



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 12 OF 2019

FESTO OUMA JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.21 of 2016 of the Chief Magistrate's Court at Busia by Hon. S.O Temu-Principal Magistrate)

JUDGMENT

1. Festo Ouma Juma, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (2) [sic] of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that on the 12th day of March 2016 at [particulars withheld], Matayos Division of Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of WPA, a girl aged eleven years.
3. The appellant was sentenced to serve twenty years imprisonment. He appeals against both conviction and sentence.
4. The appellant was in person. He raised four grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and in fact by disregarding gross violations to his rights to fair trial.
 - b) That the trial process was not fair for it was contrary to the criminal Procedure Code.
 - c) That the learned trial magistrate erred in law and in fact by not appreciating the contradictory evidence by the prosecution.
 - d) That the learned trial magistrate erred in law and in fact by failing to consider his evidence.
5. The appeal was opposed by the state through Mr. Omutelema, learned counsel who contended that the prosecution proved its case to the required standards.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Section 8 (1) (2) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act ...

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. Article 50 of the Constitution of Kenya provides for fair hearing. On this ground the appellant contended that he was not supplied with the evidence the prosecution was to rely on. When the hearing started on 10th July 2017, the appellant informed the court that he had the complainant's statement. Subsequently, the matter was taken over by another magistrate on 29th April 2019 and when section 200 of the Criminal Procedure Code was explained to the appellant, he opted to have the matter proceed from where it had stopped. He did not complain to the court that he did not have statements for the witnesses. The only logical presumption to make is that he had been supplied

with all witnesses' statements. If the same was not supplied, it was incumbent on him to inform the court so as the same could be ordered to be supplied. There was no way the court could have known without his complaint. I therefore find that the appellant was accorded a fair trial.

9. Though the appellant has complained that the Criminal Procedure Code was violated, I do not see any instance when this was done. This ground is baseless.

10. In his submissions, the appellant contended that the Government Analyst report was not properly produced. It was produced in court by corporal Anne Rono (PW4). Section 77 of the Evidence Act provides:

(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

Subsections 2 & 3 are clear; it is not mandatory to call the maker of such a document. The report was therefore tendered in court in accordance with the law.

11. The evidence of WPA (PW1) was that at about 2 a.m., the appellant pushed the door open. She assumed it was her mother who was keeping vigil, in a home where there was bereavement, with other neighbours. According to her evidence, it was dark. The appellant asked her to keep silent and held her by the nose and throat before proceeding to defile her. Though she did not testify as how she knew it was the appellant, we can only assume that this was from his voice. In recognition by voice, care must be taken to ensure that the voice that was recognized was of the person it was purported to be. This is because it is a well-known fact that some close relatives may have similar voices. Some have confused voices of close relatives even when circumstances are favourable. The court of Appeal in the case of **Simeon Mbelle vs. Republic [1982] 1KAR 578** held:

In relation to the identification by voice, one it would obviously be necessary to ensure:

(a) That it was the accused person's voice;

(b) That the witness was familiar with it and they recognized it and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

In the instant case, the prosecution did not rely much on the evidence of the purported recognition by voice. Therefore, the test that was prescribed in **Simeon Mbelle vs. Republic** (supra) would not be applicable.

12. Benard Juma Ouma (PW3) testified that the appellant is his cousin. When he was called on phone and informed of the incident, he went to the house of the appellant and found an agitated mob at his door. The complainant was present and appeared to be in pain. She had defecated on herself and had what he called sperms on her body. He arrested the appellant whom he escorted to the police station.

13. Corporal Anne Rono (PW4) testified that she visited the scene. On the bed where the minor slept, she found blood on the bed and the mattress as well as some fecal matter. She went to the house of the appellant where she found a blood stained pair of shorts which had sperms as well. She also recovered a tee shirt which was blood stained. Blood samples were taken from the appellant and the complainant. The recovered exhibits and the blood samples were taken to government chemist.

14. The Government analyst report had the following conclusion:

Based on the above findings, DNA profile generated by the blood stains from the T-shirt is a mixed profile of both the accused Festo Ouma Juma and W.P.A [name withheld] (victim), the DNA profile generated by whitish stains from T-shirt matches the profile of accused Festo whereas that generated by blood stains from the piece of mattress did not match any of the above DNA profiles.

Even if there were any doubts as to the identity of the perpetrator, the DNA generated from the T-shirt found in the house of the appellant dispelled these doubts; the appellant must have been the perpetrator.

15. The medical evidence and the evidence of the witnesses who interacted with W.P.A immediately after the complained of action, left no doubt that she was defiled. These witnesses were her mother (PW2) to whom she went to report and Bernard Juma Ouma (PW3) a village elder and a relative to both the accused and the complainant. The evidence of Kennedy Yatich (PW4) was that the following were observed on the complainant:

a) Bruises to the private part and neck;

- b) She had fresh whitish discharge with blood stains from her genitalia;
- c) Broken hymen; and
- d) Pus cells in urine.

He therefore concluded that there was defilement. This conclusion coupled with the other evidence on record, was correct.

16. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

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

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

- a) Whether there was penetration;
- b) Evidence must show that the accused is the perpetrator; and
- c) The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

In this case, all the ingredients of defilement were proved.

17. The age of the complainant was proved to be between 12 and 13 years. The appellant ought to have been charged under section 8(1) as read with section 8(3) of the Sexual Offences Act.

18. Section 8 (3) of the Sexual Offences Act states:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The learned trial magistrate sentenced him to serve twenty years imprisonment. He was therefore correctly sentenced. I will not therefore interfere with the sentence.

19. From the foregoing analysis of the evidence on record, I find that the conviction was based on sound evidence. The appeal is therefore dismissed.

DELIVERED and SIGNED at BUSIA this 8th Day of April, 2020

KIARIE WAWERU KIARIE

JUDGE