



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 30 OF 2019

HABBERT ETYERI MASIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original judgment in S.O.A case No. 4 of 2018 of the

Chief Magistrate's Court at Busia by Hon. S.O Temu– Principal Magistrate)

JUDGMENT

1. Habbert Etyeri Masika, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on 8th January 2018 at Malaba Township in Teso North sub County of Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of FMB, a child aged 4 years.

3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised the following grounds of appeal:

a. That the trial magistrate erred both in fact and in law by disregarding gross infringement of the appellant's constitutional rights as envisaged under Article 50 of the Constitution.

b. That the trial magistrate erred both in fact and in law by relying on evidence which had no probative value.

c. That the trial magistrate erred both in fact and in law by relying on DNA evidence which was produced contrary to the law.

d. That the trial magistrate erred both in fact and in law by disregarding appellant's defence.

5. The state opposed the appeal through Mr. Mayaba, learned counsel. He contended that there was sufficient evidence that linked the appellant to the offence.

6. The facts of the prosecution case were briefly as follows:

In the evening of the material day, the complainant was playing with another child. When she was returning home, the appellant lured her to his house where he defiled her. He then took her to the bush and abandoned her. She was rescued the following morning while shivering and could hardly talk. The appellant was linked to the offence by DNA evidence and the complainant's panty that was recovered from his house.

7. In his defence, the appellant contended that he was framed up.

8. This is a first appellate court. As expected, I have analysed 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 therefore be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

9. Though the appellant in his grounds of appeal contended that his constitutional rights as envisaged under Article 50 of the Constitution were contravened, my perusal of the record did not reveal any instance that could support this ground. He was accorded a fair trial.

10. The government chemist report was produced by P.C Roseline Maina (PW9). The appellant contended that this was unlawful. 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.

11. The reading of this section reveal that it is not mandatory for the maker of such a document to produce it in court. If the trial court thinks it fit to summon such officer to shed light in case of doubts. In the instant case, the report was produced procedurally and in accordance with the law.

12. There was evidence of recovery of the panty from the house where the appellant was residing as a caretaker. Ronald Wafula (PW3) testified that he had assigned the appellant the responsibilities of a caretaker in respect of a house they had constructed. On 8th January 2018, the appellant rang and informed him that he had been arrested. He went to see him at the police station. The appellant gave him the key to the house. When he went to the house, he found a child's panty. He went and reported to the police. The police went and picked it. This panty was identified by the child's mother (PW2) in court.

13. The other evidence that linked the appellant to the offence is the Government Analyst report. The conclusion is as follows:

Based on the above findings, the DNA profiles generated by the blood stains from the spotted skirt (item 2 "A") and the white spotted waist inner wear (item "A"3) was mixed DNA profiles of (name withheld) (survivor) and Habert Ateri Matika (accused) whereas the DNA profile generated by the stains from the spotted checked blouse (item "A1") matches the DNA profile (name withheld) (survivor).

Though the appellant argued that the victim did not identify the perpetrator, the DNA evidence and the finding of the victim's panty in his house was sufficient evidence to link him to the offence.

14. In the trial court, the appellant contended that he was falsely implicated to the offence due to the money owed to him. Other than the DNA evidence that implicated him to the offence, this contention was displaced by the evidence of Ronald Wafula (PW3) who had assigned him the duties of a caretaker. When the appellant called him at the police station, he gave him the keys to the house. Upon entering the house, he recovered the girl's panty.

15. 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.

16. In the instant case the age of the complainant was proved by a copy of birth certificate. It indicates that she was born on 16th December 2012. At the time of the offence she was therefore, five years old.

17. Other than the oral evidence of witnesses who interacted with the child, there was medical evidence by Brown Wafula (PW6) who said that the examination revealed that there was blood on both labia minora and majora and that the victim sustained a torn hymen which had blood. There was also blood in the urine.

18. I therefore find that the three ingredients were proved beyond any reasonable doubt.

19. Section 8 (2) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The appellant was sentenced to life imprisonment. This was the only available sentence. The sentence is mandatory.

20. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit and I accordingly dismiss it.

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

KIARIE WAWERU KIARIE

JUDGE