



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 50 OF 2015

MICHAEL KALUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant Michael Kulumba was charged with one count of defilement contrary to Section 8 (1) as read with sub-section (2) of the Sexual Offences Act number 3 of 2006. The particulars as set-out in the charge sheet are that on the 8th May 2013 at about 4.00pm at [Particulars Withheld] Village, Kanyonyo location within Kitui County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MMN a child aged 8 years, (herein the complainant).
2. In alternative the appellant was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act number 3 of 2006. That on the same date and time at the said place the appellant internationally and unlawfully committed an act of indecency with MMN a child aged 8 years by touching her private parts, namely breast, buttocks and vagina with his hands.
3. The appellant denied the charge thus the matter was set down for hearing wherein the prosecution called MM, BM, BM, Abednego Musyoka Mutia, PC Fredrick Kariuki and Dr. Patrick Mutuku as PW1-6 respectively.
4. The complainant testified that on the 8th May 2013 she met the appellant on her way home from school. It was her testimony that the appellant asked for her name and told the complainant that she has beautiful eyes. That the appellant pulled her into the bushes where he held her mouth and threatened to kill the complainant if she screams.
5. It was the complainant's testimony that the appellant tore her underpants and asked her to sit down, that the appellant removed his trouser and while lying on top of the complainant the appellant inserted his penis to her vagina. Further the complainant testified that while the appellant was on top of her she heard her father (PW2) shouting "Kulumba". That the appellant heard PW2 shout out and rose up and fled the scene. It was her testimony that PW2 found her at the scene before they proceeded home.
6. PW2 the complainant's father testified that on his way to pick the complainant from school he heard commotion in the bushes along the path. It was his testimony that he ventured within the bushes and about 10 metres away he saw the appellant run away while pulling up his trouser. That he went further with the bushes and stumbled upon the complainant. It was his testimony that the complainant did not have her underpants on and further that the complainant appeared to be scared. It was PW2 testimony that he called the area chief and took the complainant home and later Kwa Vonza Police Station and Kitui District Hospital.
7. PW3 the complainant's mother testified that she picked the complainant from the scene where PW2 found her and took the complainant home. It was her testimony that she noticed a discharge in the complainant's vagina that the complainant's vagina appeared red.
8. PW4 the local area chief testified that on the 9th May 2013 at about 7.00 am PW2 reported that the appellant had allegedly defiled the complainant the previous day on 8th May, 2013. It was the chief's testimony that he recorded the report and referred PW2 to Kwa Vonza Police Station. It was also the witness testimony that on the appellant was at Kyandoni sub-location, that he arrested the appellant the same day and handled him to Kwa Vonza Police Officers.
9. PW6 Dr. Patrick Mutuku of Kitui District Hospital testified that on the 9th May, 2013 the complainant was examined at the said hospital by one Dr. Anne Mwikya.
10. It was his testimony that the complainant was allegedly defiled and on examination the doctor discovered that there was reddening in the labia minora of the complainant, that the complainant's hymen had not been broken, that there was no infection detected by urinalysis exam.
11. It was the testimony of PW6 that the doctor who examined the complainant formed an opinion that the complainant was indeed defiled.

PW5 the investigating officer testified that on the 9/5/13 the complainant was escorted to Kwa Vonza Police Station while it was alleged that she had been defiled on 8/5/13. The investigating officer testified that he referred the complainant to Kitui District Hospital for examination. That based on the doctor's remarks he issued a warrant of arrest against the appellant and later preferred the current charge against the appellant.

12. Put on his defence the appellant further denied the charge. In his unsworn testimony the appellant testified that he left his Mwakini village town that he travelled back from Mwingi to Kabati on the 9th May 2013, it was his testimony that PW4 interrogated him at Kabati on the 9th May, 2013 and arrested him before he was handed over to Itoleka Police Station where the current charges were preferred against him. The appellant certified that PW2 holds a grudge against him, that the two have a land dispute the reason why the charges herein was framed against him.

13. The trial court a finding after full trial that, the prosecution had established the material ingredients of the main charge herein. The court was convinced beyond reasonable doubt that indeed the appellant defiled the complainant as charged. The appellant was hereby found guilty under Section 215 CPC and was convicted of a charge of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 20 years imprisonment.

APPELLANT'S GROUNDS OF APPEAL

14. The appellant was unhappy with the verdict thus lodged instant appeal and set out the following grounds of appeal;

(i) That the learned trial magistrate erred in both law and facts when he convicted me in this case while relying on recognition without considering conditions enabling point was not favourable.

(ii) That the learned trial magistrate erred in both law and facts when he convicted him with no-existed evidence since there wasn't witness from the scene who testified before the court.

(iii) That the learned trial magistrate erred in both law and facts when he convicted him in this case while relying on contradicted and uncorroborated evidence.

15. The parties were directed to canvass appeal via submissions but only prosecution complied. The appellant relied on evidence on record.

PROSECUTION'S SUBMISSIONS

16. The submitted that, the appellant was charged with the offence of defilement Contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on 8th May 2012 at [Particulars Withheld] Village, Kanyonyo location within Kitui County intentionally defiled MM Nzioka then aged 8 years. The prosecution called 6 witnesses.

17. PW1, MMN testified that on 8th May 2013 while returning from school met up with the appellant who then wanted to know her name and that once she told him, the appellant told her that she had beautiful eyes before pushing her in the bush where he defiled her before she heard her father calling her.

18. PW2 BMN testified that he was on the way home on the 8th May 2013 after having gone to take the complainant from school when he suddenly heard a commotion in the bush. It was his evidence that he stopped his bicycle to check before he stumbled on the appellant who fled the scene while trying to pull up his trouser and he saw his daughter who looked shocked. That he called the Assistant Chief and reported the matter at Kwa Vonza Police Station. The minor was treated at Kitui District Hospital.

19. PW3 BMM collaborated PW2 that she got the complainant still at the scene of crime and when she examined her private parts, she noticed some discharge. That the matter was reported to Kwa Vonza Police Station.

20. PW4 Abednego Musyoka testified that being the Chief of Kanyonyo location, he accompanied PW3 after being informed of the case of defilement to Kwa Vonza Police Station where they reported the incident.

21. PW5 PC Fredrick Kariuki stated that he was on duty at Kwa Vonza Police Station on the 8th of May 2013 when he received the complaint of defilement. That he advised the complainant to be taken to Kitui District Hospital where she was examined and treated.

22. PW6 Dr. Patrick Mutuku examined the complainant on the 9th of May 2013. He was able to observe injuries at the minor's labia minora with her hymen being broken. He formed the opinion that indeed penetration had occurred.

23. He produced the treatment card as exhibit 1, P3 form as exhibit 2, the PCR form as exhibit 3, Lab test report as exhibit 4 and the age assessment report as exhibit 5. Thus respondent submits that the appellant was positively identified by the minor and the father. Penetration was also proved by the doctor PW6.

ISSUES, ANALYSIS AND DETERMINATION

24. The court has gone through the evidence on record and the submissions tendered and the issues are; **whether the prosecution proved all the ingredients of the offence charged beyond reasonable doubt?**

25. 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.

26. On the age of the complainant: It is not in dispute that the complainant was 8 years of age at the time of the alleged offence. Prosecution exhibit 5 an age assessment report dated 13th May 2013 was produced by Pw6. There was no challenge of the same and indeed no dispute of the complainant's testimony as to age. Therefore the trial court did not labour on the issue of age.

27. 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 organ of another person."

28. This position was fortified in the case of *Mark Oiruri Mose vs Republic (2013) eKLR* when the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....' (emphasis added).

29. Later the Court of Appeal, then differently constituted, in the case of *Erick Onyango Ondeng vs Republic (2014) eKLR* held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

30. PW1, MMN testified that on 8th May 2013 while returning from school met up with the appellant who then wanted to know her name and that once she told him, the appellant told her that she had beautiful eyes before pushing her in the bush where he defiled her before she heard her father calling her.

31. PW2 BMN testified that he was on the way home on the 8th May 2013 after having gone to take the complainant from school when he suddenly heard a commotion in the bush. It was his evidence that he stopped his bicycle to check before he stumbled on the appellant who fled the scene while trying to pull up his trouser and he saw his daughter who looked shocked. That he called the Assistant Chief and reported the matter at Kwa Vonza Police Station. The minor was treated at Kitui District Hospital.

32. On cross-examination by the appellant the complainant testified that Pw2 saw the appellant lying on top of her. It was her testimony that Pw2 called the appellant one "Kalumba" when Pw2 saw the appellant lying on top of her. PW2 however testified that he saw the appellant when he rose up and ran away. The testimony of PW2 and that of the complainant is therefore not consistent as to the point PW2 saw the appellant.

33. While the complainant alleges that PW2 saw the appellant lying on top of her, PW2 testified that he only saw the appellant flee the scene. The court cannot therefore conclude that PW2 witnessed the appellant defile the complainant. In his examination in chief Pw2 testified that upon stumbling on the complainant he called the local area chief and took the complainant home.

34. The complainant corroborated Pw2's testimony that PW2 made some calls before they went home. However, PW4 the said local area chief testified that PW2 made a report at his office on the 9th May 2013 at 7.00 am. PW4 was categorical that the complainant father PW2 first made a report to him on the 9th May 2013 at 7.00 am while testimony contradicts that of Pw2 that indeed he called the area chief (PW4) while at the scene and immediately upon stumbling upon the complainant.

35. It is not known what transpired between the 8th May 2013 at 4.00 pm to 9th May 2013 at 7.00 am and indeed why the complainant's parents waited until the morning of 9th May 2013 to report the matter to any authority. As to the medical evidence the doctor who examined the complainant noted that though the complainant's hymen was not broken the same was rugged.

36. The doctor also observed that the complainant's labia minora was inflamed and formed an opinion that the complainant was indeed defiled. No spermatozoa cells were noted and not discharge was seen on the complainant's genitalia.

37. Section 2 of the Sexual Offences Act defines penetration to include both partial and complete insertion of the genital organ into another. Noting the undisputed medical evidence that the complainant labia minora were inflamed, that the hymen was rugged, the trial court was justified in making a finding that, there was forceful partial penetration of the complainant's vagina.

38. The court was guided in its finding by the decision of the High Court sitting in Kisumu in *George Omiti Raya vs Republic Criminal Appeal No. 24 of 2013* where the superior court made a finding that indeed there can be penetration without going past the hymen. (See also *Peter Mashady Nevilikmani vs State Case No. 545/13 (2014) Zasca 41* (31 March 2014 for definition of rugged hymen).

39. As to whether the appellant is a person who defiled the complainant. The appellant is a person known to PW2. Though the complainant's testimony as to how PW2 saw the appellant at the scene is not consistent with the testimony of PW2, both witnesses were categorical that the appellant was the person at the scene.

40. The trial court observed the demeanour of the complainant in her testimony and particularly when she referred to the appellant person and had no reason to doubt that she mistakenly verifies the appellant as the person who defiled her. Her testimony was corroborated by that

of PW2 who left no doubt in the court's mind that it was the appellant who fled the scene as PW2 approached the scene.

41. The appellant raised a defence of base alibi that he was away at Mwingi the date of the alleged offence. The appellant did not support his allegation that he was in Mwingi on the 8th May 2013. The appellant did not tell the court what business took him to Mwingi or otherwise tender any evidence to convince the court that indeed he was in Mwingi.

42. The trial court weighs the appellant allegations made in his unsworn testimony as against the sworn and corroborated testimony of the prosecution witnesses and dismissed the same as devoid of merit. The court also took into consideration the appellant allegations of a grudge against himself by the complainant's father over land dispute.

43. The said allegations were not substantiated, the same were based on land dispute but trial court found same incredible and to be an afterthought intended on avoiding liability. That the appellant herein was a neighbor and known to PW2. That the offence herein was committed in broad day light thereby the issue of identification could not be mistaken.

44. The court thus finds no merit in appeal and makes the following orders;

i) The appeal is dismissed, 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