



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 36 OF 2017

PETER MUNYALO PHILIP.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with offence of defilement contrary to section 8(1) (4) of the Sexual Offences Act. Particulars were that on the 5th day of February 2015 at about 1700hrs at [Particulars Withheld] village, Kiitho Location in Kitui County, intentionally and unlawfully committed an act which caused penetration with FNM a child aged 16 years by inserting his penis to her genital organ namely vagina.
2. In the alternative he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. Particulars being that on the 5th day of February 2015 at about 1700hrs at [Particulars Withheld] village, Kiitho Location in Kitui County, intentionally and unlawfully committed an act of indecency with FNM a child aged 16 years by touching her private parts namely breast, buttocks and vagina using his hands.
3. The appellant denied the charges and the case was set down for hearing. The prosecution called a total of 5 witnesses whereas the defence called one (1) witness (the appellant).
4. The prosecution's case was that **PW1** a girl child aged 16 years stated that on 5/2/2015 at around 5pm she was at their home resting when she saw goats in their shamba grazing on peas. She went and chased them out of their shamba and afterwards started her journey back home when she met Munyalo Peter, the appellant sited on the road side.
5. She stated that the appellant took her by the hands into the bush and he took off her biker and pant and he proceeded to take off his trouser and then he inserted his penis into her vagina and defiled her. She stated that the appellant had covered her mouth with his shirt and after completing the sexual act he let her go. PW1 stated that she went home and reported the matter to her mother. Prior to reporting PW1 stated that she took a bath.
6. The appellant was arrested by the chief and the sub-chief and members of the "nyumba kumi" group. PW1 stated that she was taken to Kitui District Hospital where she was examined and received treatment. She later recorded her statement at Nzambani Police Station. PW1 identified the PRC form (MFI-2) and the P3 form (MFI-1).
7. **PW2 KM**, PW1's mother stated that on 5/2/2015 she had gone to the posho mill and left PW1 at home and when she returned at 6pm, PW1 informed her that at around 5pm she had gone to chase away goats that had strayed into their shamba and when on her way back home she met Peter Munyalo who forcefully dragged her into the bush and defiled her.
8. PW2 stated that she then informed the "nyumba kumi" representative and together with the Assistant Chief went to the appellant's home where they found the appellant chewing miraa and when PW1 spotted the appellant, she started to cry and PW1 identified the appellant that he was then arrested and escorted to Nzambani Police post. PW2 stated that the appellant was a close neighbour.
9. **PW3 Jackson Muli Ngwele**, the Assistant Chief Kiitho Sub-Location stated that on 5/2/2015 at around 10pm he got a call from one lady from Mbangulo who is one of the members of the "nyumba kumi" group who informed her that a certain school girl had been defiled. PW3 called the Area Chief Kawembe Kimanzi and they proceeded to Mbangulo, 5km away.
10. On arrival they found a person who had been tied with a rope. They took the person, now the appellant to their office and later to Nzambani Police Station.
11. **PW4 Dr. Patrick Mutuku** stated that on 6/2/2015, PW1 was brought to Kitui District Hospital with complaint that she had been defiled. He stated that PW1 was examined and on her genitalia, there were mild external bruises on the outer genitalia, the vagina wall had bruises

and the hymen was broken. The lab test showed no spermatozoa.

12. PW4 stated that the injuries were fresh and PW4 concluded that there was evidence of penetration. The age of PW1 was assessed and found to be 17 years old. PW4 signed and stamped the P3 form which he then produced as Pexhibit, 1 and PRC as Pexhibit 2, her appointment card as Pexhibit 3 and age assessment as Pexhibit 4.

13. **PW5 PC David Thuravura** was the investigating officer. He stated that on 6/2/2015 at around midnight he received a telephone call while at the crime standby desk from the OCS, C.I Samuel Vundi who informed him of a certain suspect that had been arrested by the Assistant Chief, Kiitho Sub-Location on allegation that he had defiled a minor.

14. PW5 proceeded to the area and on reaching there they found the appellant, PW1 and PW2. He collected the appellant and PW1 escorted them to Nzambani Police Station where he booked the report then escorted the appellant to Kitui Police Station and escorted PW1 to Kitui District Hospital for examination and treatment.

15. He later confirmed from PW4 and PW1 had been defiled. He later recorded witness statements and charged the appellant. He did not visit the scene of crime and did not obtain any exhibits from PW1.

16. At defence, the appellant tendered sworn evidence and stated that on 5/2/2015, he went to work from morning till 12pm and at midday he went to the shops and at around 2.30pm he left the shopping centre and realized that Nziva PW1 was following him.

17. That they walked home together and at around 4pm he went to collect goats and that at 6pm he heard PW1 and another man laugh loudly, that they had a donkey and that PW1 called her friend and they went to the river. He stated that he followed PW1 because she had passed close to his house and that one of the boys that was with the complainant came running and greeted PW1 and took maize that were in baskets and put it into a sack and ran off.

18. The appellant stated that he went home and afterwards went to water his vegetables and on his way he met PW2 who asked him what he was doing with PW1 and who informed him that she had heard that the appellant had defiled PW1. And later he saw 2 other people and while they talked PW2 came and identified him and the people tied him to a tree and started beating him.

19. After full hearing the appellant was found guilty, convicted and sentenced to serve fifteen (15) years imprisonment.

20. Being aggrieved by the trial court decision he lodged appeal and set out 5 grounds. He complained -

(1) Ingredients of offence were not proved.

(2) Provisions of section 77 of the Evidence Act were not complied with.

(3) The evidence was full of contradictions.

(4) Defence was not considered.

(5) Mandatory minimum sentence was unlawful applied without mitigation being considered.

21. Parties were directed to file submissions to canvass appeal.

APPELLANT'S SUBMISSIONS

22. It is the appellant's submission that in the instant appeal, the age of the victim was not ascertained by any concrete evidence. PW1 and PW2 did not state the age of the minor during their examination in chief which is a fatal omission for a case of this nature. The appellant stated that in respect to the age assessment report that was tendered, the same has been held not to be conclusive proof of age of a minor. The appellant relied in the case of *E.K vs Republic [2018] eKLR*.

23. He submitted that indeed the minor was penetrated however the steps that were taken to link the appellant with its commission failed in its entirety. The investigating officer (PW5) ought to have taken steps to visit the scene. It is during such visits that corroborative evidence can be obtained. See the evidence of PW5 who stated that, ***“as the act occurred in a bush. I never visited the scene. I never knew the accused before. There was no exhibit I collected from the complainant.”***

24. The appellant invite this court to find that the penetration by the appellant was not properly corroborated and thus it cannot be fully held that he was properly placed at the scene of the offence. He deserves a benefit of doubt in this ground.

25. He cites the case of *J.A vs Republic [2016] eKLR*, the High Court analyzed application of the above provisions and opined thus:

“26. Section 77 of the Evidence Act allows the use of a report by a government analyst, medical practitioner, ballistic expert, document examiner or a geologist as evidence. The court may presume that the signature on such document is genuine. The court may summon the author of such document and examine him as to the subject matter thereof. In view of that provision the appellant is therefore not allowed to challenge the production of the P3 form *per se*.”

RESPONDENT'S SUBMISSIONS

26. On proving the case beyond reasonable doubt, the respondent submitted that the prosecution proved its case when PW1 clearly testified that she was on her way home when she met the appellant at about 5pm. She was pushed to the bushes unable to defend herself and scream when the appellant stuffed her mouth with his shirt. For about 30 minutes, she endured indecent assault with the appellant intent to outrage her modesty. She remained firm that the same day she informed her mother who passed information to the necessary authorities leading to the arrest of the appellant.

27. The complainant was able to point at the appellant during the trial as her attacker and PW4 the doctor was able to observe mild external bruises in her genitalia. He found her vaginal walls had bruises and the hymen was broken confirming that indeed there was penetration of the vulva by the male organ with or without defilement.

28. Thus the respondent submitted that the corroborative evidence was required to prove the offence of defilement. She identified the P3 form dated 6/2/2015 as MFI-1. The PRC form dated 6/2/2015 as MFI-2 which confirmed that the procedure was duly complied with.

29. The doctor testified that he filled the P3 form on the 6/2/2015 at the Kitui District Hospital and was able to observe mild external bruises in the minor's genitalia. That upon examination he also found her vagina walls had bruises and the hymen was broken.

30. He produced the P3 form as exhibit 1, PRC form as Exhibit 2 and treatment card as exhibit 3. He confirmed that the age assessment was done by his colleague and was able to produce it as exhibit 4.

31. The doctor produced the P3 form, PRC form and treatment card as proof that the complainant received treatment and that the perpetrator committed the act with intent or knowledge to outrage her modesty which constituted an offence. The doctor who testified stated clearly that he was the one who examined the minor even then.

32. On whether the appellant was the perpetrator, the respondent submitted that the complainant testified that on 5/2/2015 at about 5pm, she was attacked by the appellant being a person she knew well. He pushed her to the bush where he unclothed her, stuffed her mouth with the shirt he had and defiled her for about a half an hour.

33. It is the respondent's submissions that section 124 of the Evidence Act Cap. 80 provides:

“.....in a criminal case involving a sexual offence, where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

34. The respondent submitted on whether the defence of the appellant was ignored and stated that the complainant's mother testified that on the 5/2/2015 she arrived home at about 6pm and received the damning report from the complainant which compelled her to inform her area chief who sought to get the appellant and upon his arrest, he was handed over and booked at the Nzambani Police Station. That in the meantime, the minor was checked in at the Kitui District Hospital.

35. Lastly, the respondent submitted that the appellant was behind the assault that occurred against the complainant which rendered her unable to resist the terror she faced and being overpowered by the appellant was helpless which led her to succumb to the force of a ravisher.

ISSUES, ANALYSIS AND DETERMINATION

36. After going through the evidence on record and the parties' submissions, I find the issues are; ***whether the ingredients of offence charged were proved? Whether the appellants defence was considered and whether in sentencing appellant the mitigations were considered and effect thereof?***

37. To prove a charge of defilement, the prosecution needs to prove 3 essential ingredients: -

(1) Penetration.

(2) Age of the complainant.

(3) Identity of the perpetrator.

38. On whether there was penetration or not, the prosecution called PW4 Dr. Patrick Mutuku who gave evidence that confirmed the act of penetration. The doctor stated that on examination of the complainant, they found mild external bruises on outer genitalia, a broken hymen and mild bruises on the vaginal wall and PW4 concluded one (1) day old. They were fresh injuries that there was evidence of penetration.

39. This evidence was corroborated by the evidence of PW1, the only key witness and it was therefore plausible finding by the trial that the prosecution successfully proved penetration as a key ingredient to the charge.

40. The second ingredient necessary to be proved regards the age of the complainant. The prosecution stated according to the charge sheet that the complainant was 16 years old at the time the offence took place.

41. However, PW4 produced the age assessment form Pexhibit 4 showing that as at 9/11/2015 the complainant was assessed and found to be seventeen 17 years old. The appellant never disputed the complainant age and therefore the finding that the complainant was 17 years old as at 9/11/2015 and therefore a minor as per the law cannot be faulted.

42. The third and final ingredient to prove a charge of defilement is that of identity of the perpetrator and if the complainant properly recognized the perpetrator and whether the said perpetrator is the appellant herein.

43. PW1 stated that she knew the appellant prior to this offence. She stated that the appellant was her neighbour. The offence took place at around 5pm hence there was sufficient light to identify the said perpetrator. PW1 stated that she was defiled by Munyalo Peter, the appellant.

44. Initially PW1 had stated that the appellant was his uncle however on being stood down the prosecution confirmed that the appellant was a close neighbour and thus there was not relationship between them. Therefore, there could be no mistake as to the identity of the perpetrator.

45. The appellant claimed that on that date, PW1 was in the company of two other boys and therefore raising doubt as to who was the perpetrator. His argument was that PW1 was defiled by one of the two boys who he mentioned as Musumaa and Wambua Mutia. The defence by the appellant is weak and does not hold any water at all. His evidence is merely allegations which needed to be proved.

46. The prosecution's evidence was quite strong and unshaken. The defence did not call any independent evidence to prove his claim that he is not the one who defiled the complainant but that the complainant was defiled by one of the two boys mentioned.

47. The prosecution clearly proved the identity of the perpetrator. PW1 properly recognized him. She knew the perpetrator prior to the offence as their close neighbour by the name Munyalo Peter the appellant and the alleged offence took place in broad daylight and there is no allegation of existence of any grudge between the appellant, the complainant and her family.

48. As to the sentence the court sentenced the appellant what appeared to be the prescribed mandatory minimum sentence and apparently never factored in any mitigating circumstances.

49. The mandatory aspect of minimum sentences has been ruled to be unconstitutional in line with Supreme Court of Kenya case of **MURUATETU** and subsequent authorities.

50. Thus the court makes the following orders;

i) The appeal is dismissed on conviction and conviction is upheld.

ii) The sentence is set aside and matter is referred back to the trial court for mitigation and sentence.

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

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C. KARIUKI

JUDGE