



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 122 OF 2019

JULIUS NYERERE KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of Defilement contrary to **Section 8 (1)** as read with **Section 8 (3) of the Sexual Offences Act** and an alternative charge of Committing an indecent Act with a child Contrary to **Section 11(1) of Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the night of 16th September 2018 at about 8:00 p.m. at Gaitu East Location in Central Imenti Sub-County within Meru County intentionally and unlawfully caused his penis to penetrate the vagina of **WK** a child aged 15 years. In the alternative charge the facts are that on 16th September 2018 he intentionally and unlawfully touched the vagina, breasts and buttocks of **WK** a child aged 15 years.

2. The trial Court found him culpable of the defilement charge, convicted him of the offence and sentenced him to 20 years' imprisonment.

3. Aggrieved by the said decision the appellant filed this appeal on conviction and sentence raising seven grounds of appeal. He urged this court that the trial magistrate did not consider his defence. That the Clinical examination report did not link him with the ordeal and that the trial Magistrate failed to take into account the provisions of **Section 333 (2) of the CPC** and the **Muruatetu case** while sentencing him.

4. On 27/11/2019 this Court directed parties to canvass the appeal through written Submissions. Both parties have since filed their respective submissions which I have duly considered.

Analysis and Determination

5. As first appellate court, I should revisit the evidence tendered before the trial court, evaluate it, analyse it and come to own conclusions on the matter but always bearing in mind that this court did not have the advantage of hearing the witnesses or observing their demeanour. I must therefore give allowance for that. See the cases of **Okeno vs. R (1977) EALR 32**, **Mark Oiruri Mose vs. R (2013)eKLR** and **Irene Atieno Ochieng v Republic [2017] eKLR**.

6. Analysis of evidence

7. **Pw1 WK** testified that on 16/9/2018 at around 8 p.m she was sent by her mother to pick milk from their neighbour, Betty Karoki. That on her way back she was accosted by the accused person who defiled her at a nearby shamba. That Pw 3 found her lying beside the road and took her home. It was her testimony that she was taken to cottage hospital where she was treated. That she was able to identify the appellant because she had a torch and had known him for 7 years since they purchased the land they reside in from them.

8. **Pw 2 JN** confirmed that she had sent Pw 1 to fetch milk from Betty Karoki. That Pw 1 and Pw 3 arrived at her home at 9:00 p.m. and PW1 informed her that the appellant had raped and strangled her. That she took her child to Cottolengo Hospital and later Githongo Hospital where she was treated. It was also her testimony that on the material day she went to the scene of the crime with two *boda boda* riders and did the same on 18th September with police officers and the complainant. That there is no house in the vicinity and from his homestead to the scene is half a kilometre. She also stated that she reported the matter to the police station and the appellant was arrested. She presented the clothes to the police.

9. **P w 3, Benson Njuki** testified that she met with Pw 1 by the roadside and Pw1 informed her that she had been raped by the appellant. That at the time her clothes were muddy and she was holding her panty. He identified the clothes in court though stated that at the time of the offence the same were in good condition.

10. **Pw 4 Romano Kinoti M'Rinkanya** the area manager testified that he was with Eric Mwenda on the material day at a search party to

recover a goat that had been stolen. Eric Mwenda received a call informing him that Pw1 had been defiled by the appellant and they went to the homestead of the appellant where they gained entry, accosted the appellant who had locked himself in the house and took him to Chaarai Police Station.

11. In cross examination he stated that he was familiar that the complainant's family bought land from the appellant. That it was not the first time the appellant had been accused of rape since previously he had been charged at Nkubu police station where he was sentenced to 9 years' imprisonment and he had also raped an elderly lady and disappeared only to resurface later and defile the complainant.

12. **Pw 5 Samson Mindoti** the investigating officer told the court that Pw 1 and Pw 2 reported the matter in their police station on 16th September 2018. That he visited the scene after which the appellant was brought to the police station by Pw 4, Eric Mwenda and members of the public. He corroborated the testimony of Pw 1 and Pw 2 and further stated that Pw 2 presented to him the clothes worn by Pw 1 and Pw 1's birth certificate that showed that Pw 1 was born on 9/6/2003. He produced the Birth Certificate as Pexh 4, the torn biker Pexh 5 and muddy panty Pexh 6.

13. **Pw6 Samuel Mutegi**, medical officer at Githongo sub county hospital presented the P3 Form and treatment notes from Githongo Hospital. It was his testimony that the hymeneal membrane was broken. The high vaginal swab revealed a white discharge with numerous puss and epithelial cells evident of an infection and friction. It was his opinion that the complainant had been defiled.

14. **Pw 7 Eric Mwenda** corroborated the evidence of Pw 4. It was also his testimony that when they arrived at the residence of the appellant they tried to call him to open the door but he refused to answer them. He therefore directed a person named Kijia to enter the house through the window. That upon their entry to the appellant's house they found him under the bed.

15. **Dw1 the accused person herein**, testified that on the material day he stayed with his brother Ramano Mutiugi at his homestead from 5 p.m. to 9 p.m. That people came to his homestead accompanied by Pw 2 and arrested him. He stated that the arrest was an instigation by Pw 2 over a land case which they had over the land they were living in. It was his testimony that Pw 2 bought the land from his father but did not finalise the payment. That the people who arrested him are the people with whom they have a land case in the High Court. He also claimed that he has a debt with Pw 2 while Pw 3 has his debt after he gave him his motor cycle. He also alleged that he has a grudge with Pw 4 for wanting to arrest his brother after alleging that his brother smokes bhang. He denied to ever being charged with the offence of defilement but conceded that he was imprisoned for five years for robbery.

16. **Dw 2 Romano Mutugi Kirimi** corroborated the statement of Dw1 he stated that he was with Dw1 on the material date and they stayed together until 9:00 p.m. when members of the public came and surrounded his house. That he tried to intervene but was assaulted. He also alleged that the appellant was framed by Pw 2 and Z because of the land case they have between them and the accused person.

Elements of offence of defilement

17. In determining this appeal, the court should be satisfied that the elements of the offence of defilement were proved beyond any reasonable doubt. These elements are; the age of the complainant, penetration and proof that the appellant was the perpetrator of the offence.

Proof of age

18. Pw 1 and Pw 2 stated that the complainant was aged 15 years at the time of the commission of the offence. Pw 5 presented the birth Certificate showing the complainant was born on 9/3/2003. I therefore find and agree with the trial Magistrate that the age of the complainant was proved to have been 15 years at the time of the offence. The victim was therefore a child in the sense of the law.

Penetration

19. Penetration is a legal term as well as a key element of the offence of defilement. See Section 8 (1) of the Sexual Offence Act that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

20. According to Section 2 (1) of the Sexual Offences Act, penetration;

“...means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

21. The P3 form, medical chits and the post defilement care form corroborated the evidence of the complainant that there was penetration of her sexual organ. The appellant's averment in ground 4 of his memorandum of appeal that the hymen may have been broken in other circumstances was only raised in this appeal and is not backed by any evidence. There was no indication to this effect when he was cross-examining the prosecution witnesses especially Pw 1 and Pw 5. The argument is therefore bare and devoid of substance. I reject it. Accordingly, I find there was penetration of the victim.

Was the Appellant the perpetrator?

22. The main contentious issue is whether the appellant was the perpetrator of the offence. The evidence of the prosecution witnesses was consistent. Pw1 clearly identified the appellant herein. At the time Pw1 had a flashlight and knew the accused person well for they had lived as neighbours for the last seven years. Pw 1 met Pw 3 immediately after the offence and confirmed to him that she had been defiled by the appellant. The evidence of the prosecution witnesses linked the appellant to the offence. Clinical examination confirmed the penetration. In making these findings, I am aware that the appellant claimed the charges were trumped up by PW 2 with who he has a land case and of motor

cycle. It is known that some unscrupulous individuals may set up or trump up charges against a person in order to secure collateral advantage or force settlement of a civil claim. However, in this case, other than his averments, nothing tangible was adduced towards that end. I agree with the trial magistrate that the evidence of the appellant came as an afterthought. The same was not raised during cross-examination of the witnesses. The appellant did not produce particulars of the land case. He did not confirm the allegations that the prosecution witnesses were actuated by malice upon him and his brother. I therefore find that the prosecution proved that the appellant was the perpetrator of the offence. The first and the fifth ground of the appeal therefore fails.

23. As for the remaining grounds they all touch on the sentence of the appellant. I have considered the evidence on record and I find nothing on which to disturb the discretion of the trial magistrate. The sentence was proper in the circumstances.

24. The upshot of this judgement is that the appeal herein lacks merit and is hereby dismissed.

Dated signed and delivered in open court this 3rd day of February, 2020

F. GIKONYO

JUDGE

In presence of

Appellant – present

Maina for state

F. GIKONYO

JUDGE