the Appellant. On seeing PW2, the Appellant escaped. PW2 further intimated that he had issued stern warnings to the Appellant against his intentions to converge a relationship with the Complainant. PW2 then reached out to the Appellant's father who helped him open the house.

The Complainant was then take to the Police Station at Chepchoina where she recorded a statement. The investigating officer, SGT NOAH, PW3 took the statement of the Complainant. Upon recording her statement, the Complainant was taken to hospital. She was examined by EMMA KEMUNTO, a clinical officer. The following were her remarks:

“The external genitalia was normal. No laceration. Old broken hymen observed. She was previously engaged in sexual activity.”

PW4, MUSA CHEPKIYEN, a colleague to EMMA KEMUNTO, produced the treatment notes and the P3 form marked PEx2 and PEx3 respectively. Additionally, PW4 in his evidence, testified that while the Complainant's hymen was old looking, its tear is attributable to a whole array of reasons and not limited only to sexual activity.

In further support of the Prosecution's case, PW3 produced the age assessment report marked PEx1. Upon concluding investigations, the Appellant was thereafter arrested on 6th December 2019.

The Appellant gave a sworn statement. When placed on his defence, he stated that he was eighteen (18) years old. He was a form 2 student at Namanjalala Secondary. He testified that he was buying credit on 6th December 2019 near his parent's home when he was accosted by three (3) police officers. He was informed that he had been arrested on account of house breaking. He was taken to Chepchoina Police Station later transferred to Endebess Police Station. His fingerprints were taken. He was charged with the present offence. He denied the offence. He further denied knowing the Complainant and first met her in court. On the basis of the Prosecution's evidence the court found that the required standard of proof had been met. The Appellant was convicted and sentenced on account of the conviction.

This being a first appeal, it's the duty of this court to re-consider and to reevaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge -vs Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the Complainant
2. Penetration
3. Identification of the perpetrator

On the Complainant's age, PW1, the Complainant, testified that she was fourteen (14) years old at the time of the offence. Her evidence was corroborated by the age assessment report produced in evidence. In the absence of a birth certificate, the age assessment report was the best credible evidence ascertaining the Complainant's age. This court thus finds that the age of the minor was ascertained by the Prosecution. This court finds no reason to disturb that finding.

The next ingredient is penetration. Section 2 (1) of the Sexual Offences Act defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

PW1's testimony was that the Appellant took her to his house. He intimated to her that he wanted to have sexual intercourse with her. He removed her clothes and had sexual intercourse with her three times. PW2 caught the Appellant and the Complainant red handed having sexual intercourse. Upon examination in hospital, the clinician found spermatozoa and many epithelial cells in the Complainant's vagina. Such observations were consistent with sexual activity. It was further found that PW1 had been defiled. The absence or lack thereof of his DNA samples did not negate proof of this element. In other words, penetration was proved without the need of relying on the Appellant's DNA.

On the element of the identification of the perpetrator, PW1 testified that she knew the Appellant as a friend. She was able to identify him when he grabbed her that night. She could tell it was the Appellant on seeing him with the help of the moonlight. PW2, the Appellant's brother, testified that he was the Appellant's uncle. He had warned the Appellant against having a relationship with his sister hitherto. He caught the Appellant and the Complainant red handed. The identification of the perpetrator in this case was by way of recognition. The Appellant had interacted with the Complainant and PW2 before on other occasions. It is trite law that evidence of recognition is better than

identification where the Complainant has previously interacted with the Appellant. This was the case herein. The evidence of two witnesses identifying the Appellant as the perpetrator cannot be incredible. This element was proved.

The Appellant raised several grounds in this Appeal that were not raised at trial. He failed to elucidate at trial the nexus between the charges levelled against him and the family dispute he alleged ensued. He furthermore failed to inform the trial court that he was mistreated by the police upon arrest. He also failed to raise an objection on the evidence of PW4. He ought to have raised these issues at trial. He cannot raise them now. This court must thus reject them.

The Appellant challenged the charge sheet. He stated that it was defective for two reasons; firstly, the words “unlawfully” and “intentionally” were omitted from the particulars of the charge. Secondly, he ought to have been charged with incest in lieu of defilement. On the first ground, this court finds that the charge sheet remained lawful. The absence of those two words did not render equivocal the particulars of the charge. The substance and elements of the charge were not only recorded as understood but also well founded in the law. Be that as it may, the same is curable under **Section 382** of the **Criminal Procedure Code**. On the second issue, **Section 8 (1)** of the **Sexual Offences Act** defines:

“A person who commits an act which causes penetration with a child is guilty of the offence termed defilement”

Accordingly, from the definition above, it matters not whether the accused person is related to the Complainant. The allegation of a defective charge therefore fails. This court finds that indeed the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. The Appellant’s appeal against the conviction lacks merit. It resultantly fails and is hereby dismissed.

The Appellant was under **the Sexual Offences Act** sentenced to **twenty (20) imprisonment** by dint of the provisions of **Section 8 (3)**. The court meted out the mandatory minimum sentence imposed therein. In his mitigation, the Appellant stated that he is a student. He attended Bible school. He however did not show any remorse at trial and on appeal. The sentence meted out serves a deterrence purpose. This will ensure that members of the youth will be reminded of the consequences for committing such an offence. This court therefore shall not interfere with the sentence imposed at trial. The Appeal against the sentence is hereby dismissed. The Appellant shall continue to serve his term unless otherwise lawfully ordered.

It is so ordered.

DATED AT KITALE THIS 14TH DAY OF DECEMBER, 2021

L KIMARU

JUDGE