



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 83 OF 2018

MW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence in S.O. Case No. 8 of 2017

in the PM's Court at Kyuso, John Aringo (RM) and judgment delivered on 14th March 2018)

JUDGEMENT

1. The appellant MW was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 19/11/2017 of Kitui County, intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of MM a child aged 14 years.

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 being that on the 19/11/2017 of Kitui County, he committed an indecent act with MM a child aged 14 years by making his penis touch her vagina.

3. The appellant pleaded not guilty and matter went into full trial.

PROSECUTION'S EVIDENCE:

4. In sworn testimony, the victim/minor stated that she was in Class 2 at [Particulars Withheld] Primary School. She was 12 years old. On the 19/11/17 at 2pm appellant went and told her that her mother told him that he waits for her in their house so that if she goes they water the goats and animals. Her mother went to Musyoka to get her money.

5. She was left with appellant to go and water the animals. By the river the appellant fell her down and removed her pants and biker. He lay her down. He removed her pants. He lowered his trouser to his knees and lay on her. He did sex to her. He used his penis. He inserted his penis in her private parts. He ran on seeing M and Ngina and other elders.

6. He took like 3 minutes with her. He saw people and put on his clothes and ran. He was caught by Musee and taken to M.

7. Before he was tied, the lady who was employing him said that he be left. She went home. She told Ngina who told Mulati who told her grandmother K. She told her mother when she went back.

8. She just left the following day. Her grandmother took her to the hospital. They went to the police and one of the police accompanied them to hospital. After hospital they passed by the police again. They left a letter at the police from the hospital. Appellant used to visit her mother and leave in the morning.

9. In cross examination by appellant she said that appellant caught her by the river. Appellant's employer had gone to church. Appellant said that her mother said that they take animals to water. Appellant used to take animals to water alone. Goats were late to go to water. Appellant and her mother were very drunk. Her mother had called her but appellant stopped her from going to her and said they go to the river.

10. KM was at a nearby shamba. They met their mother at another river on return. Appellant beat her mother and removed her clothes. Appellant fled on seeing people. Her mother informed M and the appellant was caught. She was asked if the appellant defiled her and she

said yes.

11. **KM, PW2** is grandmother to the minor. She said that on 22/11/17 was a Sunday when the appellant defiled her granddaughter. Ngina Munyasia went on Monday evening and informed her. On Tuesday morning she went to the chief and informed him.

12. Chief told her to go to the police and hospital. She went to police at Tseikuru with the child. She was assisted to take the child to hospital. She went with a policewoman and policeman. Child was admitted on and left on Friday after they were given medicine.

13. At police they were given a letter. It was filled at the hospital. The child belongs to her daughter called Monica. She identified the P3 form dated 21/11/17 for the minor MFI-1. Treatment card for MM dated 21/11/17 MFI-2. Birth notification card for MM stating date of birth as 20/3/2003 MFI-3.

14. She knows defiler of her grandchild. He is called M. He used to stay with her daughter who is mother of the child but they were not married. He was employed at M. It was Ngina who told her of the defilement.

15. In cross examination by appellant, she said that she got the report from Ngina. Ngina said they inspected the child and confirmed that she was defiled. She went to child. Appellant defiled the child and beat the mother.

16. PW3 is the Medical Officer Incharge of Tseikuru Sub-County Hospital. He stated that the P3 form for the minor was filled on 21/11/17. Minor was 12 years of age. She was seen with complainant of being defiled by stepfather at Usueni the previous day at 2pm. Examination was done. She had lower abdominal pain.

17. There was tenderness on the lower abdomen. There was no tear or laceration on vagina but there was a whitish discharge. Lab tests were done, VCT and urine. There had been a change of clothing. She was in fair general condition. They concluded from their examination and test that some defilement occurred.

18. He assessed harm as grievous owing to the physical and mental trauma to the young girl. Urine showed red blood cells. This was most probably caused by physical trauma. Pain in lower abdomen showed that reproductive organ must have had contact with an external force. He produced P3 form as exhibit 1 and treatment card as exhibit 2.

19. In cross examination by appellant he said that the child was seen in hospital about 20 hrs after the incident. From the history they got, the culprit was a stepfather of the minor.

20. PW4 is a policewoman from Tseikuru Police Station. She is the investigating officer of the case. On 21/11/17 at about 1530hrs she got a report from a minor called MM in company of the grandmother that the granddaughter was defiled by M who was a boyfriend of her daughter. She learnt that the victim was defiled when they took goats to water on Sunday 19/11/17 at 2pm.

21. She escorted her to Tseikuru Hospital for medicals. On 22/11/17 she issued a P3 form. She recorded her statement. On 24/11/17 together with PC Cheboi, she went to Usueni to arrest suspect. They took him to custody. On 26/11/17 she recorded grandmother's statement.

22. After completing investigations, she preferred charges against the appellant as set out. Minor was born in March 2003. She was 14 years. Birth notification shows she was born on 20/1/2003. She produced the birth notification as exhibit 3. Incident was at the river bank of River Tana. She arrested appellant at a place called Mulika. She interviewed the child who identified her defiler. Medical documents also show that defilement took place.

DEFENCE CASE:

23. At the close of the prosecution's case, appellant was put to his defence. In sworn testimony she said that the minor's mother said that he would see if he did not leave the daughter alone. He was set and framed because it was even him who got for her a job to look after animals. He has never been found with any offence before.

24. In cross examination he said that he was in a relationship with mother of the child. He used to assist them look after livestock. On 11/11/17 helped her to take goats to water. They took the animals to water just the two of them.

25. The appellant was found guilty after hearing of the case and was convicted and sentenced to 20 years' imprisonment. Thus he lodged instant appeal complaining-

(1) Charges were defective.

(2) The trial was not fair.

(3) There was no prove of prosecution's case to the required standards; and

(4) The defence of alibi was ignored.

26. The appellant filed submissions and prosecution relied on proceedings.

APPELLANT'S SUBMISSIONS

27. The appellant invite this court to delve keenly into section 134 of the Criminal Procedure Code which requires in mandatory terms that every charge should be precise and abundantly distinct to the appellant. It provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offense or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as on nature of the offence charged.”

28. A number of crucial evidence that remains undisclosed for his preparation for the defence rendered the whole trial prejudicial. The likes of the witness statements, birth certificate, treatment notes, discharge summary form, the invoice, the PRC form for forgetting the P3 form were and still remains a large – now that they were not disclosed for challenge.

29. He relied in the case of *Republic vs Francis Muniu Kariuki [2017] eKLR*, at 22, 23 where Prof. Ngugi J held that:

“...Indeed, it is salutary practice for the trial court to satisfy itself that an accused person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial...”

30. Notwithstanding a more famous case of *Coalition for Reforms and Democracy (CORD) & 2 Others vs Republic & 10 Others [2015] eKLR* where it was held that:

“...There is no doubt that disclosure of evidence is prompted by fairness...Disclosure is required at the very earlier stage for the obvious reason that the accused person must prepare his defence. What must be disclosed is material relevant to the case. It does not matter either that the evidence or material exculpates the accused...”

31. Appellant submits that critical scrutiny of the charges as they were framed in the present case, they clearly disclose that there is no such a section as 8(1) (3) in the **Sexual Offences Act No. 3 of 2006**.

32. In *Henry O. Edwin vs Republic Criminal Appeal No. 645 of 2010* in Nairobi Court of Appeal where it was held that:

“We adopt with approval the sentiments of the High Court in Sigilani vs R [2004] 2KLR 480, where it was held that:

“The principle of the law governing charge sheets is that, an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will enable the accused to prepare his defence.”

33. When the Court of Appeal Judges were adopting the above, it was in respect of *section 5(b) of the ND & PSC Act No. 4 of 1994*. The same bench further noted thus:

“There is no section 5(b). The appellant was therefore charged under a non-existent provision of law. This renders the charge sheet fatally defective.”

34. The appellant further submits that a layman in matters of law has to be informed of the right to defend, challenge the evidence and if not go for an advocate. This was despised in the present case as far as Article 50 (2) (g), (h), (j) and (k) of the Constitution is concerned.

35. In the present case, appellant contend that penile penetration was not proved beyond reasonable doubt.

36. It is clear from the medical texts that yeast infection (herein referred as whitish discharge) is not caused by sexual intercourse...It is evident that the complainant got the yeast infection due to other predisposing factors which did not include sexual intercourse.

37. The appellant invites this court to be guided by the findings of the Court of Appeal in *Peter Kioko Kisilu High Court Criminal Case No. 547 of 2005* where it was held that:

“The law on alibi defences is well settled and we need only refer to Sekitoleko vs Uganda [1967] EA 531 where the Chief Justice, Sir Udo Udoma held:

‘(i) As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R vs Johnson [1961] 3ALL ER 969 applied; Leonard Aniseth v Rep [1963] EA 206 followed;

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself.”

ISSUES, ANALYSIS AND DETERMINATION

38. After going through the proceedings and the submissions on record, I find the issues are; **whether Charges were defective? Whether**

The trial was fair? Whether the prosecution proved its case to the required standards? and whether the defence of alibi was ignored?

39. On the first issue, the court borrows from the case of *Henry O. Edwin vs Republic Criminal Appeal No. 645 of 2010 in Nairobi Court of Appeal* where it was held that:

“We adopt with approval the sentiments of the High Court in Sigilani vs R [2004] 2KLR 480, where it was held that:

‘The principle of the law governing charge sheets is that, an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will enable the accused to prepare his defence.’

40. The charges the appellant faced contained all the ingredients of the offence of defilement charged. The appellant pleaded not guilty to the same as apparently he understood the content thereof. The same charges are very clear and discloses no defects at thus the ground fails.

41. On the fairness of the trial, the appellant complaint is that, the documentary evidence produced was never supplied to him in line with the law. He relies on the case of *Coalition for Reforms and Democracy (CORD) & 2 Others vs Republic & 10 Others [2015] eKLR* where it was held that:

“...There is no doubt that disclosure of evidence is prompted by fairness...Disclosure is required at the very earlier stage for the obvious reason that the accused person must prepare his defence. What must be disclosed is material relevant to the case. It does not matter either that the evidence or material exculpates the accused...”

42. However when matter was called for hearing the appellant admitted that he was ready to proceed and did proceed and participated in trial via cross-examination without informing court that he was not supplied with the documentary evidence. Thus court finds no merit on that ground.

43. On whether the prosecution proved its case beyond reasonable doubt, the minor was forthright and straightforward in her testimony. She said that appellant fell her down, removed her pants and biker. He laid her down, lowered his trouser to his knees, and lay on her. He had sex with her. Appellant inserted his penis in her private parts. Appellant put on his clothes and ran away on seeing people. He was caught by one Musee.

44. The grandmother PW2 received the information from one lady called Ngina on Monday evening. On Tuesday morning she went and informed chief who told her to report to the police and go to hospital. She took the matter up with the police and the minor was taken to hospital.

45. The medical doctor was of the view that from examination and tests conducted a defilement had occurred. He stated that the urine showed red blood cells which were most probably caused by physical trauma.

46. Pain in the lower abdomen showed that reproductive organ must have had contact with an external force. All this led him to the findings that defilement had occurred. This court is also satisfied that there was penetration.

47. The appellant in this case was not a stranger to the minor. He was actually in a relation with the mother of the minor. He was somebody she knew very well being described in the treatment notes as her stepfather. She says that the appellant used to visit her mother and leave in the morning. She identified appellant as her defiler.

48. She was plainspoken and detailed as observed by the trial court. What was a little cause for anxiety for trial court was why the lady Ngina who informed PW2 of the incident and the said Musee who caught the appellant were not led to court to testify. Their testimony was important and would have shed more light on what transpired at the scene on 19/11/17.

49. Nonetheless the trial court was satisfied that the evidence on record was adequate and this court agrees with that finding. The birth notification showed that the minor was born on 20/3/2003. She was 14 years and 8 months as at the time of the incident. All the elements of the offence in the main charge were established.

50. The trial considered the defence by the appellant and same did not supplant the strong prosecution as set out herein above.

51. ***Thus the court finds no merit in appeal and dismisses the same and upholds conviction and sentence.***

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

.....

C. KARIUKI

JUDGE