



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 19 OF 2018

SMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 1 of 2018 delivered on the 23rd day of March, 2018 by Hon. J. Nthuku, SRM]

JUDGMENT

1. The appellant was convicted and sentence to imprisonment for life for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act with particulars of the charge as set out in the charge sheet as follows:

"CHARGE SHEET

CHARGE: DEFILEMENT CONTRARY TO SECTION 8 (1) AS READ WITH SECTION 8 (2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

PARTICULARS OF OFFENCE: SHADRACK MAJIMBO OMBASO: On the 27th and 28th day of December, 2017 at [particulars withheld] in Mogotio Sub-County within Baringo County intentionally caused his penis to penetrate into the vagina of M.A a child aged 9 years."

The appellant 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."

2. The appellant appealed on grounds as out in the amended petition of appeal as follows:

"SUPPLEMENTARY GORUNDS OF APPEAL FILED UNDER SECTION 350 (2) (V) OF THE CPC CAP (75) LAWS OF KENYA

Your lordship, upon receipt and perusal of the trial proceedings and its judgment for the case of defilement and sentenced to life imprisonment, the appellant being aggrieved with the aforesaid decision, I beg leave of the Hon. Court to appeal against the said decision on the following amended grounds-

- 1. THAT, the learned trial magistrate failed in law and fact by convicting the appellant yet the prosecution did not establish the charge of defilement beyond reasonable doubt.*
- 2. THAT, the learned trial magistrate erred in law and fact in failing to note that the prosecution failed to avail the vital witnesses in the case.*
- 3. THAT, the learned trial magistrate erred in law and fact in not taking into account the appellant's plausible defence before convicting him.*
- 4. THAT, the learned trial magistrate erred in law and fact by failing to establish that the prosecution did not prove their case beyond reasonable doubt.*

REASONS WHEREFORE: I pray that this appeal be allowed, conviction quashed, sentence set aside and the appellant be acquitted"

3. The appellant filed corresponding written submissions and the DPP opposed the appeal by oral submissions made at the hearing as follows:

“20/11/19

Coram: Hon. Justice Edward Muriithi

Court Assistant: Daisy

State: Ms Kitilit

Accused: present

Appellant

I have filed written submissions.

DPP

I will make oral submissions.

Appellant

I wish to add that on 28th December 2017. In the court the complainant said the incident happened at 1.00pm but the discovery was in the night, at 10.00pm. The bleeding was discovered at 10.00am but the child was taken to hospital next day at 2.00pm.

Nothing was recovered from my house. The investigating officer carried 2 sheets as exhibits but they were returned to me when going to court saying he did not find what he was looking for.

The neighbor who is alleged to have witnessed the incident did not testify. The Doctor said he examined the victim but the tests were negative for HIV. When examined I was tested positive. How come?

I do not know about the incident or that I was not anywhere near the place. The sheets were returned to me. There was no proof that the blood on the complainant's clothes was hers and shown to belong to the complainant.

There is no evidence to show that the defilement was done by me. There was no evidence implicating me. That's all.

Ms Kitilit for DPP

The minor was 9 years. The accused was a neighbor and had earned trust from the girl. Pw1 said she had gone to make tea in the accused's house when the incident occurred. Accused claimed not to have been around the area. It was not raised during his defence. Alibi was not take up in trial court.

Pw2 and Pw3 squarely placed accused at the scene. Pw2 and Pw3 the complainant and the mother. Accused was positively identified in court. The witnesses Pw2 and Pw3 recognized him as their neighbor. HIV infection. It is true that the blood samples from the girl and the accused were taken. Accused was positive and complainant negative. The tests were done too as the incident happened on 27/28 December 2017 and the tests were taken on 29th December 2017. The girl was put on Post Exposure Prophylaxis just in case she had been exposed.

Accused was found guilty of defilement, indicating that he knowingly sought to transmit to the minor.

In his submissions, he states that penetration was not proved. We submit penetration was proved. I rely on case of Peter Kimanzi v. R Machakos HCCRA 180/2012 "evidence of penetration" P3 form shows that hymen was freshly broken. The girl had inflamed labia and tears. That is evidence of penetration.

The girl was consistent in naming the accused from the time the mother asked her. She told the same thing to investigating officer and the court.

The mother at page 12 paragraph 2 states that in the night of 28th, she woke up at 10.00pm and noted that the complainant was sleeping with legs apart and she was bleeding from her vagina. On inquiry from her she said she had been defiled.

The accused being a neighbor and having earned trust of the victim betrayed her trust considering her age. It is the duty of the society to safeguard the interest of the child. Being the neighbor and knowing that the child was tender aged, the spirit of the Sexual Offences Act requires severe sentence for defilement of children of tender age.

Accused may be a first offender. We submit that it should be taken into account that the accused not only betrayed the trust of the

child, he also had intention to infect with the virus, which he was aware that he was suffering from. He told the court at page 7 through the investigating officer that he was sick and insisted that they be taken to HIV tests.

The victim in this matter shall carry the scars of the defilement throughout her life.

We urge the court to dismiss the appeal for conviction and sentence.

Appellant in reply

It is all lies. The complainant and I are in the same village. The child was never in my house. I was also not in the house. I have never tried to defile the children and there were other children. The complainant had debt from me. I never defiled the complainant.

I pray that the court considers my truth. Since I was born, I have not been involved in such bad manners. I am distressed that I was charged with such case of defilement at my age. I have never been arrested with such defilement charge. It is all untrue. I went with the police when they came and they were looking for me. I did not tell the trial court about the debt as it was first time in court.”

Issue for determination

4. The issue for determination in the appeal is whether the defilement charge was proved and, if so, whether the appellant was proved to have been the perpetrator.

Determination

The Evidence

5. In discharge of its obligation as a first appellate court (see **Okeno v. R** (1972) EA 32 that ‘it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld’), this court has re-examined the evidence presented before the trial court, which was as follows:

“PW1

I am Winrose Kigen. I work in Mogotio Sub-County Hospital as the Clinical Officer Registration No. 4473. I have treatment card for one minor female aged nine years M. A. I treated her on 29th December, 2017. She was brought by her mother with history of being defiled by a known person inside the perpetrator’s house. The mother noted the minor was bleeding in her private parts. She said she went to clean the dishes in the perpetrators house on 27th and 28th December, 2017 and that’s when he defiled her.

Her hymen was freshly broken. She had tear at 6 o’clock at the vagina and also 2 o’clock. The labia minora was raw and inflamed. I sent her for lab test and no abnormality was seen in urine. Vagina swab was not significant. HIV test was done and VDRL was negative.

Her panty had dry blood stains on her white/purple flowered panty. We gave her Pre-Exposure Prophylaxis and antibiotics and pain killers.

I filed her P3 forms on 29th December, 2017. I produce the treatment card and P3 forms as an exhibit.

Treatment card exh 1

Lab form exh 2

P3 form exh 3

We tested the accused on 30th December, 2017 after Police Officers brought him. HIV was done on accused and it was positive. VDRL was –ve. I produce lab request form as an exhibit – exh 4

Treatment chit – exh 5

I formed an opinion that the girl had been defiled and caused grievous harm i.e the injuries on her vagina and bleeding.

Cross examination by accused person

It’s possible for a defilement victim to walk. I can confirm the child was defiled.

PW2, upon voire dire examination in which the trial court found that “The child is intelligent, she understands the importance of telling the truth but not the meaning of oath [and] she will give unsworn evidence.”

I am M.A. I am in Std. 3 [particulars withheld]Primary. I stay with my mother R. A. and my brother A. A. and M. O. and sister C. N. I know the accused, he's called Masimbo. He did bad manners to me. I usually go to his house at 1 pm or in the evening.

On 27th December, 2017 I went to his house at night (as darkness was setting in) he told me to take the radio for him in the house. He was outside so I took the radio inside and after a short while I went home. I slept and the following day at 1 pm I went to Masimbo's house and I prepared tea as he instructed me. I took tea and lay on the seat. He came and inserted a finger in my private parts then he took me to his bed and removed my panty, he also removed his panty and inserted his penis in my vagina. His house is one roomed. He first lifted me up and placed me on the bed then removed my panty. I was wearing this dress which he pulled upwards. I felt pain but he told me not to cry so I persevered. He did tabia mbaya and gave me sh.5. He told me not to tell anyone. I got home. When it was already night me I slept on my back with my legs apart because I was in pain and bleeding. At night my mother woke me up and saw blood on my panty and asked me why I was bleeding and I said I didn't know she said she will beat me up then I told her M had done tabia mbaya to me. She informed neighbours who came and looked at me.

M has been doing tabia mbaya to me for a long time but he had been threatening. I was taken to a big hospital. I have known M from the time I was in nursery.

Court

Accused identified by the witness.

My brother A. has cleared form four and O. in std. 6. They sleep in a separate house. My friend S. told me she was done tabia mbaya too by M.

Cross examination by accused

You have for a long time been inserting fingers in my vagina. I have never told anyone. I don't scream; you covered my mouth. You always insert fingers in my vagina then insert your penis.

PW3

I am R. A. I stay in [particulars withheld]. I work in the [particulars withheld]Factory at Athinai. M. A. is my fourth child aged nine years. On 28th December, 2017 my son A. came at 10 pm and called out my name to give him his keys. I saw that M. was sleeping legs apart and blood was oozing out of the vagina. The panty was bloody so I called her and she woke up. I asked her what had happened to her she said nothing. I asked for a cane and that's when she said it's M who had inserted his penis in her vagina and told her not to tell anyone. She said she had been defiled by M that same day. I called neighbor who came and saw the gaping vagina. I slept and the following morning I took her to Mogotio Police Station. I was issued with this treatment card (exh 1).

I was issued with this P3 form exh. 2 I recorded my statement and M was arrested. This is the blood stained panty she was wearing. PMFI 6. This is M.'s Birth Certificate. 2nd June, 2005 is her date of birth. Serial No. 5563058 exh 7.

Court

Copy to be retained in Court and original to be released to the witness.

M1 is my neighbor. I knew M2. visits him but I didn't suspect anything.

Court

Accused identified by the witness.

M1. said M2 defiled her three times the last being on 28th December, 2017.

Cross examination by accused

That day 28th December, 2017 at 3 pm you called me to your house and asked me why I was quarrelling and I told you that someone had told my in-law untrue things. You were arrested on 29th December, 2017 after I came to your house with Police. I didn't witness the incident. I am convinced you defiled her.

Re-examination by Prosecutor

It was on 28th December, 2017 when I found M. bleeding and that's the same day I was at M2's house at 3 pm. I took her to hospital on 29th December, 2017 and that's the date I reported to the Police Station. He was arrested on 29th December, 2017. I had no grudges with him that's why on 28th December, 2017 I was in his house and he gave me tea."

6. The Investigation Officer testified as to the arrest of the appellant as follows:

“PW4

I am No. 75149 Corporal Cecilia Githinji of Mogotio Police Station. I am the Investigating Officer in this case. On 29th December, 2017 at 3:45 pm I was in the office when a defilement report was made and booked in the OB. The complainant was brought by her mother and two other people. I interrogated them and saw the treatment notes. I issued them with P3 forms and it was filed by the doctor. **The OCS instructed Corporal Kelly to accompany the reportee in arresting the accused. He was arrested on 29th December, 2017 and brought to the Station.** I established that the accused is neighbor to the child and from 2014 he had defiled her. In 2014 it happened in the accused's bed when the complainant went to his house and accused told her never to tell anyone. The last time he defiled her was 28th December, 2017 at 1 pm when the child went to visit the accused, washed dishes for him took tea then he defiled her. She bled in her private parts and when the mother noticed she was bleeding she asked the child what had happened. I took the accused to Mogotio Hospital and he was examined. I went with him to his house with him but didn't recover anything. The child was born in 2008. I was given this blood stained panty which the complainant wore during the incident (PMFI 6). I produce it as an exhibit – exh 6.

I charged him with this offence.

Court

Accused identified by the witness.

Cross examination by accused person

From your examination, no connection was done with the complainant. I didn't see any blood stains on your bedding. I visited your house on 30th December, 2017 so its possible you washed the beddings. The child was injured.”

7. When put on his defence the appellant gave sworn evidence as follows:

“Male Adult Duly Sworn

I am SMO. I work at [particulars withheld]. I know the charges am facing. I know the witnesses. I was arrested on 28th December, 2017 from the road as I came from a tailoring shop. I knew one as Corporal Kelly. He didn't tell me the reason they wanted me to go to the Police Station with them. At the Station that's when I heard about defilement and I said it was a lie.

The child is called M1. The P3 form shows the child was examined but I wasn't examined.

HIV for the child was negative urinalysis showed nothing abnormal. The child had not been defiled. No discharge was seen in her vagina so these were no defilement. There is no conclusion of defilement in the treatment documents yet the doctor came to Court and said there was defilement. The underwear wasn't subjected to examination to know whose blood that was. The bed sheets weren't produced. The mother said the child was nine years so in 2014 she was five years. If I started defiling her at five years the mother would have known.

Nothing was brought to show I touched the child indecently. Nobody said I broke the child's hymen. I pray that I be acquitted since I have been framed.

Cross examination by Prosecution

I am not a doctor so I don't know how doctors examine. On that day I got home at 8 pm from prayers at Samuel's home. I don't know his other name. On 28th December, 2012 I spent the night at Mogotio Police Station. I was arrested at 6 pm. I wasn't arrested on 29th December, 2018.

On 27th December, 2017, 28th December, 2017 I didn't see the child. I only see her in her village but I have never spoken to her. M1's house is about half kilometer from mine. I know R. A. because I work with her and know her children. I have never had disagreements with R. A. or M. On 27th December, 2017 I was with Jesseh Rongoe and another lady at Samuel's place. They are my witness.

Re-examination by Opal

The prosecution can't tell me who to call as a witness.

I have no relationship with Rosemary. It's not true M1 used to come to my house. I was arrested on 28th December, 2017. That's the date they alleged I defiled the child.”

Findings

8. When the evidence before the trial court is weighed as a whole, it is clear that the victim child (PW2) was defiled, her mother PW3 testifying to discovering bleeding from the complainant's private part and the penetrative injury confirmed by the medical evidence of PW1

being that:

“[The complainant’s] hymen was freshly broken. She had tear at 6 o’clock at the vagina and also 2 o’clock. The labia minora was raw and inflamed. I sent her for lab test and no abnormality was seen in urine. Vagina swab was not significant. HIV test was done and VDRL was negative.

Her panty had dry blood stains on her white/purple flowered panty. We gave her Pre-Exposure Prophylaxis and antibiotics and pain killers.”

9. There is no inconsistency in the doctor’s finding of freshly broken hymen and the complainant’s evidence that the appellant had been putting his finger and his penis into her over time previously. Not all penetration need result in broken hymen, as to dispel the findings of the examining doctor (PW1) of freshly broken hymen; partial penetration (see definition of penetration in section 2 of the Sexual Offences Act), which is sufficient for purposes of defilement, may not result in hymen tear. On the question of demeanour as counseled by **Okeno v. R.**, supra, this court makes ‘allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses’ and, therefore, defers to the observation by the trial court as recorded in the Judgment that -

“I looked at the demeanor of this child she was purely innocent and didn’t portray herself as a mischievous girl.”

10. The allegation of a debt from the appellant is clearly an afterthought as it was not raised before the trial court and in this court it was stated that it was the complainant who had the debt. The court cannot fathom what debt the minor girl would have as to cause her, her mother and the examining doctor to trump up the allegation of defilement. In the trial court, the appellant suggested an alibi defence that he had been arrested on 28th and was, therefore, in police custody when it was alleged that he had defiled the girl saying, *“On 28th December, 2012 I spent the night at Mogotio Police Station. I was arrested at 6 pm. I wasn’t arrested on 29th December, 2018.”*

11. The appellant further confirmed that he had no grudge with the girl or her mother as follows:

“I know R. A. because I work with her and know her children. I have never had disagreements with R. A. or M.”

The issue of a debt from the complainant was raised only on appeal and the same is rejected.

12. As regards the identification of the appellant as the perpetrator of the defilement, the evidence was that the appellant and the complainant and her mother were neighbours, the mother testified that she had been in the appellant’s house in the afternoon before she discovered the complainant’s bleeding and the complainant knew the appellant as their neighbour, a fact conceded by the appellant when he said:

“On 27th December, 2017, 28th December, 2017 I didn’t see the child. I only see her in her village but I have never spoken to her. M’s house is about half kilometer from mine. I know R. A. because I work with her and know her children.”

13. There was no question of mistaken identity as the complainant had long known the appellant as her neighbour, which the appellant conceded. In addition, the Investigation Officer narrated how the appellant was arrested on the instructions of the OCS by Corporal Kelly, as follows:

*“I am the Investigating Officer in this case. On 29th December, 2017 at 3:45 pm I was in the office when a defilement report was made and booked in the OB. The complainant was brought by her mother and two other people. I interrogated them and saw the treatment notes. I issued them with P3 forms and it was filed by the doctor. **The OCS instructed Corporal Kelly to accompany the reportee in arresting the accused. He was arrested on 29th December, 2017 and brought to the Station.**”*

14. The Investigation Officer’s testimony as to arrest of the appellant by Corporal Kelly coincides with the appellant’s own description of his arrest as follows:

“I know the witnesses. I was arrested on 28th December, 2017 from the road as I came from a tailoring shop. I knew one as Corporal Kelly. He didn’t tell me the reason they wanted me to go to the Police Station with them. At the Station that’s when I heard about defilement and I said it was a lie.”

The OCS could only have instructed his arrest upon the report by the complainant and her mother pointing out the appellant as the defiler.

15. The age of the child was proved by a Certificate of Birth dated 28th June 2016 (PEX. 7) showing her date of birth as 2/6/2008 and, therefore, aged 9 years at the date of the offence on 28th December 2017, and consequently placing the case within the provision of section 8 (2) of the Sexual Offences Act.

16. There is no premium in the fact that the girl was shown to be HIV negative while the appellant was infected: defilement is about penetration and not infection, which may amount to an independent offence altogether, namely deliberate transmission of HIV under section 26 of the Sexual Offences Act. There may be penetration without infection, or medical intervention upon penetration or exposure to the HIV virus may prevent infection.

17. It is the finding of this court that the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act was proved against the appellant by the evidence presented before the trial court.

18. In her determination, the trial court found the defilement charge against the appellant proved as follows:

“JUDGMENT

.....

The issues for this Court's determination are;

- 1) Has the age of the complainant been proved.
- 2) Has penetration been proved if yes,
- 3) Has the identity of the defiler been proved.

On the issue of age the child's mother said the child was born on 2nd June, 2008 so she was aged nine years. The investigating officer produced the original birth certificate for the child showing her date of birth as 2nd June, 2008 so I am satisfied the child was aged nine years as at June, 2017.

On the issue of penetration the defence both in evidence and submissions maintain that there was no penetration. In defence submitted that broken hymen is not prove of defilement because hymen can be broken by vigorous exercise or other activities and further that not all girls are born with hymen. I agree with the defence that a broken hymen alone is not evidence of penetration. However, the doctor who examined the child stated that the child had a tear at 6 o'clock position and her labia minora were inflamed and there was bleeding in the vagina. These injuries cannot be due to any amount of exercise they were recent fresh injuries and taken together with the history given, then I find that the injuries on the complainant's vagina were due to penetration/insertion of a penis.

On the last issue i.e identity of the defiler, the accused person says he was arrested on 28th December, 2017 by Coprol Kelly and taken to the Police Station where he was informed that the reason for his arrest was defiling M.A. The Investigating Officer on the other hand stated that the defilement report was made on 29th December, 2017 and that's the day the accused was arrested and the arrest was done after the child's mother pointed out/took Coprol Kelly to the accused's house. To start with I find it impossible that the accused was arrested on 28th December, 2017 because there is no way he could have been arrested and informed that the reason for his arrest is defilement yet the child had not been defiled by then. Secondly, the child's mother and the Investigating Officer testified that after reporting the incident on 29th December, 2017 the child's mother led Coprol Kelly to the house of the accused and he was arrested. Even from the treatment notes of the child, the child was taken to hospital on 29th December, 2017 and this corroborates the Investigating Officer evidence that the child had been treated when the parents came with her to the Police Station to report the defilement. I therefore, find that the accused was arrested on 29th December, 2017 and not 28th December, 2017. He denied having defiled the child and said he was framed. The accused in his submission argues that had it been true he had been defiling the child over a period of time as she alleged she would not have a freshly broken hymen. The child said that the accused had been inserting fingers in her vagina over a period of time. I looked at the demeanor of this child she was purely innocent and didn't portray herself as a mischievous girl. The accused person said that he had no grudges with anybody in the complainant's family. In fact the child's mother said that the accused gave her tea the said date the child was defiled. The accused person didn't dispute sharing a cup of tea with the complainant's mother on 28th December, 2017 at 4 pm. The child said in her evidence that the accused told her to brew tea which she did and they took before she was defiled. This shows a link i.e the tea the child's mother was given by the accused was made by the child before she was defiled then she left the accused's house. This child knew the accused person well as their neighbor; the accused person equally knew her. The two families had a good relationship. The child said she used to help the accused person do house hold chores and her mother said she knows the child used to visit the accused's house. This child appeared as an honest witness. Though she said the accused had been doing bad manners to her she said he had been inserting fingers in her vagina. This could be the bad manners talked of. It's also possible the accused was bringing his penis into contact with the child's vagina without necessarily penetrating and that's why she said he used to put his penis in her vagina. The child knew who hurt her private parts but owing to her age and innocence she couldn't quite differentiate between actual penetration and simply genital contact. Even looking at her actions on the 28th December, 2017 this child's genitals had been ripped apart the panty she wore which was produced as an exhibit talks of serious bleeding. The injuries on her genitalia as per the treatment documents leaves this Court shuddering at the pain she went through yet she sneaked in her bed and slept with no intention of saying a word. It is actually upon being threatened with the cane that this child decided to speak. This was not a child who would frame another person. It's possible that from the previous incidents she did sustain minor injuries which she bore bravely so no one noticed but on this day the damage couldn't be covered up. The submission/defence by the accused that he wasn't taken to hospital can't stand. The doctor produced his treatment documents showing that he was examined on 30th December, 2017 and an HIV test was positive. Equally the argument that the child was HIV negative can't stand because firstly, the test was done only a day after the incident so bearing in mind that the HIV virus can be in incubation for three months, it's possible the child would have contracted the virus had post exposure prophylaxis not been administered to her.

I have no doubt the accused person defiled the complainant on 28th December, 2017. The charges herein have, therefore, been proved against the accused person beyond reasonable doubt and I consequently convict him under section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

J. Nthuku

SRM.”

19. Having found that the offence of defilement was established against the appellant, I respectfully agree with the finding of the trial court and affirm the same. On the sentence, I agree that the indifference of the appellant who was aware of his HIV positive status in defiling and therefore exposing his minor victim to infection is an aggravating factor, and on the test of **Wanjema v. R** (1971) EA 493, this court finds no justification to interfere with the sentencing discretion of the trial court.

Orders

20. Accordingly, for the reasons set out above, the court does not find any basis for interfering with the decision of the trial court on both conviction and sentence, and the appellant’s appeal is, consequently, dismissed.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF JANUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Kitilit, Prosecution Counsel for the Respondent.