



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 17 OF 2018

BONIFACE MUEMA ALI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with an offence of defilement contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006. Particulars being that BMA on 22/10/17 at Ngaani Sub-Location Mutha Location within Mutomo Sub-County of Kitui County intentionally caused his penis to penetrate the vagina of NNP aged 14 years and six months.
2. PW1 NNP informed the court that on 22/10/2017 at 5pm, she was fetching firewood when she saw the appellant appear and requested that they have sex, when she declined the appellant blocked her mouth, removed her pant and had sex with her by force.
3. PW1 further informed the court that she reported to her mother who took her to hospital, she identified the treatment notes as MFI-P1 and P3 form as MFI-P2. PW1 further informed the court that she was born on 20/4/2003. She identified the child health care form as MFI-P3.
4. PW1 further informed the court that the appellant who is her cousin fell her down and had sex with her while lying down, she identified a red dress she was wearing as MFI-P4, she bled, she identified blood stained pant she was wearing as MFI-P5. She identified the person who defiled her as the appellant.
5. PW2 Ruth Mutinda informed the court that NNP was examined on allegation of defilement, on examination the clothes were torn and blood stained, there were bruises on the labia minora and majora, the hymen was broken, there were lacerations on the vaginal wall, the age of injury was 15 hrs and the object causing the injury was blunt. PW2 produced the treatment notes as Exh 1 and the P3 form as Exh 2. PW2 further informed the court that the child was traumatised and that she took 4 hrs counselling the child.
6. PW3 KP informed the court that on 22/10/2017 she was at the church she told her daughter to go home fetch firewood. She left church at 6.20 pm and went home. She did not find her daughter. She returned at 9pm.
7. PW3 further informed the court that when she returned her dress had sand and was blood stained, the biker was torn. She informed her that the appellant defiled her as she was fetching firewood. She called a motorcycle, took her to the police then to the hospital at Mutomo Health Centre.
8. PW4 PC Kevin Shirako informed the trial court that on 22/10/2017 while at the report office, one KP reported a case of defilement that her daughter by the name NP was defiled by the appellant.
9. PW4 further informed the trial court that pw3 informed him that, as her daughter was fetching firewood; the appellant appeared, requested for sex which was declined. He grabbed her, fell her down, as she screamed he blocked her mouth, removed her pant, and defiled her.
10. The matter was reported and they were advised that they go for medical checkup. He took into possession the blood stained clothes, went to the scene and confirmed that at the scene there was a struggle on the ground.
11. He recorded statements of witnesses, the child was 14 years at the time, he produced the child health care form as Exh 3, he produced the red dress laced with particles of sand the child was wearing as Exh 4 and the blood stained pant as Exh 5. In his investigations he concluded that the child was defiled.
12. The prosecution closed its case and appellant was put on his defence.

13. DW1 BM informed the court that on 22/10/2017 he woke up early, washed his clothes, at 2pm he went to Wenyunyi to visit his brother. On his way he passed through a road that passes near the home of NNP. She greeted him and he proceeded home, met his mother, had supper and slept.

14. DW2 EKA informed the trial court that the appellant was her son. On 22/10/2017 she was at church, she left church at 5pm.

15. DW2 further informed the court that before leaving for the church he left the appellant at home and that she did not know what the appellant was doing at that time. She informed the trial court that all she knew was that the complainant was going to frame him and that she got that information from the other children.

16. The appellant was found guilty after case was heard and was convicted and jailed 20 years' imprisonment.

17. Being aggrieved by the above decision he appealed and set out grounds of appeal in which he mainly complained of-

- **That he was not supplied with statements of witnesses and documentary evidence.**
- **That appellant was not given time to prepare for defence.**

18. The parties were directed to file submissions to canvass the appeal. The prosecution relied on evidence on record.

19. The appellant submitted that he was not supplied with the required facilities in order to enable him do this case upto date. His proceedings file does not have the same; charge sheets, P3 form, treatment cards; any of the age assessment facilities etc. The prosecution did not cause supply of the same as it is his rights to be supplied with any facility to enable him do the case.

20. The appellant was not given enough time to do the case since from his date of plea to judgment the time was less than six months (24/10/17 – 21/3/18) whereby for the first offender it is violating his rights under Article 50(5).

21. That he was not given enough time to prepare for his defence hence knowing very well that this was against the law Article 50(2) (c).

22. Actually there was no fair trial in this case and request this honourable court to give him his rights and acquit him since it is the duty for the court to correct the prosecution in giving out evidence and then rely on section 365 of the Penal Code which provides that, whereby the accused has a right to be heard as emphasized and also the trial court knew that this was a single evidence and it relied on the same knowing that it is against section 377.

ISSUES, ANALYSIS AND DETERMINATION:

23. After going through the evidence on record, I find the issues are; **whether the appellant was accorded fair trial including supply of witnesses statements? whether the prosecution proved its case as required by the law ?**

24. On issues of fair trial the appellant never complained of not being supplied with statement witnesses nor of requiring time to prepare for defence. He participated in trial in cross examining witnesses, tendering defence and calling a witness. Thus court finds no substance in that ground.

25. On whether it is the appellant who defiled the complainant, PW1 NNP informed the court that on 22/10/2017 at 5pm she went to fetch firewood, the appellant who was she related to her by virtue of being a cousin appeared and requested for sex, she declined.

26. The incident happened at 5pm that means that she was able to see the person who attacked her and requested for sex.

27. PW1 is clear in her testimony that the person who attacked her is related to her by virtue of being a cousin that means that the accused is a person well known to the complainant. Investigation conducted by PW4 Kevin Shirako confirmed that indeed it is the appellant who attacked the complainant on the material day and time.

28. As to the identity of the person who attacked the complainant the trial court was satisfied that it was the appellant who attacked the complainant on the material day as she fetched firewood.

29. On whether the appellant defiled the complainant as alleged, PW1 NNP informed the court that the appellant requested for sex and when she declined the appellant got hold of her, fell her down, blocked her mouth, removed her pant and had sex with her by force.

30. PW1 further informed the court that she reported to her mother who took her to hospital at Mutomo Health Centre, she identified the treatment notes as MFI-P1 and the P3 form as MFI-P2. She also identified the child health card as MFI-P3 to confirm that she was 14 years at the time.

31. PW1 further informed the court that she was made to lie down. She identified a red dress that had sand as MFI-P4. She bled. She identified a blood stained red pant as MFI-P5.

32. The evidence as to defilement is supported by the evidence of PW2 Ruth Mutinda the clinical who examined NNP. On examination there were bruises on the labia manora and majora, hymen was broken and there were bruises on the vaginal, the injuries were 15hrs old. The weapon caused the injury was blunt. He produced the treatment notes as Exh.1 and the P3 form as Exh.2. PW2 made a conclusion of

defilement.

33. The evidence as to defilement is further supported by the evidence of PW3 Kamene Paul who on returning home did not find NNP. When she returned she informed her that the appellant had defiled her, she looked at her dress the same had sand and was blood stained, her biker was torn.

34. It was trial court considered opinion that bruises of the labia manora and majora, lacerations of the vaginal wall, blood stained pant demonstrated that the appellant penetrated NNP by force and hence defilement. This court agrees with that finding.

35. Investigations conducted by PW4 Kevin Shirako confirmed that indeed the appellant defiled the complainant, he visited the scene, he confirmed that there was a struggle at the scene, he produced the red dress laced with particles of sand as Exh 4 and the blood stained pant as Exh 5.

36. On age of NNP, PW1 NNP identified the child health card confirming that she was 14 years at the time of the crime. The evidence as to age was supported by the evidence of PW4 Kevin Shirako who produced the child health card as Exh. 3.

37. The court has looked at the defence case and notes that the same is not merited. Though he denied defiling NNP, there is overwhelming evidence that the appellant was positively identified and that he indeed committed the act of defiling the complainant.

38. Though DW2 informed the court that the appellant was framed, she did not state any reason that would have made the complainant frame the appellant and that she did not stated the names of children who informed her that that NNP was caned to accept framing the appellant.

39. Thus the court finds no merit in the appeal and makes the following orders;

i. The appeal is dismissed, the conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE